JOINT OPINION OF SENIOR AND JUNIOR COUNSEL

for

THE PARTICK THISTLE FOOTBALL CLUB LIMITED, a company incorporated under the Companies Acts (Registered Number SC005417) and having its registered office at The Energy Check Stadium at Firhill, 80 Firhill Road, Glasgow, G20 7AL ("**PTFC**")

re

the validity of the Written Resolution proposed by board of the Scottish Professional Football League Ltd dated 8 April 2020 (respectively the "**Written Resolution**" and the "**SPFL**")

Gilson Gray LLP ("**Agents**")

A. Introduction

1. We refer to Agents' instructions dated 13 April 2020. We are instructed to consider the following:

   (i) What, if any, duties, were owed by the directors of the SPFL in their promoting of the Resolution? Are the directors of the SPFL in breach of any of their duties?

   (ii) What is the effect of the submission (by email) by Dundee Football Club ("**Dundee**") of its vote against the Resolution? In this respect, it is understood

that Dundee sent its email (with its vote attached, rejecting the Written Resolution) at circa 4:48pm on 10 April. What is the validity of its attempt to have that vote against revoked? As Dundee, in effect, has the casting vote, should the SPFL have determined the resolution as not passed?

(iii) What remedies are available to PTFC to protect its position?

B. Documentation

2. This opinion is based exclusively on the following written material:

(i) SPFL Articles of Association dated January 2020 (the "**Articles**") to which a link is provided in the Written Resolution. We observe that neither these Articles, nor any special resolution adopting these Articles, appear to have been filed with Companies House, where the last composite version is dated 20 July 2016, and filed at Companies House on or around 2 August 2016 (the "**2016 Articles**"); the last special resolution filed being a resolution dated 15 April 2019 amending the 2016 Articles.

(ii) SPFL Rules;

(iii) the Written Resolution;

(iv) Legal Briefing Notes, accompanying the Written Resolution, dated 8 April 2020 ("**Briefing Notes**");

(v) Statement by the SPFL Board on 10 April 2020 ("**SPFL Statement**");

(vi) Letter to SPFL Members from the SPFL Chairman dated 12 April 2020 ("**SPFL Letter**");

(vii) Dundee's Rejection Voting Slip dated 10 April 2020 (the "**Dundee Vote**");

(viii) Various messages between PTFC's Chief Executive, Gerry Britton, and Dundee's Club Secretary, [redacted] dated 10 April 2020; and

(ix) Email exchange between Gerry Britton and Neil Doncaster, Chief Executive of the SPFL, dated 12 and 13 April 2020.

3. We refer below to certain other factual information, now in the public domain, in this Opinion, as well as to other factual material which forms the basis of our instructions.

C. Background

4. On 13 March 2020, the Scottish Football Association suspended all domestic football in Scotland, due to the COVID-19 pandemic, until 30 April 2020. The SPFL thereupon postponed all SPFL fixtures. As we understand matters, the practical consequence for many SPFL members is that they now have no or very little income which in turn is understood to be causing severe financial problems for many.

5. The Written Resolution and Briefing Notes were circulated on 8 April 2020. In very broad outline, the Written Resolution proposed that the 2019/2020 season, so far as the Scottish Championship, League 1 and League 2 are concerned, be brought to an immediate end without any further fixtures being played. In the case of the Scottish Premiership, the Written Resolution would have effect so as to confer on the SPFL Board a power likewise to bring the Premiership 2019/2020 season to an end in due course on the same basis. In practical terms, we understand that one of the principal drivers for these changes, if not the principal driver, was in order to allow payments to be made to SPFL members, some of whom, we understand, required the funds in order to remain solvent. In particular, the SPFL appears to have proceeded on the basis that the "link", as *per* the existing Articles and the SPFL Rules, between the end of the season, and the making of payments, required, or at least ought, to be maintained.

D. The Written Resolution

6. The Written Resolution proposes changes to the SPFL Rules. That is a "Reserved Matter" in terms of Art 64 of the Articles. Such changes may be made only by "Ordinary Resolution". An Ordinary Resolution is defined in the Articles as:

> *"a resolution of the Company at a General Meeting, which is not a special resolution, Qualified Resolution or Commercial Resolution, of which notice has been duly given in accordance with these Articles, and which requires the support of not less than each of: (i) 75% of the Members owning and operating Clubs entitled for the time being to participate in the Premiership; (ii) 75% of the Members owning and operating Clubs entitled for the time being to participate in the Championship; and (iii) 75% of the Members owning and operating Clubs entitled for the time being to participate in League One and League Two, whether all the Members of the Company actually attend and vote or not, to be passed."*

7. A company may pass resolutions by written resolution in terms of the **Companies Act 2006** (the "**2006 Act**"), **s 281(1)(a)**, **s 288** and **s 300**. The SPFL Articles, Art 74 permit written resolutions, effectively by simply referring to the applicable provisions within the **2006 Act**. Art 14 defines "*writing*" to include communications in electronic form. The Articles provide for a period of 28 days within which a Written Resolution may be voted upon: Art 74 as read with the **2006 Act, s 297**. Although the statutory period is 28 days, the Written Resolution contained a voting form seeking an indication of whether the Written Resolution was to be adopted or rejected, in the following terms:

"PLEASE RETURN AS SOON AS SIGNED AND, IF POSSIBLE,
BY 5.00 PM ON FRIDAY, 10 APRIL 2020
SPFL FAX: 0141 620 4141
Scanned responses may be emailed to:-
[redacted]

8. Where, as here, a written resolution is proposed by the directors, the basic procedure for circulation is set out in the **2006 Act, s 291**. In terms of **s 291(7)** the directors' failure to follow the circulation procedure in **s 291** would not affect the validity of a resolution which is passed. But that provision has been held not to save a complete failure to provide notice of the resolution at all: *Re Sprout Land Holdings Ltd (in administration)* [2019] EWHC 806 (Ch).

9. As we discuss in section F, below, the procedure set forth in the **2006 Act** does not as such contemplate the submission of votes "rejecting" or "opposing" a written resolution. Rather, the statutory scheme proceeds simply on the basis that if a written resolution is not passed (because it has not secured the requisite majority) within the 28-day period following its circulation it lapses: **2006 Act, s 297**. This is significant as it explains why **s 296(3)** provides that "*a member's agreement to a written resolution, once signified, may not be revoked*" and yet does not make the same provision where rejection of a resolution is signified: the short point is that the statutory scheme neither requires nor contemplates the lodging of votes rejecting or opposing a written resolution.

E. Written Resolution Procedure: Information Duties

10. Over and above the basic requirements which are imposed in relation to circulation of the resolution, directors have certain additional duties concerning the provision of information to members.

11. The starting point, in this connection, is to note that in assessing the information provided by directors in the context of the duty owed by the directors, one does not just look at the notice of the resolution itself, but one must also take into account *inter alia* any circular/note which accompanies the resolution: see, for example, *Tiessen v Henderson* [1899] 1 Ch 861, 866-867 *per* Kekewich J.

12. In the present case, accordingly, it is appropriate to have regard not just to the Written Resolution but also to the Briefing Notes and, indeed, to any further representations made to members concerning the Written Resolution, including for example the letter to members from the SPFL dated 12 April 2020 (a point to which we return, below).

13. As to the substance of the duty, the basic proposition may be summarised thus:

> "*The directors have a duty in equity to give to shareholders sufficient information for them to make informed decisions about proposals to be put to them at meetings. The duty is one of long standing. It has been variously expressed in a number of cases…"* (*Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 14 ACLR 375 at 377 *per* White J)

14. This duty is well established in the company law of the United Kingdom: thus, for example, White J's judgment was cited with approval by Neuberger J (as he then was) in the well-known case of *Re RAC Motoring Services Ltd* [2000] 1 BCLC 307 at 327a, which was in turn followed in *Sharp v Blank* [2015] EWHC 3220, [2017] BCC 187 at [26] *per* Nugee J.

15. In *Re RAC Motoring Services Ltd*, moreover, Neuberger J cited, as examples of the principle, cases from the nineteenth century, including *Kaye Croydon Tramways Co* [1898] 1 Ch 358 and *Tiessen*.

16. As White J explained in *Residues Treatment & Trading Co Ltd* (at p377):

> "*Sufficiency of information is a matter of fact and degree.*"

17. Moreover, and of fundamental importance in the present case, White J further observed:

> *"…The essence of the duty is the requirement of reasonableness or fairness in the circumstances, having regard to the interests of the company as a whole. A surfeit of information may well obscure the purpose of the resolution. A lack of information may constitute misrepresentation by omission. It is a matter of sensible judgment by the directors in each case and ultimately by the court if complaint is made to it."*

18. In the present case, the Briefing Notes (pp 2-3) stated *inter alia* that:

> *"Your Board has taken advice from a leading Q.C. about the implications of the Covid-19 epidemic for the broadcasting and other Commercial Contracts to which the SPFL is a party relating to Season 2019/20. In addition, we asked the Q.C. to consider the SPFL's future contracts for Season 2020/21 and onwards and the options available to the Company under the Articles and Rules as regards the termination of Season 2019/20, other than by playing out the remaining fixtures and the various Play-Off Competitions.*
>
> *The Q.C. has given us his opinion about whether and how the Season may be brought to an end without the remaining fixtures and the Play-Off Competitions being played, given that neither the SPFL Articles nor the SPFL Rules make any provision for the Season completing prior to the playing of 38 Premiership Matches per Club and 36 such matches in the other Divisions. The preferred method involves putting a Written Ordinary Resolution, amending the Rules and giving the Board express powers, all as described below, to all 42 Members.*
>
> *On 3 April, the Scottish Government wrote to us. The letter is set out at Appendix 1 and states that…*
>
> *… in the judgment of the SPFL Board, the only practicable means by which the outstanding fixtures and the Play-Offs and the beginning of Season 2020/21 could all be accommodated would be by a lengthy delay in the commencement of Season 2020/21, until likely around the middle September at the earliest.*
>
> *This would also mean that the balance of Season 2019/20 Fee payments to Members could not take place until around the end of August when final League standings would be known."*

19. In our opinion, it is highly significant that the Briefing Notes proceeded on the basis that the directors of the SPFL had sought advice about the means by which the 2019/2020 season might be terminated and that they apparently did so on the basis that it was necessary for the season to be ended before the "*balance of Season 2019/20 Fee payments to* Members" could be made: that, we suggest, is the natural reading of the document as a whole, and with particular reference to the final quoted sentence from the Briefing Notes reproduced at paragraph 18 above. Although it is of course true, in terms of the Articles and the SPFL

Rules as they presently stand, that balancing payments cannot be made until the current season concludes, equally the Articles and the SPFL Rules do not presently allow the current season to be declared to be over without all fixtures being played.

20. We understand, moreover, that the Briefing Notes were circulated at or around 1pm on 8 April, at which time a conference call between the Championship Clubs was taking place. We understand that the Scottish Government letter dated 3 April 2020, referred to in the Briefing Notes, was not circulated to SPFL members until the following day. Neither the Briefing Notes nor the Scottish Government letter mentioned that the restrictions imposed by the **Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020** had to be reviewed by the Scottish Ministers every 21 days, with the first review to be carried out by 16 April 2020.

21. Of key importance for present purposes is that the Briefing Notes proceed on the basis that a pre-condition for making any additional payments to SPFL member clubs is that the Season 2019/20 had to be brought to an end. That position is re-iterated in the SPFL Letter, which states:

> *"It has been suggested that it is open to the SPFL Board to distribute end-of-season fee payments to clubs now, in the absence of league placings being finalised. That is simply not the case. For the Board to be able to authorise end-of-season fee payments to clubs (amounting to £9.3 million gross), final league placings must be determined. Those who have suggested that the SPFL may make such payments, without a line being drawn under Season 2019/20, are wrong."*

22. As we understand matters, moreover, and as has been widely reported in the media, various members of the SPFL enquired of the SPFL whether there was any way that payment of moneys could be made to members without the season itself being brought to an end. On their doing so, we understand that they were informed by the SPFL (consistently with the position most recently stated by the SPFL in the SPFL Letter) that it was not possible for any such payments to be made unless the season was first brought to an end. We refer in this connection, for example, to the BBC Sportsound interview given by Scott Gardiner, Chief Executive of Inverness Caledonian Thistle FC, to this effect on 11 April 2020. Mr Gardiner further stated that member clubs were presented with the Written Resolution on a "take it or leave it" basis, as the only means by which payments could be made to clubs. The BBC journalist, Tom English, confirmed that he had spoken with three other member

clubs, in addition to Rangers, who felt that they had been bullied; and one club said it felt "as if gun had been held to their head" to vote for the Written Resolution, on the basis that there was no other basis on which moneys could be advanced to members.

23. We consider the information provided by the SPFL to be materially inaccurate, in respect that:

    (a) Fundamentally, it ignores the fact that the Articles and the SPFL Rules in any event require to be changed without all of the league fixtures being played – thus, it is not open to the SPFL (or its board) simply to declare the season to be over now in terms of the Articles and SPFL Rules as they stand. The Briefing Note does not address or acknowledge the fact that, such alterations being required, it would equally be possible to change the Articles and Rules to allow payments to be made at this time, based on current league positions (perhaps with some provision made for adjustment/balancing once the league fixtured were completed if league positions had changed by the end of the season), without the need to terminate the league season early. If, as we understand to be the case, the major concern of many member clubs was simply a desire to secure payment now, without promotion and relegation also being decided without all league fixtures being played, in our opinion these were matters of importance which ought to have been explained, fairly and clearly;
    (b) The SPFL makes interim payments in the course of a season and we understand that it has already done so in the course of the 2019/20 Season.
    (c) The SPFL had power to advance moneys to member clubs on an interim or provisional basis as loans, pending confirmation of the final payments. In this respect, it has been reported the SPFL has in fact confirmed (to Rangers FC) that it considers that has the power to make loans now without bringing the season to and end or any alteration to the Articles being required. It appears from the email exchange between Mr Britton, of PTFC, and Mr Doncaster, of the SPFL, dated 12 and 13 April 2020, that it is indeed the case that the SPFL would in principle entertain applications for loans from members clubs, possibly with the provision of personal guarantees or securities.

24. In the foregoing circumstances we consider that that there may be a basis for the argument that the directors' duty, in respect of the provision of sufficient information, in a clear manner, so as to allow informed decisions to be reached, has been breached. In this respect, we recall that "*a lack of information may constitute misrepresentation by omission*". Given that it is a *"matter of fact and degree"* whether sufficient information has been given to allow an informed decision to be taken by members, the failure to explain to members that a lesser alteration of the Articles and SPFL Rules, so as to allow payments to be made to member clubs, without the immediate termination of the current league season (and all that that entails in respect, notably, of promotion and relegation), and/or the failure to identify the possibility of loans being made were material and relevant omissions, could be characterised as a misrepresentation by omission, if it is indeed the case, as a matter of fact, that the principal concern of certain member clubs was to secure payment now without the immediate termination of the current league season.

25. If, moreover, as is understood may be the case, it could be shown that at least some member clubs which voted in favour of the Written Resolution would not have voted in favour of the Written Resolution had they been made aware of the alternatives discussed above, it respectfully appears to us that there would be reasonable grounds for challenging the validity of the procedure which has been adopted to date, and indeed of the Written Resolution were it now to be purportedly passed. Plainly, direct witness testimony from member clubs who were so induced to vote in favour of the Written Resolution would be required in order to allow such a claim to be advanced in proceedings.

F. The Dundee Rejection Vote

26. A document signifying agreement to a written resolution may be sent in electronic form under the **2006 Act, s 296(2)**, if an authenticated document is sent indicating agreement in electronic form. "Authenticated" is defined in the **2006 Act, s 1146**. Sending by electronic means is defined in the **2006 Act, s 1168(4)-(5)**, which make provision as to what it means to "send" something electronically. The procedure for written resolution by electronic voting is supplemented by **paragraphs 5-8** of **Schedule 4** to the **2006 Act**.

27. There was no obligation on any SPFL member to cast a vote. In the ordinary course, members normally vote in favour of a proposed written resolution or not at all. As we have explained already, above, a resolution simply lapses if it does not achieve the requisite

majority. That is why a vote in favour of a resolution is expressly made irrevocable by the **2006 Act**, **s 296(3)** and, equally, why there is no similar provision made in relation to a "negative" vote. There was no statutory obligation to cast a negative vote and, indeed, the statutory scheme does not anticipate that "negative" votes will be cast.

28. In so far as an SPFL member decided to exercise its right to vote, however, in our view, such a vote is subject to the terms of the SPFL's Articles. It might assist, at this stage, to explain the significance and status of a company's articles of association. Thus, the **2006 Act, section** 18 provides *inter alia*:

> *"(1) A company must have articles of association prescribing regulations for the company."*

29. A company's articles of association fall within the definition of a company's constitution: **2006 Act, section 17**.

30. On that basis, one should note that the 2006 Act, section 33 provides inter alia:

> *"(1) The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions."*

31. Accordingly, there is effectively a contract in place between, at least, the company and its members. As it is explained in **Gloag & Henderson, *The Law of Scotland*, (14th Ed., 2017), paragraph 46.14**:

> *"…Articles regulate the management of the company and once registered, form a tripartite contract between the shareholders, the company and, depending on the wording, the directors or anyone else given rights in the articles. If articles prescribe a certain course of action be followed, provided it is not contrary to some requirement of statute or otherwise illegal, it must be followed…".*

32. On this basis, although, as we have explained already, the **2006 Act** itself does not contemplate the lodging of "negative" votes, the contract between the parties, namely, the

Articles, has been operated by the SPFL and the members on the basis that what was being invited, in relation to the Written Resolution, was the submission of votes by the members, whether in favour or against the Written Resolution.

33. Against that background, we are instructed that the Dundee Rejection Vote was sent by email on 10 April 2020 at around 4:48pm. We know too from the terms of the SPFL Letter that the email transmitting the Dundee Rejection Vote was, in fact, received by the SPFL at some point on 10 April 2020. Following the 5pm deadline on 10 April 2020, the SPFL Statement was issued, around 5:44pm, publicising the fact that all but one Championship Club had voted. The allegedly missing vote, we are instructed, was that of Dundee. The factual position in relation to discussions between the SPFL Board and Dundee following the 5pm deadline is unclear.

34. In the SPFL Letter dated 12 April, the SPFL Chairman explained matters as follows:

> *"Further, it has been suggested that all Ladbrokes Championship club votes were cast on Friday night. One Ladbrokes Championship club attempted to submit a voting slip, which did not reach the SPFL until late that evening. Earlier, at 6pm on Friday, that club had confirmed in writing to the SPFL that any attempted vote from that club should not be considered as cast. We have had a number of conversations with the chairman of that club over the weekend, in which he reiterated that his club had not yet voted on the SPFL resolution. The SPFL has proceeded on the basis of the unequivocal instruction from that club received at 6pm on Friday."*

35. In our view, it is not possible to reconcile the procedural approach purportedly adopted by Dundee, and seemingly accepted by the SPFL, on the one hand, and the terms of the Articles, on the other hand. In particular, in terms of Article 185, the Dundee Rejection Vote was deemed to have been cast when it was sent:

> *"Any notice or other document [sent][1] otherwise than by post, or sent by facsimile transmission or telex or email or other instantaneous means of transmission, shall be deemed to have been served or delivered when it was left or sent."*

36. The sender of the email has confirmed when it was sent, and the SPFL have confirmed it was in fact received. The Dundee Rejection Vote was therefore deemed to have been cast at 4.48pm when it was sent. In particular, it is our opinion that the Dundee Rejection Vote

[1] We consider this word to be an obvious omission that a court would read in as a matter of interpretation: *Mannai Investments co Ltd v Eagle Star Insurance Co Ltd* [1997] AC 749.

had legal effect at that time, rather than when it was (later) received. In our view, neither the contractual effect of the Articles nor their content could be varied by a unilateral written notice (which we have not seen) apparently sent for and on behalf of Dundee that "*any attempted vote from the club should not be considered as cast*". The subsequent conversations in terms of which it is said that the vote has not yet been cast, are inconsistent with the actual vote having been executed and having had effect when it was sent at 4.48pm on Friday 10 April.

37. The consequence of the proper construction of Art 185, in our opinion, is that it was no longer open to Dundee to seek to withdraw their vote subsequent to its dispatch. We consider our analysis to be consistent with the very purpose of including provisions such as Art 185. We consider too that our construction is consistent also with basic ideas of fairness in voting procedures. Our construction avoids the situation which now arises of those who have cast a vote in a particular way either being subjected to undue pressure or being placed in a position of unfair advantage in seeking to secure favourable treatment for a changed vote.

G. Next Steps and Conclusions

38. The Written Resolution having been rejected, that is the end of the matter. If the SPFL do not accept that this is the effect of its own Articles, then, in our view, court action can be commenced to seek a declarator and interdict to that effect.

39. Alternatively, even if the Written Resolution is not regarded as already having been rejected (and recognising that, at present, the SPFL does not suggest that the Written Resolution has passed), a further ground of challenge may be available. In particular, we consider that there may be grounds for saying that the whole procedure adopted by the SPFL to date, in respect of the Written Resolution procedure is challengeable as being in breach of the duty discussed in Section E, above. That, however, will depend on the position of those members who voted for the Written Resolution and, as we have indicated above, direct evidence from one or more such member clubs would require to be obtained.

40. The SPFL should be invited to accept that the Written Resolution, in terms of the SPFL's own Articles, was rejected. Moreover, if the necessary evidence from one or more member clubs who voted in favour of the Written Resolution but who would not have done so had further information been provided concerning the possibility of payments being made

without terminating the season can be obtained, the SPFL should further be invited to accept that the Written Resolution cannot be passed given the breach of the duty to provide sufficient information, and that the votes which have been cast to date require to be set aside and treated as being of no effect, all with a view to the adoption afresh of a fair process, that is, one which allows members to make a properly informed decision, including with reference to the possibility of alternative means by which payments can be made otherwise than by the termination of the current league season. If such evidence is to hand, and the SPFL nevertheless declines to proceed in this way, proceedings for declarator and interdict could be raised on this ground also.

The Joint Opinion of

David M Thomson QC
R G Anderson, Advocate
14 April 2020