

IN THE MATTER OF FOOTBALL ASSOCIATION
DISCIPLINARY PROCEEDINGS

BETWEEN:

THE FOOTBALL ASSOCIATION

Applicant

- and -

JOHN GEORGE TERRY

Respondent

RULING OF THE FULL REGULATORY COMMISSION
FOLLOWING THE SUBSTANTIVE DISCIPLINARY HEARING
HELD BETWEEN 24TH AND 27TH SEPTEMBER 2012

1. BACKGROUND

1.1 These disciplinary proceedings arise out of an incident that occurred during an FA Premier League match on 23rd October 2011 between Queens Park Rangers FC (QPR) and Chelsea FC at QPR's Loftus Road ground. As the match approached its conclusion, QPR were winning 1-0. A number of players had been cautioned on both sides, and Chelsea had had two players sent off. Chelsea were therefore down to nine men and 'chasing the game' when the incident occurred.

1.2 Much of what happened for a matter of minutes from around the 84th minute of the game, and which is material to these proceedings, is not in dispute. The sequence of events began when a QPR player intentionally kicked the ball out

of play to enable one of his teammates, who had been injured, to receive attention. Contrary to custom and convention, when the throw-in was taken, Chelsea did not give the ball back to QPR. Play continued and the ball went out of play again for another Chelsea throw-in. Mr. Terry went up into attack and took up a position in the QPR penalty area. When the throw-in was taken he challenged for the ball with the QPR defender, Anton Ferdinand. Contact was made between them, Mr. Terry missed the ball and went to ground. He appealed for a penalty, but play was allowed to continue. Mr. Ferdinand was annoyed at Mr. Terry who he thought had gone down too easily and said to him *"get up, you're fucking bigger than me."*

- 1.3 Shortly after Mr. Terry had got to his feet, he barged into Mr. Ferdinand with his shoulder. The latter reciprocated with a shoulder barge of his own and said *"what are you doing?"* Mr. Terry momentarily appears to kick out at Mr. Ferdinand on the film footage. Shortly afterwards, as Chelsea were attacking, the Referee stopped play after one of his Assistants had brought to his attention the altercation between Mr. Terry and Mr. Ferdinand. A free-kick was awarded to QPR. As they were still within close proximity of one another, Mr. Terry called Mr. Ferdinand *"a cunt"* and made a gesture with his hand across his nose, implying that Mr. Ferdinand's breath smelt. The Referee intervened, as did at least one Chelsea player.

1.4 Mr. Terry then proceeded to run back towards the Chelsea half in order to take up a defensive position and await the free kick. For a time, he had his back to Mr. Ferdinand. Mr. Ferdinand started to move up the pitch in the direction of the half-way line and shouted out at Mr Terry, "*how can you call me a cunt, you shagged your team mate's missus, you're the cunt.*" Mr. Ferdinand also made a slow fist pump gesture with his right hand, suggesting sex (a reference accompanying what he said). Once he was back in the Chelsea half of the pitch, Mr. Terry turned round to face the play and saw the fist gesture that Mr. Ferdinand was making, and which was clearly directed at him.

1.5 At this juncture, there is no dispute on his part that Mr. Terry used the following words (although Mr. Ferdinand claims not to have heard them at the time):

"fuck off, fuck off, ... fucking black cunt, fucking knob-head."

There is also no doubt that Mr. Terry said something after "*fuck off, fuck off*," but before "*fucking black cunt, fucking knob-head.*" The available film footage of the incident, which was taken from different camera locations, shows another Chelsea player - John Obi Mikel from one angle, and Ashley Cole from another - briefly obscuring Mr. Terry's face as he uttered the missing word or words. There is a dispute as to what they were. The significance of this will be discussed in due course.

1.6 The abusive exchange between Mr. Terry and Mr. Ferdinand ended there. The match ended shortly afterwards and QPR retained their lead to win 1-0. Mr. Terry and Mr. Ferdinand did not shake hands after the match. On his evidence, Mr. Ferdinand offered to shake hands with Ashley Cole, but the latter refused, saying *"nah, you can't talk to JT like that."* Mr. Ferdinand said *"what do you mean, if he's willing to give it out, he has got to take it."* Mr. Ferdinand then went to celebrate with the QPR fans and was one of the last players to leave the pitch. An altercation took place in the tunnel following the game, although it was unconnected with what had taken place between Mr. Terry and Mr. Ferdinand.

1.7 Approximately one hour after the match ended, Mr. Ferdinand attended at the away team's dressing-room, at Mr. Terry's request. There, he met Mr. Terry together with Mr. Cole. The first thing that Mr. Ferdinand claims Mr. Terry said to him is *"What happened?"* Mr. Ferdinand says that he replied *"nothing."* Mr. Terry then asked whether Mr. Ferdinand thought that he (Mr. Terry) had racially abused him (Mr. Ferdinand). On Mr. Ferdinand's account, Mr. Terry either said *"Do you think I called you a fucking black cunt?"* or *"Do you think I racially abused you?"* Mr. Ferdinand then claims to have said *"No, I didn't hear anything like that."*

1.8 There was then reference to something that Mr. Cole thought that Mr. Ferdinand had said to him to the effect that Mr. Terry had used racist abuse

towards Mr. Ferdinand. Mr. Ferdinand said that he had "*never*" said that to "*Ash.*" He claims to have been confused by this as he had no idea what Mr. Cole was talking about, as the latter had not said that to him either during or after the match. Mr. Terry then said "*what did you say?*" to which Mr. Ferdinand replied "*you called me a cunt so I said that shagging your team mate's missus was being a cunt.*" On Mr. Ferdinand's evidence, Mr. Terry then said "*Its handbags innit, its what happens on the pitch, it happens.*" Mr. Terry then shook Mr. Ferdinand's hand and the latter left the dressing room.

- 1.9 Later on in the evening, when Mr. Ferdinand went up to the player's lounge, Mr. Ferdinand's wife asked him if Mr. Terry had racially abused him. She showed him a clip from the game which included Mr. Terry using the words "*fucking black cunt*". Mr. Ferdinand says that he was in shock, although it made sense of the conversation that he had had with Mr. Terry and Mr. Cole in the dressing room.

2. THE CRIMINAL PROCEEDINGS

- 2.1 The incident was captured, albeit imperfectly, at a point during the critical phase when Mr. Terry uttered the offending words. A film clip of the incident was posted on You-Tube at some point in time after 6.18pm on the evening of the match (although when it was capable of being downloaded is unclear). A complaint was subsequently made to the police that Mr. Terry had racially

abused Mr. Ferdinand. Parallel investigations were commenced by both the police and the FA.

2.2 On 22nd December 2011, Mr. Terry was charged with a racially aggravated public order offence. The criminal charge took primacy and the FA investigation and any disciplinary proceedings that it might bring were put on hold. Application was also made by Chelsea FC for the disciplinary proceedings to be stayed until after the criminal case had concluded. Shortly after his first court appearance in early February 2012, when the criminal trial was delayed until after the European Football Championships, the FA relieved Mr. Terry of the England captaincy. This led to the resignation of the England coach, Fabio Capello.

2.3 A trial took place between 9th and 13th July 2012 before Mr. Howard Riddle, the Chief Magistrate at Westminster Magistrates Court. Mr. Terry was acquitted. At the conclusion of the trial, perhaps because of the high profile nature of the case, the Chief Magistrate produced a written judgment. Reference will be made to it in due course.

3. THE FA DISCIPLINARY PROCEEDINGS

3.1 Following the outcome of the criminal proceedings, the FA reviewed the position and, on 27th July 2012, charged Mr. Terry with Misconduct pursuant to Rule E.3(1) of its Rules and Regulations, which included a reference to the

ethnic origin and/or colour and/or race of Mr. Ferdinand within the meaning of Rule E.3(2).

3.2 In his Answer, dated 3rd August 2012, Mr. Terry denied the charge and raised a number of preliminary issues, including the validity of the charge letter. He also challenged the jurisdiction of the FA to bring disciplinary proceedings against him and contended that they were an abuse of process on several grounds. Those matters, together with a significant and wide-ranging request for specific disclosure of documents were all dealt with at two preliminary issues hearings by the Chairman of the Commission sitting alone.

3.3 Save where it may be necessary to do so, in order to place the issues at the substantive hearing into context, no further reference will be made in this Ruling to the preliminary issues. Suffice to say, that Mr. Terry's application to stay the proceedings as an abuse of process was dismissed, as was his submission that Regulation 6.8 of the FA's Disciplinary Regulations represented a procedural bar to the FA proceedings with its case against him.

3.4 As has already been noted, there is no dispute that Mr. Terry used the words "*fucking black cunt*" and that those words were directed at Mr. Ferdinand. His defence is that the words were spoken by way of forceful rejection/inquiry to an accusation that Mr. Ferdinand had made first, namely that Mr. Terry had racially abused him. In common with the Crown's case in the criminal

proceedings, the FA's case is that Mr. Terry said the words by way of an insult to Mr. Ferdinand. It is not the FA's case that Mr. Terry is a racist. There is a large body of testimonial evidence, including statements from black footballers, to say that he is not.

3.5 Although he admits that he used abusive and insulting words and behaviour towards Mr. Terry - and self-evidently did - Mr. Ferdinand was not charged by the FA with Misconduct. This is because the Referee did not apply any on-field sanction and unless the conduct which FA Rule E.3(1) contemplates is shown to have been directed at a match official, or third party (*e.g.* a spectator), the FA's position is not to take retrospective action. In this case, though, Rule E.3(2) is engaged in Mr. Terry's case, and because of the more serious nature of his alleged Misconduct, a charge was brought against him.

3.6 However, in presenting the FA's case to the Regulatory Commission, Mr. Laidlaw QC put the FA's position in this way: if the Commission were to find, on the balance of probabilities, that Mr. Terry only used the words "*fucking black cunt*" by way of forceful rejection/inquiry, the FA would not invite the Commission to find that he should be found guilty of Misconduct, or that any sanction should be imposed. Accordingly, and contrary to media comment, although Mr. Terry himself admits that he directed the words "*fucking black cunt*" at Mr. Ferdinand, that fact alone is not enough for him to be found guilty of Misconduct in this particular case. The FA accepted that it had to satisfy the

Commission that the words were spoken by Mr. Terry by way of an insult to Mr. Ferdinand.

4. THE BURDEN AND STANDARD OF PROOF

4.1 The burden of proving the charge rests with the FA.

4.2 The standard of proof is the balance of probabilities. The relevant standard applicable to the charge in this case is complicated by the fact that the test that appears in the FA's Disciplinary Regulations at the time when the offence was allegedly committed is expressed differently to the revised test that was introduced on 1st July 2012, prior to the letter of charge against Mr. Terry.

4.3 In the 2011/12 FA Handbook, Regulation 7.3 provides that:

"The applicable standard of proof shall be the flexible civil standard of the balance of probability. The more serious the allegation, taking into account the nature of the Misconduct alleged and the context of the case, the greater the burden of evidence required to prove the matter."

4.4 The 2012/13 FA Handbook introduced the following revised Regulation 7.3.

"The applicable standard of proof is the civil standard of the balance of probabilities."

4.5 In his submissions on this point on behalf of Mr. Terry, Mr. Carter-Stephenson QC made the following points:

- (i) The alleged offence was quite clearly committed during the currency of the old Rule.
- (ii) In the ordinary course of things, the disciplinary case would have been dealt with while the old Rule was in force. The only reason why it was not was because the police investigation put the FA inquiry on hold. That is not something that Mr. Terry had any control over at all. It is not his fault, therefore, that the matter was delayed in the way that it was.
- (iii) Both Parties (the FA and those representing Mr. Terry) agreed that the most satisfactory course was that the police investigation and prosecution should be dealt with prior to the FA case. He should not be prejudiced by that.
- (iv) To say that Mr. Terry should therefore lose the protection of what Mr. Carter-Stephenson submitted appeared to be a slightly higher standard of proof would offend against natural justice and fairness.

4.6 Although the standard of proof is the same under both formulations of Rule 7.3, namely the balance of probabilities, the 'old' formulation requires the seriousness of the offence to be taken into account when considering the weight of evidence. Accordingly, for most, but not all, of the reasons advanced on behalf of Mr. Terry, and particularly the final one, the Commission finds that the standard of proof applicable at the time of the alleged offence should be applied to the charge (*i.e.* the one to be found in the 2011/12 Handbook).

4.7 In terms of the practical effect of applying the 'old' standard of proof, Mr. Carter-Stephenson submitted that it affects the interpretation of Regulation 6.8 of the FA's Disciplinary Regulations, especially when one is looking at the requirement for "*clear and convincing evidence*" (as to which, see below). He further argued that it makes the burden which the FA bears a greater one, depending on the Commission's view of the seriousness of the case, and raises the hurdle which the FA has to get over in that respect.

4.8 For the FA, Mr. Laidlaw submitted that even if the 'old' formulation of the standard of proof is to be preferred, there is little, if any, difference between the evidential requirement that it imposes on the FA and the requirement under Regulation 6.8 for "*clear and convincing*" evidence in order to rebut the presumption in Mr. Terry's favour which his successful defence of the criminal charge gives rise to.

4.9 The way in which the Commission has resolved the twin effects of the applicable standard of proof, together with the requirement for “*clear and convincing evidence*”, will become apparent in due course, in the context of our findings.

5. REGULATION 6.8 OF THE FA’S DISCIPLINARY REGULATIONS

5.1 Regulation 6.8 of the FA’s Disciplinary Regulations provides as follows:

“In any proceedings before a Regulatory Commission, the Regulatory Commission shall not be obliged to follow the strict rules of evidence, may admit such evidence as it thinks fit and accord such evidence such weight as it thinks appropriate in all the circumstances. Where the subject matter of a complaint or matter before the Regulatory Commission has been the subject of previous civil or criminal proceedings, the result of such proceedings and the facts and matters upon which such result is based shall be presumed to be correct and the facts presumed to be true unless it is shown, by clear and convincing evidence, that this is not the case.”

5.2 The construction and interpretation of various aspects of Regulation 6.8, together with its true and proper meaning and overall effect, was a source of written submissions and oral argument during the course of the proceedings, including during preliminary issues hearings. It formed one of the main planks

of Mr. Terry's case. Subject to the Commission's findings in relation to the 'new' evidence presented by the FA that was either not before, or not considered by, the Criminal Court, the interpretation, meaning and effect of Regulation 6.8 is potentially pivotal to the outcome of the proceedings.

Findings made during preliminary issues hearings

5.3 The following findings, which were made as part of the preliminary issues in this matter, are relevant to the full Regulatory Commission's determination of Regulation 6.8:

- (i) The FA is the governing and regulatory body for the national game of football. There is a clear and obvious significant public interest in the FA having in place a proper and effective system of regulation to investigate and discipline those who are subject to its Rules and Regulations, where abusive and/or insulting words and behaviour with reference to race, colour, or ethnicity are alleged to have been used. Such a system is required to protect those who are the victims of abuse, to ensure that such behaviour is shown to be unacceptable at any level, particularly to the young and impressionable, to protect the reputation of the game, and to protect wider society against the harm caused by racial abuse going unchecked in a sport watched by millions.

- (ii) Regulation 6.8 expressly applies to both previous civil and criminal proceedings.
- (iii) The word "*result*" is capable of describing the outcome of both previous criminal cases and civil cases. Use of the word 'conviction' by the draftsman would have been inapposite to describe both. It is probable that the draftsman used the word "*result*" advisedly, in order to straddle the two jurisdictions.
- (iv) The Regulation does not state that it only applies to criminal convictions. Likewise, it does not state that it only applies to acquittals. By clear inference, it must reasonably be presumed to apply to both.
- (v) Because Regulation 6.8 contemplates both previous civil and criminal proceedings, where the standard of proof is lower in the former than the latter, the word "*result*" should properly be read by reference to the applicable standard of proof in the previous case. In other words, beyond a reasonable doubt in criminal cases, and the balance of probabilities in civil cases.
- (vi) Where a disciplinary charge is subject to the civil standard of proof, there can be no objection in principle to a professional body bringing disciplinary proceedings against one of its members following an acquittal

of an identical, or similar, criminal charge (*e.g.* proceedings before the General Medical Council). Such disciplinary proceedings will be subject to the rules and regulations of the professional body.

(vii) It follows that the mere fact that a respondent has been acquitted of a criminal charge whose subject-matter is identical, is not capable of acting as a procedural bar preventing the FA from bringing disciplinary proceedings. This is because of the differing standards of proof. In other words, Regulation 6.8 does not entitle a respondent in Mr. Terry's position to say 'I was acquitted, therefore Regulation 6.8 prevents any disciplinary proceedings being brought against me.'

5.4 Consideration of the balance of the issues that Regulations 6.8 gives rise to was left to the full Regulatory Commission, including the interpretation, meaning and effect of "*facts and matters*", as well as "*clear and convincing evidence*."

"Facts and matters"

5.5 There was broad consensus between the Parties that "*facts and matters*", in the context of criminal proceedings, can only be discerned where there is a guilty verdict. In that event, one can infer certain key facts and matters from the outcome, namely the constituent ingredients of the offence which the magistrate(s), judge, or jury found to be proved. An example of a theft case was provided to the Commission.

5.6 Conversely, where the outcome is an acquittal, with a simple ‘not guilty’ verdict, what led to the “*result*” or outcome (*i.e.* the “*facts and matters*” upon which it was based, are not capable of discernment. Mr. Carter-Stephenson submitted that “*facts and matters*” in Regulation 6.8 must be those matters that led to the outcome, that is the acquittal. The acquittal itself may be the only known fact in terms of the “*result*” in a trial with no narrative verdict, and no evidence as to what led to the acquittal.

5.7 In a civil case, following a trial, there is always a narrative judgment, which may be given orally or in writing. The findings that were made by the court, and which led to a particular outcome (*i.e.* the basis for the “*result*”), are readily discernible as they can be distilled from the judgment.

5.8 The present case, however, is different to the scenarios set out above, and untypical, for the fact that the Chief Magistrate prepared a narrative judgment in writing setting out the reasons for finding Mr. Terry not guilty. Mr. Carter-Stephenson argued that the only “*facts and matters*” in the judgment that are relevant to the result are those that favoured Mr. Terry in the decision that was reached and not those that were adverse to him. In particular, great reliance was placed on the Chief Magistrate’s assessment of Mr. Terry as a “*credible*” witness who honestly believed that Mr. Ferdinand had accused him of a racial

slur, and responded to it. This aspect of the criminal court case will be addressed further in due course.

- 5.9 The Commission does not accept the submission made on behalf of Mr. Terry, referred to in the preceding paragraph. The “*result*” before the Chief Magistrate should be judged by reference to all of the findings that were material to his decision to acquit Mr. Terry. Only in that way can those that were favourable to him be seen and judged in their full context, thus enabling a balanced view of the Chief Magistrate’s ultimate decision to be arrived at. However, for reasons that will appear in due course, this particular debate is not material to the outcome of these disciplinary proceedings.

“Clear and convincing evidence”

- 5.10 Mr. Terry’s case is that Regulation 6.8 is devoid of any meaning unless the “*clear and convincing evidence*” required to rebut the presumption is new or additional, in the sense that it is not evidence that was before the previous court. If it were otherwise, it is argued, then Regulation 6.8 simply allows the FA to have an impermissible ‘second bite of the cherry’ by bringing a charge based on the identical subject-matter of a criminal charge that resulted in an acquittal, and by relying on a lower standard of proof. The FA contends that both existing and new evidence is contemplated by the wording and language of the Regulation.

5.11 The duty that the FA is under to effectively regulate and discipline its members means that the question here is whether Regulation 6.8 expressly, or by clear implication, permits or precludes that from happening in this case, or any other following an acquittal of a criminal charge with the identical subject-matter.

5.12 First and foremost, in construing this aspect of the Regulation, the Commission finds it highly significant that ‘new’, ‘additional’, ‘fresh’ or ‘further’ (or any other such similar words) do not appear in Regulation 6.8, in the context of the words “*clear and convincing evidence*”. There is no need to imply any of the above words in order to make sense, or meaning, of the provision.

5.13 Secondly, the contextualised approach to the interpretation of the word “*result*” in Regulation 6.8 means that regard properly can and should be had, on a case-by-case basis, to the standard of proof in the previous proceedings, as compared with the standard of proof in the subsequent disciplinary proceedings. The standard of proof may be the same (*i.e.* in a case involving previous civil proceedings), or it may be different (*i.e.* in a case that is concerned with previous criminal proceedings). What may not be “*clear and convincing evidence*” to the criminal standard of proof, may well be “*clear and convincing*” to the lower civil standard.

5.14 There are four potential scenarios capable of arising out of previous civil or criminal proceedings which, by implication, Regulation 6.8 contemplates:

- (i) The conviction of a respondent following a criminal case.
- (ii) The acquittal of a respondent following a criminal case (*i.e.* the scenario here).
- (iii) A finding of a civil court adverse to a respondent.
- (iv) A finding of a civil court in favour of a respondent.

5.15 The standard of proof that is applicable in each case is the basis for determining whether new or existing evidence is required in order to rebut the presumption under Regulation 6.8, whether it is the FA, or a respondent, who bears the burden in any given case.

- (i) In scenario (i) above, because of the lower standard of proof applicable in the disciplinary proceedings, the FA would prove the fact of the conviction of a criminal charge arising out of the same-subject matter as the disciplinary charge and simply rely on the existing evidence that was before the court below. In order to rebut the presumption that operates against him under Regulation 6.8, and having regard to the differing standards of proof, the respondent would almost certainly require new evidence if he is to have any realistic chance of bridging the gap between the differing standards of proof.
- (ii) In contrast, under scenario (ii), the acquittal means that the criminal charge was not proved beyond a reasonable doubt. The FA bears the

burden of rebutting the presumption. The lower standard of proof in the disciplinary proceedings means that the evidence required to do so may be either existing evidence, or new evidence.

- (iii) In scenario (iii), the FA would again rely on the findings that were made against the respondent, together with the existing evidence that the previous court considered. The respondent would require at least some new evidence, although the evidential gap that he has to bridge in order to rebut the presumption is likely to be narrower than it is in scenario (i), and he may be able to rely on at least some existing evidence. This is because the standard of proof in scenarios (iii) and (iv) is the same in both the civil and disciplinary proceedings.
- (iv) In scenario (iv), the roles in scenario (iii) are reversed. This time the FA would require some new evidence, but may also be able to rely on some existing evidence, depending on the findings made in the civil case.

5.16 As has been shown, a blanket requirement for new evidence does not exist and, in particular, does not exist in the present case (a scenario (ii) type case). That is simply a reflection of the contextualised approach that should properly be applied to the word "*result*", as a result of a preliminary ruling. At the risk of repetition, there is nothing objectionable, in principle, to FA disciplinary proceedings following an acquittal. The FA is not having an objectionable

‘second bite of the cherry’ in this case, but its ‘first bite’. The purpose of the criminal proceedings that were brought by the Crown was not to regulate football. Regulation 6.8 merely gives rise to a rebuttable presumption. It does not act as a procedural bar. Reference to both existing evidence and, if necessary, new evidence, may be required depending upon the nature of the previous proceedings, but the Commission rejects Mr. Terry’s argument that Regulation 6.8 is devoid of meaning unless there is new evidence. It is perfectly capable of operating in the manner described above, and having meaning.

5.17 Finally, Mr. Terry argued that a passage in a footnote to an internal Briefing Document that was prepared at high senior level within the FA on 18th January 2012, and distributed to both the FA Chairman and its General Secretary, should inform the interpretation of Regulation 6.8. The passage in question is this:

*“There is also the FA investigation to follow, but it would be expected/anticipated
The FA decision (sic) will reach the same conclusion as the courts.”*

Those who were privy to that document gave evidence at a preliminary hearing. In common with all of the other witnesses, they were ignorant of the terms of Regulation 6.8. None of them played any part in the drafting of the Regulation which is undertaken by an entirely separate department within the

FA. As an extraneous aid to interpretation, therefore, the statement in the Briefing Document is of no consequence.

5.18 If the Commission had been left in any doubt as to the meaning and practical effect of “*clear and convincing*” evidence – and no such doubt exists – the wide-ranging discretionary powers that are conferred upon a Regulatory Commission in the first sentence of Regulation 6.8 includes one that it “*may admit such evidence as it thinks fit.*” That power enables a Commission to consider both existing and new evidence, in its discretion, and in the interests of fairness and justice. If it had been necessary to do so, this Commission would have exercised that discretionary power here to allow the FA to rely on the existing evidence that was before the Criminal Court.

5.19 For all of those reasons, the Commission finds that the requirement for the FA to show that there is “*clear and convincing evidence*”, to the civil standard of proof, in order to rebut the presumption in favour of Mr. Terry that arises out of his acquittal, is capable of including both existing and new evidence. It follows that the Commission can consider matters afresh, receive both existing and new evidence, and arrive at its own judgment applying the civil standard of proof, as augmented by the requirement that the evidence that the FA requires in order to rebut the presumption should be clear and convincing, as well as having regard to the requirements of the ‘old’ Regulation 7.3.

5.20 Although the Commission is not bound by any of the findings made by the Chief Magistrate, his judgment featured in the arguments before the Commission at both preliminary and substantive hearing stages. Certain observations are worthy of note before going on to consider the evidence that was presented to us.

6. THE JUDGMENT OF THE CHIEF MAGISTRATE

6.1 Submissions were made by the Parties as to the relevance of the judgment and findings of the Chief Magistrate and what, if anything, can and should be drawn from them. Inevitably, those submissions were drawn along party lines. Certain findings that were made are notable for the careful and, no doubt, advised way in which the Chief Magistrate articulated them. Other factors, most notably his assessment of the witnesses, particularly Mr. Terry, also clearly informed the outcome.

6.2 Mr. Terry's defence before the Criminal Court, and his defence before the Commission, hinges on him hearing, or at least believing that he heard, Mr. Ferdinand first accuse him (Mr. Terry) of racially abusing him. In other words, that Mr. Ferdinand accused Mr. Terry of calling him a "*black cunt*", thereby provoking Mr. Terry to repeat the words back to him by way of forceful rejection/inquiry. In his interview with the FA, Mr. Terry said that he was "*really sure and quite clear*" that Mr. Ferdinand had used such words. In his prepared statement that he took with him to the police station Mr. Terry said

that Mr. Ferdinand had clearly used those words. He said during his police interviews: *"I'm very sure, very sure, those words were used."* Indeed, Mr. Terry went as far as saying that Mr. Ferdinand was not telling the truth in denying that he had used the words first.

6.3 The Chief Magistrate made this observation of Mr. Terry's defence:

"Mr. Terry's explanation is, certainly under the cold light of forensic examination, unlikely. It is not the most obvious response. It is sandwiched between other undoubted insults."

(see p.6 of the Judgment).

6.4 Mr. Terry's case, as argued before the Regulatory Commission, was that even if the Chief Magistrate had been applying the civil standard of proof, he would have found Mr Terry not guilty. In support of that submission, heavy reliance was placed upon the Chief Magistrate's assessment of his credibility:

"It is a crucial fact that nobody has given evidence that they heard what Mr. Terry said or more importantly how he said it. He has given effectively the same account throughout. Insofar as there are discrepancies in his account, they are understandable and natural. He says that he was himself wrongly accused by Mr. Ferdinand on the pitch of calling him a black cunt. He has maintained that from the beginning. Mr. Ashley Cole has corroborated that it was mentioned to him

during the game. There is no doubt that reasonably soon after the game he made the accusation to Mr. Ferdinand. He confirmed that basic account in a statement on the evening of the match. He gave evidence to that effect in this court. There have been minor discrepancies in the account. It seems likely that his belief that he was wrongly accused on the pitch has strengthened as time goes by, and I have discussed that above. However, his account has been subject to the most thorough questioning on at least three occasions. Nobody has been able to show that he is lying. The lip readers do not provide evidence that categorically contradicts his account. What may at first sight have seemed clear to the non-expert, is less clear now. There are limitations to lip reading, even by an expert. I have assessed John Terry as a credible witness."

- 6.5 At face value, there is some force in the argument that it would not have been open for the Chief Magistrate to find against Mr. Terry, even on the balance of probabilities, if he found him to be a credible witness. His defence would have to be regarded as improbable, or less likely than not, for a court applying the civil standard of proof to reject it. On the other hand, the Chief Magistrate was looking at the evidence through the prism of the criminal standard of proof. He set out the relevant test in his judgment. Furthermore, his assessment of Mr. Terry as credible had limitations, to be found in the way in which the Chief Magistrate expressed the following findings:

- (i) That it was "highly unlikely" that Mr. Ferdinand accused Mr. Terry on the pitch of calling him a "black cunt" (p.14 of the judgment, emphasis added). This finding represents an implicit rejection of Mr. Terry's case in this regard.
- (ii) That it was "inherently unlikely" that Mr. Ferdinand should first accuse Mr. Terry of calling him a black cunt, then shortly after the match completely deny that he had made such a comment and then maintain a false account to that effect throughout the police investigation and throughout the criminal trial. (p.6, emphasis added).
- (iii) That it was "possible" that Mr. Terry believed at the time, and still believed, that such an accusation was made. In context, the Chief Magistrate at this point observed that *"The prosecution evidence as to what was said by Mr. Ferdinand at this point is not strong"* and that Ashley Cole had given corroborating, *"although far from compelling corroborating"*, evidence on this point. (p.14, emphasis added).
- (iv) That it was therefore "possible" that what Mr. Terry said was not intended as an insult, but rather as a challenge to what he believed had been said to him (p.15, emphasis added).

- 6.6 Putting to one side his assessment of Mr. Terry as a *"credible witness"*, it is tolerably clear from the precise and careful language in which he couched the above findings that the Chief Magistrate would not have been satisfied, on a balance of probabilities, that Mr. Ferdinand did accuse Mr. Terry on the pitch of calling him a *"black cunt"*. In particular, his use of the words *"inherently unlikely"* in that context would obviously be inconsistent with a finding to the civil standard of proof that Mr. Ferdinand did use the words *"black cunt"* first.
- 6.7 Further, the Chief Magistrate used the word *"possible"* twice in quick succession: once in the context of Mr. Terry's belief that he had been accused of a racial slur by Mr. Ferdinand and then in relation to the ultimate question, namely whether Mr. Terry's use of the words *"fucking black cunt"* was not intended as an insult, but rather as a challenge to what he believed had been said to him. The Chief Magistrate did not use any language to convey the sense of something that was probable, or more likely than not, in connection with either of those pivotal propositions. Instead, in the language used by lawyers, the sense conveyed by his use of the word *"possible"* is something that is less likely than not. The fact that he described the prosecution case as *"strong"* provides over-arching support for that analysis.
- 6.8 Before turning to address the evidence that was put before the Commission, it is to be observed that the Chief Magistrate did not derive any real assistance from the evidence of the two lip readers who were called to give evidence;

Susan Whitewood for the prosecution and Laraine Callow for the Crown. Ms. Whitewood was of the opinion that the words spoken by Mr. Terry were:

“Yeah and I [face obstructed] you/ya fucking black cunt [pause] fucking knobhead”.

6.9 Ms.Callow was of the same opinion. However, both Experts agreed that there was a possibility that they were mistaken, and in particular that “you/ya” may have been “a” or a number of other similar words. Concerns were expressed by Ms. Callow in particular, but also Ms. Whitewood, about the reliability of lip reading evidence and whether those who take decisions on the basis of such evidence will understand the full force of its unreliability.

6.10 Counsel for the Crown observed that the evidence of the lip reading Experts was, to a very large extent, validated by the evidence of Mr. Terry himself, and who did not deny using the words “fuck off, fuck off”, “fucking black cunt”, or “fucking knobhead”.

7. THE EVIDENCE PRESENTED TO THE REGULATORY COMMISSION

7.1 The Football Association called Anton Ferdinand and Susan Whitewood to give oral evidence to the Commission. Neither Mr. Terry, nor any of his witnesses, including Ashley Cole, were called to give oral evidence.

7.2 Mr. Ferdinand took an oath and proved the witness statements that he had signed during the course of both the police and FA investigations. He was not cross-examined. It follows that his evidence was unchallenged. In the light of the Commission's ruling as to what is capable of amounting to "*clear and convincing*" evidence for the purposes of Regulation 6.8, this has very important consequences that arise in the following way. In his statement, dated 3rd November 2011, Mr. Ferdinand said this:

"5. *I was annoyed by what JT had said and so I said to him "How can you call me a cunt, you shagged your team mate's missus, you're the cunt."* JT started to run back to his position. I also started to run up the pitch and I shouted again at him *that he was the cunt because of what he did with a team mate's wife.*

6. *As JT was running away from me, he looked back a couple of times and as he did so I made a gesture with my right hand, a slow fist pump. It was obvious the gesture related to sex. I am sure JT saw the gesture. I then carried on up the pitch as I wanted to get back into the game. I didn't look at JT once I'd made the gesture towards him so I didn't see whether he spoke to me and I did not hear anything he may have said in response."*

7.3 Although Mr. Ferdinand used the word "*cunt*", in the context of his insult at paragraph 5, there is no reference to the word 'black' or, indeed, any reference to colour, race or ethnicity in the two paragraphs referred to above, or at any

other place in any of his statements where he deals with what happened on the pitch itself. The context of Mr. Ferdinand's abusive and insulting words and behaviour in his evidence set out above is sex, not colour, race or ethnicity. Furthermore, he refers to "*your team mate's missus*" without naming the team mate in question, Wayne Bridge. Mr. Ferdinand's unchallenged evidence before the Commission is that he did not use any word beginning with a 'b' that might have been heard and/or misunderstood by Mr. Terry to be 'black' or any other kind of racial reference that could possibly have led the latter to believe that an accusation of a racial slur had been made against him.

7.4 Mr. Terry's decision not to give evidence, and not to call any other witness on his behalf, denied the Commission the opportunity to see that evidence tested, and to evaluate it. It is, of course, his prerogative to say to the FA, as his prosecutor, 'You prove the case against me', but as he placed so much reliance on the Chief Magistrate's assessment of his credibility, the Commission had no real material to enable it to make any kind of judgment, whether favourable or unfavourable, on that important issue. He gave evidence to the Chairman of the Commission during the course of a preliminary hearing, and was found to have done so truthfully (albeit mistakenly), but the subject-matter that fell for consideration on that occasion was quite different to the one before the full Regulatory Commission.

7.5 As has already been noted, Mr. Terry's credibility in the eyes of the Chief Magistrate appears to have had its limitations, in terms of the extent to whether it would have been capable of producing the same outcome (*i.e.* an acquittal) had the civil standard of proof been applied. Moreover, the Chief Magistrate's findings are not capable of binding the Commission, and can have no bearing on the evidence that we are entitled to have regard to when considering the charge against Mr Terry. Ultimately, therefore, whether the outcome before the Chief Magistrate would have been the same, or different, had he been applying the civil standard of proof to the evidence as presented to him is a hypothetical question. The Commission must reach its own decision. To that end, a large bundle of documents was prepared, including interviews of Mr. Ferdinand, Mr. Terry and Mr. Cole, together with statements from them and others, experts' reports and other documents. The Commission only received Mr. Ferdinand's unchallenged witness evidence, together with that of Susan Whitewood.

7.6 The films clips are also essential to a proper understanding of the sequence of events, and the context in which the words "*fucking black cunt*" were spoken by Mr. Terry. They also reveal his demeanour.

7.7 In the absence of a positive challenge to the FA's case, the Commission makes the following findings, on the balance of probabilities, taking into account the serious nature of the charge against Mr. Terry:

- (i) That Mr. Ferdinand did not accuse Mr. Terry of racially abusing him and did not use the word 'black' or any words that could have been heard, understood, or misunderstood by anyone to have any kind of reference to, or context with, skin colour, race or ethnicity. We are driven to conclude not just that it is "*highly unlikely*" that Mr. Ferdinand accused Mr. Terry on the pitch of calling him a "*black cunt*", but that he did not.
- (ii) That Mr. Terry did not hear, and could not have believed, understood or misunderstood Mr. Ferdinand to have used the word 'black', or any word(s) that might have suggested that he was accusing Mr. Terry of racially abusing him.
- (iii) That Mr. Cole did not hear, and could not have believed, understood or misunderstood Mr. Ferdinand to have used the word 'black' or any other word beginning with the word 'B' that had any reference to, or context with, skin colour, race or ethnicity. The issue as to what Mr. Cole did, or did not, hear will be revisited later on in this Ruling, in connection with the FA interview of him on 28th October 2011.
- (iv) That in the brief time that it took Mr. Ferdinand to advance up the pitch towards Mr. Terry, it is improbable that the focus of Mr. Ferdinand's abuse and insults of Mr. Terry would have changed so quickly from an allegation of an affair, to one involving skin colour, or race.

- (v) Apart from the initial phase of the incident as a whole, Mr. Terry and Mr. Ferdinand were never closer to one another than an estimated distance of 19 metres. In interview, Mr. Terry estimated the distance between them to be between 20 and 35 yards during the crucial phase of their exchange. Loftus Road is a small, compact ground. The crowd is close to the pitch. Witnesses comment on the noise that is generated, including Mr. Terry himself. Accordingly, when he turned to face the play, and prepare for the free kick, Mr. Terry would have seen the pumping fist gesture of Mr. Ferdinand, but it is unlikely that he would have heard anything that the latter may have been saying.

7.8 There are then further aspects of Mr. Terry's defence that the Commission finds improbable, implausible and contrived, and which serve to underline and reinforce our decision:

- (i) As the Chief Magistrate observed, the words "*fucking black cunt*" were sandwiched between two admitted insults. Those words were preceded by "*fuck off, fuck off*", and followed by "*fucking knobhead*". It seems inherently unlikely that if he had been accused by Mr. Ferdinand of calling him something that ended with the words "*black cunt*", that Mr. Terry would have added the word "*fucking*" when he threw the words back, if he was genuinely doing so by way of forceful denial. It is also

inherently improbable, that a denial of such a serious allegation would then be followed by an insulting sexual reference directed at Mr. Ferdinand (i.e. *"fucking knobhead"*).

- (ii) His repetition of words that Mr. Terry claims were said to him first by Mr. Ferdinand is implausible if they were really intended to be a robust denial. A much more likely reaction would have been *'I didn't call you a black cunt'*, or at least to have prefaced the words *"fucking black cunt"* with *'are you saying that I called you?'*, or something similar. Instead, the words *"black cunt"* are simply repeated on Mr. Terry's case, with the word *"fucking"* added at the beginning, and a question-mark at the end to be inferred. A much more plausible and likely explanation is that Mr. Terry was angry; angry at Mr. Ferdinand's taunting and provocation of him, angry at the way the match had gone, and angry at the way in which it seemed likely to end. The much more likely explanation for what he said is that all of this provoked him into saying *"fucking black cunt"* as an insult, which is consistent with the fact that insults preceded and followed those words.

- (iii) The Commission is entitled to use its collective experience of life and people to judge demeanour. We have watched the film footage many times. In the critical phase, during which he uses the words *"fucking black cunt"*, Mr. Terry can be seen to be smiling initially, before his facial

expression changes to disdainful and contemptuous. At no point is his demeanour and facial expression that of someone who is imploring, injured, or even quizzical in the face of an unfounded allegation by Mr. Ferdinand that he (Mr. Terry) had just been racially abusive towards him (Mr. Ferdinand). This was an allegation, apparently, that had never previously been levelled at Mr. Terry. Anger is a conceivable reaction to such an accusation, but at no time does Mr. Terry convey any sense of 'No, I didn't' with his facial expression, or body language.

- (iv) Mr. Terry's anger manifested itself again in what remained of the match. A few minutes later he had an altercation with the QPR goalkeeper, Paddy Kenney during which Mr. Terry said:

"You fucking cunt, you fucking cheeky cunt".

Those words were accompanied by gestures from Mr. Terry, namely puffing out his cheeks out and putting his arms out. This was a reference to another physical characteristic, namely to suggest that Mr. Kenney was overweight.

- (v) The Commission heard no evidence from either Mr. Terry or Mr. Cole about their claim that, during what remained of the match, Mr. Terry said to Mr. Cole that Mr. Ferdinand had accused Mr. Terry of racially abusing

him. In the light of our previous findings, we are driven to find, on the balance of probabilities, that even if such an exchange took place (as to which we have some doubt), it was contrived by Mr. Terry. It is impossible to follow their respective movements from the film footage to see whether they were ever sufficiently close to have spoken after Mr Terry said the offending words, but it seems much more likely that both he and Mr. Cole were focussed on trying to salvage something from the game than speaking about the 'fallout' from Mr. Terry's altercation with Mr. Ferdinand.

- (vi) Mr. Terry made no attempt to confront Mr. Ferdinand when the game ended. Instead, he went to acknowledge the support of the Chelsea fans. If he genuinely believed that he had been the victim of an unjustified accusation of the serious type alleged, it is very surprising that Mr. Terry left it for approximately one hour after the match before he requested a meeting with Mr Ferdinand. The Commission cannot speculate as to what may have transpired during that hour or so, apart from the likely realisation on Mr. Terry's part that what he said may well have been caught on camera and be a source of trouble for him. When they did speak after the game, Mr. Ferdinand's unchallenged evidence is that the first thing Mr. Terry said to him was "*What happened?*" This is telling. Without first speaking to Mr. Ferdinand, and asking that question, Mr.

Terry could not have known what Mr. Ferdinand heard or knew, and whether he intended to pursue matters further.

7.9 In the light of those findings, the Commission is quite satisfied, on the balance of probabilities, that there is no credible basis for Mr. Terry's defence that his use of the words "*fucking black cunt*" were directed at Ferdinand by way of forceful rejection and/or inquiry. Instead, we are quite satisfied, and find on the balance of probabilities, that the offending words were said by way of insult. We are able to arrive at that decision without needing to make any adverse findings against Mr. Terry arising out of his decision not to give evidence. Accordingly, the Commission finds that there is "*clear and convincing*" evidence, which satisfies the requirements of the 'old' formulation of the standard of proof in Regulation 7.3, in order to rebut the presumption that operates in Mr. Terry's favour under Regulation 6.8. The FA has discharged that burden on the existing evidence that was before the Criminal Court, without any need to resort to 'new' evidence (see below). The 'new' evidence further bolsters the strength of the FA's case, particularly the facts and matters surrounding the evolution of Mr. Cole's statement.

Susan Whitewood (lip-reading evidence)

7.10 Although Mrs. Whitewood's evidence was also not challenged, it has already been noted that she reached an agreed position with Ms. Callow during the criminal proceedings. The Commission cannot ignore that agreement. Like the

Chief Magistrate, the Commission finds that the lip reading evidence does not materially assist beyond what is validated by Mr. Terry himself. However, in the light of the findings set out above, the lip-reading evidence is not material to our decision.

'New' evidence

7.11 There are three further aspects to the FA's case which are said to be 'new', in the sense that they were not put before, or considered, by the Chief Magistrate in the previous criminal proceedings.

The Barcelona evidence

7.12 On 24th April 2012, Mr. Terry was sent off during the second leg of the European Champions League semi-final match between Barcelona and Chelsea. Film footage of the match clearly shows that he deliberately 'kneed' a Barcelona player, Alexis Sanchez, in the back of his legs when play was elsewhere. The FA rely on comments that Mr. Terry is said to have made immediately after he left the field of play, but which he subsequently had to retract. According to a *Guardian* newspaper report of the same date, Mr. Terry told a touchline reporter:

"I did not deliberately strike the player".

7.13 Following the match, which Chelsea drew to go through to the final, and after viewing video replays of the incident, Mr. Terry is reported to have made the following statement:

"I've seen the replay and it does look bad. I'm not that type of player to intentionally hurt anyone. I've raised my knee which I maybe shouldn't have done in hindsight. But hopefully people who know me as a person, as a player [know] I'm not that type of player. ..."

7.14 For the FA, Mr. Laidlaw contended that this shows that the incident involving Mr. Ferdinand is not the only time that Mr. Terry has been untruthful about what happened on a football pitch.

7.15 Objection was taken, as a preliminary issue, to the admissibility of the evidence of the Barcelona game, but as strict rules of evidence do not apply to FA disciplinary proceedings, the material which the FA sought to rely upon, namely a newspaper report and film footage, was allowed to proceed to be considered by the full Regulatory Commission. The wide-ranging discretionary powers conferred upon a Regulatory Commission in the first sentence of Regulation 6.8 (see above) reflects the position in civil proceedings, where hearsay evidence is treated as being inclusionary, and given such weight as the court thinks fit, unless and until any other issue as to its admissibility is raised

which might lead to its exclusion (see *Polanski -v- Conde Nast Publications Limited* [2005] UKHL 10).

7.16 The Commission saw the footage of the incident, but did not receive any evidence from the touchline reporter, or any other witness, to whom Mr. Terry may have spoken immediately after he was sent off when he is said to have denied deliberately striking the Barcelona player. Mr. Carter-Stephenson urged upon the Commission the hazards of relying upon unattributed, and untested newspaper reports, particularly those that are based on hearsay, and perhaps multiple hearsay. In short, he submitted that the Commission cannot safely rely on the reports in question without any assistance to establish the accuracy of its contents. Although Mr. Terry could have provided the Commission with that assistance, there was no obligation for him to assist the FA in making good evidence whose reliability was otherwise questionable, although the consequences of him not giving evidence have already been spelt out.

7.17 Even if the Commission were to accept the reports at face value, Mr. Carter-Stephenson submitted that it proves no more than that Mr. Terry is a footballer who does not like being sent off. In the view of the Commission, it goes further than that. He was no doubt disappointed, but if the statement that he made immediately after he was sent off is accurate, it would clearly have been untrue. The film footage amply demonstrates that he kned the player deliberately. If they had been confirmed to our satisfaction, his contradictory

statements following his sending-off in the Barcelona match would have caused the Commission (and the Chief Magistrate) to approach Mr. Terry's post-match claim not to have racially abused Mr. Ferdinand with caution. Ultimately, though, there is insufficient evidence before the Commission to enable us to safely place any real weight on the newspaper report.

7.18 No question-mark as to its reliability attaches to the film footage of the incident that led to Mr. Terry being sent off in the Barcelona match. This incident undermines those of his character witnesses who suggest that he has preternatural reserves of self-control. His actions in a crucial Champions League semi-final show that he is capable of losing his self-control. It was also a significant lapse of judgment for a player and captain which his post-match statement recognises. Those are matters that are relevant to our overall assessment of his disposition, demeanour and conduct during the critical phase of the match against QPR.

7.19 The Commission is not satisfied that any aspect of the Barcelona incident can, by itself, properly be regarded as "*clear and convincing*" evidence capable of rebutting the presumption in Mr. Terry's favour. Instead, his loss of self-control, and significant lapse of judgment, are factors in the overall assessment. They simply serve to support the decision that we have already reached.

Mr. Terry's press statement issued during the evening of 23rd October 2011

7.20 During the evening of 23rd October 2011, Mr. Terry released a press statement.

The accompanying piece which appeared in the *Daily Telegraph* the following day included the following:

"I'm disappointed that people have leapt to the wrong conclusions about the context of what I was seen to be saying to Anton Ferdinand. I thought Anton was accusing me of using a racist slur against him. I responded aggressively, saying that I never used that term."

7.21 If one reads that statement literally, Mr. Terry appears to be saying that he told Mr. Ferdinand *"I never said [black cunt],"* or some such similar words. If so, then that is the sort of normal reaction to be expected of someone in Mr. Terry's position, confronted with a false accusation that he had racially abused Mr. Ferdinand - the 'No, I didn't' type of denial. But that is not how he reacted, as has been shown. His denial was to say *"fucking black cunt?"* The press statement, if it was intended to represent the exact words that Mr. Terry used at the time, and in response to the accusation, is materially different to what he did say, and what his case has subsequently been based upon.

7.22 In his judgment, the Chief Magistrate made these observations about this aspect of Mr. Terry's case, and his actions in releasing the statement, contrary to the advice of his advisors:

"There is then the fact that on the evening of the match, 23rd October 2011, Mr. Terry made a press statement. I have not been told what was in that statement, save that it contains the basic defence in this case, namely that he was responding to something said to him (in the prosecution bundle there is a copy of a report in the Daily Telegraph the following day). I do think this is an important point. Mr. Terry tells me he was advised to wait until all the television footage was available before making a statement. I am satisfied he is likely to have received that advice. A cautious adviser would not have wanted a client to be tied to an account that could later be controverted by other evidence. [Counsel for the prosecution] is right to put the question that it is important in a PR world to meet a high profile allegation with an immediate response. However, it is a high risk strategy if there is a possibility that contradictory evidence will later appear. We know, as Mr. Terry will have known, that there would be a number of recordings of the match from different angles. Overall, the fact that he made an immediate statement, and has maintained that account in detail and co-operatively throughout this process, without significant contradiction to his evidence, is undoubtedly a factor in favour of the defence."

7.23 The Commission was anxious to try and resolve the contradiction between the Chief Magistrate's observation that he had not been told what was in Mr. Terry's press statement, with the conclusions that he then proceeded to draw from it in Mr. Terry's favour. We were told that the newspaper report of the statement was in the prosecution bundle, although the statement itself may not have been. Therefore, the newspaper report may not have contained the complete statement, although it seems reasonable to assume that what was reported represented the key passage in it.

7.24 Mr. Carter-Stephenson, who together with Mr. Daw, represented Mr. Terry at the criminal trial, was unable to recollect whether Mr. Terry was cross-examined by Counsel for the prosecution about the apparent discrepancy between what appears in the press statement and what Mr. Terry did say. Mr. Carter-Stephenson thought that the Chief Magistrate may not have appreciated that the report in the *Daily Telegraph* was word for word the same as the statement, but that was a matter that it was canvassed in front of him. He submitted that there was nothing inconsistent in the press statement and that, even if there was, the Chief Magistrate remarked in his judgment that he regarded such inconsistencies and discrepancies as nothing more than one would normally expect to see in a case like this.

7.25 Notwithstanding those submissions, the Commission was unable to judge for itself whether the press statement that he released was intended to represent

the actual words that Mr. Terry spoke to Mr. Ferdinand by way of forceful denial, or whether he was simply paraphrasing what he said, leaving out the profanities. The one person who could have helped the Commission to resolve that question was Mr. Terry himself. This was not 'new' evidence, in the sense of something that had only come to light since the criminal trial, or which was not considered at all by the Chief Magistrate. Mr. Terry no doubt had his reasons for not giving evidence to the Commission and clearly that was an 'all or nothing' decision for him to take. He either had to expose himself to questions on all relevant and admissible issues, existing or new, or not at all. As has already been stated, the Commission has found the Misconduct charge against him to be proved without the need to make an adverse finding against him for failing to give evidence.

7.26 Ultimately, the only evidence before us on this particular issue was the bare newspaper report of 24th October 2011. In the absence of any kind of explanation from Mr. Terry as to how and why it should be interpreted differently, we have no other option other than to construe the terms of the statement literally. On their face, they are inconsistent with the case that he then pursued, insofar as the manner in which he expressed his denial to Mr. Ferdinand is concerned. Such a conclusion, though, must inevitably be tempered by a degree of caution. If there had been more affirmative proof that the statement was materially inconsistent with the case that Mr. Terry subsequently advanced, then its significance may well have been pivotal to an

assessment of its credibility. As it is, the unchallenged inconsistency is capable of providing yet further support for the decision that we have reached on other evidence. If it were absent, however, the outcome would be no different.

The 'evolution' of Ashley Cole's evidence

7.27 It is also the FA's case that Ashley Cole's evidence has evolved and that the word "*black*" was introduced retrospectively into the witness statement that he provided to the FA, with a view to bolstering Mr. Terry's claim that the words that he (Mr. Terry) spoke to Mr. Ferdinand were not said by way of an insult, but as repetition and forceful denial of what Mr. Ferdinand had accused him of saying. In support of its case in this regard, the FA pointed to an exchange of e-mails that took place between the FA and Chelsea's Club Secretary, David Barnard, in which requests were made, on behalf of Mr. Cole, to amend his draft witness statements. Again, the Commission was in the invidious position of having very little live witness evidence to test the documentary evidence. Nevertheless, as will be shown, the Commission's view of this new evidence is that it casts considerable doubt over Mr. Cole's claim that he heard, or could have heard, Mr. Ferdinand use the word "*black*" when the latter insulted Mr. Terry with words and gestures. The new evidence undermines Mr. Cole's corroboration for Mr. Terry's claim that when he used the words "*fucking black cunt*", he did so by way of forceful rejection/inquiry.

7.28 The sequence of events material to this issue began on 28th October 2011, when the FA's Head of Off-Field Regulation, Jenni Kennedy, attended at Chelsea's training ground in order to interview Mr. Terry, Mr. Cole and John Obi Mikel in connection with the incident. She was accompanied by a colleague who was employed by the FA at the time, Adam Sanhaie. Mr. Terry's interview was tape-recorded, but that of Mr. Cole was not. Mr. Barnard was also in attendance. Both Ms. Kennedy and Mr. Sanhaie made handwritten notes of the interview of Mr. Cole. Mr. Sanhaie's notes were initially omitted from the FA's disclosure of relevant documents and other material in its possession, and only came to light just before the commencement of the substantive hearing. Although there was no witness statement from him, and he did not give oral evidence, his notes were admitted into evidence. The Commission revisited and read carefully both his, and Ms. Kennedy's, notes of Mr. Cole's interview.

7.29 The following extract appears in Ms. Kennedy's notes of what Mr. Cole said during his interview of him:

"Couldn't hear the initial confrontation –

Saw gesture -> AF running towards me –

Could see he was speaking – loud – having sex

Clearly 100% aimed at John ->

Definitely a 'B' word – could have been "Bridge"? but I don't know for sure

4-5 car lengths away and very loud.

I didn't hear what JT said -> Quite close to him (a car's length away) -> I didn't even see him speak".

The relevant excerpt from Mr. Sanhaie's notes read as follows:

"Anton shouts with gesture

Saw gesture heard 'b' word said, but not sure what saying

Anton running towards us could see him speaking but not sure what said.

He wasn't talking normal AF was making gesture re having sex.

I knew what AF was getting at re JT shagging gesture meant for JT attention.

Not sure if JT saw. The gesture was aimed at JT.

Think ref was to JT activities – heard 'B' word but not sure what the word was. Def 'B' word. At same time as made gesture."

7.30 Mr. Laidlaw submitted that it is significant that the word "black" is not referred to in either set of notes in the context of what Mr. Ferdinand is alleged to have said to Mr. Terry. There is reference in both sets of notes to Mr. Cole hearing a "B-word" and during submissions there was speculation that that may have been a shorthand reference for "black", alternatively a profanity. On closer examination, however, neither of those two possibilities seems likely. Firstly, the fact that the word "cunt" appears elsewhere in their notes, in connection with a different phase of Mr. Cole's involvement in events, shows that neither

Ms. Kennedy nor Mr. Sanhaie were shy about recording profanities in full, as opposed to shorthand. Secondly, both of them have recorded that although Mr. Cole said that he definitely (“def”) heard Mr. Ferdinand say a word beginning with the letter “B”, he was not sure what the word was, and Ms. Kennedy noted that Mr. Cole said it could have been “Bridge” (which had a connection with Mr. Ferdinand’s first gesture). The Commission concludes, therefore, that it is probable that Mr. Cole said in interview that he heard a word that began with a ‘B’, and that it could have been Bridge.

7.31 The first draft of his witness statement was sent to Mr. Cole by e-mail on 2nd November 2011. It included the following passage:

“I couldn’t hear what AF was saying although I am pretty sure one of the words began with a ‘B’ and it could have been the word ‘Bridge’. As AF was saying this I clearly saw him make a gesture with his arm. The gesture was one I would associate with sex as it was a pumping type gesture. I was probably about 4-5 car lengths away. I’m 100% sure that AF was speaking and making the gesture towards JT.” (see para.4)

It can be seen that there is express reference to a word that “began with a ‘B’” (which was not subsequently altered), but the word “black” does not appear. If Mr. Cole did not mention during his interview the possibility that he had heard Mr. Ferdinand use the crucial word “black” when he insulted Mr. Terry, but

spontaneously remembered it a few days later, it would be surprising given the subject-matter lying at the heart of the discussion (*i.e.* skin colour). If he was sure that the word began with a 'B', as he appears to have been, it is difficult to see how he thought that it could have been "*Bridge*" during the interview, but did not think to say that it could have been "*black*."

7.32 On 3rd November 2011, Mr. Barnard sent an e-mail to the FA in which he referred to a conversation that he had with Ashley Cole, during which the latter had raised several points in relation to his first draft statement. The following amendment, amongst others, was requested:

"Para.4. He wishes to add the words "Black or" before the word "Bridge" in line 5."

A second draft witness statement was prepared to take account of that amendment and two others which, for present purposes, are not material. A further amendment to the second draft statement was then made before a third and final version was approved by Mr. Cole and signed by him on 8th November 2011.

7.33 Shortly before the substantive hearing, a witness statement signed by Mr. Barnard was served. It is dated 13th September 2012. It includes the following

statements in connection with the FA interview of Mr. Cole, some 10½ months' earlier:

"I clearly remember that Ashley Cole said to the FA that he saw Anton Ferdinand abusing John Terry by making some hand gestures in his direction of a sexual nature whilst at the same time calling him a "fucking cunt" and making numerous references to "Bridge's missus". Ashley Cole made a specific point, more than once, of saying to the FA that whilst he could not hear all of what Anton Ferdinand was saying he believed he saw Anton Ferdinand use a word beginning with "B" and it could have been the word "black" and/or "bridge" followed by the word "cunt" immediately thereafter. Ashley Cole made this very clear to the FA. There is no doubt in my mind that this was said during the interview. (para.6)

On reading through Ashley Cole's draft statement it became immediately apparent to both of us that there were inconsistencies in the content of the draft Witness Statement and the clear account Ashley Cole had given in the FA interview. In particular, the FA had failed to record the reference to the "B" word. (para.9)

I must also be very clear that during the FA interview Ashley Cole was unequivocal with the FA representatives stating what he thought he heard Anton Ferdinand say, namely the use of the words "black" or "bridge." (para.15).

7.34 It has already been observed that, through Mr. Barnard, Mr. Cole requested that the word "*black*" be added at paragraph 4 of his initial draft statement. He did not request in the e-mail of 3rd November, or at any other time, that the word "*fucking*", or the word "*cunt*" should be added in the context of his evidence as to what he may have heard, or understood, Mr. Ferdinand to have said on the pitch to provoke Mr. Terry's response. In that context, the words "*fucking*" and "*cunt*" do not appear in either Ms. Kennedy's notes of her interview of Mr. Cole, or those of Mr. Sanhaie. Ms. Kennedy gave oral evidence to the Commission and her recollection as to whether Mr. Sanhaie was, or was not, taking notes was, in places, difficult to understand (although the recent disclosure shows that he clearly did take detailed notes). Nevertheless, she was adamant that if the word "*black*" had been said she would have noted it. Having regard to the context of the interview, it would be very surprising if she had not, and even more surprising if her colleague had also failed to do so.

7.35 Furthermore, the fact that Mr. Barnard's e-mail of 3rd November 2011 makes no reference to, let alone a request for, the conjoined words "*fucking cunt*" to be added to paragraph 4 of Mr. Cole's draft statement, or anywhere else, is, on the face of it, entirely inconsistent with the contents of paragraph 6 of Mr. Barnard's own recent witness statement. It is also significant, and troubling, in the light of Mr. Barnard's recent evidence, that the word "*fucking*" does not appear at all in any of the three drafts of Mr. Cole's statement. At no time did

Mr. Cole, Mr. Barnard, or anyone else, ask for that word to be inserted. The Commission is therefore quite satisfied on this evidence alone that Mr. Cole never heard Mr. Ferdinand use the word "*fucking*", contrary to what Mr. Barnard says in his statement.

7.36 Further, although the words "*black cunt*" appear together in all three drafts of Mr. Cole's statement, they do not feature until later on in the sequence of events, when the setting changes to the dressing room meeting that took place an hour or so after the match had ended, when Mr. Terry is asking the question of Mr. Ferdinand: "*Do you think I called you a fucking black cunt?*" (see para.11 of Mr. Cole's statement).

7.37 All of this causes the Commission to have very real concerns about the accuracy of Mr. Barnard's recollections, and the motivation for the assertions that he makes in his witness statement about what Mr. Cole said during the FA interview of him, particularly his alleged use of the word "*black*", but also the words "*fucking*" and "*cunt*". These concerns raise significant doubts in our minds about the case that Mr Barnard's statement advances, namely that of Mr. Cole saying in interview that he heard Mr. Ferdinand use the words "*fucking cunt*", coupled with a word beginning with a "*B*", that could have been "*black*", accompanying his pumping fist gesture. It is self-evident that, if true, such evidence would provide direct support for Mr. Terry's case. That would appear to be the clear purpose for its inclusion in Mr. Barnard's statement.

7.38 The absence, though, of the word *"fucking"*, or the conjoined words *"fucking cunt"*, from any of Mr. Cole's statements shows Mr. Barnard's recollections to be materially defective. In turn, this inevitably casts significant doubt over the accuracy of his assertion that the word *"black"* was used by Mr. Cole in interview. It further causes the Commission to have considerable doubt as to whether the request to amend paragraph 4 of Mr. Cole's statement, to include the word *"black"*, was based on Mr. Cole's own personal recollections, or as a result of discussions that he had had with Mr. Barnard, as the e-mail of 3rd November 2011 acknowledges they had had.

7.39 If there is a satisfactory explanation for the discrepancies in Mr. Barnard's evidence, the Commission was not provided with one. We must therefore draw our own conclusions from the documents alone, save for Ms. Kennedy's adamant assertion that she would have noted the word *"black"* had it been referred to by Mr. Cole in interview. On the balance of probabilities, the Commission finds that the contemporaneous notes of that interview, which were made by Ms. Kennedy and Mr. Sanhaie, are more likely to be accurate than the recollections of Mr. Barnard over 10 months later, in their recording of key words and phrases that Mr. Cole used. They establish, on a balance of probabilities, that Mr. Cole did not use any of the words *"black"*, or *"fucking"*, or *"cunt"* during the FA interview of him on 28th October 2011, to describe what

he did hear, or may have heard, Mr. Ferdinand say to Mr. Terry to provoke the latter to respond as he did.

7.40 Moreover, Mr. Ferdinand's unchallenged evidence is that the only word of the unholy trinity that he used when he taunted Mr. Terry was "*cunt*". He did not say "*fucking*", and, critically, he did not say "*black*". It is also highly pertinent that what he did say was in the context of a sexual slur directed at Mr. Terry, relating to an extra-marital affair, and not one that had any kind of racial connotation.

7.41 These highly material issues relating to Mr. Cole's evidence were not addressed by the Chief Magistrate - he clearly did not have the interview notes of the FA's Interviewers, or Mr. Barnard's statement before him - and they do not appear in his judgment. Accordingly, that material can and should properly be regarded as cogent new evidence. Had it been before him, the Commission has no doubt that the Chief Magistrate would have examined Mr. Cole's evidence as to what he claims he heard Mr. Ferdinand say to Mr. Terry on the pitch very carefully indeed, or scrutinised it even more closely than he may have done. Like the Commission, the issues that have arisen would have informed his view as to whether Mr. Cole's evidence was capable of providing reliable corroboration for Mr. Terry's case. On the evidence before us, the Commission has considerable doubts in that regard.

7.42 Having regard to all of the matters set out above, the issues and inconsistencies that surround Mr. Cole's evidence provide yet further support for the FA's case that there is plainly more than enough cumulative evidence, both existing and new, to amount to a "*clear and convincing*" case in order to discharge the burden that it bears.

8. DISCLOSURE

8.1 The late disclosure of Mr. Sanhaie's notes served to fuel concerns that Mr. Terry's advisors have harboured over the adequacy or, rather, the inadequacy, of the disclosure that the FA had given, whether voluntarily, or in compliance with the order for specific disclosure that had been made at a preliminary hearing. This led the full Commission, on the second day of the substantive hearing, to make a further wide-ranging order for disclosure against the FA in relation to the computer file for Mr. Terry's case. Although the process of complying with that order was time-consuming and no doubt expensive, it revealed that, save for one document, there was nothing that was material to the issues in the case that had not been disclosed. The document in question was referred to in the report of Ms. Callow, the lip reading expert whom the FA had initially instructed, but had then 'given away' to Mr. Terry.

8.2 The oral evidence of Matthew Johnson demonstrated that the FA does not have any kind of established system, procedure or protocol for dealing with the type

of disclosure order that was made in this case. It was unique. Whether any large business or organisation has such a pre-emptive system in place may well depend on how many times they are involved in litigation. Due to the serious time constraints for compliance with the order for specific disclosure in this case, coupled with the wide-ranging nature of the order, Mr. Johnson inevitably delegated the task of carrying out certain searches and retrieval of documents to others. This inevitably meant that he relied on others. The paucity of documentation in connection with certain specific matters was surprising, and attracted adverse comment from Mr. Terry's Advisors, although an explanation was given, and accepted.

- 8.3 The Commission is satisfied, insofar as it reasonably can be, that the FA did comply with its disclosure obligations in this case. Disclosure in any jurisdiction is an imperfect exercise. It is also tedious, and it would be understandable if Mr. Johnson did not relish the prospect of having to turn around such a substantial order for disclosure in less than two working days. Mr. Sanhaie's notes fell through the net, undermining a categorical assurance that had been given to the Commission. But when they were located, the documents were disclosed despite the inevitable controversy that then ensued. Further, the fact that certain documents were disclosed, and which then caused the FA some difficulty and embarrassment, lends weight to the theory that the exercise led by Mr. Johnson has been undertaken in an honest, fair and transparent manner, in such a way as to facilitate a fair final hearing for Mr.

Terry. Likewise, the outcome of the significant disclosure exercise that was undertaken on the second day of the hearing, which gave rise to almost 1,000 pages' worth of documents and which lasted most of that day.

9. SANCTIONS

- 9.1 When considering the appropriate penalty for a breach of Regulation E.3(2), a Regulatory Commission is required to consider the imposition of an increased sanction, taking into account the following entry point for a first offence, namely a sanction that is double that which the Regulatory Commission would have applied had the aggravating factor not been present. The entry point is not mandatory, and a Commission has a discretion to impose a sanction greater or less than the entry point, according to the aggravating or mitigating factors that are present in each case.
- 9.2 Regulation 8 (Punishments Relating to First Team Matches) provides that a player who is dismissed from the field of play for using offensive or insulting or abusive language/gestures will be suspended automatically from first team competitive matches until such time as his club's first team has completed its next two first team competitive matches.
- 9.3 In the present case, because of the position that was taken by the FA, a two match ban would not have been made - or any other sanction applied - if we had not found that the words "*fucking black cunt*" were said by way of insult.

The aggravating feature of Mr. Terry's abusive words that led to him being charged with Misconduct was his use of the word "*black*". If that word had not been present, and he had said to Mr. Ferdinand "*fuck off, fuck off, fucking cunt, fucking knobhead*", then Mr. Terry would not have been charged with 'simple' Misconduct. If he had been, then it would patently have been unfair for the FA not to have also charged Mr. Ferdinand. The FA recognised this in the way in which it put its case. Consideration of the entry point is therefore artificial, because, absent the reference to skin colour, the balance of Mr. Terry's words would have attracted no action and/or no sanction.

9.4 The Commission received submissions from both Parties on the question of sanctions. The following aggravating features were said to be present:

- (i) Mr. Terry's position as an international footballer of exceptional ability playing for one of the best known-teams in the world and, at the time of the offence, captain of both his club and the England national side.
- (ii) His conduct undermines the FA's efforts to promote inclusivity, equality and diversity and in combating racism in football through the "Kick it Out" Campaign.

- (iii) The offence was committed during the course of a high profile fixture that was watched by two million viewers domestically, and a further significant number of people abroad.
- (iv) The victim impact statement of Mr. Ferdinand makes it plain that he has been badly affected by the incident. He has been the subject of hateful abuse and adverse comments, but has acted with restraint and dignity. He had to give evidence before the Criminal Court, an experience that he did not relish, and was ready to give evidence to the Commission. It was no doubt an ordeal for him.

9.5 There are then the following mitigating factors:

- (i) Prior to this offence, Mr. Terry has had a 'clean' disciplinary record for at least the past five years. He has an exceptional disciplinary record for a central defender, receiving only four red cards (none for verbal abuse) during a professional career in which he has played 668 matches.
- (ii) He has been through a criminal trial, followed by disciplinary proceedings, at great personal and professional cost.
- (iii) Mr. Terry was subjected to extreme provocation by the wholly inappropriate behaviour of Mr. Ferdinand. That cannot in any way excuse

or justify what Mr. Terry said in response, but the altercation between them could and should have ended in the QPR penalty area, if it ever had to happen at all. Mr. Laidlaw described Mr. Terry's words as *"perhaps an almost unconscious stream of invective"*, delivered in anger, and *"without thinking through the consequences of what he was about to say."*

- (iv) A significant number of those who are, or have been, involved in the game of professional football have provided character references for Mr. Terry. They include black players who attest to the fact that, as Chelsea club captain, he welcomes every player to the club and looks after them, irrespective of skin colour, race or ethnicity. The statement of Ryan Bertrand is perhaps the most notable. It is accepted by everyone involved in the criminal and disciplinary proceedings that Mr. Terry is not a racist.
- (v) When he gave evidence at a preliminary hearing, Sir David Richards, the Chairman of the FA Premier League, testified as to Mr. Terry's generosity when asked to contribute towards charitable causes.
- (vi) In contrast with a previous high profile FA disciplinary case involving racial abuse, Mr. Terry's racist insult was issued only once. Although once is clearly once too many, the Commission accepts that it was said in the heat of the moment. Had it been said more than once, the entry point penalty would have applied to successive insults.

(vii) The deplorable and, in some instances, unlawful, abuse that Mr. Ferdinand has been subject to since the incident is to be utterly condemned. It is not, though, as a direct consequence of Mr. Terry's abuse of him. Rather, it is an indirect consequence, unintended by Mr. Terry, and caused by the actions of others whose behaviour has no place in any civilised society.

9.6 Taking into account all of the relevant factors, and balancing them in the scales, the Commission took the view that a suspension from competitive matches involving Chelsea's first team for four matches was an appropriate sanction, together with an index-linked financial penalty of £220,000. Mr. Terry was also ordered to pay the costs of the Commission, save for those of, and incidental to, a preliminary issues hearing that took place on 4th September 2012, where his application for specific disclosure was substantially successful.

9.7 The operation of the sanctions were stayed on terms, pending delivery of this written Ruling, and subject to any appeal against it that may be made.

4th October 2012

The Regulatory Commission

Craig Moore, Barrister - Independent Chairman

Stuart Ripley – Member of FA Judicial Panel

Maurice Armstrong – Member of FA Judicial Panel

Appearances:

For the Football Association

Jonathan Laidlaw QC, Leading Counsel

Stephen Brassington, Junior Counsel

(Instructed by Matthew Johnson of the FA's Governance and Disciplinary Division)

For Mr. Terry

George Carter-Stephenson QC, Leading Counsel

Christopher Daw, Junior Counsel

(Instructed by Grosvenor Law LLP)