

DECISION OF THE FOOTBALL LEAGUE AS TO WHETHER OR NOT MR MASSIMO CELLINO SATISFIES THE OWNERS' AND DIRECTORS' TEST SET OUT IN APPENDIX 3 OF THE FOOTBALL LEAGUE'S REGULATIONS (THE "OAD TEST")

1. Introduction

1.1 On 19 March 2014, an Owners' and Directors' Declaration form was submitted to The Football League, signed by Mr Massimo Cellino on his own behalf and by Mr David Haigh on behalf of Leeds United Football Club ('**LUFC**'), affirming that Mr Cellino is not subject to any 'Disqualifying Condition' that would disqualify him from acting as a 'Club Director' (as those terms are defined in the OAD Test) of LUFC.

1.2 Rule 3.3(b) of the OAD Test requires the League to confirm, within five working days of receipt of such Declaration, whether or not it accepts that affirmation. However, both LUFC and Mr Cellino have asked that the League make its decision as quickly as possible, on the basis that 'time is of the essence'.

1.3 The League's decision turns on the proper treatment under the OAD Test of a judgment issued last week by a court of first instance in Sardinia, Italy, in proceedings brought by the Public Prosecutor of Cagliari (no. 7354/12). The Public Prosecutor charged Mr Cellino with evasion of import tax payable in respect of a boat, contrary to Article 292 D.P.R. 43/1973 in connection with Article 70 D.P.R. 633/1972. Citing Article 62 bis of the Italian Criminal Code (which permits the court to take into account mitigating circumstances) and Articles 533-535 of the Italian Procedural Code, on 18 March 2014 the court declared Mr Cellino guilty beyond reasonable doubt of the offence ascribed to him ('*reato lui ascritto*') and ordered him to pay a fine ('*multa*') of €600,000 and the costs of the proceedings. It also ordered confiscation of the boat.

1.4 The League must determine whether this judgment (the '**Judgment**') constitutes (i) a conviction of Mr Cellino by a competent court having jurisdiction outside England and Wales; (ii) for a like offence to an offence involving a Dishonest Act, within the meaning of the OAD Test, i.e., an act that a reasonable person would consider dishonest. If so, then Mr Cellino is disqualified from acting as a Club Director for a Club. If not, then as far as the League is aware based upon the information submitted to it, he is not subject to any Disqualifying Condition.

1.5 The League considers these two elements in turn below.

2. The Judgment constitutes a conviction for purposes of the OAD Test

2.1 The League considers that the Judgment constitutes a conviction for purposes of the OAD Test, for the following reasons.

2.2 First, Mr Cellino and LUFC do not dispute that Sardinian court was competent to issue the Judgment and had the requisite jurisdiction over Mr Cellino to do so. Mr Cellino was legally represented in those proceedings and did not object to the court's jurisdiction over him in respect of the charges brought. The League concludes the Sardinian court is a competent court for the purposes of the OAD Test.

2.3 Next, the League's Italian lawyers have advised that the Judgment brings to an end the proceedings before the first instance court. The League's Italian lawyers have also

advised, however, that Mr Cellino has a right of appeal against the Judgment and that as a result it is not yet considered a 'final' judgment under Italian law. Mr Cellino has advised the League through his lawyers that he intends to exercise his right of appeal against the Judgment (indeed, he says that the appeal is 'on foot'). His lawyers assert that unless and until the Judgment is affirmed on appeal in the third tier of justice of the Italian judicial process, it is not a 'final judgment'. On the basis that Article 27 of the Italian Constitution provides that '[a] defendant shall be considered not guilty until a final sentence has been passed', they contend that the Judgment is therefore not a conviction ('if he is innocent, he does not have a conviction') for purposes of the OAD Test.

2.4 The League disagrees, for the following reasons:

2.4.1 The League is advised that if a competent Italian court (such as the Sardinian court in this case) finds a defendant guilty of a crime, and specifies the sanctions to be imposed upon him, then under Italian law the defendant is considered to have been convicted of a crime, even if the Judgment is not final because the defendant has the right to appeal against that conviction. This is apparent from Article 533 of the Italian Procedural Code, which is specifically cited in the Judgment, and which states: 'The judge pronounces the sentence of conviction if the accused is guilty of the offence charged beyond all reasonable doubt'.

2.4.2 The fact that Article 27 of the Italian Constitution provides that '[a] defendant shall be considered not guilty until a final sentence has been passed' does not change this. Article 27 means that the guilty verdict issued by a court of first instance is not considered to be final, and so the sanctions imposed by the court are not enforceable, unless and until the defendant has exhausted all of his rights of appeal against that judgment. However, it remains the case that the defendant has in fact been convicted of the crime in question by a competent first instance court, notwithstanding that he is still entitled to a presumption of innocence unless and until he has exhausted all his appeal rights. In short, the Judgment is still a 'conviction', albeit one that is subject to appeal. See, e.g., Maffei and Betsos, 'Crime and Criminal Policy in Italy' (2007) 4(4) *European Journal of Criminology*, 462-482, para 2.2: 'Art. 27 grants a presumption of innocence to those subject to criminal prosecution. The presumption stands until a final judgment on the case is reached: any prison term served by a defendant before the final judgment (even after a conviction in the first instance or appeal) is considered "preliminary detention"' (emphasis added).

2.4.3 Nor is the first instance judgment a nullity pending its affirmation on appeal. To the contrary, aspects of the judgment may be given effect notwithstanding the pendency of appeal and the presumption of innocence that prevails pending that appeal. For example, a defendant who has been found guilty of a crime at first instance and sentenced to a period of imprisonment, and who then appeals against that judgment, may still be sent to prison to start serving his sentence in certain cases while his appeal is pending, as a precautionary measure. As another example, in this case, if Mr Cellino appeals against the Judgment then the fine and the costs ordered against him will not be payable pending the appeal, but he will not be permitted access to his confiscated boat.

2.4.4 Similarly, there is nothing in Italian law to stop other bodies providing that first instance convictions trigger collateral consequences under their own rules notwithstanding that the defendant has appealed and so the judgment is not yet considered final (and the defendant is therefore still entitled to the constitutional presumption of innocence). For example, Article 11 of the CONI "Codice di Comportamento Sportivo" (the Italian Olympic Committee's Code of Behaviour in Sport) provides: 'In order to protect the integrity and

authority of ... agencies of the national sports federations, individuals associated with sports, sports promotion Bodies and Associations, including also the representative bodies of the company, are immediately suspended as a precautionary measure, in the manner prescribed in the third paragraph of this Article, where they have been convicted, even if the sentence is not final, for the crimes listed in Annex "A" or which have been subjected to interim preventative measures. The suspension remains until the next acquittal or upon termination of criminal proceedings or the expiration or revocation of the preventive measures' (emphasis added). Thus, for example, the FIGC (the Italian FA) reserves the right, by order of its Federal President, to apply Article 11 of CONI and impose an interim suspension after a first instance conviction for certain listed offences, without waiting for final judgment. (See Art. 22 ter of the FIGC Ordinary Internal Rules). To be clear, neither CONI nor the FIGC lists the offence of which Mr Cellino has been convicted as a trigger for exclusion, but that is beside the point (if the League wants to make a different crime a trigger for disqualification from serving as a director of one of its clubs, it is entitled to do so). What the CONI Code and the FIGC rules illustrate is that even under Italian law, a first instance conviction for a listed crime can be a trigger for exclusion from sporting office, notwithstanding that the conviction is being appealed and so is not 'final' (and the defendant continues to be presumed innocent) pending the appeal.

2.4.5 The question for the League is whether, given the above, the Judgment constitutes a conviction within the meaning of the OAD Test. The OAD Test and its application are governed by English law, which requires the League to consider the natural and ordinary meaning of the words used, as well as the underlying purpose of the rules. Taking those factors in turn:

2.4.5.1 Webster's Dictionary defines a 'conviction' as 'the act of proving, finding or adjudging a person guilty of an offense or crime'. The Judgment falls squarely within that definition, since it expressly and unequivocally finds Mr Cellino guilty of a crime. If it had been issued by an English court, there is no doubt that it would qualify as a 'conviction' within the meaning of the OAD Test. And as a matter of fact the Judgment is still considered to be (and is referred to as) a 'conviction' in Italian law, albeit that it is not considered final in Italy unless and until all appeal rights have been exhausted, pending which Mr Cellino remains entitled to a presumption of innocence. That significant difference between Italian criminal procedure and English criminal procedure (in England, such a conviction is final and the defendant is considered guilty unless and until an appeal court overturns it) does not require the League to treat the Judgment differently (for purposes of the OAD Test) to a conviction issued by an English court. Under Italian law, the Judgment remains a finding by a court of competent jurisdiction following due process that Mr Cellino is guilty of a crime. And (as noted above) even under Italian law consequences can and do flow from such a 'non-final' conviction, including disqualification from association with sports bodies, notwithstanding the constitutional presumption of innocence until all appeals from the conviction have been exhausted. The League can see no reason why there should be a different result under the OAD Test, which very specifically makes 'conviction' the trigger for disqualification, not 'a final conviction after all appeal rights have been exhausted', even though if it would have been easy to say that if that was what was intended.

2.4.5.2 Such a construction of the OAD Test accords with the purpose behind the test, which is to protect the integrity of the sport and the League's competitions and stakeholders by preventing anyone who has been convicted of an offence involving dishonesty acting as director of a member club. It would undermine that purpose to allow a disparity in treatment depending on whether the conviction comes from an English or an Italian court.

Again, there is no doubt that the Judgment would be considered a conviction if issued by an English court. The fact that it was issued by an Italian court does not change the essential feature of the Judgment, namely that it found Mr Cellino guilty beyond reasonable doubt of the crime charged. Nor does it matter for these purposes that that finding will not be considered final in Italy until all appeal rights have been exhausted. Given that Italian sports bodies treat such a 'non-final' first instance conviction as a sufficient trigger for exclusion from sporting office, the League sees no good reason to take a different approach.

2.5 For these reasons, notwithstanding that as a matter of Italian constitutional law Mr Cellino remains entitled to a presumption of innocence while he appeals the conviction through the higher courts, and so the guilty verdict is not considered final under Italian law unless and until his appeal rights are exhausted, the League concludes that the Judgment does constitute a 'conviction' for purposes of the OAD Test,

3. The offence of which Mr Cellino has been convicted involves findings of conduct that a reasonable person would consider dishonest

3.1 The League also considers that the offence of which Mr Cellino has been convicted involves findings of conduct that a reasonable person would consider dishonest, for the following reasons:

3.1.1 On the basis of their analysis of the '335 certificate', the minute of the Judgment, and the opinion of Mr Cellino's Italian lawyer dated 25 February 2014, the League's Italian lawyers have advised that the Sardinian court found Mr Cellino guilty not of a strict liability administrative infraction (as contended by Mr Cellino's lawyers), but rather of a criminal offence under Article 292 D.P.R. 43/1973 in connection with Article 70 D.P.R. 633/1972 (evading import tax).

3.1.2 They have also advised that that guilty verdict necessarily entailed a finding on the part of the court that Mr Cellino (a) either failed to file the necessary tax declaration or filed the necessary tax declaration but with the facts in it misstated, (b) knowingly and with intent to avoid complying with his tax duties, i.e., with intent to avoid paying tax that was properly due from him. They confirm that all Italian tax crimes require a finding of intent ('dolo'), not the lower threshold of negligence ('culpa').

3.1.3 The League considers that any reasonable person would consider such conduct to be dishonest. And it follows that the offence of which Mr Cellino has been convicted is a like offence to an offence involving a 'Dishonest Act' within the meaning of the OAD Test.

4. Decision

4.1 For the reasons set out above, the League considers that the Judgment constitutes a conviction by a competent court having jurisdiction outside England and Wales for a like offence to an offence involving a Dishonest Act, within the meaning of the OAD Test, and therefore Mr Cellino is disqualified from acting as a Club Director for a Club unless and until the Judgment is overturned on appeal or is spent.

London, 24 March 2014