IN THE MATTER OF AN ARBITRATION

UNDER RULE K OF THE RULES OF THE FOOTBALL ASSOCIATION

PROCEEDING AS AN APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

MR MASSIMO CELLINO

Appellant

-and-

THE FOOTBALL ASSOCIATION

Respondent

DECISION

INTRODUCTION

1. This is the unanimous determination of the Appeal Board, consisting of Edwin Glasgow CBE, QC, Chairman, Charles Flint QC, and Jane Mulcahy QC, in an Appeal brought by Mr Massimo Cellino ("Mr Cellino") against a Decision ("the Decision") of a Regulatory Commission of The Football Association ("the Commission") dated 5 December 2016.

2. The parties to this Appeal are Mr Cellino, who was represented by Ian Mill QC ("Mr Mill") and Nick De Marco, Counsel, and David Hinchliffe and Liz Coley of Walker Morris LLP, and The Football Association ("the FA") represented by Christopher Coltart QC ("Mr Coltart") and Shane Sibbel, Counsel, and Amina Graham and Bryan Faulkner of the FA.

BACKGROUND

3. At all times material to the Decision, Mr Cellino was the President, director and Chairman of the board of Leeds United Football Club ("LUFC"); Mr Derek Day ("Mr Day") was an Authorised Agent for the purposes of the FA Football Agents

Regulations; Mr Graham Bean ("Mr Bean") was a specialist consultant engaged by LUFC, and Mr Barry Hughes ("Mr Hughes") was a freelance unauthorised agent.

4. In May 2016 Mr Cellino, LUFC, and Mr Day, were all charged with misconduct under FA Rule E in relation to fees paid to and/or claimed by Mr Hughes in connection with the transfer of the former LUFC player, Ross McCormack ("the Player"), from LUFC to Fulham FC in July 2014. (LUFC and Mr Day were also charged under other provisions of the FA Rules.)

5. Mr Cellino is the only appellant to this appeal. He was charged and in part found to be liable in relation to offences committed by LUFC. Accordingly it is necessary for us to consider the secondary charges brought against him alone in the context of those brought against LUFC and found by the Commission to have been proved.

<u>The Charges</u>

6. The charges against LUFC were as follows:

   "LUFC is hereby charged with misconduct pursuant to Football Association Rule E1(b).

   It is alleged that LUFC has breached the following FA Football Agents Regulations ("the Agents Regulations") in relation to the Transaction involving the transfer of Ross McCormack ("the Player") from LUFC to Fulham FC ("FFC") on 8 July 2014 (hereinafter referred to as "the Transaction"):

   - **Regulation C.2**
   - **Regulation J.1**

   (The Regulations referred to are those as applicable during Season 2014/15).

   <u>Regulation C.2 provides:</u>

   "A Club, Player or Authorised Agent must not so arrange matters as to conceal or misrepresent the reality and/or substance of any matters in relation to a Transaction or Contract Negotiation."

   It is alleged that LUFC concealed and/or misrepresented the reality and/or substance of matters in relation to the Transaction by entering into an arrangement where a scouting contract with Derek Day was created and/or signed in order to facilitate the payment of Barry Hughes ("BH"), an Unauthorised Agent, for his performance of agency activities in relation to the Transaction.

Regulation J.1 provides:

"A Club must not at any time use the services, either directly or indirectly, of an Unauthorised Agent in relation to any Agency Activity. A Club must not directly or indirectly make any payments to any Unauthorised Agent in respect of any Agency Activity."

It is alleged that:

• LUFC used the services of an Unauthorised Agent, namely BH, in relation to Agency Activity in the Transaction; and/or

• LUFC directly or indirectly made payment to an Unauthorised Agent, namely BH, in respect of Agency Activity in the Transaction."

7. Mr Cellino was charged by letter on the same day, as follows:

"You are hereby charged with Misconduct for a breach of Football Association Rule E3(1) in relation to the Transaction involving the transfer of Ross McCormack ("the Player") from LUFC to Fulham FC ("FFC") on 8 July 2014 (hereinafter referred to as "the Transaction").

FA Rule E3(1) provides:

"A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute…"

It is alleged that you acted in a manner which is improper and/or brings the game into disrepute in that:

1. With your consent, connivance or authorisation, Leeds United FC ("LUFC") used the services of an Unauthorised Agent, namely Barry Hughes ("BH"), in relation to Agency Activity in the Transaction; and/or

2. With your consent, connivance or authorisation, LUFC directly or indirectly made payment to an Unauthorised Agent, namely BH, in respect of Agency Activity in the Transaction; and/or

3. With your consent, connivance or authorisation, LUFC concealed and/or misrepresented the reality and/or substance of matters in relation to the Transaction by entering into an arrangement where a scouting contract with Derek Day was created and/or signed in order to facilitate the payment of BH, an Unauthorised Agent, for his performance of agency activities in relation to the Transaction."

8. All these charges related to payments made to Mr Hughes who had presented himself to Leeds and Mr Cellino as an agent acting for the Player. LUFC and Mr Cellino had not initially been interested in transferring the Player, but Mr Hughes promised that he could obtain a fee of £10 million for LUFC as a result of the transfer on condition that he was paid a fee of £250,000.

9. Mr Day admitted the charges against him in June 2016. The Commission imposed a fine of £75,000 on Mr. Day and a suspension for a period of 18 months, of which 11 months was suspended, for acting as an intermediary. LUFC initially denied the charges against it but subsequently admitted them on 9 September 2016. The Commission imposed a fine of £250,000 on LUFC.

10. The Commission found that Mr Cellino had committed a breach of FA Rule E3 (1) on the basis of the allegation in paragraph 3 of the notice of charge only. It imposed sanctions on Mr Cellino by way of a fine of £250,000, a suspension for 18 months from acting as a director of LUFC or any other football club playing in any FA competition, a requirement that he should not exercise any shareholder voting rights, or other powers, in relation to LUFC prior to expiry of the suspension, and a requirement that he should attend a course of education on the duties of a director of a football club under FA rules.

11. Accordingly this appeal is directly concerned only with those parts of the Decision which deal with Mr Cellino's position although those parts need to be examined in the context of the Decision as a whole.

PROCEDURAL HISTORY

12. In relation to the charges against Mr Cellino, set out above, a substantive hearing took place before the Commission on 15 and 16 September 2016. On 10 October 2016 the Commission circulated draft written reasons on liability. On 21 October 2016 there was a further hearing in relation to sanctions.

13. On 26 October 2016, and just before the Commission could issue its final decision including penalties, Mr Bean wrote to the FA asking that the Commission be notified that he was withdrawing all assistance and evidence on behalf of the FA because the FA had refused to pay him a fee of £1,800 for acting as a witness. As a result of Mr Bean's actions, an application was made on behalf of LUFC, Mr Cellino and Mr Day to recall Mr Bean for further evidence. That application could not be heard until Monday, 28 November 2016. The application was dismissed in a determination issued to the parties on 5 December 2016, the same date as the Decision (see further below).

14. By a Notice of Appeal dated 23 December 2016, Mr Cellino appealed the Decision. The FA's Response to the Notice of Appeal was dated 20 January 2017.

15. The appeal hearing took place on 30 January 2017 and written reasons were issued on 3 February 2017. The Appeal Board upheld the findings on liability concerning Mr Cellino but reduced the length of his suspension to 12 months and his fine to £100,000. (It also reduced LUFC's fine to £200,000.)

16. Ten days later, on 13 February 2017, Mr Cellino commenced FA Rule K proceedings against the decision of the Appeal Board, one of the grounds being that a member of the Appeal Board was a leading member of the FA Council and hence did not appear independent and impartial.

17. On 30 June 2017 the parties compromised the apparent bias issue and agreed that a further appeal be heard by us, proceeding as an FA Appeal Board.

18. Skeleton arguments of both parties were forwarded to us by an email from the FA dated 25 July 2017.

19. The effect of the compromise agreement reached between the parties was that, on 27 July 2017, we heard Mr Cellino's appeal – based on his Amended Notice of Appeal dated 6 July 2017 – *de novo*.

THE DECISION

20. The Decision has been examined on behalf of both parties, and by us, with considerable care. We have rightly been reminded that, as a matter of well-established principles in all cases, we should be conscious, when considering the substantive issues in this appeal, of the fact that the Commission had the benefit of hearing the witnesses and that, as a matter expressly stipulated in the FA Rules, this Board should only interfere with findings which we are satisfied no reasonable Commission could make. We briefly set out at this stage the Commission's findings which are material to this appeal because we are also conscious of the need to examine those findings which are specifically challenged in the context of all those which were made in relation to Mr Cellino.

21. We acknowledge our gratitude to Mr Mill QC and Mr Coltart QC, and to all those who assisted them, for the helpful way in which the matter was presented to us.

22. The most material findings of the Commission were:

    (1) Mr Cellino did not know that Mr Hughes was an Unauthorised Agent (para 80);
    (2) It was not possible to say on the evidence whether or not Mr Cellino recklessly or deliberately shut his eyes to the question of whether or not Mr Hughes was an Unauthorised Agent (para 80);
    (3) While it was "*hardly impressive*" that the President/Chairman of a Championship club had so little evident grasp of the need for rigour in relation to agency activities for the club, allegations 1 and 2, for which knowledge that Mr Hughes was an Unauthorised Agent was an essential element, were not proven against Mr Cellino (para 80);

(4) At a meeting in September between Mr Bean, Mr Hughes and Mr Cellino they all knew that a payment of fees to Mr Hughes in relation to the transfer of the Player would be a breach of the FA rules (para 32);

(5) The suggestion of a Scouting Agreement (as a solution to the problem in respect of the Rules) did not come from Mr Cellino (para 33);

(6) It was not an essential element of allegation 3 that Mr Cellino knew that Mr Hughes was an Unauthorised Agent (para 83);

(7) The "*essential thrust*" of allegation 3 was Mr Cellino's knowing participation in the deceptive Scouting Agreement by using it to pay Mr Hughes for agency activities. It had been proved that Mr Cellino knew that LUFC was concealing and/or misrepresenting the reality and/or substance of the Scouting Agreement in order to facilitate payments to Mr Hughes (para 81);

(8) Mr Cellino knew that there was a need to conceal from the FA that payments were being made to Mr Hughes for agency activities in relation to the McCormack transfer (para 81);

(9) Mr Cellino approved and implemented the Scouting Agreement deliberately to achieve that concealment (para 81);

(10) The principal aim of the Scouting Agreement was to pay Mr Hughes his £250,000 agency fees (para 68);

(11) Mr Cellino knew when he signed the Scouting Agreement that he had agreed (on behalf of LUFC) to pay Mr Hughes £250,000 for agency activities; that the agreement was to deceive the FA into believing that £185,000 was being paid entirely for scouting activities by someone else (Mr Day), and that £65,000 of the payment to Mr Hughes was going to be accounted for by using the outstanding debt due from the player, which was not going to be mentioned anywhere in the documentation submitted to the FA (para 81);

(12) Mr Cellino's evidence about the Scouting Agreement showed him to be capable of a deliberate untruth which he cannot have believed himself (para 40);

(13) It had been blindingly obvious to Mr Cellino that authorising and implementing the Scouting Agreement as a means of misleading the FA was an improper act (para 83);

(14) The findings set out under 19.4 to 19.13 above clearly established that Mr Cellino had acted in a manner which was improper and brought the game into disrepute in breach of Rule E3(1) (para 81).

<u>THE ISSUES IN THE APPEAL</u>

23. There are four issues which are raised by this Appeal:

(1) The interpretation of the charge – first issue;

(2) Whether there was evidence to support critical findings – second issue;
(3) Whether, as a matter of procedural fairness, the FA's case was adequately put to Mr Cellino – third issue;
(4) Whether the sanctions that were imposed were excessive – fourth issue.

First issue

24. The first issue is whether it was open to the Regulatory Commission, as a matter of construction and in light of the findings which it made, to interpret the wording of the charge so as to find it proved against Mr Cellino.

25. At the commencement of the hearing of the Appeal, Mr Mill raised on behalf of Mr Cellino for the first time the argument that, having found that the FA had failed to establish that Mr Cellino had knowledge of the fact that Mr Hughes had been an Unauthorised Agent, it had not been open to the Commission to find that the charge against him had been proved on the basis of the third allegation set out in the charge.

26. Notwithstanding the fact that this argument had not been raised at any prior stage of these proceedings, Mr Coltart accepted on behalf of the FA that it was a matter of jurisdiction which the Appeal Board could not properly exclude from consideration. We accordingly agreed that the issue could be argued by way of written submissions after the conclusions of the oral hearing and we duly considered the Appellant's Addendum to Amended Notice of Appeal and Submissions on 31 August 2017 and the further submissions on behalf of the FA of 15 September 2017.

27. The new ground of appeal is argued on behalf of Mr Cellino on two bases:

(1) It was and is an essential ingredient of each of the three allegations which form the alternative basis on which the charge was brought against Mr Cellino, as we set out at paragraph 7 above, that he knew that Mr Hughes had been an Unauthorised Agent; and
(2) In view of the way in which the matter had been argued at the hearing, it was unfair to Mr Cellino that the Commission found the charge proved and it would accordingly be unfair on the part of the Appeal Board not to set aside that finding.

28. The first of these points is very fully and carefully analysed in the written submission but we do no unfairness to that analysis if, having read it with care, we adopt this reduction of it from paragraph 9 of the submission: *"…the essential thrust of allegation 3 was the covering up of the very wrongdoing identified in allegations 1 and 2, and knowledge of that wrongdoing necessarily formed part of the mental element*

in all three allegations. The Appellant's case is that this much is clear simply from an analysis of the text of the charge…"

29. As an additional supplementary point it is submitted that, if there is ambiguity in the construction of the wording of the charge, we should construe it *contra proferetem,* and in that regard our attention is drawn to the CAS Decision in the case of ***Vanessa Vanakorn v Fédération Internationale de Ski*** and, by implication, to the other CAS decisions cited at paragraph 85 of that Decision.

30. As to the "unfairness" point, we again think that we can reduce the submission to this: in the light of the way in which the matter was debated between the Chairman of the Commission and Mr Coltart on behalf of the FA, *"Mr Cellino was never put on notice that a broader case of knowing involvement in the concealment of some unspecified wrongdoing was pursued against him….Mr Cellino was never questioned on whether he was aware that some unspecified wrongdoing was being concealed."*

31. Reliance is also placed, in advancing this argument on behalf of the Appellant, on an exchange which it is asserted took place between the Commission and Mr Coltart "*during his submissions*". A note by pupil barrister Isabel Buchanan (attending with Counsel for Mr Cellino) of Mr Coltart's response to being asked whether knowledge that Mr Hughes was an Unauthorised Agent was an essential element of "the charge" was that he had said that this might give rise to *"interesting legal discourse"* but that it *"needn't trouble"* the Commission because there was *"an overwhelming inference"* that Mr Cellino knew that Mr Hughes was an Unauthorised Agent.

32. On the point of construction the main point made by Mr. Coltart is that allegation 3 does not require proof of knowledge of the unauthorised status of the agent. The offence is complete if arrangements have been put in place to effect a concealment, whatever the purpose of the deception. The material facts which required to be proved were that Mr Cellino understood (a) that there was a problem in making payment to Mr Hughes and (b) there was a need for subterfuge in order to circumvent this issue.

33. As to the question of construction, it is contended on behalf of the FA that the Appellant's submission that the third charge follows the same structure and uses the same words is factually wrong in that the words are patently not the same and, more significantly, *"the gravamen on the misconduct has moved away from the use and/or payment of an Unauthorised Agent and now fixes on the issue of concealment and/or misrepresentation"*.

34. Mr Coltart also stresses that, whereas the first two charges refer to *"the use or payment of an Unauthorised Agent namely BH"* the third charge reverses the word order and refers simply to *"payment to BH, an unauthorised agent"*.

35. In response to the points on unfairness Mr Coltart underlined that, in his evidence, Mr Cellino in fact addressed the impropriety of the Scouting Agreement, and that the wrongdoing alleged was not unspecified. (Mr Coltart made a number of other points in his written submission but, in the light of our decision on the point of construction, it is not necessary to rehearse these here.)

Analysis

36. On the central point of construction we accept the submissions made by the FA. On its natural meaning the impropriety alleged in paragraph 3 lay in entering into a Scouting Agreement which concealed or misrepresented the transaction which the agreement was designed to effect. The fact that Mr Hughes was an unauthorised agent explained why such an agreement was necessary, but the essence of the charge lay in the concealment or misrepresentation implicit in the Scouting Agreement. We agree with the reasoning of the Commission at paragraph 80 which properly recognised that it had not found that Mr Cellino knew that Mr Hughes was an unauthorised agent, but that authorising and implementing the Scouting Agreement as a means of misleading the FA was in itself an improper act.

37. Although we accept that paragraph 3 of the charge must be interpreted in the context of the other allegations made, it does not follow that reliance on the unauthorised status of the agent had the same effect in all three paragraphs. The status of the agent was indeed an essential element of the charges made in paragraphs 1 and 2. If the agent had been authorised then there would have been nothing improper in the club using his services of or making payments to him. But under paragraph 3 the Scouting Agreement was improper on the basis that it concealed or misrepresented the substance of the true underlying arrangements, and that was improper regardless of Mr Cellino's knowledge that Mr Hughes was an unauthorised agent.

38. It is clear to us, and we consider that it plainly was to all concerned in this matter, that what has been referred to as the "thrust and gravamen", or purpose and essence, of the third allegation was the creation of a sham Scouting Agreement for the purposes of deceiving the FA. There could never have been much doubt, and there is none in the light of the Commission's unchallenged findings of fact, that Mr Cellino was well aware of, and actively participated in, the creation of the sham agreement in that it did not record anything that had in fact been agreed and that he knew and intended that the FA should be deceived by it. It is also clear beyond doubt that Mr Cellino persisted in giving deliberately misleading accounts, and ultimately dishonest evidence, of the purpose of that agreement.

39. It is equally clear to us that there cannot have been any unfairness to Mr Cellino as a result of the way in which this third allegation was worded and applied by the Commission. The wrongdoing was not unspecified, as asserted in the submission referred at paragraph 27 above. The wrongdoing lay in entering into an agreement which concealed from or misrepresented to the FA the true nature and purpose of that agreement. Mr Cellino had the opportunity, which he took in his witness statement at paragraphs 24 and 25, to deny that he was informed that there was anything wrong, illegal or untoward in entering into the Scouting Agreement, which he understood to lie at the heart of the charges brought by the FA.

<u>Second Issue</u>

40. The second issue is whether there was evidence before the Commission which could support a finding – particularly that at paragraph 29 of the Decision – that Mr Bean had made it clear that Mr Hughes could not be paid without LUFC being in breach of FA rules.

41. The essence of the argument put by Mr Mill for Mr Cellino was as follows:

    (1) For the charge to be established it was necessary that it be proved that Mr Cellino knew, not only that the Scouting Agreement was a sham, but that it involved a breach of the FA rules.
    (2) That knowledge could only have been based on what he was told by Mr Bean at the meeting on 18 September.
    (3) There was no evidence from Mr Bean on the basis of which the Commission could have found that he told Mr Cellino that the Scouting Agreement involved a breach of the FA rules.
    (4) Having declined to accept Mr Bean's evidence as to what he told Mr Cellino on two key points, namely that Mr Hughes was an unauthorised agent and that the idea of making the Scouting Agreement came from Mr Cellino, there was an inconsistency in the reasoning of the Commission in finding that Mr. Bean's evidence that he had told Mr Cellino that the Scouting Agreement would be in breach of the FA rules was credible.

42. Mr Mill also placed considerable emphasis in his oral submissions (as a matter of substance and quite distinct from the point made in relation to procedural fairness, with which we deal below when considering the Third Issue) on the fact that the following question had been put to Mr Cellino:

    > *"Q: The only way to fix it and fulfil your obligations was to deal with this through a scouting agreement because [Mr. Bean] told you the rules would prevent you doing this any other way. A: Yes"*

Mr Mill's oral submission to us was that this was in itself a conclusive point – because the FA was "*stuck with that answer*".

43. The written argument of the Appellant summarised the effect of the evidence of Mr Bean as follows:

> *"When it came to giving his evidence before the Commission, however, Mr Bean no longer maintained that he had specifically informed Mr Cellino that payment to BH would breach the FA Rules. His detailed witness statement, prepared for, and no doubt with the assistance of, The FA, makes no repetition of that allegation. Paragraph 14 of that statement states that Mr Bean made clear to both Mr Cellino and BH that the payment could not be made, but there is no reference to The FA Rules as being a, let alone the, reason why it could not be made; or indeed that the Scouting Agreement which the Commission found Mr Bean had in fact himself suggested would not be a permissible means of making such a payment. Again, it is to be noted that this paragraph 14 untruthfully repeats the allegation that it was Mr Cellino who suggested the Scouting Agreement.***
>
> *At the hearing itself, Mr Bean was cross-examined by Leading Counsel for Leeds and Mr Cellino about exactly what he said to Mr Cellino with respect to the payment to BH at the September meeting, and about whether he had advised Mr Cellino that such payment would be in breach of the FA Rules. According to Mr De Marco's pupil's notes, Mr Bean replied "[I] don't know if I mentioned the rules". The notes of the hearing made by Mr Tom Day, junior counsel for The FA, corroborate this answer. Mr Tom Day's notes say Mr Bean said: "I can't remember if I said it not being allowed under the rules".*
>
> *Thus, Mr Bean did not maintain at the hearing that he had told Mr Cellino that paying BH would be in breach of the Rules, whether in his witness statement or in oral evidence. Rather, he accepted that he was not sure whether he had in fact made such a statement."*

44. On that analysis, it is argued, the evidence of Mr Bean could not support any finding of the Commission that he had informed Mr Cellino that the scouting agreement was in breach of the FA rules. The reasons given for making the findings, contrary to the evidence of Mr Cellino but purportedly based on the evidence of Mr Bean, are set out in paragraph 28 of the Decision as follows:

> *"In general we find [Mr Bean's] account of [Mr Cellino's] involvement and motivation in these matters, including in particular Mr Cellino's knowledge of the purpose of the Scouting Agreement, to be convincing. It matches what we see in the documents and, importantly, it matches what we can clearly see about Mr Cellino's dominant role in the affairs of LUFC. "*

45. Hence the basis of preferring the evidence of Mr Bean to that of Mr Cellino was (i) that the former was more convincing on this matter than the latter; (ii) the unidentified documentary evidence, and (iii) the dominant role of Mr Cellino. Mr Mill submits that the role of Mr Cellino does not provide any evidence as to whether he was told that the Scouting Agreement was in breach of the FA rules. As to documents, it is accepted that there clearly was such evidence from which

the Commission could find that Mr Cellino appreciated that the purpose of the Scouting Agreement was to make payments to Mr Hughes, and that such an agreement was only necessary because a direct payment to Mr Hughes would not be permitted. Indeed Mr Cellino accepted that in his own evidence that *"[t]here was no other way to pay him in the deal"*. But the issue, so it is argued, was whether or not Mr Bean told Mr Cellino that to make payments through the mechanism of the Scouting Agreement would in itself be a breach of the Rules. On that issue it is submitted the dominant role of Mr Cellino and the documents could provide no support. Further the Commission gave no specific reasons as to why it found that evidence from M. Bean, whom it had found to be a liar and to have a motive to gain revenge on Mr Cellino, should be accepted as more convincing than that from Mr Cellino, although it was accepted that he too was found to have deliberately given dishonest evidence.

46. The starting point in the Reply Submissions made by Mr Coltart for the FA was that the charge was that Mr Cellino knowingly authorised an agreement which concealed or misrepresented the reality that payment was being made to Mr Hughes for agency activities. That was sufficient knowledge to constitute a breach of the FA rules. It was not necessary for it to be proved that Mr Cellino had been warned by Mr Bean that the Scouting Agreement itself involved a breach of FA rules, or indeed, as the Commission pointed out at paragraph 83 of its Decision, that Mr Cellino knew what the applicable rules were.

47. Mr Coltart submitted that the argument for the Appellant conflates two different issues, namely: (i) whether Mr Bean had said that any payment to Mr Hughes would be in breach of the FA rules (since the payment to Mr Hughes had not been recorded on the relevant forms at the time of the transfer of the Player); and (ii) whether Mr Bean had said that the Scouting Agreement was an impermissible way to get round the FA rules. In summary Mr Coltart's argument was that the first statement had indeed been made by Mr Bean, and the second did not need to be because it was "*blindingly obvious*". It was suggested that the assertion that someone in Mr Cellino's position needed to be told that it would be a breach of a rule for a sham agreement to be presented to the FA for the purpose of concealing the true position was surprising.

48. The main points which Mr Coltart made on the evidence overall were as follows:

    (1) The evidence of Mr Bean was that he told Mr Cellino that Mr Hughes could not be paid because that had not been documented in the agreement; by "agreement" it is clear that he meant the form AG1, which Mr Cellino had signed at the time of the transfer, and by which Leeds had declared that it had no agent;

(2) There was no dispute that Mr Cellino knew that the Scouting Agreement, to be submitted to the FA, purportedly recording an agreement with Mr Day, was in fact designed to enable payments to be made to Mr Hughes;

(3) The documents on which the Commission relied in reaching its conclusions included the AG1 and emails from which it was clear that Mr Cellino was directly involved in agreeing the payments to be made to Mr Hughes, and the way in which they were to be paid;

(4) It therefore followed that the Scouting Agreement was known by Mr Cellino to be a document which concealed or misrepresented the reality that payment was being made to Mr Hughes for agency activities; that was sufficient knowledge to constitute a breach of the FA rules;

(5) The Commission was entitled to find that Mr Cellino's evidence was deliberately untrue in suggesting that the scouting agreement was in part a means of paying another creditor £117,500. Further, that finding entitled the Commission both to prefer the evidence of Mr Bean to that of Mr Cellino, and to draw the obvious inference that a clear lie about the purpose of the Scouting Agreement was itself support for the case that Mr Cellino told that lie because he must have known that the agreement was improper.

49. In response to questions from us, and notwithstanding the fact that there did not appear to be any direct challenge to the Commission's finding at paragraph 81 of the Decision that Mr Cellino *"knew when he signed the Scouting Agreement, that it was to deceive the FA…."* Mr Coltart submitted that the Commission had plainly been entitled to base that conclusion on its finding, at paragraph 26 of the Decision that: *"By the end of the September meeting [Mr Cellino and Mr Hughes and Mr Day] all well understood and agreed what the Scouting Agreement was for, …. and that it was a false document to hide from the FA…."* He also emphasised that it could not be disputed that Mr Cellino had known and intended that the false document would be presented to the FA by referring us to the cross-examination of Mr Day, conducted by Leading Counsel then acting for Mr Cellino, which criticised Mr Day for having been late in lodging that document with the FA, it also being pointed out that no payment could in any event have been effected to Mr Day as an Authorised Agent without documentation which on its face supported the payment being lodged with the FA.

50. Finally it was submitted by Mr Coltart that the reliance on the partial note of one question that he had put in cross-examination to Mr Cellino presented a wholly false impression. The slightly fuller note which had been taken by Tom Day, Junior Counsel for the FA, recorded that the statement on which Mr Mill relies, and which we set out under paragraph 39 above had been preceded by the words *"You say that…"* It was accordingly plain beyond doubt to all those present at the hearing before the Commission that what was being put was to Mr Cellino was

that his explanation was incredible – which the Commission indeed found it to be.

Analysis

51. For an appeal to succeed on the second issue, we repeat that it would be necessary for us to find that the Commission, in its findings on the evidence, came to a decision which no reasonable tribunal could have reached. It was conceded by the FA that proof of the charge required the Commission to find that Mr Cellino knew that the Scouting Agreement concealed or misrepresented the reality that payment was being made to Mr Hughes for agency activities. It was not necessary for it to be proved that Mr Cellino was told by Mr Bean that the Scouting Agreement was in breach of the rules, or that Mr Cellino knew what rule it breached.

52. The submissions of the Appellant must be considered not only against the background of the findings which the Commission made in respect of Mr Bean's evidence, both written and oral, but also in the light of the Commission's decision, also made on 5 December 2016, on an application by Mr Cellino and the other participants to re-open the proceedings. The basis for that application had been that, Mr Bean having approached the FA after the hearing of the evidence with a request for a substantial witness fee, which was declined, he then stated that he was "withdrawing" his assistance and his evidence. In that decision, produced at a time when the Commission's main Decision had already been circulated in draft, it held that there was no basis for any suspicion that Mr Bean had been offered any assurance as to immunity from FA charges, and that the FA had not agreed to pay Mr Bean a fee for his evidence. But in the course of its reasoning the Commission found that Mr Bean had leaked confidential information about the hearing to the Daily Star; had pursued his claim to a fee in an *"ill-judged and rather foolish in a way which is entirely consistent with our assessment of him for the purposes of evaluating his evidence"*; had lied in his evidence to the Commission about not being the source of a previous leak to the press, and that it was *"hardly surprising that someone guilty of a leak to the press maintains a bare-faced denial".* The Commission then stated:

> *"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 the denial at the September hearing as making any further material dent in his credibility."*

53. Having made findings that the principal witness for the FA had both attempted to trade his evidence for money and had lied, it was surprising that the Commission felt able to attach any weight to the evidence of Mr Bean on any contested issue of fact, without corroborative evidence. One would have expected to find in the Decision a clear analysis of the oral evidence given by Mr

Bean explaining why some parts of his evidence were accepted, whilst many were rejected, and a precise identification of the corroborative evidence relied on.

54. The critical findings of fact made by the Commission in relation to this issue were these:

(1) Mr Bean told Mr Cellino that the money could not properly be paid within the FA rules (paragraph 22);

(2) Mr Bean, Mr Cellino and Mr Hughes agreed that the Scouting Agreement was a false document to hide from the FA that Leeds had been in breach of the FA riles "*in connection with (Mr. Hughes') role and the documentation*" relating to the transfer (paragraph 26);

(3) Mr Bean gave Mr Cellino a warning that Mr Hughes could not be paid without Leeds being in breach of the FA rules (paragraphs 29 and 30);

(4) Mr Bean and Mr Cellino both knew that a payment of fees to Mr. Hughes in relation to the transfer would be a breach of the FA rules (paragraph 32);

(5) Mr Cellino knew from the September meeting that the purpose of the Scouting Agreement was to hide from the FA that Leeds was paying to Mr Hughes £250,000 for his work on the transfer (paragraph 35);

(6) Mr Cellino knew that there was a need to conceal from the FA that payments were being made to Mr Hughes for agency activities in relation to the transfer (paragraph 81);

(7) Mr Cellino was told by Mr Bean that to disclose to the FA that payments were being made by Leeds to Mr Hughes would have revealed a breach of the FA rules in connection with the transfer (paragraph 83).

55. There was evidence on which the Commission could reasonably find that Mr Bean had in substance advised Mr Cellino that payment could not be made to Mr Hughes, on the basis of the documentation completed at the time of the transfer and the form AG1. That evidence was contained in paragraphs 12 and 14 of Mr Bean's witness statement. Mr Bean did accept in cross-examination that he might not have said that paying Mr Hughes was in breach of the rules, but the Commission was entitled to find the charge proved without evidence of an express warning to that effect. The question was whether, on the totality of the evidence, Mr Cellino knew that the transaction which he authorised was improper – which it manifestly was. We reject the suggestion that it is credible that anyone in Mr Cellino's position could have believed that it would not breach one of the FA's Rules for it to be presented with a sham agreement which was deliberately designed to conceal the truth.

56. On that basis the evidential findings were properly founded not solely on the statements made by Mr Bean but also on the context of the transfer transaction; the declaration that had been made in the form AG1, signed by Mr Cellino, that Leeds had not retained an agent in the transfer; the involvement of Mr Cellino in arranging how payments were in fact to be made; the manifestly incredible explanation for the Scouting Agreement which Mr Cellino gave to the Commission, and the obvious inferences to be drawn from an agreement which concealed its true purpose and effect.

57. Mr Cellino accepted, in cross-examination by Mr Coltart, that Mr. Bean had told him that Mr. Hughes could not be paid because he was "*not included in the original deal*", yet that was the entire purpose of the Scouting Agreement. Given the finding of the Commission that Mr Cellino had lied, in both his oral and written evidence, about the purpose of the agreement it was entitled to find, having regard to all the circumstances, that he knew the agreement had an improper purpose and that Mr Bean's evidence about Mr Cellino's involvement and motivation in the transaction was to be preferred to Mr Cellino's denial.

58. The Commission found at paragraph 83 of its Decision that, however ignorant Mr Cellino may have been of the specific FA Rules:

> "*…he must be taken to know that he was bound by FA Rule E3(1) not to act in any manner which was improper or which brought the game into disrepute. That follows from the basic principle that ignorance of the law (or in this case, the FA Rules) is no excuse. It was blindingly obvious to Mr Cellino that authorising and implementing the Scouting Agreement as a means of misleading the FA was an improper act…*"

We can find no basis on which that conclusion by the Commission could properly be overturned.

59. Dealing with the rhetorical question that was put to Mr Cellino in cross-examination and Mr Mill's suggestion that the FA is "*stuck*" with the answer that he gave, the argument assumes that it was necessary for it to be put to Mr Cellino that he knew that it would be a breach of the rules for the Scouting Agreement to be used as a means of disguising payments to Mr. Hughes. For the reasons given by the Commission as set out above it was indeed obvious that to use the Scouting Agreement for that purpose was improper.

60. The critical findings of fact at paragraphs 26, 28 and 29 of the Decision were supported by evidence and were findings which a reasonable tribunal was entitled to make on the basis of the evidence which it read and heard and which findings we cannot properly overturn.

The third issue

61. The third issue is whether Mr Cellino was denied a fair hearing on the basis that it was not put to him in cross examination that Mr Bean had advised him that it would be a breach of the FA Rules to pay Mr Hughes. The rules of fairness, whether arising at common law or under section 33 of the Arbitration Act 1996, are that a party must be given a reasonable opportunity of putting his case and of dealing with that of his opponent. On this general issue it is not necessary to go into the criminal law jurisprudence cited by Mr. Coltart, derived from ***Browne v. Dunn*** [1893] 6 R 67. We accept the submissions made by Mr Coltart on this well-known matter of principle, from which we did not understand Mr Mill to dissent.

62. Following from our reasoning on the second issue set out above, the question whether Mr Cellino was advised by Mr Bean that payment to Mr Hughes would be a breach of the FA rules was not essential to the charge found to be proved by the Commission. The case which Mr Cellino was required to have a fair opportunity to meet was that he improperly authorised the Scouting Agreement which concealed or misrepresented the reality of what had in fact taken place in order to facilitate payment to Mr Hughes. He was required to be given a fair opportunity to meet that case either through his evidence, whether written or oral, or in submissions.

63. We are entirely satisfied that Mr. Cellino had that fair opportunity. It is only necessary to refer to his witness statement at paragraph 25:

> *"I unequivocally deny at any stage did Mr Bean indicate to me there was anything wrong, illegal or untoward in signing this agreement. Further, at no stage did he or anyone else ever indicate to me that any payments being made under that agreement were in breach of any law or football regulation. Had that been the case I would have expected Mr Bean to have advised me of that fact."*

64. We have already referred to the question put to Mr Cellino in the course of his cross-examination:

> *"Q: The only way to fix it and fulfil your obligations was to deal with this through a scouting agreement because [Mr. Bean] told you the rules would prevent you doing this any other way. A: Yes"*

65. That question, having been preceded by the words *"You say that…"* was not followed up with a supplementary question as to whether he appreciated that the rules would also prevent the use of a Scouting Agreement, but Mr Cellino clearly appreciated that whether that agreement was "*wrong, illegal or untoward*" was a point he had to answer. That is why he had invested his credibility in pretending that the purpose of the Scouting Agreement was in part to meet the claims of another creditor, a point on which he was disbelieved by the Commission at paragraph 40 of the Decision.

66. We therefore dismiss the third ground of appeal. Mr Cellino received a fair hearing from the Commission.

<u>The fourth issue</u>

67. The fourth issue is whether the sanctions imposed on Mr Cellino were excessive.

68. The sanctions which were imposed on Mr Cellino by the Commission were that he:

(i) *is fined £250,000;*
(ii) *with effect from 1 February 2017, will be suspended for 18 months from being a director (as defined in section 250 of the Companies Act 2006) or shadow director (as defined by section 251 of that Act) of Leeds United Football Club Limited or any other company whose activities include any ownership (whole or partial) or operation of any football club playing in any competition sanctioned by the FA;*[1]
(iii) *with immediate effect and until the expiry of his suspension under (ii) above must not exercise any shareholder voting rights or any other rights or powers which he has in relation to Leeds United Football Club Limited in favour of the appointment of any person connected with him (as defined by section 252 of the Companies Act), though he is not required to take any steps to remove any existing director so connected with him; and*
(iv) *before 30th April 2017 or such later date as agreed with the FA is to attend and complete to the satisfaction of the FA an education programme covering the duties and responsibilities of an owner and director of an English professional football club including duties and responsibilities under the FA's Rules and regulations (the details of such training course to be provided to Mr Cellino by the FA); and if he has still failed to attend and complete such a programme by the end of his suspension under (ii), that suspension and the consequential order under (iii) will continue until he has done so*[2]*.*

69. Having rejected 9 of the 11 factors which had been advanced by way of mitigation on behalf of Mr Cellino, but giving him credit for: (i) the fact that he did not know, and was not recklessly or wilfully blind to the fact, that Mr Hughes was not an unauthorised agent; (ii) his previously clean disciplinary record and his "*last minute expression of regret*" and (iii) the recent positive steps taken at LUFC, the Commission explained why it regarded Mr Cellino's misconduct as "*very serious indeed*."

[1] The terms of this ban were subsequently varied by the parties to encompass "*all football activity*".
[2] At the hearing before us the FA envisaged that there might be some amendment of this provision by agreement.

70. The Commission effectively repeated its finding that Mr Cellino had actively perpetrated a dishonest sham to mislead the FA and to deliberately disguise breaches of the rules by LUFC in connection with a £10 million plus player transfer. It was noted that this had not been of spur-of-the-moment decision; he had had time to reflect. Further his role had been central.

71. As to sanctions in other cases, four decisions of FA Regulatory Commissions were cited to the Commission which expressly recognised that penalties should be *"fair and proportionate"* and *"broadly in line with any clearly established range of penalties for truly comparable cases"*. However, the Commission added that *"we see no such established range which should inhibit us…"* We note that we are not persuaded that the correct approach is necessarily to have regard to decided case only for the purpose of seeing to what extent they may "*inhibit*" a decision in any given case. We consider that it may be better to have regard to the extent to which earlier decisions can appropriately inform the approach to deciding sanction in the case under consideration.

72. Dealing first with the cases which were cited to the Commission, Mr Mill helpfully took us to each in turn, and we summarise his observations:

    (1) *The FA v Wycombe Wanderers & Phil Smith* (May 2014) was a case in which an Authorised Agent was suspended for 2 years, 18 months of which were suspended, in respect of what that Commission described as *"extremely serious"* breaches of Regulation C.2, having rejected the agent's evidence *"as being unreliable and contradictory"*, and deploring the aggressive manner in which he pursued payment knowing that he was not entitled to it.

    (2) *The FA v Sunderland & Abu Mahfuz* (May 2014) was a case in which the agent carried out agency activities on behalf of Unauthorised Agents, and the agent and club misrepresented the reality of the transaction to the FA. Mr Mill unsurprisingly asserts that this case was *"very similar"* to Mr Cellino's. The Commission in that case described the case as being *"a serious case of misconduct"* involving multiple breaches relating to a €4.5m transfer fee. Here too the suspension had been for 2 years, 18 months of which were suspended.

    (3) *The FA v Kleinman, Levack, Rahnama and Brighton & Hove Albion FC* (February 2015) case had involved the lodging of false declarations with the FA in circumstances which the Commission described as constituting *"serious offences which involved the respondents deliberately concealing information"* from the FA and *"acting in combination to deceive [the FA] by means of false declarations"* The agents were suspended for 14 months, 7 of which were suspended and fined £7,500 each. A club official was

suspended for 9 months, 6 of which were suspended and the club was fined £90,000.

(4) *The FA v Arsenal & Alan Middleton (October 2105)* was a case which Mr Mill accepts should be distinguished on the important ground that it involved negligent rather than dishonest breaches of Agents Regulations, resulting in the agent being fined £30,000 and suspended for 3 months, all of which were suspended.

73. Mr Mill also draws our attention to three decisions of Regulatory Commissions relating to discrimination cases in which suspensions in terms of weeks had been imposed. We do not refer to these in any detail because, while Mr Mill rightly points out that discrimination must always be regarded as an aggravating feature of any disciplinary case, we agree with Mr Coltart that these cases concern what he describes as "*entirely different types of offending*".

74. We have in mind in considering the appeal on sanction that the ground of appeal on which Mr Cellino must rely is that the Commission imposed a "*penalty, award, order or sanction that was excessive*". Equally, and by parity with an appeal on liability, it is necessary for an Appellant to specify why it would be substantially unfair to alter the original decision.

75. It is also important to remember we are constrained by the findings of the Commission set out at paragraph 54 above, since we have not overturned the Commission's findings as there expressed.

76. However, we have also taken on board – as articulated by Mr Mill – that other serious cases have resulted in partially suspended sentences (paragraph 72 above). Further, in no case did an individual suffer both a long suspension and a substantial fine.

77. Conversely, it is right to take into account that Mr Cellino was not only the Chairman of a senior club, but was also found by the Commission to be a powerful and dominant personality who had corrupted at least one other individual in the process, and was also clearly a man of considerable substance.

78. Having taken into account all the submissions made to us and bearing in mind particularly the fundamental principle that sanctions should be both fair and proportionate and in line with other comparable decisions, we have come to the conclusion that the sanctions imposed by the Commission were, to an extent, excessive. Having regard to seriousness of the deception that was perpetrated in this case but also to the range of penalties that have been imposed in other cases we have come to the conclusion that we would substitute a suspension period of 12 months (none of which should be suspended) and a fine of £100,000.

CONCLUSION

79. For the reasons set out above we dismiss the appeal against the finding of the Commission that Mr. Cellino committed a breach of FA Rule E3(1) as alleged at paragraph 3 of the charge dated 12 May 2016. However we vary the sanctions imposed by the Commission so that they are as recorded in paragraph 78 above.

80. It will be noted from our reasoning above that on a number of material points the argument required reference to notes taken by Junior Counsel and a pupil of what was said at the hearing in evidence or argument. In our view it would be preferable if in significant cases the FA ensured that a transcript be taken, which would avoid any dispute as to the accuracy of notes made by Counsel.

COSTS

81. Neither party at the hearing made submissions on costs. (They wished first to consider our decision.) We think it helpful, however, to record that we are minded to find that Mr Cellino pay the FA's costs of the appeal to be agreed, alternatively to be determined by us.

82. Should Mr Cellino wish to argue to the contrary, he should provide written submissions to the FA and to us within 14 days of the date of this decision. Within the same period the FA should provide to Mr Cellino and to us a Schedule of Costs.

ORDER

83. Once the costs matter is finalised, we suggest the parties agree a form of Order for the Award and submit the same to us for our approval.

Dated 2nd October 2017

Edwin Glasgow QC **Charles Flint QC** **Jane Mulcahy QC**