RUGBY FOOTBALL UNION

Charges under Rule 5.12 arising out of the Blackett Review

OPINION

- 1. I have been asked to advise the President of the RFU whether there is sufficient evidence to bring charges under Rule 5.12 against any individual, based on the conclusions and material referred to in the report of the Blackett Review.
- For the reasons set out below my opinion is that there is no basis on the evidence which I have seen for bringing disciplinary proceedings against any member of the Council.
- 3. I have reviewed all the material provided to me relating to those aspects of the Blackett report relating to leaks from within the RFU to the media.
- 4. However I have not been able to see all the evidence which was available to the review panel. Some witnesses gave evidence to the panel on the basis that their evidence would remain confidential to the review and would not be further disclosed, without their consent. All the witnesses have been asked to give their consent to their evidence being disclosed to me and to the President and for their agreement to give evidence, if required, in any disciplinary proceedings. 9 of the 22 witnesses have not given that consent and so I have not been able to review their evidence. Only 4 out of the 9 directors who gave evidence to the review have consented to their evidence being disclosed to me.
- 5. I have focused on those aspects of the Blackett Review which give rise to suspicion that a member or members of the Council may have engaged in conduct prejudicial to the interests of the Union in providing information to the media about confidential transactions or discussions of the board of management between December 2010 and June 2011.
- 6. On the basis of the conclusions of the Blackett report at paragraphs 83 to 85 the main focus of my review of the evidence has been on the role of Martyn Thomas, the former chairman of the board, in allegedly disclosing information to the press. The conclusions of the Blackett Review on that aspect of its work were:

- (1) that it was unable to draw any conclusions on whether Martyn Thomas used the press to undermine John Steele, the CEO, by planting stories that he might be dismissed (paragraph 84)
- (2) that there was no doubt, in its view, that some of the information contained in an article published by the Daily Telegraph on 12 June came from off the record discussions between Martyn Thomas and Paul Ackford on 11 June (paragraph 85).

Disciplinary proceedings

- 7. Rule 5.12 gives power to the Union to discipline any person subject to its jurisdiction for any infringement of the RFU rules and regulations and "for any conduct which is prejudicial to the interests of the Union or the Game or which amounts to cheating."
- 8. Under regulation 19 the standard of proof to be applied in disciplinary cases is the balance of probabilities. Under regulation 19.5.12 disciplinary panels are not obliged to follow strict rules of evidence, so that hearsay evidence would be admissible.
- 9. Under regulation 19.6.9 proceedings for an alleged breach of rule 5.12 may be brought by the President where the Disciplinary Officer is conflicted. Before bringing disciplinary proceedings against members of the Council permission must first be obtained from at least two of the three "wise men" elected by the Council.
- 10. The approach which I have adopted is to ask whether on the available evidence an objective impartial and reasonable disciplinary tribunal, properly directed and acting in accordance with the law, is more likely than not to find a charge under Rule 5.12 proved. If that test were satisfied the question whether it would be in the overall interests of the Union to bring such charges would be a matter for the President and the wise men to decide.

Authority of the chairman to brief the press

- 11. The terms of reference of the chairman of the board state that he should act with the President and CEO as one of the RFU's principal spokesmen. Similar terms of reference apply to the President and the CEO, who is to act as the main point of contact with the media.
- 12. The procedures of the board require that all members of the board keep strictly confidential the content of any discussion or decision, or how members voted on any particular matter, and not give any statement or comment to the media on such matters without having first agreed the same with the CEO or the communications

- director. The procedures also provide for collective responsibility of the board and that all decisions of the board are to be supported by all members.
- 13. The code of conduct for council members states that they should abide by the RFU media policy. That media policy describes media relations as a strategic discipline in which managing the media is a vital part of RFU activity. The policy states that "providing information selectively to particular journalists" is a viable media strategy and that includes the channelling of information "either on or off the record". The guidelines for Council members are that they may speak to the press on local issues, but on national issues they should first seek the guidance of the communications department. The media policy also states that council members should not give off the record comments.
- 14. The Blackett Review is critical of the board in not setting appropriate standards to deal with the issue of leaks to the media (see Annex C4). The report refers at annex C3 to four board minutes which relate to communications between the RFU and the media between September 2009 and April 2011. Not all of those minutes relate to the matters in issue, but none evidence any restriction placed on the authority of the President, chairman or chief executive to brief the media as spokesmen for the RFU.
- 15. I do not read the RFU media policy as limiting the authority of the President, chairman or CEO under their terms of reference. That policy is directed generally to the business of the council, not the board, and does not deal with the duties of those members of the board who are appointed as spokesmen for the RFU. If it were the direction of the board that the President, chairman or CEO should not be permitted to speak to the press unless the communication had first been cleared through the communications department then that would need to have been clearly spelled out in the terms of reference or board procedures or by board decision. If it was acceptable for the members of the communications department to speak off the record to the press it is difficult to see why the chairman or CEO should not also be permitted to do so.
- 16. The evidence does not indicate any general understanding that the chairman or CEO was required to consult the communications department before speaking to the press. One board member gave evidence that the chairman quite rightly talked to the press as part of his role. Indeed the report of the Blackett review recommends that the media protocol should be strengthened so as to require any off the record briefings to be approved by the director of communications (or head of media) as well as the President, chairman, CEO or disciplinary officer.
- 17. Accordingly on the evidence available to me there was no explicit restriction placed by the board on its chairman as to the circumstances and manner in which he should act as spokesman in speaking to the press. In particular there was no prohibition on the chairman speaking off the record to the press. In respect of the important

decisions taken by the board during the relevant period, there is in the minutes no stipulation as to how and when information about those board decisions should be communicated to the media, although it was obvious that some of those decisions would necessarily become public.

18. On the evidence which I have seen the chairman had a general discretion to disclose information to the media, with no clear limitations placed on that authority by the board. The implicit limit on the authority must have been that such disclosure was reasonably considered to be necessary in the interests of the RFU.

Rule 5.12

- 19. In the case of a member of the board or council whose role did not include acting as spokesman to the press the disclosure off the record of confidential board discussions would, in general, be improper and contrary to Rule 5.12.
- 20. But in the case of a board member entrusted with the duty of acting as spokesman the position is different. The absence of clear rules laid down by the board as to what might be disclosed means that considerable discretion was conferred on those who were permitted to speak to the press. The chairman was required to act in the interests of the RFU but where he was minded to disclose information on or off the record he would need to balance the perceived need to disclose, in answer to a question from the press, against any possible damage to the principles of confidentiality and collective responsibility which applied to board business.
- 21. I therefore proceed on the basis that to sustain a charge under Rule 5.12 against the chairman it would be necessary to prove both that the specific disclosure complained about was made by the chairman to the journalist and that the disclosure was damaging to the interests of the RFU in that it could not reasonably be justified as necessary in the circumstances.

Evidence of the source of leaks to the press

- 22. In framing a case against any individual Council member it would be necessary to identify precisely the confidential information that is alleged to have been disclosed to the journalist and that such disclosure was unauthorised or improper as being contrary to the interests of the RFU. The greater the number of possible sources of such leaks the more difficult the case becomes.
- 23. The report of the Blackett review stated that there was "significant circumstantial evidence" that a significant amount of the sensitive material which reached the press emanated from Martyn Thomas. The evidence is only circumstantial because, in the nature of alleged unauthorised oral disclosures, there is unlikely to be any available

direct evidence. The journalist will decline to reveal his source, there will be no available documentary record of the leak, and the alleged source is likely to deny that he disclosed the material information.

- 24. None of the evidence which I have reviewed provides any direct evidence that the chairman was the source of the relevant disclosure to the press. The report made the point that the majority of the elected members of the board believed that the chairman was the source of a significant amount of unauthorised information. A statement of belief is not even hearsay evidence and it would not be relevant to any proper consideration by a disciplinary committee. The board members could only give relevant hearsay evidence if either the journalist had told the member who the source was or the chairman had admitted that he was the source. One board member did give such evidence in the form of third hand hearsay but it related to an article written before the relevant period and so could not be relevant evidence in relation to the matters in issue.
- 25. At paragraph 57 of the report of the Blackett Review it is stated that the panel had heard from one candidate for the performance director role that he had been informed by another candidate that the chairman had breached the confidentiality of the appointment process. The panel obtained evidence only from one candidate. I have reviewed the transcript of his evidence in the course of which he did say that he had been telephoned by other potential candidates. However he did not give any evidence to the effect that he had been informed that the chairman had breached the confidentiality of the appointment process.
- 26. So in the absence of any direct evidence the case of alleged unauthorised or improper disclosure by the chairman would have to be based on inference alone.

The case based on inference

- 27. I have reviewed all the press articles that were considered by the review panel in annex C of the report with a view to establishing the source or sources of the leaks.
- 28. The thesis advanced in the Blackett report is that only the chairman had access to all the information covering the full spectrum of the 7 key events examined, about which information appeared in the press (page C2). However it does not logically follow that only the chairman can have been the source of all or any of the leaks to the press during the relevant period. Some of the articles appear to be founded on more than one source and the general thrust of the evidence to the panel was that there was a number of people within the RFU responsible for leaking information. Once it is accepted that that in respect of one particular item of information there is a number of potential sources, then it adds nothing to the strength of the allegation to

note that the chairman was also one of a number of potential sources in respect of another item of information.

- 29. Furthermore even if the chairman was one of the few individuals with direct access to information about the relevant transaction or discussion at a board meeting, it does not follow that it was one of those individuals who then communicated that information directly to the press. There was no general restriction on a member of the board discussing confidential matters with another member of the Council or with a senior member of the RFU staff. One cannot exclude the possibility that some information which ended up with the press did not come directly from those few members of the board with firsthand knowledge.
- 30. In the absence of direct evidence and in the face of denial of unauthorised disclosure a compelling inferential case would have to be found to justify disciplinary proceedings against any individual.
- 31. In order to prove a case in these circumstances it would be necessary to produce clear evidence excluding others with direct knowledge of the relevant information as the source of the disclosure. Some of those individuals, including board members, were prepared to give evidence to the Blackett Review but have not been prepared to allow their evidence to be used for the purpose of considering disciplinary proceedings. In my opinion without supporting evidence from at least all those members of the board who had knowledge of the relevant confidential information no case could be proved. Even if they were all prepared to give evidence it is difficult to see why, in the absence of some additional objective evidence, the tribunal should accept their evidence and disbelieve that of the person against whom the charge is brought. Logically it makes no difference whether there is only one other potential source or several; the evidence from each director does not corroborate the other, as each can only speak as to his own conduct. There would have to be a very solid evidential basis for a finding that the individual charged was dishonest in denying that he was the source.
 - 32. I illustrate the difficulties by reference to what appears in the view of the Blackett Review to be the clearest case of unauthorised disclosure which it attributes to the chairman. That is the disclosure contained in the article published in the Sunday Telegraph on 12 June 2011.
 - 33. In his evidence to the panel the chairman accepted that he did have discussions with the journalist before the article was published and he was clear as to the responses he gave. On his evidence his discussion with the journalist, who already appeared to be in possession of confidential information from others, had a legitimate purpose. The board must have anticipated that its decision would be subject to intense scrutiny and criticism in the press, and must have expected that its chairman and acting chief executive would strongly defend the decision, both on and off the record. That

defence would necessarily entail making clear that the decision was well founded and that it was unanimous. Indeed that was the thrust of the information which the chairman gave to the press on the record. Once those matters were raised with the press it would then be a matter of judgement how far to respond to questions, respecting as far as possible the principle of confidentiality of board discussions and collective responsibility. In principle it was entirely proper for the chairman to seek in the interests of the RFU to support the board's decision.

- 34. The chairman did accept that he may have gone too far in speaking of matters that may have contravened the terms of the compromise agreement between John Steele and the RFU. As appears from the letter from Mr. Steele's solicitors dated 14 June 2011 there was a complaint about a number of comments which the chairman had apparently made on the record. Those comments may have been unwise but they were on the record and intended to support the board's decision.
- 35. There is no direct evidence to contradict the evidence of the chairman as to his off the record discussions with the journalist, and no grounds for a strong inference that other information in the article about the board discussions must have come directly from him. The information about the board meeting on 9 June was known to all board members attending and indirect communication through a person not present at the meeting cannot be ruled out. Evidence is not available from all those board members. The inference to be drawn from the article is that it was based on information from a number of different sources, and some information or comment may have been recycled from earlier stories.
- 36. In my view it is very dangerous to seek a draw any inference as to source from the manner in which the journalist chooses to report the information. The slant of the reporting may owe more to the view of the journalist than the motives of the person who leaked the information. But in any event the article of 12 June does not suggest that it was the chairman who was the source of the information about the board discussions. Those discussions are reported in a manner which appears to portray the conduct of another member of the board in a particularly favourable light. That might raise the suspicion that it was that individual, and not the chairman, who was actually responsible, directly or indirectly, for those points being leaked to the journalist. That illustrates that where there are multiple potential sources it is impossible to form any solid conclusion attributing particular disclosure to any one person. This is all speculation, not evidence.
 - 37. In his evidence to the Blackett Review the chairman was only asked to deal in detail with the circumstances in which confidential information came to be disclosed in the Sunday Telegraph article published on 12 June. So in respect of the other 6 key events identified in the report at annex C the chairman was not given the opportunity to rebut the suggestion that he may have been the source of some of the information disclosed. In respect of the key events listed at annex C as numbers 1 to

5 the reporting does not evidence that there had been disclosure which violated the principles of board confidentiality and collective responsibility, nor anything to indicate that the relevant disclosure emanated from the chairman. In respect of key event 6, the reporting of the board meeting of 12 May does indicate that there was unauthorised or improper disclosure of confidential board discussions, but again there is a number of people who, directly or indirectly, could have been the source of that information. In addition to violating the confidentiality of board proceedings those disclosures also served to undermine the position of the CEO. But as the Blackett Report noted at paragraph 84 it is not possible to reach any conclusion that the chairman was responsible for such disclosure.

38. The evidence given to the Blackett Review suggests that during the relevant period there was a large number of leaks which probably emanated from different individuals. The report states at paragraph 79 that a culture had developed of speaking to the media about confidential matters. Some of the disclosures relating to the process of seeking the appointment of a performance director may well have come from outside the RFU. In the absence of any direct evidence reasonable suspicions must arise, and they do not all point in the same direction.

Summary

- 39. In summary there is no direct evidence to support an allegation of unauthorised or improper disclosure by the chairman or any other member of the Council. Any case based on inference would need to be compelling. To make such a case it would be necessary to produce evidence from each of the other board members with firsthand knowledge of the specific confidential information which appeared in the press. Such evidence is not available. Even if it were available that would not provide sufficient evidence to establish a charge against a member of the Council who denies being the source.
- 40. In my opinion in respect of the alleged disclosures referred to in annex C to the report of the Blackett Review there is no solid evidence which could support a charge against any member of the Council under Rule 5.12.

Charles Flint QC

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