IN THE MATTER OF AN ARBITRATION UNDER RULE K OF THE RULES OF THE FOOTBALL ASSOCIATION

KARL OYSTON

Claimant

and

THE FOOTBALL ASSOCIATION LIMITED

Respondent

AWARD OF THE ARBITRAL TRIBUNAL

Introduction

1. This is the award of the Arbitral Tribunal, consisting of Tim Kerr QC (chairman), Desmond Browne QC and Charles Flint QC. We have been appointed to determine two arbitration claims brought by the claimant ("Mr Oyston"), against the respondent ("The FA"), in notices dated 15 and 20 April 2015, served in accordance with Rule K of the Rules of The FA ("the Rules").

2. Mr Oyston seeks declaratory relief to the effect that disciplinary proceedings brought against him by The FA in a letter dated 20 March 2015 are unlawful and should not proceed, and an order quashing or setting aside The FA's decision to bring the charge set out in that letter. The FA resists Mr Oyston's claim to that relief and contends that the charge has been lawfully brought and should be determined by a Regulatory Commission.

3. Mr Oyston's case is that certain text message exchanges between him and a Mr Stephen Smith ("Mr Smith") were sent in circumstances giving rise to a reasonable expectation of privacy on Mr Oyston's part, with the consequence

that it was contrary to the The FA's written policy and therefore unlawful to charge Mr Oyston with using abusive and/or insulting words during those exchanges.

4. We received written and oral argument from the parties at a hearing in London on 15 May 2015. Mr Oyston was represented by Brabners LLP, solicitors, and by Nicholas Randall QC and Sara Mansoori of counsel. The FA was represented by Polly Handford, its Head of Legal, Corporate, and by Kate Gallafent QC of counsel. The Tribunal is grateful to both parties and their representatives for their helpful contributions.

The Facts

5. Mr Oyston is the chairman of Blackpool Football Club ("the Club"). The FA is the governing body of association football in England. It exercises regulatory and disciplinary jurisdiction over players, clubs and club officials. It is common ground that Mr Oyston was at all material times a "Participant" to whom the Rules applied and that he was subject to the disciplinary jurisdiction of The FA. The Rules include an offence of "Misconduct", defined in Rule E.

6. On 20 May 2014, The FA published a statement on its website following its decision not to bring a disciplinary charge against Richard Scudamore, the chief executive of the FA Premier League, arising from certain emails sent by Mr Scudamore, which were subsequently made public. The FA's statement included the following:

> .... The FA does not as a matter of policy consider private communications sent with a legitimate expectation of privacy to amount to professional misconduct. The FA has applied this policy on an ongoing basis and in relation to numerous other cases.

7. In or around November 2014, Mr Oyston's personal mobile telephone number was made public on a social media site. Mr Smith obtained it and, on the morning of Saturday 15 November 2014, texted Mr Oyston, introducing himself as a fan dedicated to the aim of removing Mr Oyston as chairman of the

Club. Mr Oyston had never met Mr Smith but had heard he was active in an unofficial group of supporters of the Club.

8. Initially, Mr Oyston texted back "Please contact BSA" (Blackpool Supporters Club). Mr Smith's messages soon became abusive and personally insulting. Mr Oyston rose to the bait and, broadly, responded in kind, until the exchange descended to the level of mutual insults and abuse. In the light of the specific allegations made it is only fair to Mr. Oyston to observe that it was Mr. Smith who first used the word "retard" and who first made disparaging comments about the other's family. It is unnecessary to set out the detailed contents of the exchange, since it is not disputed by Mr Oyston for present purposes that he, as well as Mr Smith, used language that was insulting and abusive.

9. The exchange continued in similar vein until Monday 17 November 2014. Towards the end of it, Mr Oyston was sending messages inviting Mr Smith to "sod off please" and "go away for your own good". Mr Smith texted Mr Oyston saying:

> Keep it coming your [sic] just talking jargon ... You can never answer a question or have a reasonable conversation... Why not try that? Fully confidential ... Fan to chairman???? Or you going to do what you do all the time Karl and play dodge?

10. Mr Oyston's response to that message was "Fuck you". The exchange ended when Mr Oyston started responding "Please contact BSA" and Mr Smith indicated his intention to "report" Mr Oyston.

11. Soon afterwards, passages from the exchange of text messages were reproduced in the Sun newspaper. The messages also came to the attention of The FA, which received complaints about them. On 22 December 2014, the BBC reported on its website that Mr Oyston had apologised unreservedly for "stooping to the level of those threatening and abusing my family".

12. The FA wrote to Mr Oyston on 12 January 2015 asking Mr Oyston for an explanation, stating that certain of the messages could amount to an

"Aggravated Breach of FA Rule E3(1)" and indicating possible disciplinary proceedings. Mr Oyston replied on 23 January in some detail, to the effect that he and his family had suffered harassment and that the messages sent by him were private correspondence sent in the course of his private life and were never intended for publication.

13. The FA responded on 29 January, explaining that it "may bring disciplinary action in respect of communications sent in circumstances where there was no legitimate expectation of privacy", and invited Mr Oyston to add to what he had already said if he would like to "say any more about the nature of these communications and particularly whether you consider that you had a legitimate expectation of privacy when entering into text conversation with Mr Smith and if so why …. ."

14. Mr Oyston wrote back to The FA on 3 February 2015, asserting that he did indeed have a legitimate expectation of privacy when conversing by text message with Mr Smith. He relied on the following points in support of that contention:

(1) the text messages were sent from his private mobile number to Mr Smith's private mobile number, not via social media;

(2) they were sent from home on a Saturday morning, outside business hours;

(3) they were sent in response to unsolicited messages following publication of Mr Oyston's private mobile number without his consent;

(4) Mr Smith refused to make his case to the BSA in a public manner, choosing instead to communicate directly and privately with Mr Oyston;

(5) the subject of the exchanges included the personal and private lives of Mr Oyston and Mr Smith and their families;

(6) Mr Oyston had no reason to suppose that Mr Smith would subsequently publicise the content of the exchanges;

(7) Mr Oyston had not intended to bring upon himself and the Club the embarrassment that publication of the exchanges would cause;

(8) the private nature of the exchanges is shown by the unguarded content of the messages sent by Mr Oyston;

(9) Mr Smith had himself alluded to a conversation that was "[f]ully confidential"; and

(10) publication of the messages had breached Mr Oyston's rights under Article 8(1) of the European Convention on Human Rights ("ECHR").

15. The FA considered the contents of Mr Oyston's letters of 12 and 23 January 2015 and, having done so, decided to reject his contention that he had a legitimate expectation of privacy and to charge him with misconduct. On 20 March 2015, the FA's Senior Regulatory Legal Advisor, Dario Giovanelli, wrote to Mr Oyston stating that The FA had considered the contents of those two letters, and that:

> ... we do not accept that the context of the exchange, the medium by which it was communicated, nor your mistaken understanding of Mr Smith's intention regarding the messages gave rise to a legitimate expectation of privacy in this case. On the contrary, we consider that the very nature of the exchange (which was for the most part abusive and hostile), your intention in using words (which were designed to insult the recipient) and your relationship with the other party to it (essentially that of a stranger) created an environment in which no legitimate expectation of privacy could have arisen.
>
> Put simply, we do not accept that you were entitled to have a legitimate expectation of privacy in circumstances where you became embroiled in a mutually abusive exchange with a supporter of your Club who was unknown to you.

The Proceedings

16. Also on 20 March 2015, The FA charged Mr Oyston with five separate instances of misconduct through use of abusive and/or insulting words, contrary to Rule E3, in five text messages sent by Mr Oyston during his exchange with Mr Smith. Mr Oyston does not dispute before us that they were abusive and/or insulting. Certain passages (underlined in the charge letter) were alleged to constitute an "Aggravated Breach" on the basis that they referred to disability.

17. So far as material here, Rule E3 provides:

> (1) 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 or use ..... threatening, abusive, indecent or insulting words or behaviour.
>
> (2) A breach of Rule E3(1) is an "Aggravated Breach" where it includes a reference, whether express or implied, to any one or more of the following:- ..... disability.

18. The Chairman of the Judicial Panel of The FA was asked to consider a request from Mr Oyston for an extension of time to formulate his response to the charge. As recorded in an email of 30 March 2015, he granted an extension until 14 April and observed that if Mr Oyston wished to "challenge the jurisdiction of The FA in this matter, this should be placed before the appointed Commission as a preliminary issue ... ."

19. It was common ground before us that this was a reference to the procedural powers of the Regulatory Commission required to determine the charge, which are set out in The FA's Regulations for Football Association Disciplinary Action ("the Regulations"), and include the following relevant provisions:

> 3 THE CHARGE
>
> 3.1 The decision that facts or matters may give rise to Misconduct and that a Charge be brought will be made by the Chief Regulatory Officer (or his nominee) on behalf of The Association.
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> ...
>
> 4 DIRECTIONS
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> ....
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> Preliminary Applications

4.2 A party to the disciplinary proceedings may apply for issues to be dealt with on a preliminary basis (a "Preliminary Application"). A Preliminary Application must be made as soon as practicable following service of the Charge, and in any case no later than 10 working days prior to the full hearing date.

....

In determining the Preliminary Application the relevant Regulatory Commission shall have the power to:

- Dismiss the Preliminary Application summarily.
- Order that the issues raised in the Preliminary Application be dealt with as part of the main proceedings and not on a preliminary basis.
- Allow or dismiss the Preliminary Application in full or in part.
- Make such other order as it considers appropriate.

The decision of a Regulatory Commission as to matters subject to a Preliminary Application shall be final and binding and there shall be no right of further challenge.

General Procedures

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4.11 The decision of the Regulatory Commission on matters referred to in this Regulation 4 is final and not subject to appeal.

....

7 DETERMINING THE CHARGE AND PENALTY

7.1 The Regulatory Commission will first consider whether or not a Charge is proven. .....

....

WRITTEN STATEMENT OF DECISION

9.1 The Regulatory Commission shall as soon as practicable send to the Participant Charged and the Chief Regulatory Officer .... , a written statement of its decision, which shall state:

(a) the Charge(s) considered and whether admitted or denied;

(b) the decision as to whether Misconduct has been proved or not; and

(c) any penalty or other order imposed.

.....

> 9.3 The Regulatory Commission shall, upon the written request of the Chief Regulatory Officer … or Participant Charged lodged with the Secretary of the Regulatory Commission within seven days of the date of the written statement of its decision, state in writing:
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> (a) the findings of fact made by it; and
>
> (b) the reasons for its decision finding the Charge(s) proved; and
>
> (c) the reasons for any penalty or order.
>
> 9.4 Participants and The Football Association shall have the right to appeal a decision of a Regulatory Commission to an Appeal Board. Such appeals shall be conducted in accordance with the Regulations for Football Association Appeals. There shall be no further right of challenge in respect of decisions of the Regulatory Commission, which are otherwise final and binding.

20. After further correspondence, Mr Oyston served notices of arbitration under Rule K, resulting in our appointment. On 20 April 2015 the disciplinary proceedings were stayed by the appointed chairman of the Regulatory Commission, with the consent of the FA, given on the conditions that the arbitration proceedings must proceed expeditiously and must be limited to the question of the jurisdiction of The FA to bring the charge and the ability of Mr Oyston to challenge that jurisdiction by arbitration proceedings under Rule K.

Reasoning and Conclusions

21. It was common ground that we have, as arbitrators, the same supervisory jurisdiction over decisions of The FA's disciplinary organs as the High Court would have in the absence of a relevant arbitration clause. The jurisdiction is "very similar to that of the court on judicial review", as Richards J (as he then was) observed in *Bradley v. Jockey Club* [2004] EWHC 2164 (QB) at paragraph 37, cited with approval on appeal by Lord Phillips MR, [2005] EWCA CIV 1056, at paragraph 17.

22. It was also common ground that, as in a judicial review claim, the Tribunal's jurisdiction to grant or withhold relief is discretionary and the discretion to grant relief is normally not exercised if there is a satisfactory alternative remedy

open to the claimant. We have to decide, first, whether we should determine Mr Oyston's challenge to The FA's decision to bring the charge against him; and secondly, if we decide to determine that challenge, whether The FA's decision to bring the charge was unlawful.

The first issue: should the Arbitral Tribunal determine Mr Oyston's challenge to The FA's decision to bring the charge?

23. Mr Randall QC, for Mr Oyston, submitted that this was a rare and unusual case in which arbitration under Rule K is the only means of challenging The FA's decision to charge Mr Oyston. He contended that the decision to bring the charge was founded on the proposition that Mr Oyston's conduct fell outside the scope of The FA's stated policy, and that an arbitral tribunal appointed under Rule K is the sole body with the power to remedy an unlawful decision as to the application of the policy.

24. He argued that the Regulatory Commission has no power, express or implied, to interpret the policy and give a ruling on the legality of a charge based on a decision that a person's conduct was not such as to give rise to a legitimate expectation of privacy, within the meaning of the policy. The Regulatory Commission only has power, Mr Randall submitted, to apply the Rules; and the policy is not part of the Rules and therefore not part of the contractual relationship between the parties.

25. It followed, said Mr Randall, that the Regulatory Commission could not, under regulation 4.2 of the Regulations, properly treat the lawfulness of the decision to bring the charge, applying The FA's policy, as the subject of a "Preliminary Application", as the Chairman of the Judicial Panel had directed. If the Regulatory Commission were to proceed as directed by the Chairman of the Judicial Panel, and if in law the charge were bad, any decision on the merits from the Regulatory Commission would be an expensive nullity.

26. Both parties referred the Tribunal to the decision of Sir Martin Nourse given on 5 December 2007, sitting as a sole arbitrator under Rule K, in *Stretford v. The FA Ltd.* In *Stretford*, Sir Martin Nourse declined to determine Rule K challenges to disciplinary proceedings brought against Mr Stretford, who sought a determination that his challenges should be adjudicated upon in the arbitration rather than being allowed to proceed to a disciplinary hearing.

27. In the arbitration, Mr Stretford asserted that the decision to appoint a Disciplinary Commission in his case was a breach of his rights under Article 6 of the ECHR and a breach of natural justice; and that certain rules under which he was charged were not applicable to his conduct or were in unreasonable restraint of trade.

28. Mr Randall submitted that in *Stretford*, unlike the present case, the disciplinary body had power under the applicable rules to determine all the matters raised in the arbitration proceedings, and it was therefore appropriate, in the usual way, to allow the disciplinary body to exercise its functions and not to intervene and interfere with those functions.

29. He argued that in the present case, by contrast, the presence of a stated policy not forming part of the Rules or of the contractual relationship between the parties, was a distinguishing feature which meant that the decision to charge Mr Oyston could only be the subject of an arbitral process permitting exercise of the supervisory jurisdiction articulated in *Bradley*, which the Regulatory Commission does not possess.

30. There was therefore, submitted Mr Randall, no alternative remedy and there could be no bar to arbitration arising from the requirement to exhaust domestic remedies before resorting to arbitration. Nor would there be any right of appeal against a purported decision of the Regulatory Commission that the decision to bring the charge was lawful. It was no answer for The FA to agree, as it had done, to confer such a right of appeal by agreement on an ad hoc basis.

31. In the alternative, Mr Randall submitted that even if that analysis was wrong and the Regulatory Commission could itself determine the legality of the decision to charge Mr Oyston, the Tribunal should accept the invitation to determine the issue now since the parties were before the Tribunal, the issue had been raised and was suitable for determination by the Tribunal as a matter of good case management and in the interest of saving costs.

32. For The FA, Ms Gallafent QC submitted that we should not entertain Mr Oyston's challenge. She did not dispute that we have jurisdiction to do so, but relied on the well known proposition that a reviewing court or tribunal should not exercise its review jurisdiction where there is a viable alternative remedy and should only interfere before the event in the most exceptional cases, of which this is not one.

33. Ms Gallafent pointed out that Rule K1(b) of the Rules provides that no arbitration shall be commenced under the Rules unless and until the claimant "has exhausted all applicable rights of appeal pursuant to the Rules and Regulations of The Association". She submitted that Mr Oyston had not done so; and the Regulatory Commission could decide whether the decision to bring the charge was flawed and unlawful, applying the usual public law principles.

34. Ms Gallafent argued that the power to decide whether a charge has been lawfully brought is a necessary incident of the power to determine guilt or innocence. If the Regulatory Commission found that a charge had been unlawfully brought, it would simply dismiss the charge. She argued that there was nothing unlawful in a decision that "goes no further than to place the allegations in question before a disciplinary tribunal" (*R (Aurangzeb) v. Law Society* [2003] EWHC 1286, per Newman J at paragraphs 4-5).

35. Ms Gallafent contended that there is no "bright line" separating different types of defence that can and cannot be run before a Regulatory Commission. A challenge could be brought on the ground of irrationality or other standard

public law grounds such as disregard of relevant considerations when deciding to bring a charge. Mr Oyston's challenge was premature and if it were entertained, that would encourage undesirable satellite litigation which would increase costs. Ms Gallafent also submitted that The FA had not agreed to confer ad hoc jurisdiction on the Regulatory Commission to determine the merits of this challenge, because that was not necessary.

36. She submitted that the position here was in substance no different to that in *Stretford*, where the arbitrator was invited to determine challenges attacking the foundation for The FA's charges against Mr Stretford in that case, and rightly declined to do so. She referred us to the statement of Coleridge J, giving the judgment of the court in *Bunbury v. Fuller* (1853) 9 Ex 111, at 140, to the effect that a judge with limited jurisdiction within a geographical area must inquire into whether a contested matter arose within that area or outside it.

37. She also referred us to the written statement of reasons for the decision of a Regulatory Commission (chaired by Nicholas Stewart QC) of 8 September 2008, in *The FA v. Bethell*. Mr Bethell, employed as a member of a club's ground staff, was charged with misconduct arising from an incident at a Premier League match, but the charge against him was dismissed on the ground that he had never agreed with his employer to submit to the disciplinary jurisdiction of The FA.

38. Finally, Ms Gallafent submitted that if it was correct that the Regulatory Commission had the power to determine the legality of The FA's decision to charge Mr Oyston, it would be wrong for this Tribunal to accept the invitation to determine that same point. A claimant should not be allowed by a fait accompli to invoke convenience and good case management as a basis for undermining the autonomy of the Regulatory Commission and the proper exercise of its functions.

39. We turn to our reasoning and conclusion on this issue. We start from the proposition that it should be rare indeed for an arbitral body to intervene and determine a preliminary challenge made in the course of disciplinary proceedings. We agree with The FA's submission that it is undesirable and normally wrong for a Rule K arbitral body to determine a preliminary issue that is properly to be raised before, and determined by, the disciplinary body with the function of adjudicating in disciplinary proceedings.

40. However, in the present case we cannot accept the proposition that the Regulatory Commission has the power to determine the issue raised by Mr Oyston in this arbitration, namely whether The FA acted lawfully in deciding to charge him with misconduct, in the light of The FA's policy of not treating as misconduct the content of communications sent in circumstances giving rise to a legitimate expectation of privacy.

41. There are two features in this case which prevent us from leaving the issue to be determined by the Regulatory Commission. The first is The FA's stated policy, which, unusually, operates outside the Rules and not as part of them. The second is the absence of any procedural mechanism giving the Regulatory Commission power to determine a challenge, exercising the review jurisdiction identified in *Bradley*, to the legality of a decision to bring a charge, founded on the application and scope of that policy.

42. These unusual features of the case have no counterpart in the *Stretford* case decided by Sir Martin Nourse. In *Stretford*, there was no free standing challenge to the antecedent decision of The FA to charge Mr Stretford, and no facts relevant to such a challenge which fell outside the scope of the applicable rules themselves. In *The FA v. Bethell*, the Regulatory Commission was empowered and required to decide the question of precedent fact whether Mr Bethell had agreed to submit to The FA's disciplinary jurisdiction.

43. In the present case, the width of the Regulatory Commission's powers must be considered. They are defined in and circumscribed by the Regulations. The right of appeal is restricted to an appeal on the merits. As regulation 4.2 expressly states, there is no right of appeal against a decision on a Preliminary Application. Neither the Rules nor the Regulations confer any jurisdiction on the Regulatory Commission in respect of the policy at issue in this case. Its powers appear to be restricted to whether the charge is proven on the facts: see regulation 7.1.

44. For those reasons, we prefer the submissions of Mr Oyston on this issue and we conclude that we are the only body empowered to determine whether The FA acted lawfully in charging Mr Oyston in this case. We therefore conclude that we should, in the exceptional circumstances of this case, determine the challenge made by Mr Oyston in this arbitration.

45. In doing so, we do not propose to pre-empt the Regulatory Commission's decision on the merits, if Mr Oyston has been properly charged. Nor do we have to decide whether the policy in fact applied to the conduct of Mr Oyston in sending the text messages which are the subject of the charge, for that is a matter for the lawful judgement of The FA as discussed below. We need only decide whether it was legally open to The FA to bring the charge.

The second issue: did the FA act lawfully in deciding to bring the charge against Mr Oyston?

46. In order to determine this issue, we have to examine the scope of The FA's stated policy and whether The FA could properly take the view that Mr Oyston did not, when sending the text messages which are the subject of the charge, have a "legitimate expectation of privacy". We therefore have to examine that concept, but only as far as necessary to determine whether a reasonable prosecutor could take the view that Mr Oyston did not, on this occasion, have such a legitimate expectation.

47. Neither party submitted that there was any practical difference between the phrase "legitimate expectation of privacy" in The FA's policy statement of 20 May 2014, using the language of public law, and the phrase "reasonable expectation of privacy" used in private law claims in tort for misuse of private information, where the claimant relies on rights derived from Article 8 of the ECHR. We agree that the two formulations can for present purposes be treated as synonymous.

48. Mr Randall submitted that Mr Oyston plainly had a reasonable expectation of privacy when sending the text messages in question, and that no reasonable prosecutor could decide otherwise. He invited us to quash or declare invalid The FA's decision to charge him. Alternatively, even if it were legally open to The FA to form the view that Mr Oyston's conduct fell outside the policy, The FA had reached that permissible conclusion by an impermissible route and we should, on that alternative case, remit the back to The FA for reconsideration.

49. Mr Randall argued that the content of The FA's policy statement corresponded to the first stage of the two stage test used to determine whether there has been an actionable interference with a right protected by Article 8(1) of the ECHR, i.e. an interference that is not justified under Article 8(2). The first stage of the test, submitted Mr Randall, determined whether a person had a reasonable expectation of privacy in a particular situation.

50. He submitted further that where communications are "correspondence", within Article 8(1), they are nearly always protected, since the protection of Article 8(1) expressly extends to protection of a person's correspondence. He noted that text messages are correspondence (as accepted by Nicol J in *Ferdinand v. MGN Ltd* [2011] EWHC 2454 (QB), at paragraph 55), and invited us to reject The FA's pleaded contention (based on *AD v. Netherlands*, App. No. 21962/93) that correspondence loses the protection of Article 8(1) once received and used by the recipient.

51. Mr Randall further submitted that a person necessarily has a reasonable expectation of privacy if Article 8 protection is engaged, i.e. where a reasonable person of ordinary sensibilities in the same position as the claimant would feel that the communications should not be published (*Murray v. Express Newspapers plc* [2009] Ch 481, per Sir Anthony Clarke, judgment of the court, at paragraph 39). He emphasised that this is a low threshold and should not be confused with the proportionality of any interference, at the second stage.

52. At the second stage, a balancing exercise must be undertaken to determine whether interference with the claimant's Article 8 right is justified under Article 8(2). The FA, said Mr Randall, had undertaken not to charge a person with misconduct if his Article 8 right to respect for his private and family life, or his correspondence, were engaged, even if interference with the right by publishing the communications in question could be justified.

53. He submitted that The FA had misdirected itself by erroneously considering whether it was justifiable to interfere with Mr Oyston's expectation of privacy, rather than by considering only whether he had that expectation in the first place. As to the facts, Mr Randall relied, in effect, on the same points as those in Mr Oyston's letters of 12 January and 3 February 2015, summarised above.

54. A proper evaluation of those features, applying the policy correctly in the light of the jurisprudence would, submitted Mr Randall, necessarily and inexorably should lead The FA to the conclusion that Mr Oyston enjoyed a reasonable expectation of privacy when he sent the text messages in question, and the contrary decision of The FA was accordingly flawed and unlawful.

55. Ms Gallafent, for the FA, accepted that text messages are "correspondence", within Article 8(1), but submitted that communicating by "correspondence" did not necessarily mean the sender enjoyed a reasonable expectation of privacy. She explained that while The FA relied on *AB v. Netherlands* to show that correspondence would usually lose its Article 8 protection once received, The

FA did not submit that the sender was excluded from Article 8 protection if he or she could invoke the right to respect for private or family life.

56. Ms Gallafent submitted that the question confronting The FA when it made its decision to charge Mr Oyston was not whether Article 8 rights were engaged, but whether he enjoyed a reasonable expectation of privacy, and according to the Court of Appeal in *Murray* (at paragraph 36) that question:

> … is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

57. Ms Gallafent submitted that no one in Mr Oyston's position could reasonably expect that Mr Smith should keep the communications confidential. He made it clear at the start that he was a disgruntled supporter of the Club who intended to secure Mr Oyston's removal if he could. There was no pre-existing relationship between the two men. He deliberately provoked Mr Oyston into responding, voluntarily, to insults with insults.

58. In all the circumstances, submitted Ms Gallafent, a reasonable person with ordinary sensibilities would fairly expect Mr Smith to publish the texts if they suited his purpose of ousting Mr Oyston. That proposition was not altered, she submitted, by the likelihood that Mr Oyston would be embarrassed by disclosure of the text messages sent by him and might well wish them not to be published. Nor, she went on to submit, did it assist Mr Oyston that the abuse was mutual and not all on one side.

59. Ms Gallafent pointed out that Mr Smith's offer of a confidential conversation on a "fan to chairman" basis came very late in the dialogue, probably on the Monday, 17 November 2014, and clearly signalled that Mr Smith was not treating the dialogue as having been confidential up to that point, since it was

an offer to change the basis of the conversation, not to continue it on the same basis.

60. In the light of those submissions, Ms Gallafent submitted that, far from being perverse and unlawful, the decision to charge Mr Oyston was correct. Further, she stated that The FA had considered the points made in correspondence by Mr Oyston and had properly reached the view that they were not persuasive in favour of a reasonable expectation of privacy, so that the decision to charge Mr Oyston was not irrational nor perverse even if the Regulatory Commission should subsequently take a different view.

61. Having considered the facts and the parties' rival contentions, our reasoning and conclusions are as follows. We agree with The FA that the correct starting point is not Article 8 of the ECHR as such, but the FA's policy of not treating as misconduct words used on an occasion where the user enjoyed a "legitimate expectation of privacy". We regard those words as meaning the same as a "reasonable expectation of privacy" as used in recent cases articulating the scope of the developing tort of misuse of private information.

62. We do not agree with Mr Oyston's submission that if the method of communication used is "correspondence" within Article 8(1), which includes text messages, the sender necessarily has or probably has a reasonable expectation of privacy and thus must benefit from The FA's policy. The method of communication is but one component of the factual examination which must be undertaken, taking account of all the circumstances of the case (see the citation above from paragraph 36 of the court's judgment in *Murray v. Express Newspapers Ltd*).

63. Nor do we accept Mr Randall's submission that the fact that the messages were mutually abusive and insulting supports Mr Oyston's case that he had a reasonable expectation of privacy. We agree with Ms Gallafent's point that Mr Smith made clear his intention to dislodge Mr Oyston from the chairmanship of

the Club if he could; and that a reasonable person in Mr Oyston's position might, arguably, expect Mr Smith to publish the text messages if he thought that would help to secure Mr Oyston's removal.

64. The factual examination of all the circumstances of the case is for the Regulatory Commission to undertake, if the charge was lawfully brought by The FA. As already noted, our role is limited to deciding whether a reasonable prosecuting authority could decide to bring disciplinary proceedings against Mr Oyston based on the text message exchanges, in the light of The FA's stated policy.

65. We have no difficulty in concluding that The FA's decision to bring the charge was lawful, and is not made unlawful by the policy. We are clear that a reasonable prosecutor could take the view adopted by The FA here, that on the facts of Mr Oyston's case, he did not have a reasonable expectation of privacy, and that his case therefore fell outside the policy and not within it.

66. The letter dated 20 March 2015 shows that proper consideration was given to Mr Oyston's reasons, stated in correspondence, for contending that he had a reasonable expectation of privacy. The letter from Mr Giovannelli, The FA's Senior Regulatory Legal Advisor, rejected the contention that a reasonable expectation of privacy was present, in the light of the context of the exchange, the medium by which it was communicated, and Mr Oyston's mistaken understanding that Mr Smith did not intend to publish the messages.

67. In the same letter, Mr Giovannelli went on to state The FA's view that the abusive and hostile nature of the exchange, Mr Oyston's intention to insult Mr Smith by using the words he used, and the absence of any prior relationship between the two men, created an environment in which Mr Oyston had no legitimate expectation of privacy. Mr Giovannelli and The FA reached that view after considering Mr Oyston's contrary arguments.

68. It is not for us to say whether that view is correct or not. It is sufficient for us to decide that it was lawful for The FA, acting rationally as a disciplinary prosecuting authority, to reach the view it reached, and to decide on the basis of that view to bring the charge against Mr Oyston. There was nothing perverse or irrational about that decision; nor was the reasoning leading to it flawed by disregard of relevant considerations, having regard to irrelevant ones, or otherwise.

69. We therefore decide the second issue in favour of The FA. The decision to bring the charge against Mr Oyston was lawful and the charge should now be determined by the Regulatory Commission.

The Tribunal's Decision

70. For those reasons, the Tribunal's decision is as follows:

(1) The FA's decision to bring the charge against Mr Oyston is amenable to the Tribunal's review jurisdiction;

(2) in the most unusual circumstances of this case, it is appropriate to exercise that jurisdiction;

(3) The FA's decision to bring the charge against Mr Oyston was not unlawful and the charge was properly brought.

71. Mr Oyston's claim is therefore dismissed. Subject to any further written representations from the parties (which should be sent within seven days from the date of this Award), we are minded to order that Mr Oyston shall pay The FA's legal costs and costs of the arbitration, to be assessed by the Tribunal if not agreed. If the parties require costs to be assessed, they should inform the Tribunal.

Tim Kerr QC, Chairman

Desmond Browne QC

Charles Flint QC

Dated: 21 May 2015