In the matter of a Regulatory Commission of The Football Association

Between:

The Football Association

and

(1) Leeds United Football Club Limited

(2) Massimo Cellino

(3) Derek Day

Decision of the Regulatory Commission on Participants' Application to Reopen Proceedings

Introduction

1. This is the Regulatory Commission's decision (with reasons) on an application by the Participants to reopen the proceedings and have further oral examination of a witness who has already given written and oral evidence. Before going into the detail of this application, we set it in the context of the proceedings to date. We keep this background brief as the full history of the case can be conveniently found elsewhere by anyone likely to be reading this decision.

2. There was a full oral hearing of this case at Wembley Stadium on Thursday 15 and Friday 16 September 2016 ("the September Hearing"). Witnesses were called by the Football Association as the prosecutor of charges against the three Participants and by

all the Participants. The principal witness for the FA was Mr Graham Bean. At the conclusion of the hearing the Commission reserved our decision.

3. On 11 October 2016 the Regulatory Commission, through its secretariat at the FA ("the FA Secretariat"), circulated to the parties a confidential draft of our decision and reasons on the charges ("the Draft Decision"). In relation to the charge against Mr Cellino, which he had denied, the Draft Decision contained the Commission's finding that the charge was proven as well as findings on the factual basis for that decision and on matters which could be relevant to penalties. The charges against Leeds United Football Club Limited ("LUFC") and Mr Day having been admitted, the Draft Decision contained factual findings which could be relevant to penalties in their cases.

4. The Draft Decision did not deal with penalties. The Participants were offered the opportunity of written and oral submissions on penalties after considering the Draft Decision. All three Participants made written submissions. Mr Day, but not the other two Respondents, made oral submissions through counsel at a videoconference hearing on Friday 21 October 2016. The Commission's decision on penalties was withheld pending the outcome of this application but has now been issued.

5. This application was made in writing on 31 October 2016 by counsel on behalf of LUFC and Mr Cellino and then supported on the same day by an email from counsel acting for Mr Day. Accordingly it is an application by all three Participants. The Regulatory Commission held an oral hearing of the application at Wembley Stadium on Monday 28 November 2016 ("the Application Hearing"). Mr Nick de Marco of counsel represented all three Participants at that hearing and Mr Christopher Coltart QC appeared for the FA and opposed the application.

Events leading to this application: Mr Graham Bean

6. Mr Graham Bean was the principal witness for the FA at the September Hearing. His part in this whole matter up to that date was described in the Draft Decision and is similarly described in the final written decision and reasons of the Regulatory Commission, which will have added our decisions on penalties.

7. In a nutshell, Mr Bean was directly involved with Mr Cellino and Mr Day in crucial events on which the charges against these Participants were based.

8. The Draft Decision expressed the Commission's views on Mr Bean's evidence and his role in this whole matter. We do not repeat or elaborate those views here.

9. This application has been triggered by written exchanges between Mr Bean and the FA since the September hearing which have been brought to the notice of the parties and the Commission after the circulation of the Draft Decision.

10. On Thursday 27 October 2016 the Chairman of this Regulatory Commission received information from the FA Secretariat which was then reflected in a 28 October 2016 email from the FA Secretariat informing all the parties that the Chairman had asked them to be notified as follows:

> 1. *Mr Graham Bean has made a request for a substantial witness fee which the FA has declined. The Regulatory Commission does not propose to become involved at all in that dispute.*
> 2. *On 26 October 2016 Mr Bean asked for the Regulatory Commission to be notified that he would now be withdrawing all his assistance and evidence relating to the hearing on 15/16 September 2016.*
> 3. *The chairman does not propose to take any further action in relation to Mr Bean's notification. Mr Bean's evidence has been given and will continue to be taken fully into consideration and weighed accordingly by the Regulatory Commission.*

11. There was obviously no question of Mr Bean's having the right or power to withdraw evidence already given, as reflected in the Chairman's point 3. Moreover, to avoid any doubt, the Commission has never understood that threatened withdrawal of his evidence to imply any suggestion from Mr Bean himself that his evidence had not been correct. None of the parties has suggested that interpretation either. It was clearly not that sort of withdrawal of evidence that Mr Bean had in mind.

12. That communication from the Chairman brought an email from Walker Morris, the solicitors for LUFC and Mr Cellino, on the same day 28 October 2016 expressing great alarm and concern and seeking immediate disclosure of:

1) All correspondence between the FA and GB relating to GB's request for a witness fee
2) All correspondence between the FA and GB relating to his withdrawal of evidence and assistance
3) All correspondence between GB and the Commission in relation to this issue.
4) Details of what steps the FA had been able to take to investigate the circumstances relating to GB's change of position.

13. Later that same day 28 October 2016 the FA made what the Participants describe as "some disclosure in relation to the first 3 questions raised in [Walker Morris's] email" while the Participants continue to say that the FA have not dealt with the fourth point.

14. That email was addressed to the FA Secretariat as well as the other, so was correctly forwarded to the Commission. The Chairman issued directions by email from the FA Secretariat to the parties that same afternoon as follows:

> 1. *As chairman of the Regulatory Commission, I do not regard [that Walker Morris email] 12:38 today as a request to the Regulatory Commission but as a request to the FA. If Walker Morris do wish to make any application to the Regulatory Commission they may do so and must then make it clear that it is an application to the Regulatory Commission.*
> 2. *The Regulatory Commission has received no direct communication from Mr Bean but as the parties know from Mr Paddy McCormack's email 11:49 today the chairman of the Regulatory Commission was notified as there indicated.*
> 3. *How the FA responds to points (1), (2) and (4) of Walker Morris's request is a matter for the FA in the first place and unless any application is made to the Regulatory Commission (which would then be considered on its merits) the Regulatory Commission will do and say nothing on that question.*
> 4. *The Regulatory Commission will defer its final decision on penalties in the first place until 16:00 on Monday 31 October 2016, when it will review the position to see if there should be any further deferral.*

The Commission's final decision on the case has been deferred pending the resolution of this application.

15. The Commission's written directions dated 2 November 2016 including a direction that any party wishing to apply to the Commission for any order or direction,

including disclosure of documents or other information, should do so as early as possible in writing. No such application was made before or at the Application hearing and it was not submitted by the Participants that any remaining non-compliance with the requests in Walker Morris's email had a material bearing on the Commission's decision on this application. The Commission does not consider it does.

Mr Bean's fee request, the FA's response and the launch of this application

16. In this section, and generally in this decision, we are not going to set out anywhere near every step or every detail, which would not help anybody. Mr Bean submitted an invoice to the FA on 5 October 2016 asking for a fee of £1,800 for his "*Attendance at FA as a witness – consultancy rate of £150 per hours (£1800)*". He also asked for expenses of £258.19.

17. The FA has rejected the request for that £1,800 fee. Mr Bean insists that he gave evidence as a consultant. The FA regards him as a witness of fact so not entitled to a fee as if he were an expert witness, though it did tell him on 14 October 2016 it would consider an application for reasonable loss of earnings.

18. Mr Bean wrote to the FA on 14 October 2016: "*Irrespective of how the FA wish to window dress my attendance I attended as a football consultant . . . . The facts are that when I am working my hourly rate is £150 per hours* [sic], *unless a pre agreed fixed fee is arranged.*"

19. The FA again refused and Mr Bean threatened to go to the small claims court (as it is still commonly called). The FA's solicitor Ms Boulton wrote twice to Mr Bean on 26 October 2016 re-iterating the FA's position and it was then that Mr Bean notified his purported withdrawal of his evidence and future assistance. He also said he would be raising the issue with the media.

20. On Saturday 29 October 2016 the Daily Star published a story under the headline "EXCLUSIVE: FA investigation into Leeds owner Massimo Cellino could be set to collapse". It is obvious from its content that GB was the source of that story.

21. On 31 October 2016 Mr Day's representatives sent an email inviting the Commission to consider dismissing the proceedings against him in the light of these matters concerning Mr Bean. Following LUFC/Cellino's submission of this written application on 31 October 2016, Mr Day no longer asks simply for dismissal of the proceedings at this point. On this joint application, all three Participants now propose in the first place that the Commission should reopen the proceedings and direct Mr Bean to be recalled for further cross-examination. If he is not recalled then the Participants do say that these proceedings should be dismissed.

22. The FA as prosecutor of the charges, represented by Mr Coltart QC, has rejected all calls for reopening or dismissal of the proceedings and opposes this application.

Principles and approach on reopening

23. The Regulatory Commission's had clearly not completed its work on this case (in lawyers' language, was not *functus officio*). Following the videoconference hearing on 21 October 2016, when these further matters about Mr Bean cropped up on 26 October 2016 we had not yet issued our final decision including penalties (nor any further draft to the parties).

24. All parties agreed that the Commission had the power to re-open the hearing, including recalling Mr Bean for further examination. We plainly had, as well as the power to dismiss the proceedings entirely if that was the fair thing to do.

25. Whether and how we should exercise that power is the question.

26. There is no dispute among the parties about the basic principles. The Commission has discretion whether or not to direct and receive further evidence from Mr Bean. Weighing all the relevant factors, we should do so if it is necessary in order to do justice to the Participants, or any one of them. That is to put the principle in its highest and most basic form, but it is the essential guide.

27. The FA has cited the decision of Gilbart J in TZ v General Medical Council [2015] EWHC 1001 (Admin). While there are significant differences between that case and this one, i.e. beyond the obvious differences on the facts, it contains authoritative and helpful guidance which this Commission will follow.

28. The summary in paragraph 99 of the judgment in the TZ case is particularly helpful and is agreed by all parties to be correct. Starting from essentially the same position as we have here, i.e. that the Commission does have the discretion to recall Mr Bean to give further evidence including by cross-examination, Gilbart J. said that the issues on the exercise of discretion were:

    i) What was the relevance of the new evidence?
    ii) Why had it not been called before?
    iii) What significance did it have in the context of the draft findings of the Panel?
    iv) What effects would its admission have on the conduct of the hearing, and in particular on:
        a) the need to recall witnesses;
        b) the length of the hearing?
    v) Taking all matters into account, would justice be done if the new evidence were not received and heard?

29. The judge also referred to the need for panels to be astute to avoid the unnecessary prolongation of hearings by those who are simply dissatisfied by the draft factual decisions. He made it clear that applications of this sort must receive anxious scrutiny. We give this application just that scrutiny. It is obvious that all three Participants are dissatisfied with factual findings in the Draft Decision. Nevertheless, if it is necessary to recall Mr Bean in order to do justice to any of the Participants, then that is what we should direct. While the Commission has no power to order Mr Bean, we are assuming that if he were initially resistant to attending the FA's jurisdiction over him as a Participant in football would overcome that resistance. There is some risk that he would refuse and could not be compelled to attend a further hearing but we disregard that risk entirely in reaching our decision.

30. This application is based on events since the September hearing. Accordingly point (ii) in Gilbart J's list is not a hurdle for the Participants to overcome. The same applies to point (iv), as there would be no recall of any witnesses other than Mr Bean and a further hearing could not realistically take more than a single day, even including any consequential submissions following his further evidence.

31. That leaves (i), (iii) and (v) of the issues identified by Gilbart J. Taken together, in the present circumstances of this case they boil down to a single question: Is there a realistic possibility that if Mr Bean is recalled, that would materially change the Regulatory Commission's decision on the charges or the penalties?

What could emerge from recalling Mr Bean?

32. This is not an application to adduce further evidence which has a direct bearing on the facts supporting or countering the charges. The position is not that since the September hearing evidence has come to light about the events which led to the charges. The basis of the application is that further examination of Mr Bean may lead the Commission to a re-appraisal of Mr Bean's reliability as a witness and, because of the importance of his existing evidence, a change in the Commission's decisions on the charges and/or the penalties.

33. After discussion between the Commission and the parties' counsel at the Application hearing, it was agreed that a question posed by Mr de Marco could be expressed as follows: *Was there an inherent real and not frivolous risk that in expectation of a substantial fee Mr Bean's evidence might have been tailored in favour of the FA?* We shall call this "**the Taint Question**".

34. A different though related question emerges on this application. Unlike the question noted in paragraph 33 above, that other question was not reduced at the Application hearing to a specific form but can fairly be expressed in two parts as: *Was there any agreement or understanding between the FA and Mr Bean before the September hearing giving Mr Bean any form or immunity or guarantee against being charged by the FA for his own part in these matters? If so, was there an inherent real and not frivolous risk that such agreement or understanding might have led Mr Bean to tailor*

his evidence in favour of the FA? We shall call these questions together "**the Immunity Question**".

35. The Participants say that recalling Mr Bean is the only fair way to give them the opportunity of exploring those questions and that if they are not given that opportunity the whole proceedings would be unfair and should be dismissed.

36. The questions overlap and it is convenient to consider the Immunity Question first.

The Immunity Question

37. Neither the evidence before the Commission at the September hearing nor the further matters before us at the Application hearing contain any indication that the FA ever offered Mr Bean either a full or conditional guarantee of immunity from FA charges against him. The FA had written to Walker Morris on 1 September 2016 stating that it could "confirm that [Mr Bean] has not at any stage been offered any form of immunity in relation to these proceedings".

38. At the September hearing Mr Ian Ryder, the FA's Integrity and Anti-Corruption Manager, under cross-examination by Mr de Marco on behalf of Mr Derek Day, said that he had taken a decision not to charge Mr Bean and although he could not remember when, no assurances had been given to Mr Bean before he was interviewed by Mr Ryder on 9 October 2015. Moreover, there was no evidence that he had ever been given any such assurance.

39. The Participants have submitted on this application that in cross-examination Mr Ryder and Mr Bean gave conflicting evidence and suggested some kind of immunity was offered. However, the Commission does not find evidence to support any form of immunity offered to Mr Bean and is satisfied (as it was when circulating the Draft Decision) that the position on this issue went no further than Mr Ryder's evidence noted in paragraph 38 above.

40. The whole question when, how far and in what terms Mr Bean might have been assured that he would not be charged was live on the table at the September hearing. The Participants were not prevented from exploring that question or the question of

any formal or informal immunity which he might have been given. This raises a similar point to issue (ii) in Gilbart J's list (above). The actions of Mr Bean since the September hearing come nowhere near providing a solid enough basis for recalling Mr Bean so as to allow the Participants further exploration of the Immunity Question.

The Taint Question

41. It is strictly not this Commission's function to make a ruling on the extraneous dispute between Mr Bean and the FA about his fees claim. Having said that, it does have a bearing on the questions we have to decide here to say that, even on the limited material available to the Commission, we are confident that (leaving aside any possible proof of his loss or earnings) the FA never agreed to pay Mr Bean the fee he is now claiming. It is unrealistic to suppose that the FA would have rejected his claim in such firm terms if there had been such an agreement. Moreover, as mentioned in paragraph 18 above Mr Bean wrote to the FA on 14 October 2016 "*my hourly rate is £150 per hours (sic), unless a pre agreed fixed fee is arranged.*" That plainly indicated that he was not saying that there was a pre agreed fee.

42. Mr de Marco's submissions implicitly and realistically recognised that point. He developed his submission on the Taint Question on the basis that it was enough for his purposes that even without any such agreement Mr Bean, when he gave his evidence at the September hearing, might have had in his own mind either the idea that there had been a fee of the order he now claims or the expectation, or at least hope, that he might obtain such a fee. That, said Mr de Marco, created a real risk of Mr Bean's having tailored his evidence in favour of the FA. He says that the answer to the Taint Question is Yes, so that in order to maintain the fairness of these proceedings Mr Bean must now be recalled.

43. The Commission does not agree. We cannot read what was in Mr Bean's mind about a prospective fee when he was giving evidence at the September hearing. What this Commission can and does do is consider carefully whether the suggested risk is a real one (in which case we should grant this application) or is so unlikely that it does not justify continuing these proceedings any longer by directing recall of Mr Bean.

44. Even if we assume that the question of his witness fee was running through Mr Bean's head when he gave evidence (which is doubtful, to say the least), he had other significant concerns, as the Draft Decision indicates, including his own reputation in football and his wish to see Mr Cellino punished. The Commission heard Mr Bean's evidence for some four hours and has all along recognised and evaluated those other motives and concerns.

45. The Participants' submissions on this application laid heavy emphasis on the Commission's description of Mr Bean's evidence as "crucial". So it is, especially though not only in the sense that without Mr Bean's evidence the FA would have found it impossible or practically impossible to set up a case to be answered by all these three Participants. However, by the conclusion of the September hearing we had seen and heard all the other witnesses, including Mr Cellino and Mr Day who had both been cross-examined. We also had extensive documentary evidence to be assessed together with the witnesses' evidence, including interview transcripts. Mr Bean's evidence did not stand alone. The Commission is not going to repeat or explain here the contents of the Draft Decision, including its findings about the evidence of Mr Bean, Mr Cellino and Mr Day. Those findings can speak for themselves. There are no findings crucial to the Commission's decisions on the charges or the penalties which could realistically be undermined by anything at all likely to emerge from further examination of Mr Bean in the light of recent events concerning his fees claim.

46. Our assessment of Mr Bean as a witness and of the different strands of his evidence appears from the Draft Decision and is not elaborated here. Except on one point, discussed in paragraphs 48-50 below, our final decision closely follows the Draft Decision. Moreover, we have made no change to our decision on penalties in the light of the further material put before the Commission in connection with this application. We see nothing in the further material before us which leads us to any material change of view regarding Mr Bean's evidence or (which is the critical point on this application) to see any real possibility that anything would result from further examination of Mr Bean to cause any such change.

47. Mr Bean's fees request to the FA and the manner in which he has pursued it are ill-judged and rather foolish in a way which is entirely consistent with our assessment of

him for the purposes of evaluating his evidence. We believe that must already be clear from the Draft Decision. The Commission does not see that the events since the September hearing are realistically capable of significantly shifting the Commission's confidence or lack of confidence in the reliability of the various elements of his evidence. The Draft Decision already indicates how and where we see reliability or unreliability, always taking account of relevant documents and setting his evidence alongside the evidence of Mr Cellino, Mr Day and the other witnesses.

Leaks to the media

48. There is one issue on which the material put before the Commission since the September hearing has altered our view since the Draft Decision. It is obvious that Mr Bean was the source of the *Daily Star* story on 29 October 2016 and that he had failed to keep the confidentiality which he knew attached to these proceedings.

49. The Commission does treat that as further evidence in the proceedings and it does tip the balance on a point in paragraph 71 of the Draft Decision, where we wrote that we had insufficient evidence to make any finding about the source of information leaked to the press even before charges had been brought. Mr Day believed the source was Mr Bean. In the light of this further evidence, we now consider that is probably right. In the Commission's final decision we have therefore made that change from our Draft Decision. We have given it fresh consideration on the question of penalties although we concluded that it makes no difference.

50. We do not attach significance to the fact that in his evidence at the September hearing Mr Bean denied being the source of any earlier leak. While of course it follows from the Commission's altered finding on this point that Mr Bean's denial was a lie, we find it hardly surprising that someone guilty of a leak to the press maintains a bare-faced denial. The Draft Decision did not treat Mr Bean as an impeccably truthful witness on all matters and that has not changed. We do not regard either Mr Bean's leaking to the media or that denial at the September hearing as making any further material dent in his credibility.

Conclusion

51. While we have referred to the Taint Question, the essential question on this application is the one we have set out in paragraph 31 above: Is there a realistic possibility that if Mr Bean is recalled, that would materially change the Regulatory Commission's decision on the charges or the penalties? The Commission is comfortably satisfied that the answer is no. It follows that there is no reasonable basis for exercising discretion by allowing this application.

52. The Regulatory Commission sees this application as an example of exactly what Gilbart J had in mind at paragraph 100 of his judgment in TZ v General Medical Council (above). These Participants saw the writing on the wall of the Draft Decision and have seized on Mr Bean's recent misguided actions to attempt to rescue themselves from the imminent consequences of the Commission's findings. They and their lawyers are not to be blamed for this attempt but after the anxious scrutiny which is required from this Commission, we find that on examination the grounds are flimsy. The application by all three Participants is dismissed.

Nicholas Stewart QC
Chairman

Gareth Farrelly

Paul Raven

5 December 2016