

IN THE APPEAL HEARINGS OF

LICHFIELD RFC AND THURROCK RFC

-v-

THE RUGBY FOOTBALL UNION

JUDGMENT OF RFU INDEPENDENT PANEL

Introduction

1. This is the appeal of Thurrock RFC and Lichfield RFC against the decision of the RFU not to award the club a place in new Women's Super Rugby Competition (the 'Competition'). Due to difficulties with availability these appeals were heard separately but for the convenience of all and with the agreement of the parties this judgment contains the reasoned decisions in relation to both appellants.
2. Prior to their hearings, all parties were notified of a number of issues pertaining to the professional circumstances of the panel members. Whilst we have not set those matters out here they are recorded in writing and a recording of the hearing is also available. Having been provided with an opportunity to consider those matters neither of the appellants nor the RFU raised any objection to any panel member.
3. We heard arguments first in relation to Thurrock on the 29 March 2017 and in relation to Lichfield on the 31 March 2017. During the course of Lichfield's submissions on the 31 March it became clear that the 'ranking table'¹ contained errors. This was an important document and the errors had a potentially significant effect on the submissions of all parties including Thurrock. Having considered submissions from Lichfield and the RFU the panel agreed to adjourn the hearing until 19 April 2017 Directions were made for the service of an update on the position by the RFU and for the service of additional skeleton arguments.
4. The panel also recognised that these developments may have affected the position of Thurrock. Consequently they were also invited to provide further written submissions and if they wished to do so and invited to attend on the adjourned date to address the panel further. They chose to do both.
5. We concluded submission for both cases that day and adjourned for the panel to deliberate and to provide this judgment.

Basis for Appeal

6. The RFU ran a competitive tendering process to decide upon the award of places in the 'Competition.' That process was formally initiated by the provision of a Request for Proposals

¹ Found at p136 of the first Lichfield disclosure bundle

Tender document² (the 'RFP') dated the 14 November 2016. Clubs were allowed until the 9 January 2017 to submit their tenders.

7. The RFP was a detailed document with extensive explanations of the reasons for the tender process, its background, its criteria and its terms and conditions. It contained a template application document and multiple appendices. It represented the agreement which all parties to the tendering process would enter into and abide by. At paragraph 7.11 it contained the following 'term and condition.'

"Only unsuccessful applicants may have the right of appeal against the decision of the RFU, but solely on the grounds that the process set out in this RFP has not been followed."

8. This clause makes clear that it is not the purpose of this appeal to assess whether the ultimate decision taken by the RFU was the correct one. The RFU appointed the original panel to make that decision and that panel brought a range of relevant expertise to the decision making process. The sole purpose of these appeals is therefore to decide whether an appellant has satisfied us that the process set out in the RFP has not been followed in their case.
9. Mr Weaver for Lichfield in his oral submissions argued that process must include, not only the underlying way in which the tender process was set out and handled, but also must include any obvious procedural irregularities in the RFU applying the criteria or the methodology to their decision making process (transcript p4). He accepted entirely that the underlying decision is not a matter for appeal.
10. We agree that the RFU were obliged to deal with the applications by way of an objective, measurable and equitable process. They were required to act fairly when determining and managing this application process. Has there been a material irregularity or a breach of the process?
11. Throughout these proceedings we have been acutely aware of the serious nature of these appeals and the effect the outcome of this process will have on those who are party to them, their members, supporters and other groups and individuals linked to the clubs.

Background

12. We will not set out here the detail of all of the RFP but it begins with an executive summary setting out the multiple objectives of the new competition. Namely, to provide a competition open to clubs, Universities and Colleges at the top of the domestic women's game in England, to provide a platform for the best female players to play in an intense competition, to support the development of England players for international rugby, to provide a showcase for marketing and commercial advancement of women's rugby and to provide a competition attractive to spectators and sponsors alike.
13. The RFP also summarised the background to the tender. It is clear to us that the process, which brought about the RFP was a lengthy, thorough and considered one, which had the proper interests of the women's game at its heart. Back in May 2015 the RFU had resolved to review the top tier of women's rugby and consultation had suggested the domestic structure was "underdeveloped" and was failing to provide an optimal environment for current and potential England players to properly develop. Consequently, a formal review took place beginning around May 2015 which produced findings and a strategy for women's rugby. These findings were taken to RFU Council on the 14 October 2016 and all Premiership and Championship Clubs were notified of the decision of Council in a letter dated the same day.³

² Page 1 of both initial bundles

³ Disclosure bundle p10

14. Initially in October 2016 the RFU sought an ‘expression of interest’ by writing to all Universities, Colleges and RFU members. That document, although not the same as the RFP, contained the nucleus of it. It made clear, at that initial stage, that the proposed transformation would be based on minimum operating standards and that entry into that league would be subject first and foremost to the club’s ability to fulfill those minimum operating standards. It also made clear that “All players across England should have access to the new competition, and therefore the process to determine its membership should include consideration of the geographical spread of rugby throughout England – while recognising that this will only be one consideration and priority must be given to those entities meeting the criteria.”⁴ [emphasis added] The panel considered this was an early and clear statement of policy that was continued throughout the process. The RFU was always seeking to achieve a league properly spread across England. The panel felt that was a common sense objective and one that would properly reflect the advertised aims of the competition.
15. The findings of the review and the strategy were taken out and explained to all Premiership and Championship clubs in a consultation. Details of that consultation were contained in the ‘Premiership Clubs Meeting’ document.⁵ A meeting took place on the 14 November 2015 to which Lichfield, as a Premiership club was party. The Championship Clubs, including Thurrock participated in a telephone conference with similar content on the 7 December 2015. Those meetings set the tone for what was to come and provided an opportunity for the clubs to understand that. The power point for that consultation was a very detailed document. It contained important messages in the context of these appeals. It included the following important matters “*structure isn’t broken – but many clubs aren’t providing a high-quality environment,*” there is a “*lack of finance, time, knowledge and skills within the clubs.*” Later it spoke of a⁶ “*Basis in minimum standards, as a prerequisite for participation*” and “*eight to ten clubs, geographically distributed to maximise player access.*”
16. There followed a series of opportunities for all of the clubs to ask whatever questions they wanted about the process. Like others, Lichfield did ask a series of questions. The panel was provided with an email dated the 2 December 2016 in which Ms Williams of Lichfield set out their questions to the RFU. We have considered those questions in full.
17. A large number of the questions and answers were then published for all interested parties to make use of in their applications. Some were very specific but some were more general, for example “*How much detail do you want in the application? Do you want full copies of the communication strategy etc.?*” Answer:- “*Please provide what you think you need to, to convince us of the validity of your submission.*” It was clear then that the process was one, like most competitions, which placed the onus on the applicants to ‘put their best foot forward’ and to satisfy the RFU of why they should be included the competition.
18. As for what the minimum operating standards were the body of the RFP provided the clubs with details of the ‘key focus’ of those minimum standards and set them out in detail in Appendix A of the document. It was made clear via the answer to question 19 from the conference call summary of the 12 December 2016 that the minimum standards needed to be in place by the 1 September 2017. Nevertheless, the assessment of the applicants’ ability to meet the minimum standards would be made at the time of the interview that formed part of the application process.
19. The applications received were then considered and shortlisted. Applicants were invited to attend an interview January/February 2017. The RFU selected a panel to conduct those interviews made up of the following people; Heather Taylor (Panel Chair, Sport England).

⁴ Disclosure bundle p20 and original bundle RFP, p3 section 3, 5th bullet point.

⁵ Original disclosure bundle (Lichfield p24)

⁶ Page 43

There is no challenge that she is independent of the RFU. Neil Tunnicliffe (consultant) said to be independent of the RFU. Alys Lewis (RFU Senior Legal Counsel) there is no challenge that she is independent of any applicant. Nicky Ponsford (RFU Head of Women's Performance) said to be independent of any applicant and Malcolm Caird (RFU Counsel member for Surrey) said to be independent of any applicant. Both of these appellants were invited to interview and were informed in advance, in writing of individuals who would interview them. The written applications were made available to the interview panel. Neither made any objection to the interview panel as constituted.

20. The interview panel members were provided with a scoring matrix that they used to mark the applicants. Each panel member completed a separate scoring matrix in respect of each applicant. At the end of all the interviews each panel member counted up their scores for each applicant. Alys Lewis, Malcolm Caird and Heather Taylor sent their scores to Nicky Ponsford. Nicky Ponsford inputted each of these panel members' scores and her own into a scoring assessment table. Nicky Ponsford sent the table to Neil Tunnicliffe who firstly inputted his own scores into the table and secondly, calculated the average score for each applicant and added the additional ranking columns to the table (i.e. the six right hand columns in the table).
21. Neil Tunnicliffe sent the table back to Nicky Ponsford for her review. She identified that one of her scores was incorrect. Neil Tunnicliffe amended the table accordingly to reflect Nicky Ponsford's correction. That final table was circulated to WPMG on 12 February 2017 in advance of the meeting on 13 February 2017. Both Appellants were also provided prior to the adjourned hearing with an un-redacted copy of Nicky Ponsford's "Paper to Women's Performance Management Group meeting, 13/2/17"
22. This paper set out the recommendations made to the WPMG and the process for how the 10 clubs were settled upon. This panel does not see the need to rehearse the entirety of the content of that document here. Both appellants have seen it in un-redacted form and where necessary to deal with specific points raised we will refer back to it in more detail. It is however important to say at this point that of fourteen clubs interviewed, the top twelve clubs were deemed to have met the minimum operating standards. Lichfield came in eleventh place and Thurrock fourteenth.
23. The clubs who were ranked 1-9 by score, made it into the league all be it that one club had conditions attached. Only after minimum operating standards had been assured and as a consequence of geography, it was considered appropriate to make a choice between the tenth placed club and the twelfth placed club. Both came from the same part of North East England, which was not otherwise represented in the league. In fact in absence of one of these clubs being in the competition, a simple glance at a map revealed to the panel that a very large portion of England would have had no access at all to elite Women's rugby. We therefore understood why the decision was taken that a club which met minimum operating standards from that area should be included in the league if possible. After further evidence was gathered from those two clubs, the club originally placed in twelfth, was successful in gaining the final place in the league. We take the view this represented a reasonable approach and one which was both within the process set out in the RFP and in line with good common sense.

Findings

Thurrock

24. Thurrock were not legally represented but the panel were greatly assisted by the submissions made by Mr Adams on their behalf and by the written documents they produced.
25. Thurrock's appeal came into existence initially via a series of communications from Mr Dean White to the RFU. We were asked by Thurrock to disregard the matters raised by Mr White.

We have done so save to the extent they have some limited relevance to an issue of independence that is pursued by Thurrock and involves Mr White.

26. The email which formally sets out Thurrock's basis for appeal was that sent by Mr Chris Emerson on the 8 March 2017. It raises a number of matters that were developed orally by Mr Adams along with a number of additional matters. We also received in advance of the hearing additional matters in writing from Thurrock. Below we have set out what we consider to be the central matters that Thurrock rely upon, in support of their contention, that the process set out in the RFP, was not followed in their case. In our deliberations we have reviewed and considered all of the submissions made orally and in writing to decide whether or not the appeal should be successful.
27. The written submissions say; "*Our main concern in relation to not following the process amounts to the interview as I believe that by being invited to interview the club had met all the criteria set out in the document as required.*" We do not accept this ground has merit. This process was a competition. Nowhere did it state that all clubs that met minimum standards would be welcomed to the new league. That would defy common sense in a league limited by numbers. An invitation to interview did not mean the club had met minimum standards. If Thurrock were right then there would in fact be no purpose for any interview stage at all. For those reasons we do not find this submission assists Thurrock in their appeal.
28. Thurrock complains that the original RFU panel was not a wholly independent one. They submit there were two permanent members of the Women's Performance Management Group on the interview panel. This did not turn out to be factually correct. Only Ms Ponsford is a permanent member of the WPMG. Mr Caird and Mr Tunnicliffe do however attend meetings but only as observers. It is obviously the case that all three of these individuals have strong links to the WPMG and for that matter to the RFU. The RFU's response is that there was no requirement of independence in this process and that such independence would in any event not be viable. We agree with that submission. The purpose of the original panel was not to be independent but to bring the necessary expertise to ensure the objectives of the process were met. Notwithstanding that however the RFU did in fact add an independent chair to the interviewing panel. That additional element of independence was commendable but not necessary to ensure fairness of process.
29. Thurrock also submitted that a series of emails exchanged between Mr Caird and Mr White support Thurrock's claim that Mr Caird was or may have appeared to be biased against them. They also submit that Mr Caird and perhaps others on the interview panel had shared information with other clubs but not with Thurrock. The first point to be made is that the emails referred to all pre-date the beginning of the tender process and are not directly relevant to this process.
30. Thurrock accepted that Mr White had discussed the emails with the Thurrock committee at the time. Therefore the committee was entirely aware of them when they were notified that Mr Caird was to be on the interview panel. Despite that Thurrock raised no objection to Mr Caird either prior to or at the interview.
31. Although there was no requirement of independence the panel was required to be fair and to treat applicants equally. With this in mind the panel considered the content of the email exchange but found nothing to support a contention that Mr Caird had demonstrated or might have any grievance or bias against Thurrock.
32. We have (as we have in the case of Lichfield's appeal) applied the test set out in the authority of *Porter and Magill [2002] 2 AC 357*. The question for the panel is whether the circumstances were such that a fair-minded and informed observer might think there was a real possibility that the tribunal was biased. We do not consider there is any possibility that such an

observer would consider such a possibility of bias here. Indeed to a limited degree Mr Caird's treatment of Thurrock can be assessed by the fact that he was the second highest scorer of Thurrock's application after Ms. Ponsford.

33. The clubs were notified in advance the names of the people who would interview them. Thurrock accepted that they did not object to anyone because "they thought they would get a fair hearing and we decided not to take the point." No objection was raised at the time and that the panel concludes is because there was no real basis to do so. Although we are sympathetic to the fact that Mr Emmerson had to take over the presentation for Thurrock at the last minute it cannot explain why Thurrock did not raise the matter if they were truly concerned about it. It is also important to note that Thurrock were offered an opportunity by the panel to come back on another day but they chose not to take up that offer.
34. Thurrock point to section 3 of the RFP point 5 (set out above) and argue that insufficient weight was given to their geographical position. They argue their location in the South East some distance from London and the population of Thurrock and its surrounding area should have justified greater weight being given to that point. For reasons set out above it transpired that the RFU ultimately did give significant weight to geography when they chose a team from the NE to be in the league. The obvious distinction was that unlike the team in twelfth place, the interviewing panel did not find Thurrock to have met the all-important minimum operating standards. Without that section 3 point 5 made it clear that geography was a secondary consideration.
35. Thurrock submits the process of selection was not objective or equitable. They say "this is particularly noticeable when considering the meritocracy of our club and Lichfield who over three years have proved their worth in the current premiership." This submission effectively amounts to a complaint Lichfield and Thurrock are good sides and they should have been were chosen for the new league because of it or much that more weight should have been given to these factors.
36. This submission overlooks the background and purpose of the new league. The new league was to be a viewed as a "new and distinct from the current Premiership competition." All clubs, Universities and Colleges were to be given equal opportunity to demonstrate their ability to fulfill the minimum operating standards. The test was not based on the playing record of the club no matter how good. There were clearly a broad range of necessary competencies, against which the applicants were to be judged. There is no reference in the criteria to the RFU being required to take account of the team's current or past status in the leagues and playing record was not, and was clearly not intended to be, part of the criteria for selection. This argument is in any event undermined by the fact that Thurrock has not held premiership status in recent years.
37. Thurrock complains that the panel used a scoring matrix during the interview and that details of it were not circulated in advance. This argument is mirrored by Lichfield below. Thurrock argues it created an additional set of criteria above and beyond that set out in the RFP. Thurrock's scoring matrix has been provided to them. The panel does not agree with their submission. The RFU did provide the interviewers with a scoring matrix that fell into seven broad categories; Personal Introduction; Presentation; Governance; Finance; High Performance; People and Facilities. Each category was divided into either two or three sub categories, each sub-category was marked out of four. The matrix was not unique to Thurrock. It was used for each applicant.
38. We take the view that the matrix helped to create a fair system as it encouraged a consistency of approach and one where each interviewer became accountable for the mark they gave. It is also self-evident from this appeal, that the matrix has improved the transparency of the process. The appellant has been able see the documents and the redacted versions relating to

other applicants and advance submissions about them. We do not agree that the matrix introduced a new set of criteria but rather set out an ordered and sensible basis by which the interviewers could test, whether or not the interviewee had met or would meet the minimum standards. The template broadly reflected those minimum standards as set out in the RFP its schedules and appendices. There was no obligation on the RFU to disclose the matrix in advance or at all and in our view doing so would have rendered the interview process largely ineffective.

39. In oral submissions and separately from the independence point Thurrock contend the interview should have been adjourned to another day because the interview panel knew that they did not have Mr Adams present due to a last minute commitment that had arisen. As we point out above Thurrock were asked if they wanted to adjourn the interview to another day but decline the offer. Consequently we can see no merit in this point.
40. In any event, as with all applicants, the interview panel also took into account not only what was said at interview but also the written application and supporting document. In all of the circumstances we do not feel that the interview panel or the process can be criticised. We do not think the process was unfair to Thurrock and we do not think therefore these submissions assist their appeal.
41. When Thurrock returned on the 19 April 2017 Mr Adams advanced further submissions. Some represented new areas, Thurrock having been provided with further disclosure and others were additional submissions relating to matters that they had argued at the previous hearing. Thurrock advanced no specific submissions that arose as a direct consequence of the errors in the scoring assessment table.
42. Thurrock referred us to Mr Melville's letter of the 27 February 2017. This letter informed Thurrock that their application was unsuccessful and they would not be part of the new league. They argue the reasons Mr Melville gave for their rejection were demonstrably wrong and therefore the process had not been followed. In this letter Mr Melville's list clearly provided examples only and was not an exhaustive list of the reasons for rejection. Thurrock's submission is that any concerns over: their financial model; their experience and expertise to deliver a step change to a high performance programme or uncertainty; and lack of appropriate governance structure are simply wrong and are not based on the evidence.
43. As part of these further submissions Thurrock repeated their assertion that, in their view they are an applicant who reached the minimum standard. They submit this because they progressed to the interview stage. They complain that other teams who have been included in the league cannot have not met the minimum standard because, for example they don't have the minimum player base. The interviewing panel read and listened to evidence that was advanced to them regarding all aspects of the minimum standards. The interviewing panel had relevant experience. We are confident from what we have heard and read that they were alive to the existence of the issues surrounding the abilities of the applicant's to secure sufficient players of a sufficient standard to meet the criteria. We have seen no evidence to persuade us that the interviewing panel did not properly consider, whether or not each team did or could meet the minimum standards in relation to player numbers
44. For completeness it was clarified as part of the hearing that Thurrock were not in fact considered to have met the minimum standard even after the interview. The interview process was very much a continuing assessment process used in conjunction with the written applications to make a decision.
45. Thurrock pointed to the fact that they have accredited status with the RFU and they would require good governance to achieve that accreditation. They pointed to their position regarding their charitable status and they did not accept their standards were too low and in terms of

providing a high performance programme. In support of these submissions they reminded the panel that Mr Mobbs-Smith and Mr Hanbury had been a significant positive in their application. They outlined these individuals' backgrounds and experience. They submit that as a club they have a strong understanding of performance sport. They argued that insufficient weight had been given to these factors and that the interviewing panel had been mistaken in any belief that they could not deliver a sound financial model. They also submit they have the required training facilities and also have strong associate brand. In support of these submissions Thurrock point to the marks they received. They say there is too much disparity between the interviewers. They don't agree that the marks reflect them as a club.

46. We have considered all of the submissions made on behalf of Thurrock very carefully. We have reviewed the marking sheets provided along with all of the other information and materials provided pre and post the adjournment of the initial Lichfield hearing. We can however see nothing to suggest that Thurrock were treated unfairly or differently to any other applicant. It is, we repeat, not our role in this appeal to assess whether or not we agree with the interviewing panel and we express no conclusions in that regard. It is only for us to say whether we are satisfied that the appropriate process was followed. It may well be there is some disparity in the marking and it may well be that Thurrock could present some further evidence to suggest that some conclusions were hard on them but the decision which was taken was based on the whole of the application. This process was a competition. The very nature of it meant the applicants were to persuade the RFU that they met or would meet the minimum standards and that they were one of the most suitable teams to form the new league, those things were obvious. Regrettably, Thurrock did not persuade the interviewing panel and we can find no reason to say that Thurrock was treated in a manner that could be described as outside of the process. Consequently their appeal is unsuccessful.

LICHFIELD RFC

47. Lichfield addressed the panel on two separate days and were represented throughout by Counsel, Mr Weaver. We have considered thoroughly all of Mr Weaver's helpful oral and written submissions.
48. Mr Weaver began by reminding the panel that Lichfield are the only top flight team to have been omitted from the new Women's Super Rugby competition. It is clear that they are one of the most successful playing teams in the country. A large number of the current England squad were Lichfield players or are former Lichfield players.
49. He went on to make a number of comments about the disclosure, which the RFU had made and about matters they had declined to disclose. By the conclusion of the hearing on the 19 April it was clear to us that the RFU had made extensive disclosure of all matters that could reasonably be said to have a bearing on our decision. Lichfield had time to consider that disclosure and were afforded every opportunity to make written or oral submissions about any aspect of it.
50. Lichfield argue that the interviewing panel which went on to make recommendations to the WPMG was not a neutral panel. Although a slightly different point we reiterate the panel was not designed and could never have been independent in the general sense. As to its independence/neutrality as between applicants, Lichfield make the following complaints. Nicky Ponsford they point out is alumni of Loughborough University. Given Loughborough University were an applicant in this process they submit it is an 'obvious irregularity' that Ms Ponsford did not recuse herself from the process. It was established at the hearing that Ms Ponsford completed her time as a student at Loughborough in 1989 some 26-28 years before this process even began.

51. Lichfield further complains that they have discovered Mr Caird is a member of the WPMG. That is not correct. He is not a member of the WPMG but a non-voting observer. In any event even if he were, this could not be said to affect his independence as between the applicants and gives rise to no unfairness or to a breach of process.
52. Further Lichfield complain that Mr Caird is a life member of Haslemere RFC and Haslemere RFC is, according to their website, “a partner club with Harlequins RFC.” Harlequins were a successful applicant in this process. We understand a partner club to refer to a relationship such as that which is enjoyed by many junior clubs with senior clubs local to them. It is no more than a network to for example, encourage and facilitate ticket sales for the senior club and the like. We have not been shown any evidence to persuade us that Mr Caird has any significant relationship or arrangement with Harlequins, personal, professional or fiscal, which would or could in any way effect or bias his decision making in this process.
53. We have, as we were urged to do, applied the test set out in the authority of **Porter and Magill [2002] 2 AC 357**. The question for this panel is whether the circumstances were such that a fair-minded and informed observer might think there was a real possibility that the tribunal was biased. We cannot see in the circumstances as they exist here any possibility that a fair-minded observer would consider that either Ms Ponsford or Mr Caird presented a real possibility of bias.
54. Having concluded as we have above we do not believe it is necessary to go further than this, but for completeness we point out that if both Mr Caird and Ms Ponsford’s marks were removed from the scoring table it would make no real difference to the end result and so there can have been no unfairness to Lichfield. There was no plenary session following the interviews and therefore they cannot be said to have had an influence on the other panel members.
55. Lichfield submit because Mr Melville wrote in an email on the 9 March 2017 that the “panel had made the decision” but the RFU in its written submission said the panel made “recommendations” to the WPMG who in turn made the decision, demonstrates a ‘serious doubt’ over the decision-making process and its transparency and fairness. It may be that Mr Melville’s language was not as precise as it might have been or that he simply made a mistake, no doubt partly because he was not expecting scrutiny on this point. The RFU has now however provided an unredacted copy of Ms Ponsford’s draft minutes of the WPMG meeting on the 13 February 2017. This document has been described on behalf of the RFU as one of the most important in this appeal and we have already referred to it. We agree with that assessment of importance because the document sets out how things moved on following the interview process, what happened when and why. Far from there being an absence of transparency it provides Lichfield (and Thurrock) with a clear outline of the decision making process and an ability to make submission with on that process.
56. Lichfield also complains the criteria by which applicant teams were to be assessed was never properly revealed to the applicants. The RFP at section 4 is they say, only a summary and appendix A of the RFP provided only a list of minimum expectations. No indication they say was given to applicant teams of what criteria would be specifically assessed and what weight would be given to each criteria. We have reviewed the RFP, the questions asked in the application form and the matters set out, in our view, in considerable detail in appendix A. It is we think abundantly clear what the RFU were looking for from those documents. However, if it was not clear to any of the applicants, the RFU gave further opportunities to clarify by asking questions. We have been provided with a series of such questions which Lichfield themselves asked. They were engaged in the process and like any other interested party had ample opportunity to seek clarification. Additionally the RFU published a number of the questions asked and the answers given so that applicants could see what others were asking.

57. Lichfield, like Thurrock, complains that the scoring matrix was not disclosed prior to the submission of the tender document and the interview. They give further reasons for this complaint in their skeleton argument at paragraph 31. We have considered those arguments. We refer back to the reasons given above regarding Thurrock and add that we do not see any obligation on the RFU, or any organiser of a competition of this nature, to provide the applicant with a scoring matrix of this type. We conclude it was a document based largely on the minimum standards as they are set out in the RFP and its appendices and contains exactly the type of enquiries that anyone would expect to be asked in an interview scenario, where such matters are being tested by the interviewer. More importantly perhaps it was the same for all. None of the teams were provided with the scoring matrix in advance and we would not have expected them to have received it.
58. The RFU points us to section 7.6 of the RFP (terms and conditions) where the parties specifically agree that information on the evaluation process will not be given by the RFU. That is what happened here and all applicants agreed to that. It is also worthy of note in the context of questions being raised as to an absence of transparency, that the RFU has now disclosed to both Lichfield and Thurrock their own scoring matrix in an unredacted form and a number of other in a redacted form. This has allowed Lichfield to advance further submissions about how their application was treated.
59. Lichfield complain they are unable to test the content of the letter of Mr Melville dated 28 February 2017. They say there is a lack of transparency as to how each applicant was measured which leaves them “utterly unclear” as to how the complaints raised in the letter were arrived at or the basis for them. We do not feel there is anything in this submission to cause us to believe that things moved outside of the process. Lichfield now have their scoring matrixes from each interviewer together with any comments the interviewers felt it appropriate to write.
60. In their submissions Lichfield specifically tackled the feedback given by Mr Melville and have sought to demonstrate to the panel that the feedback was wrong. They began with finances. There was much debate during the hearing surrounding the various accounting documents which Lichfield had submitted with their application. It was demonstrated during the course of the hearing that a mistake had been made in Lichfield’s skeleton argument and that their assertions as to their financial position and most particularly in relation to the availability of finances were worse than set out in the skeleton argument. That there had been a mistake was accepted by Lichfield but the extent of it and its effect was however disputed. We stress that we do not conclude this appeal based on this issue. However, what was demonstrated during the course of submissions on behalf of the RFU, was that there were ample grounds for us to conclude that the interviewing panel had adequately reviewed the relevant facts relating to Lichfield’s finances and were perfectly entitled to come to the conclusion that they did, when they provided the feedback that “Lichfield’s finances as presented did not demonstrate a sustainable model, with a lack of clarity over how additional finance would be raised to meet the elevated standards of competition.”
61. For example there is some force in the RFU’s concern that, if Lichfield were to make the financial commitment required for this competition it would amount to them putting every last penny the club has into it this commitment. We can see that may well cause financial problems as the commitment continued year on year.
62. In relation to the interview process Lichfield complain the RFU panel did not ‘put its case’ to them. In other words they complain that when the RFU saw that the application may not meet the minimum standards or be weak in a particular area the interviewing panel should have sought further evidence. They further complain that they do not know whether other clubs were asked the same questions as they were and so cannot compare and assess whether the process was fair. The interviews were not recorded and we would not expect them to have

been. We would also not expect (as Lichfield suggest they should have been) all candidates to have been asked the same questions, that is not the nature of an interview, which is a developing inquiry.

63. Lichfield accept they were asked where the financial shortfall was going to come from and that they had an opportunity to answer that question. There was also some discussion in the interview about the extending of Lichfield's facilities and the generation of revenue through that and about them having sponsors lined up. We repeat it was the applicant's responsibility to persuade the RFU and we feel the RFU took sufficient steps to facilitate that process in the standardising of the application form and by using the questions and answer sessions and through the scoring matrix. We repeat that on the 12 December 2016 the answer to question 20 was "Please provide what you think you need to, to convince us of the validity of your submission."
64. Lichfield in the same vain criticised the interviewing panels conclusions in relation to their governance structure. The interviewing panel had concerns over Lichfield's reliance on one individual who has full time alternative employment, rather than a team of individuals being responsible for the programme. Without commenting on the conclusion itself, we have listened to lengthy submissions and read all that has been placed before us but we have not come across anything that persuades us this conclusion was not one that the panel was reasonably entitled to arrive at based on the factual material they were provided with by Lichfield in writing and in the interview.
65. Thirdly Lichfield make a similar complaint in relation to the conclusion of the interviewing panel that "the [Lichfield's] focus was on developing the game rather than the development of high performance athletes and did not demonstrate the step change expected to deliver in the new professional competition." Mr Weaver submits that this flew in the face of Lichfield's application, which set out how player development is already part of their development plan. He also submits that the RFU had ignored the existing evidence of Lichfield's ability to create and develop elite players.
66. We have also considered Lichfield's submission that the scoring matrix attributed too few marks to properly recognise the playing ability of a club. It is our view that section 5 of the scoring matrix provides an appropriate reflection of the minimum standards. It is correct that Lichfield has a high number of elite players and an excellent playing record but it seems to us that the panel's conclusions in this general area relate to matters which are not entirely resolved by the current or historical existence of elite players within the club or their success. We do not think there is any evidence that the panel ignored Lichfield's track record. The panel was however looking for more to provide the necessary step change. No doubt the current standard of playing personnel was taken into account but the panel was obviously concerned about other aspects. Again we can see nothing that prevented the interviewing panel coming to conclusion it did in relation to this area.
67. Lichfield say they can demonstrate that other teams have been given an unfair advantage by being allowed to provide further information after the interview. They raise concerns that scores were added after interview by one of the interview panel on consideration of an updated budget. During the course of one applicant's interview it emerged that some mistakes had been made by the applicant in their calculations. The applicant requested an opportunity to correct the figures and submit them post interview. The member of the interviewing panel then left the scoring matrix blank and corrected it when the information was provided. We see nothing irregular about this. The applicant had noted itself that it made an error and actively sought to rectify it. The panel quite reasonably allowed an opportunity to put the accurate version of information they already had before them. The panel member quite reasonably held back from attributing a mark until they had seen the accurate version. We cannot see that any unfairness arises to this appellants or to any other applicant.

68. Additionally in relation to the supply of additional information Lichfield complain that the North East clubs were visited on the 24 February 2017. We have set out above the circumstances of these visits as they were explained in the evidence and at the hearing. These visits were conducted for a very specific purpose and only to assist in the decision between two clubs because of their geography and the appropriate desire of the RFU to properly represent the competition nationwide.
69. In coming to the conclusions that we have it would not be appropriate for this panel to analyse and compare every score, for every applicant, to assess why or how each interviewer arrived at those scores. We have however looked generally at the scoring matrix sheets that we have been provided. We can see nothing in those scoring sheets which causes us to believe Lichfield were assessed any differently to any other applicant or to enable us to say the interviewing panel were not entitled to come to the conclusions which they did. Neither can we see any evidence that other applicants were given any advantage over Lichfield.
70. Lichfield argue that whilst their failings have counted against them other applicants have had theirs overlooked. They point to the specific requirements for registered players set out in the RFP and contest that Loughborough University, Firwood Waterloo and DMP cannot have complied with that element of the minimum standards. The RFU deny this is the case saying that all clubs who have been offered a place in the competition have an appropriate player base. We have no doubt at all that these issues would have been dealt with via application forms and in interview and see no evidence that teams have had failings overlooked. We also see no evidence that the panel has been misled, or that it took inappropriate matters into account or that it treated this criteria "less strictly" than others. We do not feel there has been a breach of the process in this regard.
71. Lichfield complained originally that geographical spread had not been taken into account or that how it had been taken into account had not been explained. We have set out above what happened in regard to the clubs from the North East. We are content that Lichfield's geographical position has been appropriately taken into account. Although they were a team that met the minimum standards, it is clear that when the first nine teams had taken their places, there was then a much greater call for a team from the North East and an appropriate decision was taken to try to fill the tenth place from that area, with a team which also met the minimum standards. Given that (1) geography was a valid consideration (as made clear by the RFP) and that (2) the geographically-relevant clubs had each already met the minimum standards, we think that the decision on the tenth placed team was one that was reasonably open to the RFU to take.
72. Lichfield raised the issue of conditions which were placed on the ninth placed team. Those conditions were outlined in the hearing and Lichfield had an opportunity make submissions on the topic. We have investigated what those conditions were. Lichfield only complained about one of the conditions that allowed/required the ninth placed team to formalise its relationship with its Director of Rugby. We do not see that imposition of that condition caused any unfairness or fell outside the process in the RFP. Because the Director of Rugby was already engaged and the condition only related to a formality we do not think Lichfield were disadvantaged by it.
73. In relation to the errors which occurred with the ranking table. Lichfield accepted that the when the errors were corrected there was no real effect on them or any other applicant. They make the point however that the large number of errors in itself shows a failing in the system. We agree it is most unfortunate that in a process so important to all such basic errors arose. That said, we are entirely satisfied that all has now been rectified and no unfairness has resulted. We do not see any reason why these appeals should be allowed as a consequence of this matter.

74. We have considered with great care all submissions made to us by Lichfield both in writing and orally. We have only set out in this document those which we consider to represent the central matters on which they rely in their attempt to persuade us that the appropriate process has not been followed. We remind ourselves that the assessment of the interviewing panel was an overall one based on a broad spectrum of materials assessed during the application process and whilst Lichfield did meet the minimum standard they were not considered to have met as high a standard as other applicants. There was one exception to this as a team who were scored slightly lower than Lichfield did make it into the league. We have set out how this occurred and why. Without commenting on the decision itself, we repeat our view that this decision was one that was reasonably open for the RFU to take based on the facts and did not fall outside the process as described by the RFP.
75. For the all the reasons we have set out above we are not persuaded in any way that the process has not been followed or that there has been any unfairness to Lichfield. In those circumstances their appeal is unsuccessful.

Philip Evans QC
Dr Julian Morris
Michael Short

27 April 2017