

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT APPEALS PANEL

DONCASTER ROVERS BELLES LADIES FOOTBALL CLUB

Appellant

- and -

THE FOOTBALL ASSOCIATION

Respondent

DECISION AND REASONS OF
THE INDEPENDENT APPEALS PANEL

1. BACKGROUND

- 1.1 This is an appeal by Doncaster Rovers Belles Ladies Football Club (referred to as either “the Belles” or “the Club”) against the outcome of a tendering and selection process organised by The Football Association (“The FA”) for the creation of a two-tier Women’s Super League (“WSL”) for elite women’s football in England, commencing in 2014. The background to the process, and its context, are important to understand and is therefore set out in some detail, before turning to consider the remit of the Appeals Panel and the appeal itself.
- 1.2 The Belles have a long and proud tradition as one of the founding members of women’s football in this country, dating back to 1969. They have won the FA Women’s Premier League (“WPL”) twice (at a time when the WPL was the top tier in women’s football), and the FA Women’s Cup on six occasions. The Club has been runner-up in both competitions on numerous occasions. During its dominant period, between 1978 and 1993, the Belles lost only one league match. More recently, in 2009 the Belles launched a social enterprise initiative, to promote community, social, health and educational services, with female sport as a focal point. There can therefore be no dispute as to the Belles’ pre-eminent reputation within the women’s game.

- 1.3 The FA Women's Super League ("FAWSL") was launched in 2011. It followed a tendering process in 2009, which closely resembled the more recent one that is in issue. In common with the seven other clubs currently in the WSL, the Belles applied for a licence for two seasons, and were successful. The licences were extended in December 2012 for a further year to cover the 2013 season.
- 1.4 The current *de facto* second tier of women's football is the FA WPL, National Division. There are then two further leagues below the National Division, namely the Northern and Southern Divisions. Since its inauguration, there has been no promotion to, or relegation from, the WSL based on final league positions. In other words, for the past three seasons, the WSL and WPL have proceeded as separate entities insofar as league competition is concerned (although clubs from the various leagues have competed have against one another in cup competitions).

Outline of the bidding process for licences to join the WSL for the period from 2014 to 2018

- 1.5 On 24th October 2012, the FA announced a new five-year initiative called 'Game Changer', with a view to progressing women's football. One of the key commitments of the strategy was to expand the WSL from one division to two with effect from 2014, with promotion and relegation to and from the two divisions (WSL 1 and WSL 2). The number of places in WSL1 would be between 8 and 10, with a maximum of 20 teams across the two divisions.
- 1.6 The principal strategic aims and objectives of the reformed women's game were stated by The FA to be:
- (i) To develop the WSL in order to gain greater exposure for the women's game and financially sustain semi-professional women's football in England;

- (ii) To provide the highest level of national, competitive league football for women in England with the aim of strengthening the player pathway and playing base of the sport in England and developing the available player pool eligible to play for the English national teams;
- (iii) To attract and retain England's most talented players; and
- (iv) To support and strengthen the commercial viability and sustainability of the WSL and its member clubs.

1.7 The application process was announced by the FA on 4th December 2012. All women's football clubs who wished to apply to enter the expanded WSL were invited to submit applications, and were eligible to apply for both WSL1 and WSL2. The process was open to both existing and newly-created clubs. At the League Annual General Meeting, also held on 4th December 2012, the then eight members of the WSL were informed that they would have to re-apply to the FA for a licence to participate from 2014 as part of the process of opening-up and expanding the women's game in England. Clubs were also told that their applications would be considered on their own merits against the published criteria. The latter focused on the ability of clubs to move forward and help to progress the strategic objectives of the WSL, rather than past performance. The clock was effectively being set back to zero.

1.8 Clubs were asked to complete a template Club Development Plan, which set out minimum requirements to be satisfied in the newly formed WSL 1 and 2, as the basis for their application. The template included four sections, which set the minimum requirements to be satisfied:

Section 1: Finance and business management;

Section 2: Commercial sustainability and marketing;

Section 3: Facilities; and

Section 4: Players, support staff and youth development.

The requirements that are particularly relevant to the Belles' application will be referred to in more detail in due course.

- 1.9 When they submitted their applications, clubs were required to sign the terms and conditions accompanying the various documents that they received as part of an application pack. The terms that are relevant to this Appeal will be referred to in due course.
- 1.10 The deadline for applications was set as 4th March 2013. There then followed a timetable culminating in the announcement of a decision that would enable any clubs who might need to give notice to leave the WPL, to do so at a meeting in June. However, it meant that the announcement of the decisions as to which teams were offered places in which League was made after just one match of the current WSL season.

2. THE BELLES' APPLICATION

- 2.1 The Belles submitted their application, and initially applied to join WSL1 only.
- 2.2 Following receipt of applications from 33 clubs, a preliminary screening process was undertaken by pre-screeners against the published minimum requirements set out above. Pre-screeners were allocated to each of the four Sections set out above and marks were awarded to each of the applicant clubs in each depending upon the extent to which they had satisfied the various criteria. The pre-screeners indicated whether a club had passed or failed a particular each of the four Sections.
- 2.3 Although they were judged to have failed the Section 2 requirement at the initial pre-screening stage, the Belles were ranked 6th overall out of the 13 clubs who had applied for WSL1, and 2nd in its region. The Belles were given a 'Pass' for the Facilities requirement (Section 3), with a mark of 15 out of 20 (and also for Sections 1 and 4), but a 'Fail' for Commercial and Marketing (Section 2).

- 2.4 There then followed a moderation process when the pre-screeners re-appraised their respective initial findings and marks, and adjustments were made. A marking matrix was prepared. As a result of this stage of the process, Doncaster slipped from 6th place to 9th overall for a place in WSL1, and from 2nd to 4th in its region.
- 2.5 The Belles made an overall net loss of just half a mark at the moderation stage (down from 63.8 to 63.3 out of 100), from which it can confidently be inferred that the three teams who moved ahead of them had made a net gain in their overall marks. By how much they did so, and the reason(s) why, is unclear because none of the other teams who were allocated a place in WSL1 have indicated their consent to waiving confidentiality relating to their applications. What the redacted post-moderation matrix does show is that the team that had moved above the Belles into 8th place had 64.5 marks (*i.e.* just 1.2 marks more).
- 2.6 At the moderation stage, the Belles' initial mark for Section 2 was reduced from 15 (out of 30) to 14, but the 'Fail' assessment was replaced with a 'Pass'. That seems anomalous, although the notes that have been disclosed relating to the Club's application include a comment that Section 2 was a pass, "*but only just*". Post-moderation, the Belles' mark for Section 3 remained at 15 (out of 20), although documents show that some concerns already existed over the availability of the Keepmoat Stadium for the Club's fixtures.
- 2.7 Following the pre-screening and moderation stages of the process, a number of applicants were notified that they had been unsuccessful due to their inability to satisfy one, or more, of the minimum criteria. The 19 clubs who progressed to the interview stage, including the Belles, were notified and informed of the next step in the process, namely interviews to be conducted by a Selection Panel over a three-day period during mid-April. Amongst other documents, a summary of the findings of the pre-screeners in respect of each of the applicants was provided to the members of the Selection Panel.

2.8 The Selection Panel comprised:

- (i) Michael Game – Chairman of the FA WSL and FA Board Director,
- (ii) Sue Hough – Chair of the FA Women’s Committee, Chair of The FA WSL League Management Committee, and Vice-Chair of The FA WSL.
- (iii) Kelly Simmons MBE – Director of National Game and Women’s Football.
- (iv) Paul Vaughan – Independent Commercial Consultant with experience of professional league management and competitive bid/tender process in other sports.

The Panel was attended by Mary Guest, a Solicitor and Head of The FA’s Legal (Commercial) department. Ms. Guest’s role was that of an observer, to ensure that the process was followed correctly.

2.9 All clubs who had applied for either WSL1 alone, WSL2 alone, or for both Leagues (in the alternative), were to be interviewed. On 27th March, Alan Smart, the Vice-Chairman of the Belles, received a telephone call from Sally Horrox (FAWSL Project Lead and FA Consultant), to inquire whether the Club also wished to be considered for WSL2 and for this to be discussed at the forthcoming interview. When he submitted the application, Mr. Smart had only ticked the box for consideration for WSL1. For present purposes, suffice it to say that Mr. Smart indicated that the Club would be prepared to discuss WSL2 if that was the wish of the Selection Panel. The significance of the phone call will be returned to later.

2.10 Representatives from the Belles, including Mr. Smart, attended for interview on 11th April. The Club made a 20-minute presentation, followed by a 30-minute question and answer session with the Selection Panel. The notes of the interview show that a range of matters were discussed, and that concerns were raised by the Panel regarding the availability of the Club’s ground, which Mr. Smart attempted to address. Mr. Smart and his team then went to a separate room where they saw three of the pre-screeners, when the question of facilities was again discussed, amongst other things.

2.11 Following the interviews, the Panel unanimously decided to offer licences to eight clubs for WSL1, with effect from the 2014 season, and 10 clubs a place in WSL2. The Belles were to be offered a place in WSL2. On 25th/26th April all of the clubs who had been interviewed were contacted and informally told of the decision. Ms. Simmons telephoned Mr. Smart and informed him that the Belles were being offered a place in WSL 2, subject to them fulfilling certain requirements. By letter, dated 30th April 2013, Ms. Simmons confirmed the offer in writing. The letter refers to two conditions, to which the offer was subject, the second being as follows:

*“The club providing satisfactory confirmation of ground grading, ground availability, maintenance (providing for a maximum of a 3 week ‘closed’ period for maintenance in June), usage terms and pitch quality at Castle Park. **The current proposals for Keepmoat do not currently meet minimum criteria and licence requirements.**”* (emphasis added)

2.12 On 8th May 2013, Mr. Smart, wrote to the FA indicating its intention to appeal against the decision not to offer the Belles a place in WSL1. The letter advanced a number of points, which were amplified in a subsequent letter dated 16th May. The clear perception held by the Club, its supporters, and others, was that it had been relegated in favour of Manchester City, who had only finished fourth in the WPL in the 2012 season, with the three sides that finished ahead of it remaining in the newly formed WSL2.

2.13 On 10th June, on the Club’s application, the hearing of the substantive appeal was adjourned by an Independent Appeals Panel until 25th June to provide the Belles more time to prepare their case. A differently-constituted Independent Appeals Panel was convened to hear the substantive appeal on the latter date.

3. THE GROUNDS OF APPEAL

- 3.1 The grounds of the Belles' appeal may be summarised thus:
- (i) The Selection Panel was not independent;
 - (ii) The Selection Panel was tainted by perceived, if not actual, bias;
 - (iii) The FA has failed to follow a fair process in determining that the Club should not be offered a place in FAWSL 1; and
 - (iv) The FA has failed to lawfully exercise its discretion in determining the clubs to be included in WSL 1 (and by excluding the Club).
- 3.2 Those arguments, which appear in Ms. Mulcahy's Skeleton Argument on behalf of the Belles, represent a refinement of the points made by Mr. Smart in his two letters, referred to above. This is not surprising, as he had prepared the Club's case on appeal without the benefit of legal advice. There remain, though, a substantial number of miscellaneous complaints which are set out at paragraph 38 of the Skeleton Argument.
- 3.3 We heard oral evidence from three witnesses, who had each provided a written witness statement, namely Mr. Smart (for the Belles) and Ms. Simmons and Ms. Guest (for the FA). For economies of scale, their evidence will only be referred to where necessary. We found all three of witnesses to be honest and truthful, and that they each of them did their best to assist us. Mr. Smart did, though, at times have some difficulties with his recollections.

The burden and standard of proof

- 3.4 The burden of proving its case rests with the Club, to the civil standard of proof (the balance of probabilities). Where any disputed issue of fact arises, or where we have had to test the strength and reliability of either documentary or oral evidence, we have applied that standard in our determination of it.

4. THE REMIT OF THE APPEALS PANEL

4.1 Before turning to address each of the grounds of appeal, the first and foremost question that falls for consideration is the remit of the Appeals Panel. Clause 12 of the Terms and Conditions applicable to the applications submitted by all of the applicant clubs states as follows:

“12. The FA will be free to exercise its discretion in licensing clubs as it sees fit, subject to compliance with the terms of the licensing process as set out in this document. There shall be no appeal against the exercise of such discretion. However, an applicant club who feels that the FA has not complied with the terms of the licensing process may lodge an appeal with the Independent Appeals Panel responsible for the FA WSL on this point (emphasis added). ... In the event that the Independent Appeals Panel concludes that the FA has failed to comply with the terms of the licensing process, it may order the FA to carry out the selection process again, in accordance with its terms and based on the documents already submitted. ...”

4.2 The Club quite properly does not challenge the validity, or binding nature of clause 12. All of the applicant clubs are and were bound by it, as was the FA. However, the remit that clause 12 provides was the subject of argument.

The FA’s case on the remit of the Appeals Panel

4.3 We summarise The FA’s case first, as the remit point was first taken in the skeleton argument prepared on its behalf by Mr. Lewis QC. He submits, firstly, that this Appeals Panel is merely a ‘creature’ of clause 12. Its remit is strictly limited to those expressly provided for by that particular contractual term. It has no additional supervisory powers akin to a judicial review (see *Bradley -v- The Jockey Club* [2005] EWCA Civ 1056). Further, that there is no room for clause 12 to be hedged around with any implied term(s) that would enable the Appeals Panel to oversee the discretion exercised by the Selection Panel.

4.4 Mr. Lewis further submits that, by its appeal, the Belles seek to challenge the substance of the Selection Panel's exercise of discretion, as opposed to the process, which clause 12 expressly prohibits. In doing so, the Club is attempting to elevate a purely administrative decision of The FA as to which clubs to offer a WSL1 place, and how it should spend the significant financial investment that it has committed to make in the women's game over the next four years, as if the process was a quasi-judicial one. Concepts of independence and impartiality, and procedural fairness relate to quasi-judicial tribunals, such as a disciplinary commission. They concern the relationship between the quasi-judicial tribunal and the parties to the dispute, and whether a party knows the charge and has had a fair hearing. That, submits Mr. Lewis, is very different to an administrative decision by a sports governing body as to which clubs are offered a place in a new structure that it is going to fund. A sports governing body is not under any obligation to have all of its administrative decisions made by persons independent of it simply because the decisions affect clubs. Such an arrangement would be unworkable.

4.5 Accordingly, it is submitted that an appeal can only be made on the very narrow and limited basis that the FA *"has not complied with the terms of the licensing process"*, as set out in the terms and conditions. Compliance with the terms of the licensing process means taking the procedural steps specified, in the way specified, which, Mr. Lewis argued, the FA has manifestly done. If we are satisfied that the FA has taken the steps required of it, then that is the end of the matter and disposes of the appeal.

4.6 Finally, even if we were to find that there has been a material failure on the part of the FA to follow the specified procedural steps, Mr. Lewis submits that our powers would be limited by clause 12 to ordering The FA to carry out some part of the selection process afresh, based on the same evidence that was presented to the original Selection Panel. We cannot substitute our discretion and order The FA to offer the Belles a place in WSL1.

The Belles' case on the remit of the Appeals Panel

- 4.7 For the Club, Ms. Mulcahy argued that the process that the FA set up was a competition and that the decision it reached was not a purely administrative one, as Mr. Lewis argued. The logical extension of the FA's argument is that it could go through the motions of carrying out the various steps even though it had, from the start, already identified the clubs to take part in WSL1, and yet not be susceptible to challenge.
- 4.8 Ms. Mulcahy relied upon the decision in *Horkulak -v- Cantor Fitzgerald International* [2004] EWCA Civ 1287 (a case concerning the award of a discretionary bonus in the context of an employer/employee relationship), as authority for the proposition that a contract which allows for the exercise of a discretion contains an implied term that it will not be exercised arbitrarily or capriciously. She further argued that, in a sporting context, The FA will only be protected from challenge if it exercised its discretion lawfully.
- 4.9 By analogy with the public law standard of review, the exercise of discretion is always limited, and never unfettered. Further or alternatively, it is necessary for the body exercising its discretion to ask the right questions; to take account of only relevant considerations; and to act reasonably and fairly. Accordingly, Ms. Mulcahy contended that the Belles are entitled to ask the Appeals Panel to scrutinise the way in which The FA exercised its discretion when it reached the decision that it did not to offer the Club a place in WSL1.
- 4.10 Further or alternatively, there is nothing to distinguish the Appeals Panel from any other quasi-judicial process: the Panel has the jurisdiction to remit the process to be carried out again in the same way as a court or a Rule K arbitral panel exercising a supervisory jurisdiction. That is what the terms and conditions provide.

4.11 Lastly, Ms. Mulcahy submits that what the terms and conditions do not provide for, is power for the Appeals Panel to decline to remit the process because to do so would make no difference.

4.12 At this juncture, it is helpful to digress in order to identify the terms and conditions that are relevant to the licensing process.

The steps specified by the terms and conditions

4.13 The relevant steps are, firstly, clauses 2, 3 and 6, which apply to applicant clubs. In brief summary, they respectively provide for: (a) the submission by clubs of their Club Development Plan and the material they consider best suits their application (for which they were responsible) (clause 2); (b) the provision of supporting evidence where a change in circumstance is planned or anticipated (clause 3); and, (c) to ensure that all information that is provided in support of an application is correct, complete and accurate (clause 6). Clause 4 then specifies that the FA “*may or may not invite some clubs*” to an interview, and clause 5 contains confidentiality provisions relating to applications.

4.14 Clauses 7 to 11 inclusive are then set out verbatim:

“7. The FA has set out in the Club Development Plan: ‘Minimum Requirements’, the minimum requirements that any club wishing to apply for and obtain membership of the FAWSL1 or FAWSL2 from 2014 must meet. All clubs applying for an FAWSL club licence will be first assessed and marked against FAWSL1 criteria unless a club makes it clear that it wants to apply specifically for a FAWSL2 licence. Applicants will then be graded depending on the marks allocated to them for meeting and/or exceeding minimum requirements.”

8. *Those clubs who, in the reasonable opinion of The FA, do not satisfy the minimum requirements for FAWSL1 or FAWSL2 or who have no reasonable potential of doing so within a timeframe set by The FA may have their application rejected by The FA without further consideration. The FA shall retain the discretion to set aside any particular requirement for any particular club for such period of time as The FA stipulates ...*
9. *The FA shall use its discretion to allocate an FA WSL club licence to those clubs who in its reasonable opinion are the most suitable licensee clubs for each of FAWSL1 and FAWSL2.*
10. *Where there is more than one applicant club from any given region, in exercising its discretion to allocate FAWSL club licences (and in deciding which of FAWSL1 and FAWSL2 each successful club shall be allocated to), The FA will first have regard to the grading and marking structure, and will then assess the capacity of that region to sustain more than one FAWSL club, taking into account in particular the commercial sustainability of the relevant applicant clubs.*
11. *At the conclusion of the process, The FA will circulate decisions to individual clubs, including specific feedback on successful and unsuccessful applications. There will be no opportunity for the club to review or seek to amend or influence the individual club assessments after the deadline for submission of applications at 4pm on March 4 2013, unless specifically requested by The FA."*

4.15 Clause 13 is not germane to the issues that arise, and clause 14 specifies that the terms and conditions and the application and adjudication process are governed by English law.

Ruling

4.16 As a matter of construction and interpretation, the first sentence of clause 12 envisages two things, although the order in which they appear needs to be reversed to show how they follow one another sequentially:

- (i) A requirement that the FA will comply with the terms of the licensing process, as set out in the terms and conditions; and
- (ii) Subject to its compliance with (i), the FA will be free to exercise its discretion in licensing clubs as it sees fit.

4.17 The FA has throughout, up to and including the appeal hearing itself, emphasised the open nature of the process, and that all applications would be judged equally on their merits. It is therefore difficult to gainsay the proposition that it should act conscientiously, fairly and in good faith towards all of the applicant clubs (including the Belles) in taking the specified steps, as set out in the terms and conditions. If The FA and the applicant clubs had turned their minds to that question at the time they entered into the various (identical) contracts relating to the process, it is reasonable to assume that they would have agreed to the inclusion of a provision to the effect that The FA would so act when taking the specified steps in the process. Further, that it would exercise its discretion to award licences in a genuine and rational manner.

4.18 Accordingly, if we were only concerned with the first sentence of clause 12, a term to the effect that The FA would act conscientiously, fairly and in good faith in taking the steps specified in the terms and conditions could and should reasonably be implied, by applying the 'officious bystander' test. Further, that the FA would exercise its (unlimited) discretion genuinely and rationally (*i.e.* not arbitrarily or capriciously). Such implied terms are not inconsistent with the express provisions of the first sentence of clause 12. On the contrary, they would reflect the reasonable expectation that a major sports governing body like the FA will act in a fair and transparent manner in all of its dealings, including a competition process of the kind here.

- 4.19 The difficulty for the Club in its arguments is the second sentence of clause 12. It is couched in mandatory terms - by the use of words "*There shall be no appeal ...*" - and unambiguously precludes an appeal to this Appeals Panel against the exercise of discretion by The FA. Its intention to have exclusionary effect is underlined by the fact that it is immediately followed by a provision that does permit an appeal if a club feels that The FA has not complied with the terms of the licensing process. Since an appeal is expressly permitted on the latter ground, there seems to us to be perfectly respectable case for saying that an implied term is capable of attaching to the carrying out by The FA of the specified steps (*i.e.* those set out in the terms and conditions). However, an implied term attaching to the exercise of discretion would seem to be otiose in view of the absolute embargo against any appeal relating to The FA's exercise of its discretion.
- 4.20 The terms upon which the discretionary bonus in *Korkulak* might be paid, do not appear to have been subject to any express contractual term that prohibits an appeal by the employee against decision not to award a bonus.
- 4.21 Accordingly, in our judgment, no appeal lies to this Appeals Panel against the way in which The FA exercised its discretion to offer - or not to offer - licences to applicant clubs. That is what the Club seeks to challenge with most of its arguments. The only conceivable basis upon which such an appeal might be permissible under clause 12, which indirectly related to the exercise of The FA's discretion, is if it could be shown that the specified step under clause 9 had not been complied with on the ground that The FA had failed to exercise its discretion at all in deciding what offers to make to which clubs (*e.g.* by tossing a coin in order to select clubs). Ms. Mulcahy argued that the decision not to offer the Belles a place in WSL1 was taken by the pre-screeners, and not the Selection Panel, but we reject that argument for reasons that will follow.

4.22 If we are wrong in any way in our construction and interpretation of clause 12, and had proceeded to interpret and apply it by reference to the implied terms contended for by Ms. Mulcahy (*i.e.* including a term relating to the exercise of discretion), we would still have found that:

- (i) The FA did undertake the specified steps in the licensing process that it was required to take in accordance with the terms and conditions, in an conscientious and fair manner, and in good faith; and
- (ii) The FA (in the form of the Selection Panel) did positively exercise its discretion in the selection of clubs to be offered licenses in a way that was genuine and rational (*i.e.* not arbitrarily or capriciously).

4.23 The appeal therefore fails at that preliminary hurdle. Nevertheless, as a number of other grounds were argued in the alternative, we will go on to address them.

5. ALLEGED LACK OF INDEPENDENCE OF THE SELECTION PANEL

5.1 Alleged lack of independence on the part of the Selection Panel is said to arise in two ways. Firstly, a brochure accompanying the application materials stated that there would be:

“A Selection Panel, comprising independent members and FA representatives with relevant skills and experience.”

5.2 In the event, the composition of the Selection Panel included only one member who was completely independent of The FA, namely Mr. Vaughan, with the other three members being employees of The FA and at the heart of the women’s game.

5.3 The Belles assert that because only one member of the Selection Panel was wholly independent, The FA has failed to comply with the process. The Appeals Panel rejects this ground of appeal for the following reasons:

- (i) The composition of the Selection Panel was not a contractual term of the process set out in the terms and conditions. Instead, the above statement appeared in a brochure that formed part of the application pack materials. The highest at which it can be put, in terms of its status, is a statement of intent on the part of the FA. A Selection Panel that did not comprise at least two members who were wholly independent of the FA does not taint the process in any way, let alone invalidate it.
- (ii) 'Independence', in the context of the selection process, should properly be interpreted as requiring the members of the Selection Panel to be independent of the applicant clubs, not of the governing body responsible for administering the process. A relationship or connection of some kind between a member of the Selection Panel and one of the applicants might well give rise to at least an appearance of a lack of impartiality on the part of the member. But no such perception of partiality arises simply because the member is an employee of the governing body taking the decision as to which clubs should be selected.
- (iii) It would be impractical to require such an important decision of the kind in question, involving the investment of some £8 million, where expertise and experience is essential, to be taken by people who are wholly independent of a sports governing body like the FA.
- (iv) The Selection Panel consisted of a combination of FA representatives, all of whom were independent of the applicant clubs, and an expert (Mr. Vaughan) who was completely independent of the FA. We can see no reason to question the claim that the Panel was selected in order to achieve the right blend of skills and experience.

- (v) The statement in the brochure was silent as to how many entirely independent members and how many FA representatives there would be. If there had been two entirely independent members, and 10 FA representatives, no objection could have been taken. We do not accept the proposition that an additional entirely independent member, sitting with three FA representatives, would have made any material difference to the outcome of the selection process involving the Belles, having regard to the way in which it was decided.
- (vi) The statement by a representative of The FA, Sally Horrox, to Mr. Smart that the Selection Panel would be “*independent*” was not capable of imposing any binding obligation on the FA to provide an entirely independent Selection Panel, or capable of raising this detail to a term of the process. In any event, we have found that all four members of the Selection Panel were independent, in the way in which the requirement for independence should properly be understood and applied for the purposes of ensuring impartiality in the process.
- (vii) Subject to any question of actual, or apparent, bias on the part of one or more of the Selection Panel members (as to which, see below), the Belles were not disadvantaged compared with any of the other applicants by the absence of more than one member who was entirely independent of the FA. The composition of the Selection Panel was the same for all of the applicant clubs.

6. ALLEGED BIAS/PERCEIVED BIAS/LACK OF INDEPENDENCE OF MEMBERS OF THE SELECTION PANEL

- 6.1 The Club alleges that “*the decision making panel is tainted by perceived if not actual bias.*” In submissions, it was put on the basis that three members of the Selection Panel, namely Mr. Game, Ms. Hough, and Ms. Simmons had “*closed minds*” when they made their decision not to offer the Belles a place in WSL1.

The complaint has also been characterised as “*a lack of independence*”. This is therefore the second way in which the independent nature of the selection process is challenged.

6.2 Michael Game

- (i) In his formal witness statement, Mr. Smart claims to have spoken to Mr. Game on a one-to-one basis at the meeting that took place on 4th December 2012. Mr. Smart says that he asked Mr. Game whether Manchester City were expected to apply for the WSL to which Mr. Game responded:

*“I’m looking forward to them **applying** so the league can benefit from their money”*
(emphasis added)

- (ii) Paragraph 2 of the Belles’ Appeal Letter, dated 8th May 2013, quotes Mr. Game as having said that he was:

*“Looking forward to **welcoming** Manchester City into the Super League [FA WSL], and the Women’s game benefiting from their [Manchester City’s] money”*
(emphasis added).

- (iii) The FA’s recollection is that a response to a question from the floor was partly given by Sally Horrox and partly by Michael Game. Their response is said to have been that the application process was open and that any club could apply, thus enabling a new club like Manchester City Ladies FC (or any other new club) to enter FAWSL in 2014 if its application was successful. It was noted that club finances and financial sustainability was an important minimum requirement, with the league becoming more professional and with players’ wages increasing. A club like Manchester City Ladies FC may therefore be a strong applicant on this basis, but it would be assessed against all minimum requirements and tested as to whether its plan met the league’s strategic objectives.

- (iv) This was put to Mr. Smart, but he maintained that he had spoken to Mr. Game personally. The FA's case on this issue was based entirely on hearsay, as neither Mr. Game nor Sally Horrox provided witness statements or were called to give evidence. For his part, Mr. Smart appeared to have real difficulties articulating what his understanding of bias was, and how he considered it had operated to the Belles' detriment. Nevertheless, his assertion that he did speak to Mr. Game was not challenged by any probative evidence from The FA and we therefore find, as a fact, that he did have a conversation with Mr. Game at the meeting on 4th December when the question of a newly affluent women's club like Manchester City applying to join the WSL was discussed.
- (v) There is, though, a clear inconsistency between the words that Mr. Smart attributes to Mr. Game in his witness evidence, and Mr. Smart's recollection, as set out in the Appeal Letter. Both statements are in speech-marks to indicate that they are based on direct quotation. When the difference between "*welcoming*" and "*applying*" was put to him, Mr Smart did not seem to appreciate that there was any material difference between the two, in terms of their effect on the statement that Mr. Game is said to have made.
- (vi) Since his witness statement is verified by a statement of truth, we would tend to prefer Mr. Smart's account of the conversation rather than the one he cited in the appeal letter of 8th May, but we are left with considerable doubt as to his ability to accurately remember the precise words that Mr. Game used, or the sense that they conveyed. That is not at all surprising, given the passage of time that has elapsed since the meeting took place. Additionally, although we found him to be a truthful witness, there are other aspects of Mr. Smart's recollections that cause us to question how reliable they are (see below concerning alleged bias against Ms. Simmons).

- (v) We are not therefore satisfied, on the balance of probabilities, that there is any reliable evidence before us from which we can make a properly informed decision as to what precisely Mr. Game said, still less that he said anything to Mr. Guest to show bias, or the appearance of bias, in favour of Manchester City, or any other newly-affluent club that might enter the application process. If he said something to the effect that he looked forward to, or would welcome, an application from a newly affluent club, because of the financial benefits that it would bring to the women's game, then that simply reflects one of the objectives of the 'Game Changer' initiative, namely to establish a financially sustainable semi-professional women's game. No-one could properly accuse Mr. Game of having an improper ulterior motive on that ground.

6.3 **Sue Hough**

- (i) Ms. Hough is the chair of the Management Committee for the WSL and responsible for its day-to-day management. The facts and matters that are alleged to give rise to bias/perceived bias on her part overlap with other issues that the Club raises, and which it is convenient to refer to at the same time.
- (ii) On 23rd September 2012, the Belles were scheduled to play Birmingham City Ladies at the Keepmoat Stadium, with a 2pm kick-off. Three weeks before the match, the Club notified The FA that there was a problem with the fixture because of the progression of Doncaster Rugby Club in a cup competition. The Rugby Club took precedence over the use of the ground. The Management Committee discussed alternative options, which included playing the match against Birmingham on 22nd September, or finding an alternative ground (so that it could still be played as a Belles' home fixture). If neither of those options could be accommodated, the fixture would have to be reversed and played at Birmingham. The Belles then confirmed that they would be able to play at the Keepmoat on 23rd September after all, but with a later kick off time of 7.45pm. The Management Committee agreed to this.

- (iii) Mr. Smart's evidence was that there was "*uproar*" at the proposal that the fixture should be reversed and that the Management Committee were forced to reverse their decision. This, he says, brought him into direct conflict with Sue Hough, "*who will no doubt have felt put out by having to back down on such a contentious matter.*"
- (iv) Although we did not receive any evidence from Ms. Hough herself, Ms. Guest told us that she sits with her on a Management Committee consisting of 11 persons that consider matters such as fixture issues.
- (v) Mr. Smart's basis for questioning Ms. Hough's impartiality and integrity appears to be based entirely upon his own supposition and conjecture. There is no evidence that she was so 'put out' or embarrassed, let alone angered, by the re-scheduling of one match that she would subvert the selection process against the Belles. Such an argument lacks any credible basis. The match was rearranged at the last minute because the Belles suggested an option that they had not previously canvassed. That option was agreed to by the Management Committee, and the Belles playing the fixture at home after all.
- (vi) Further, the fact that Ms. Hough raised issues about the availability of the Keepmoat Stadium at interview is not surprising, as she was the Panel member allocated the task of asking questions of all the applicants relating to Section 3 ('Facilities'). Even if she drew on the experience of the rearranged Birmingham City fixture when she asked the question, there is no evidence that that caused her to close her mind to the Belles' application for WSL1. A reasonable, objective and informed person would not reasonably apprehend that because of her experience of a single incident that she would not bring an impartial mind to bear on the adjudication of the Belles' application (see *Locobail, Baker -v- Quantum Clothing Group* [2009] EWCA Civ 566).

(vii) The Belles' ability to guarantee ground availability throughout the playing season was raised at the moderation stage as an issue of concern, despite the high ranking and 'Pass' for Section 3 that was recorded at pre-screening, and which was not adjusted following moderation. It stemmed, principally, from the fact that the Club only has third 'call' on the Keepmoat Stadium, after Doncaster Rovers FC and Doncaster Rugby Club. All the other applicants for places in WSL1 have second call on their grounds, save for one club that has primacy. Additionally, concern was raised that the Football League would require the pitch to undergo maintenance for a number of weeks following the end of the domestic Football League season in May, and during the WSL season. For the duration of the maintenance period, the pitch cannot be used and the Belles would be unable fulfil any home fixtures.

(viii) The Belles were given a longer interview than some other clubs, so that ground availability and other issues could be addressed. The length of the interviews reflected this. It enabled those clubs whose applications were incomplete to amplify them. As a matter of commonsense, it is difficult to see how, if the decision not to offer the Belles a place in WSL1 was a *fait accompli* before the time of the interview stage, they would be allocated a question and answer session lasting 30 minutes (compared with 10 minutes for five other existing WSL clubs). It is noteworthy that Everton and Notts County (formerly Lincoln Ladies) who are current WSL sides, were also given the same time as the Belles, both for their presentation and for questions and answers, as were Manchester City. Everton and Notts County were ultimately offered places in WSL1 and it is therefore impossible to deduce that the length of the interview meant that the Belles' fate was sealed before they even attended the interview.

(ix) The notes of the Belles' interview as recorded by Ms. Guest show that it was Mr. Game who began by raising concerns about the lack of availability of the ground. Ms. Hough raised similar concerns and Mr. Smart confirmed that the Club was "third in" and that this cannot change.

- (x) We also heard from Ms. Guest how arrangements with television broadcasters and other commercial partners would require applicants to show that their use of a Grade A ground throughout the playing season could be guaranteed.

- (xi) The Belles were unable to give the Selection Panel that assurance, either in relation to the Keepmoat Stadium, or their alternative ground at Castle Park. The possibility of 'double-headers' appears to have been referred to in passing during the initial stages of the application process (a Belles' match starting at 6.30pm, to follow a Doncaster Rovers FC men's home fixture), but this was noted during the moderation stage to have been unsuccessful from a ticketing perspective when it was attempted in 2012. There was no evidence before us that the Club advanced any kind of case to show that it could commit to regular evening kick-offs, whether at 6pm or any other time.

- (xii) The pre-screeners' conclusions were not provided to the Selection Panel until after the interviews of the 11th and 12th clubs, and before the Panel made their decision. The Club argues that the Selection Panel did not make the decision concerning the Belles' application, but adopted instead the decision of the FA pre-screeners. Alternatively, that the Selection was influenced to come to the same decision as the pre-screeners. However, the brief adverse comments that were made in the summary in relation to the Belles' ground arrangements do not appear to have added anything to the views that the Selection Panel had already formed, as recorded in the interview notes. We find that the process as a whole, including the Selection Panel, gave the Club every reasonable opportunity to show that all of the minimum requirements could be met, including Facilities. It was unable to do so. On any objective interpretation, that cannot be characterised as biased or unfair.

- (xiii) The concerns that were identified by the pre-screeners at the moderation meetings, and the fact that Mr. Game was the first member of the Selection Panel to raise the question of ground availability during the interview, undermine the argument that Ms. Hough was biased against the Belles' application, or that such a perception existed. Others were also concerned. If she knew that there was, or might be, an issue over ground availability, then that knowledge, by itself, does not come close to requiring her to recuse herself from the Selection Panel on the grounds of actual or perceived bias. It did not compromise her independence. Even if one were to accept that the fixture re-scheduling incident in September 2012 did cause friction between the Club and Ms. Hough, it is not unreasonable to assume that this was one of many such issues that she and her Committee regularly have to deal with involving clubs. To suggest that she should have withdrawn from the Selection Panel because of the single incident relied upon is unsustainable.
- (xiv) Accordingly, we find the case against Ms. Hough in relation to bias, or perceived bias, to be devoid of any merit. Likewise, the alternative claims that she had a "closed mind" (within the meaning contemplated by the decision in *Bovis Homes Limited -v- New Forest District Council* [2002] EWHC 483) and/or lacked independence.

6.4 **Ms. Simmons**

(i) Point 1

- (a) Firstly, in his witness statement, at paragraph 27, Mr. Smart says this:

"Lastly, Kelly Simmons was the person who told me, following the decision to exclude the Belles from WSL1, that the player budget – and the inability to compete – was the reason why we were refused a place in WSL1. ... But that is no longer the reason maintained by the FA. There is reason, therefore, to doubt Ms. Simmons' independence, not least because she is an FA employee."

The basis therefore, for this particular allegation of bias, perceived bias or lack of independence on the part of Ms. Simmons, is that she gave inconsistent reasons for why the Belles were not being offered a place in WSL1, and that the Club's inability to comply with the Facilities requirement was not cited during the telephone conversation that Mr. Smart had with her on 25th April.

- (b) In his witness statement, Mr. Smart says that Ms. Simmons spoke to him on 25th April to deliver the "*devastating news*" that the Belles would not be offered a place in WSL1. When he gave evidence to us, he said that did not get any further than listening to the first reason that she cited, which was player budget and not being able to compete on the field. In his understandable upset, Mr. Smart told us: "*My personal world fell apart.*" He conceded that he could not disagree with Ms. Simmons' statement that she did go on to cite four further reasons why the Belles' application for a place in WSL1 had been unsuccessful, including deficiencies in the Club's marketing plans and ground issues/concerns.
- (c) We were provided with a written framework prepared by Ms. Simmons - effectively a 'crib' - for the calls that she made to a number of clubs at the end of April, to deliver either good or bad news. She also made a transcript of the call that she made to Mr. Smart, which confirms that she did refer to the five issues that were subsequently set out in the letter of 30th April offering the Belles a place in WSL2.
- (d) It follows that this limb of the case for alleged bias and/or perceived bias and/or lack of independence on the part of Ms. Simmons simply falls away. It is regrettable that it was levelled at her because Mr. Smart was unable to accurately recall what she had said to him during their conversation on 25th April. To his credit, he was prepared to concede the point in cross-examination.

(ii) Point 2

- (a) In paragraph 28 of his witness statement, Mr. Smart refers to an interview that Ms. Simmons had on Radio 5 Live on 2nd May when she was asked about the application process. When she responded to a question about the typical turnover for a WSL1 club she gave a range of between £200,000 and £300,000. Mr. Smart says that he was dismayed at what he considered to be "*a clear breach*" of an FA-imposed embargo on speaking about the application process.
- (b) It is not clear whether Mr. Smart alleges that this episode is said to constitute a lack of independence on Ms. Simmons's part. It post-dated the selection process, and the communication of the decisions of the Selection Panel. If there was an embargo, and it was still in place by 5th May, what Ms. Simmons said was incapable of having any adverse effect on the Belles, or to breach any confidence. It was simply a statement of fact. By this point in time, Mr. Smart was still very disappointed at the outcome, and the knowledge that the Club's turnover was toward the higher end of the scale that Ms. Simmons had indicated must have rankled with him. That would appear to be the point he is making here. It is irrelevant to any of the issues in the appeal and can have nothing to do with allegations of bias or lack of independence.

(iii) Point 3

- (a) Another issue emerged during the course of the hearing that gave rise to a further allegation of lack of independence against Ms. Simmons. In her evidence, she stated that her preference had always been for a top-tier division consisting of no more than eight clubs. She told us that that was a view she shared with Hope Powell, the Coach of the English Women's Football Team. According to Ms. Simmons, Ms. Powell did not think that there was sufficient quality in depth to sustain more than an eight-team elite top-tier and that a league of that size would drive standards up. This, it was argued, meant that Ms. Simmons too had a closed mind to there being more than eight clubs in WSL1, to the detriment of the Belles in 9th position.

- (b) This argument founders for the reason that although eight clubs was regarded by Ms. Simmons as an optimum number, two further places in WSL1 were available if the Belles had been able to satisfy the Selection Panel in relation to the points set out in The FA's letter of 30th April, and ground availability in particular. Despite her longstanding preference for eight clubs, we accept Ms. Simmons' evidence that if there had been nine or 10 clubs, all with sufficiently strong applications, they would have been offered a place in WSL1. Having seen her answer questions in cross-examination, and judged her demeanour, we are satisfied that Ms. Simmons had no ulterior motive when she considered the Belles' application, and that there was no appearance that she might have.
- (c) We therefore find that none of the allegations of bias, perceived bias or lack of independence that have been levelled against Ms. Simmons have been established. Indeed, they fall short of being established by some considerable distance.

7. FAIR PROCESS

7.1 Insofar as this ground of appeal has not already been covered, we reject the Clubs' case that The FA has failed to follow a fair process. We add the following points.

7.2 The Belles' application was pre-determined

- (i) The theory that the Belles' fate was pre-determined by the pre-screeners, cannot be squared with the fact that the mark for 'Facilities' remained the same post-moderation and ranked the Club highly (5th in Section 3). The letter from The FA of 30th April informing the Club of its decision, and written by Ms. Simmons, states that the proposals for the Keepmoat Stadium did not meet minimum criteria and licence requirements. By clear inference, therefore, the Selection Panel reduced the 'Pass' for Section 3 at the pre-screening stage, to a 'Fail' following the interview stage.

- (ii) In our view, this demonstrates that the Selection Panel did positively exercise its discretion when the selection decision was made in respect of the Belles. The feedback that it received from Ms. Horrox after the interviews were conducted added nothing, in our view, to the views that the Selection Panel had already arrived at, as evidenced by the interview notes.
- (iii) As has already been noted, when he submitted the Belles' application, Mr. Smart only ticked the box indicating a wish to be considered for WSL1. Ms. Horrox contacted him on 27th March to see whether the Club wished to be considered for WSL1 first and, if unsuccessful, for WSL2. The Club points to the fact that, by the time of this conversation, it had slipped to 9th place overall following moderation and therefore fell outside the optimum number of eight clubs for WSL1. Although we did not have a witness statement, or hear any oral evidence from her, Ms. Horrox's note of the conversation with Mr. Smart, which she recorded in an e-mail on the same day, is as follows:

"Alan confirmed that he thought this would be the mutual sequence of events at interview but did not understand that he needed to tick both boxes when filling in the form."

We note that two other current WSL clubs, Chelsea and Everton, applied for places in WSL1 and WSL2, in the alternative. Everton, like the Belles, were allocated 30 minutes for questions and answers at the interview stage. If Ms. Horrox had not contacted Mr. Smart, the Belles would not have been considered for WSL2 and, as the outcome of the process shows, would not have been made the offer it has. That more benevolent interpretation of the motivation for the inquiry is borne out by Ms. Horrox's contemporaneous record of Mr. Smart's response, which indicates nothing more than an administrative oversight on his part. That it is now characterised as something more sinister is, we suspect, is coloured by the disappointment of the outcome.

- (iv) Five teams who were ultimately successful in their applications for WSL1 were allocated shorter question and answer sessions at interview. The Belles argue that those teams had been earmarked for WSL1 prior to interview. In other words, that their applications were a 'done deal'. At the risk of repetition, we accept the perfectly plausible and reasonable explanation that the longer Q&A sessions were intended to provide some clubs, including the Belles, with an opportunity to amplify aspects of their applications, and for The FA to explore any concerns with them. As has already been noted, the three other teams who were also successful in their applications for WSL1 were allocated Q&A sessions of identical length to the Belles. If the Belles' application had been pre-judged, why was it considered necessary to allow them three times longer than some other clubs to present evidence in support of their application? If the die had already been cast against the Club, it seems reasonable to assume that they would have been given the same time, or even less, than the five clubs who are said to have been pre-judged favourably.
- (v) Finally, if Mr. Game, Ms. Hough and Ms. Simmons had all been replaced on the Selection Panel, as the Club argues they should have been on the grounds of bias *etc*, the influence that the pre-screeners are said to have had over them would presumably have been even greater over three replacements with an inferior collective knowledge of the women's game.

7.3 **The regional spread of clubs in WSL1**

- (i) As part of the licensing process, an analysis of the regional spread of clubs was undertaken. The Club points to the fact that three clubs in the North-West have been selected for WSL1 (Liverpool, Everton and Manchester City), and none in the North-East. This, it was argued, fails to take into account an important relevant consideration.

- (ii) This argument is misconceived. Clause 10 of the terms and conditions contemplates what will happen when there is more than one applicant club from any region. It does not require an even regional spread of clubs. We heard evidence that consideration was given to the concentration of the three clubs in the North-West and it was judged that the region could sustain them, having regard to various factors. The only complaint that can therefore legitimately be made is that the map showing the distribution of WSL1 sides in the North of England looks very lop-sided. That is not something that assists the Belles in seeking to challenge either the steps that The FA took, or its decision not to offer the Club a place in WSL1.

7.4 **Reference to non-English players**

- (i) The Selection Panel was provided with details and a large number of documents ahead of the interviews. They were accompanied by a covering letter from Kate Boxer of The FA. In it, she made the following observation:

“The pre-screening team has worked on the assumption that a maximum of 20 FA WSL licences can be offered: 8-10 for FA WSL1 and 10 for FA WSL2. NB. If 10 FA WSL1 licences are offered, this may impact on quality and competitiveness of FA WSL1 and dilute the quality of FA WSL2 and reserves. It may also result in an influx of more Welsh, Scottish, Irish and other EU and non-EU players. There is a real concern that there is insufficient talent to field 10 competitive FA WSL1 squads at this time.”

- (ii) We accept the Club’s submission that the concerns raised regarding non-English players was not one of the selection criteria. It was irrelevant to the Selection Panel’s considerations and should not have been included. It arguably raises questions of European Community Law, but that was not a line of argument that it was necessary for Counsel to develop.

- (iii) We cannot speculate what effect this irrelevant point may have made on the minds of the Selection Panel, save that it is unlikely to have affected which clubs were selected for WSL1 and 2 respectively. If it did influence the members of the Panel in any material way, then it did not affect the outcome as far as the Belles are concerned because of the points that have already been addressed, principally ground concerns.
- (iv) The passage from Ms. Boxer's letter quoted above also feeds into the debate over whether there should be 8, 9 or 10 clubs competing in WSL1. The evidence does point towards a consensus that 8 sides was considered to be the optimum number, on player quality grounds. But there was no contractual commitment on the part of the FA to offering any more than 8 places and the Belles' application was not considered to be sufficiently strong.

7.4 **Marketing**

- (i) The Club says that Mr. Smart was not given any, or any sufficient, opportunity during the interview to address concerns about marketing. Mary Guest's notes record that there was a discussion concerning the proposed initiative of a "Club Doncaster" brand (a collaboration with the men's football team which might include 'double-headers' to tap into the men's "numbers"). Mary Guest noted that this initiative sounded like it was in its early stages. There was also a discussion about income streams, and reference to sponsorship in order to make good any shortfall in revenue. Mr. Vaughan asked how the Club intended to drive numbers up, which Mr. Smart responded to.
- (ii) Then, the pre-screeners' assessment summary, following the interviews, says this in relation to Section 2 of the Belles' bid:

"Weaker – couldn't give focus

Couldn't answer marketing questions/focus

No confidence in ability to deliver."

It seems tolerably clear, therefore, that questions regarding Section 2, including marketing, were asked of Mr. Smart, both during the interview with the Selection Panel and the subsequent session with the pre-screeners.

- (iii) At the initial pre-screening stage of the Club's application, the following comments had been recorded:

*"Confused list of ideas instead of clear objectives and plan;
No attendance objectives over 4 years or ticketing policy."*

- (iv) Following moderation, its mark of 14 out of 30 for Section 2, placed the Club in 11th place out of the 13 clubs who were applying for WSL1, and outside the maximum number of 10 places (based on that criteria alone). The brief notes made by Sally Horrox at that stage of the process record the Club's strategy to be:

*"Confused + disorganised list of same ideas talked about in 2012.
Proposing double headers but didn't work in 2012.
No clear objectives – can't see what trying to do. ..."*

The comments made in the pre-screener's summary, that was prepared following the interview with the Selection Panel, suggests that the Club may have fallen further than the moderation assessment.

- (v) The adverse observations that are set out above were not communicated to the Club until disclosure took place as part of the Appeals process. But we have difficulty accepting the proposition that no, or insufficient, questions were asked of Mr. Smart to enable him to address concerns in relation to Section 2. It was the Club's responsibility to advance a coherent and sustainable commercial and marketing plan.

- (vi) Ultimately, though, Ms. Mulcahy is right to observe that The FA's real focus at the appeal hearing was on ground issues, rather than marketing deficiencies. The FA's letter to the Club, dated 30th April 2013, states that its marketing plan was "*not as compelling*" as other clubs. In contrast to ground issues, the letter does not say that minimum standards had not been met in relation to Section 2. Nevertheless, it is clear that there were significant concerns surrounding that aspect of the Club's application, which The FA was properly entitled to take into account when arriving at its decision not to offer the Club a place in WSL1.

7.5 Player budget

- (i) The Club's projected playing salary budget of £35,000 represented 11% of annual projected turnover, compared with an anticipated player salary budget by the FAWSL of approximately one-third of turnover. Doncaster's projected player salaries' budget of £35,000 placed it 11th out of 12 of those clubs that were short-listed for FAWSL 1.
- (ii) In its response to the Club's two appeal letters, the FA's case was that the Selection Panel did not believe that the Club's financial model was one that would support the development of professional football as strongly as other applicant clubs, in line with the strategic objectives of the FAWSL. The notes of the interview indicate that Ms. Simmons went through income streams with Mr. Smart and his team, although we have been unable to find any specific reference to player budget. It was not a point that Mr. Lewis pressed.

7.6 Miscellaneous

- (i) A number of further points are taken at paragraph 38 of Ms. Mulcahy's skeleton argument. They have been addressed in the context of the main arguments that she advanced and, like them, are rejected.

8. ALLEGED FAILURE BY THE FA TO EXERCISE ITS DISCRETION

8.1 The Appeals Panel is satisfied that The FA, through the Selection Panel, did exercise its discretion lawfully, and made a positive decision that was neither arbitrary nor capricious. We therefore dismiss this ground of appeal.

9. WAIVER

9.1 The FA's fallback position is that if we had found there to be evidence of actual or perceived bias, or a lack of independence on the part of any of the members of the Selection Committee, the Belles were not entitled to raise such arguments, on the ground that they had been waived. The question of waiver falls away in the light of the findings we have made, but for the sake of completeness we have gone on to consider it.

9.2 Mr. Smart was not informed of the composition of the Selection Panel until 28th March 2013. He had previously asked Sally Horrox who would be sitting on the Panel and she was unable to tell him. When he did find out, he was concerned to see that it included Mr. Game and Ms. Hough, but decided not to raise it as an issue so close to the interview stage of the process. When he was asked why he had not objected to any of the Selection Panel, he said: "*you don't bite the hand that feeds you.*" That statement reflects a pragmatic, commercial judgment on his part, and is one that many people in his position may well have taken.

9.3 The other consideration that Mr. Smart appears to have weighed in the scales is that, as an existing WSL Club, the Belles were in a good position with their application to join WSL1. Teams from outside the existing WSL, would have to show that they had an "*exceptional*" case for inclusion in WSL1. This, together with The Belles' ever-present status in the top-flight, would explain why he did not initially tick the box for consideration for WSL2, as a fallback.

- 9.4 However, Mr. Smart's decision to do nothing, and say nothing, had consequences. On the Club's own case, by the interview stage there was not merely the appearance of bias on the part of two members of the Selection Panel, but actual bias. Mr. Smart was fully aware of the facts giving rise to his belief, but allowed the process to continue and attended the interview with the Panel, without raising any objection. All of the other applicant clubs also attended for interview, investing time, trouble and expense, ignorant of the fact that an allegation of bias was being stored, to be raised if necessary once the process was completed and the selection decision announced.
- 9.5 In our judgment, Mr. Smart's failure to raise an allegation of actual bias, when he had full knowledge of the facts that he considered gave rise to it, waives any entitlement to apply for Mr. Game and Ms. Hough to recuse themselves from sitting on the Selection Panel, or to set the decision aside on any of the interchangeable ways in which bias/lack of independence has been advanced.
- 9.6 If the Belles had been successful in their application for a place in WSL1, it is inconceivable that any of the allegations that have since been made against the members of the Selection Panel would ever have seen the light of day. In our judgment, Mr. Smart's decision to remain silent, coupled with his continued participation in the process by attending the interview, demonstrated a clear and unequivocal, informed and voluntary waiver of any right to object to the composition of the Selection Panel (see the judgment of Lord Bingham CJ in *Locabail*, paras. 68 and 69, and the first instance and appeal decisions in *JSC BTA Bank -v- Mukhtar Ablyazov* [2012] EWHC 3023 (Comm), and [2012] EWCA Civ 1551).

9.7 The alternative explanation is that the concerns that he now raises in this appeal about the members of the Selection Panel have been significantly elevated in Mr. Smart's mind as a consequence of the sheer disappointment that he understandably feels at the outcome of the Belles' application. In other words, even if he had some concerns at the time of the interview, they were of a relatively minor nature and certainly not worth raising. He alludes to this in his statement in relation to the comments he attributes to Mr. Game:

"I did not think much of the comment at the time, but for reasons I will explain below, this comment has become increasingly significant."

If, when Mr. Smart found out who would be sitting on the Selection Panel, his concerns about two of its members had been remotely close to the level that he now claims they are, his decision not to say anything would be extremely difficult to justify on the grounds of commercial pragmatism.

10. DECISION

10.1 For all of the reasons set out above, we dismiss the Club's appeal on all four grounds set out in the Skeleton Argument submitted on its behalf, together with the miscellaneous grounds contained in paragraph 38 of that document.

Craig Moore

Chairman of the Independent Appeals Panel

28th June 2013

Appearances

The Independent Appeals Panel

Craig Moore, Barrister, Independent Chairman

Tom Finn, FA Football Panel Member

Michael Dunford, FA Football Panel Member

For the Club

Ms. Jane Mulcahy of Counsel

Mishcon de Reya Solicitors

For The FA

Mr. Adam Lewis, Queen's Counsel

Mr. Tom Mountford of Counsel

Charles Russell LLP Solicitors