

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

B E T W E E N :-

THE FOOTBALL ASSOCIATION

and

RICKY MILLER

DECISION AND WRITTEN REASONS
OF THE INDEPENDENT REGULATORY COMMISSION

Regulatory Commission	Graeme McPherson QC (Chairperson) Aisling Byrnes (Independent Legal Panel Member) Stuart Ripley (Independent Football Panel Member)
Secretary to Regulatory Commission	Paddy McCormack (Regulatory Commissions & Appeals Manager)
Date	4 August 2020
Venue	Remote hearing
Appearances	<u>For the FA</u> Yousif Elagab (FA Regulatory Advocate) <u>Observers (the FA)</u> Robert Henderson (Anti-Doping Manager, The FA) Nisha Dutt (Head of Case Management, UKAD) Justin Humphries (Paralegal, UKAD) <u>For Mr Miller</u> Kendrah Potts (Counsel) Phil Hutchinson (Solicitor, Mills & Reeve LLP) <u>Observers (Mr Miller)</u> Simon Barker (The PFA)
Witnesses	<u>For the FA</u> None <u>For Mr Miller</u> Ricky Miller Dr Tim Rogers

(A) Introduction

- 1) Until June 2019 Ricky Miller (***Mr Miller***) was a professional footballer under contract with Port Vale FC (***Port Vale***).
- 2) On 9 March 2019 Mr Miller provided a urine sample (***the sample***) to UK Anti-Doping Control Officials following a match between Port Vale and Mansfield Town FC (***Mansfield***). That sample was analysed for the presence of
 - a) Substances defined as Prohibited Substances in the list of Prohibited Substances and Methods produced by WADA and recognised by the FA, valid as from 1 January 2019, and
 - b) Prohibited substances listed in paragraph 2.1 of the FA's Social Drug Policy Regulations.
- 3) The analytical report received by the FA from the Kings College Drug Control Laboratory confirmed that analysis of the 'A' sample taken on 9 March 2019 disclosed the presence of benzoylecgonine (***BZE***). BZE
 - a) Is a metabolite of cocaine, which is a Prohibited Substance, and
 - b) Is itself a Prohibited Substance.
- 4) On 26 April 2019 the FA wrote to Mr Miller
 - a) Informing him of the results of the analysis of the 'A' sample and offering him the opportunity to have the 'B' sample analysed. Mr Miller subsequently informed the FA that he did not wish to have the 'B' sample analysed, and accordingly the 'B' sample was not analysed
 - b) Informing him that the presence of the prohibited substance in the sample constituted a breach of Regulation 3 of the FA Anti-Doping Regulations 2018/19 (***FAADRs***)
 - c) Provisionally suspending him pursuant to FAADR Regulation 25 from participating in First Team Competitive Matches and Non-First Team matches, including Friendlies, until further notice. FIFA imposed a worldwide provisional suspension (effect from 26 April 2019) on 13 June 2019.
- 5) By letter dated 5 July 2019 the FA charged Mr Miller with a breach of FAADR Regulation 3(a) (***the Charge***). The Charge relates to the presence of BZE in the sample.

- 6) By his '*Disciplinary Proceedings: Reply Form*' dated 10 September 2019 ('*Reply Form*')
Mr Miller
 - a) Admitted the Charge, and
 - b) Requested a personal hearing before an Independent Regulatory Commission.

- 7) The personal hearing of the Charge requested by Mr Miller took place before us on Tuesday 4 August 2020. Due to the ongoing restrictions resulting from the COVID-19 pandemic, the hearing took place remotely. It was common ground between the parties that since
 - a) Analysis of the urine sample provided by Mr Miller on 9 March 2019 disclosed the presence of BZE,
 - b) BZE is a Prohibited Substance, and
 - c) BZE is a metabolite of cocaine, also a Prohibited Substancethe only issues for this Regulatory Commission to determine at the hearing were sanction and costs.

- 8) Prior to the hearing we were able to read all of the documents in the bundle before us, comprising
 - a) The Charge letter and the evidence (AC/1 – AC/21) served with the Charge letter and relied on by the FA. That evidence included
 - i) Various documents relating to the collection and analysis of the sample
 - ii) An undated letter from Mr Miller responding to the FA's 26 April 2019 letter
 - iii) The transcript of an interview with Mr Miller that took place on 13 May 2019 ('*the interview*')

 - b) Unused evidence (AC/22-AC/23) served by the FA

 - c) Mr Miller's Reply Form and the documents served with that Reply Form, including
 - i) Written Submissions served on behalf of Mr Miller
 - ii) A witness statement from Mr Miller
 - iii) A witness statement from Dr Tim Rogers, Consultant Psychiatrist
 - iv) An Assessment dated 18 June 2019 by Sporting Chance
 - v) An undated letter from Colin Garlick, the Chief Executive and Club Secretary at Port Vale

- vi) An email from September 2019 from Yvonne Day. Ms Day is Mr Miller's mother.
 - d) A report served by the FA from Professor Kim Wolff, Head of Drug Control Centre at King's College, London
 - e) Supplemental Written Submissions served on behalf of Mr Miller, and the Exhibits to those Supplemental Written Submissions – in particular, a second witness statement from Mr Miller and a letter from Colin Bland of Sporting Chance
 - f) Written Submissions on sanction served by the FA
 - g) Various email correspondence.
- 9) The parties also provided copies of the authorities to which reference was made in their written submissions. We read those prior to the hearing.
- 10) At the hearing itself on 4 August 2020 we heard
- a) Oral evidence from Mr Miller (bv videolink) and Dr Rogers (by telephone), each of whom was cross-examined by the FA and asked questions by us
 - b) Closing submissions on behalf of each party.
- 11) At the conclusion of the hearing we informed the parties that we intended to reserve our Decision and to provide our Decision with Written Reasons in due course. This is now that Decision and Written Reasons. Before setting out our Decision and Written Reasons, we confirm that prior to reaching our Decision and in the course of preparing these Written Reasons we considered with great care the entirety of the materials, the written and oral evidence and the submissions that each party put before us. If we do not explicitly refer to a particular document, piece of evidence or submission below, it should not be inferred that we have overlooked or ignored it; as we say, we have considered the entirety of the materials put before us.

(B) A preliminary matter

- 12) In advance of the hearing we indicated that we wished to hear from Professor Wolff at the hearing. That was because Professor Wolff's report had been prepared and served before

Mr Miller's second witness statement had been served in which, as we explain below, he had provided a different chronology for his use of cocaine to that which had been provided when Professor Wolff prepared her report. Although the FA had (in its Written Submissions)

- a) Confirmed that it had *'liaised with'* Professor Wolff about that new chronology (without giving details of that liaison or disclosing any documents relating to it), and
- b) Set out its position on the extent to which that new chronology was *'broadly consistent'* with
 - i) The concentrations of BZE and cocaine found in the sample, and
 - ii) The absence of ethyl glucuronide (*'EtG'*) therein

out of fairness of Mr Miller we considered it sensible and desirable to hear evidence directly from Professor Wolff to confirm that matter, given its importance to the issues before us.

13) However, that indication from us was subsequently rather overtaken by events. At the start of the hearing the FA explained

- a) That it had liaised again with Professor Wolff,
- b) That it had been told by Professor Wolff that she had 'made a mistake' in the opinions and conclusions that she had previously expressed, and
- c) That it wished to call Professor Wolff not to confirm what the FA had said in its Written Submissions, but to give evidence that would differ (materially) from the views that she/the FA had previously expressed. When pressed, the FA was unable to identify exactly what evidence Professor Wolff would give (or which parts of her report, if any, she would be saying were wrong), but it was made plain
 - i) that the evidence that she would be giving would not be favourable to Mr Miller, and
 - ii) that the thrust of her evidence would be to the effect that the analysis of the sample suggested that Mr Miller had taken cocaine after midnight on 9 March 2019.

14) That was the first occasion on which Mr Miller had been notified of the FA's intention to call evidence (from Professor Wolff or anyone else) to that effect or to depart from its previously-confirmed position that the chronology described by Mr Miller was *'broadly consistent'* with the matters set out in paragraph 12(b) above.

15) The FA was unable to offer any reason

- a) For Professor Wolff's apparent change of heart; all that it could say was that Professor Wolff had previously '*made a mistake*'. The FA was unable to say what that mistake was – for example, whether Professor Wolff had previously misread the contents of documents produced in the course of analysing the sample, had misinterpreted aspects of the data contained in such analytical documents, had discovered literature which undermined her previously-expressed opinions on the interpretation of that data, or had simply changed her mind about what could be inferred from the data. We were told that Professor Wolff had not articulated her current view (whatever it might be) in writing in any form

 - b) For why that change of heart had emerged so later in the day; all that the FA could say was that Professor Wolff had indicated her change of heart to it at 7.30pm on the evening before the hearing was due to start.
- 16) We were addressed by both parties as to how we should proceed in light of that development:
- a) The FA's primary position was that Professor Wolff should be given the opportunity to provide a further written report setting out the opinion that she now wished to express before us. However
 - i) The FA was unable to say when Professor Wolff would be able to provide such a supplemental report, but
 - ii) Regardless of when she might have been able to do so, it was inevitable (given that she was otherwise engaged throughout the day of the hearing) that an adjournment of the hearing would be required to enable that to happen

 - b) The FA's secondary position was that the hearing should proceed as planned, with Professor Wolff giving her new opinion (and any explanation for the change in her opinion) for the first time in her oral evidence. The FA explained however that because of her prior commitments Professor Wolff would only have been able to give that evidence for the first time at 4pm on the day of the hearing

c) Mr Miller's position was that, regardless of how we dealt with Professor Wolff, he did not want the hearing to be adjourned. He was adamant that he did not want the Charge to continue to hang over his head, and he wanted the matter to be resolved one way or another on 4 August 2020. The principal reason for that [REDACTED]; as the evidence from both Mr Miller and Dr Rogers before us made clear, Mr Miller had suffered immensely since the sample had disclosed the presence of BZE, he was trying to get his life back on track and he considered it imperative to be able to put this matter behind him. His primary position therefore was that the hearing should proceed, but without any supplemental report being served from Professor Wolff or supplemental opinion being expressed by her, in the alternative, he was prepared to proceed in any event, and simply 'take his chances' with whatever Professor Wolff might say.

- 17) We did not consider it fair to Mr Miller to allow the hearing to proceed on 4 August 2020 on the basis
- a) That Professor Wolff would, at some stage during the day, give oral evidence to the effect that her original report was in some way erroneous, but
 - b) That until that point in the hearing neither we nor Mr Miller (nor it seems the FA) would know
 - i) Exactly what parts of her report would be 'corrected', or
 - ii) Exactly what she would be saying in her evidence, or
 - iii) Exactly what the FA's case on her evidence was/would be.

We therefore found it easy to reject the FA's secondary position; the prejudice that would be caused to Mr Miller by proceeding on that basis was all too obvious.

- 18) We also had little difficulty in rejecting the FA's primary position. The events underlying this Charge occurred in March 2019 and the proceedings had been hanging over Mr Miller's head since the FA served the Charge July 2019. During that time Mr Miller had suffered immensely with his mental health, as the factual and expert evidence showed, to the extent that proceedings had been stayed for a period in late 2019 (in the FA's own words) '*to assist [Mr Miller] in recovering his mental health and wellbeing*'. We considered that it would be grossly unfair on Mr Miller for this matter to now be adjourned at the last minute, particularly when

- a) The FA was unable to explain why Professor's Wolff's 'mistake' had emerged so late in the proceedings,
- b) The FA was unable to explain exactly how Professor Wolff's evidence would differ from that contained in her report,
- c) The FA was unable to tell us when a report from Professor Wolff might be available,
- d) Mr Miller was thus unable to know whether he would wish to seek expert evidence in response, let alone anticipate when such response evidence might be obtainable, and so
- e) We were accordingly unable to say for how long the hearing might be adjourned and so for how much longer this matter would be hanging over Mr Miller before a new hearing could take place.

19) In the circumstances, we concluded that the most appropriate way in which to proceed was

- a) For us to refuse the FA permission to serve a supplemental report from Professor Wolff or to call Professor Wolff to give oral evidence which differed from the contents of her report,
- b) For the hearing to continue on 4 August 2020,
- c) For the FA to be permitted to rely on the served report of Professor Wolff insofar as it wished to do so/was able to do so in light of the discussions that it had had with her on the evening before the hearing.

20) We were satisfied that for the purpose of hearing and determining the Charge that when proceeding in that way we would be able

- a) To put from our minds what we had been by the FA told about Professor Wolff's 'change of heart', and
 - b) To determine the Charge on the basis of the evidence that we had read and would hear.
- The parties accepted that we would be able to do so. We were in fact able to do so.

(C) The structure and provisions of the relevant FAADRs

i) The Preamble

21) The Preamble to the FAADRs sets out the fundamental aims of Anti-Doping, namely

- a) To uphold and preserve the ethics of sport
- b) To safeguard the physical health and mental integrity of Players
- c) To ensure that all Players have an equal chance.

Those are also the fundamental aims laid down by *inter alia* WADA. FAADR Regulation 1 confirms that the FAADRs are intended to implement the mandatory provisions of the World Anti-Doping Code (*'the Code'*) and should be interpreted in accordance with that purpose.

22) That Preamble to the FAADRs also sets out Participants' Responsibilities. It specifies that Players must

- a) Be aware of and comply with all applicable anti-doping policies and Rules and Regulations adopted by the FA
- b) Be aware of what constitutes an Anti-Doping Rule Violation (*'ADRV'*), including what substances are prohibited under the FAADRs
- c) Take responsibility for all substances that they ingest and for all substances that they use
- d) Co-operate with any investigation regarding a potential Anti-Doping Rule Violation,

23) Finally the FAADR Preamble also explains

- a) That Adverse Analytical Findings and the Use of Prohibited Substances will be dealt with as strict liability violations, such that
 - i) it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Player's part to establish an ADRV for the presence or Use of Prohibited Substance, and
 - ii) a lack of intent, Fault, negligence or knowledge on the part of a Player is not a valid defence to a charge that such an ADRV has been committed
- b) That the FAADRs contain a number of mandatory penalties based on the penalties stipulated by WADA which can be eliminated or reduced only in accordance with the exceptional or special circumstances set out in Part 8¹ of the FAADRs.

ii) Anti-Doping Rule Violations

24) An *'Anti-Doping Rule Violation'* (*'ADRV'*) is defined as *'a breach of any one of Regulations 3-12 (inclusive) ...'*. FAADR Regulation 3 provides:

¹ Wrongly referred to in the Preamble itself as Part 7.

‘Presence of a Prohibited Substance² or its Metabolites³ or Markers⁴ in a Player’s Sample:

(a) The presence of a Prohibited Substance or any of its Metabolites or Markers in a Sample provided by a Player is prohibited unless they Player establishes that the presence is consistent with a Therapeutic Use Exemption that has been granted to the Player

(b) Sufficient proof that an ADRV has been committed pursuant to Regulation 3 is established by any of the following: the presence of a Prohibited Substance or its Metabolites or Markers in the Player’s ‘A’ Sample where the Player waives analysis of the ‘B’ sample and the ‘B’ sample is not analysed

...

(d) Subject to Regulation 3(e) the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample will constitute an Anti-Doping Rule Violation

...

(f) The penalties set out in Regulation 51 apply to this violation’.

iii) Disciplinary proceedings for ADRVs

25) Part 3 of the FAADRs sets out the procedure to be followed in the event that the presence of a Prohibited Substance is detected in a sample. For present purposes we need only refer to

- a) FAADR Regulation 26 - in proceedings alleging an ADRV
 - i) The burden of proving that an ADRV has taken place falls on the FA, and
 - ii) The standard of proof is ‘*the comfortable satisfaction of the Regulatory Commission*’⁵, bearing in mind the seriousness of the allegations that are made
- b) FAADR Regulation 27 – facts relating to an ADRV may be established by any reliable means.

² Defined as ‘any substance or class of substance defined as such in the Prohibited List’. ‘Prohibited List’ is the list of Prohibited Substances and Prohibited Methods that is produced by WADA as updated from time to time and recognised by the FA in accordance with paragraph 5 of the Preamble to the FAADRs.

³ Defined as ‘a substance produced by a biotransformation process’

⁴ Defined as ‘a compound, group of compounds or biological parameters that indicate the Use of a Prohibited Substance or Prohibited Method’, where ‘Use’ is defined as ‘the utilisation, application, ingestion or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method’.

⁵ That standard of proof is greater than a mere balance of probabilities but less than proof beyond reasonable doubt.

iv) Penalties

26) The starting point for any consideration of penalty is FAADR Regulation 36. That Regulation 36 provides that

- a) If in disciplinary proceedings brought pursuant to the FAADRs it is found that an ADRV has been committed, a penalty *shall* be imposed in accordance with Part 6 of the FAADRs (FAADR Regulations 50-58) and Part 7 of the FAADRs (emphasis added). Part 7 of the FAADRs concerns sanctions for multiple ADRVs and has no relevance in this case
- b) Unless the Participant establishes that there are grounds to eliminate or reduce such penalty in accordance with any applicable provision of Part 8 of the FAADRs, the Regulatory Commission shall have no discretion to reduce those penalties
- c) Subject to FAADR Schedule 1 paragraph 2.11 a mandatory element of the each penalty for an ADRV is the Public Disclosure of that penalty.

27) FAADR Regulation 51 then provides

‘Subject to the relevant provisions of Part 8 of [the FAADRs] for a violation committed by a Player under [FAADR Regulation 3] (presence) ... the following penalties must be imposed

(a) Where the ADRV does not involve a Specified Substance,⁶ 4 years’ suspension unless the Player ... establishes that the violation was not intentional, in which case 2 years’ suspension’.

28) FAADR Regulation 50 provides:

‘The term “intentional” as used in this Part 6 [of the FAADRs] is meant to identify those Participants who cheat. The term therefore requires that the Participant engaged in conduct which he knew constituted an [ADRV] or knew that there was a significant risk that the conduct might constitute or result in an [ADRV] and manifestly disregarded that risk. An [ADRV] resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be an not intentional if the substance is a Specified Substance and the Participant can establish that the Prohibited Substance was Used Out of Competition. An [ADRV] resulting from an Adverse Analytical Finding for a substance which is only prohibited

⁶ Meaning ‘any substance classified as such in the Prohibited List’. The Prohibited List records ‘In accordance with Article 4.2.2 of the WADA Code, all Prohibited Substances shall be considered as ‘Specified Substances’ except substances in Classes S1 (Anabolic Agents), S2 (Peptide Hormones, Growth Factors, Related Substances and Mimetics), S4.4 & 4.5 (certain Hormone and Metabolic Modulators), S6.A (Non-Specified Stimulants) and Prohibited Methods M1, M2 and M3’. Cocaine falls within Class S6.A. It is thus a Non-Specified Substance/not a Specified Substance.

In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Participant can establish that the Prohibited Substance was Used Out of Competition in a context unrelated to sport performance’.

‘*In-Competition*’ is defined in FAADR Schedule 2 as meaning

‘the time period starting at midnight on the day of a match until the time on that match day that the Sample collection procedures have been completed by the Competent Officials ...’

‘*Out of Competition*’ is defined as meaning any time which is not In-Competition.

29) Finally for present purposes we turn to Part 8 of the FAADRs ‘*Reduction of Penalties for Exceptional Circumstances*’. The Regulations in that Part specify a number of threshold criteria which, if established by a Participant, permit (but do not oblige) a Regulatory Commission to replace the penalties contained in Part 6 of the FAADRs with the penalties stipulated in Part 8 of the FAADRs:

a) FAADR Regulation 66 (‘*Elimination of the period of suspension based on No Fault or Negligence*’) provides

‘If a Participant establishes in an individual case that he bears No Fault or Negligence for the ADRV in question then any otherwise applicable period of suspension will be eliminated. This Regulation only applies in exceptional circumstances. This Regulation 66 may only be applied to ADRVs under Regulation 3 (presence) ... It may not be applied to any other ADRV’.

‘*No Fault or Negligence*’ is defined as meaning that the Participant

‘is able to establish that he did not know or suspect even with the exercise of the utmost caution that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an FAADR ...’

b) FAADR Regulation 69 (‘*Reduction of the period of suspension based on No Significant Fault or Negligence*’) provides

‘If a Participant establishes in an individual case where FAADR Regulations 67 and 68 are not applicable that he bears No Significant Fault or Negligence then ... the otherwise applicable period of suspension may be reduced based on the Participant’s degree of Fault, but the reduced period of suspension may not be less than one-half of the period of suspension otherwise applicable.’

‘*No Significant Fault or Negligence*’ is defined as meaning that the Participant

‘... is able to establish that his Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relation to the ADRV. Except in the case of a Minor, for any violation of FAADR Regulation 3 the Player must also establish how the Prohibited Substance entered his system ...’

‘Fault’ is defined as meaning

‘... any breach of duty or lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Participant’s degree of Fault include for example the Participant’s experience, whether they are a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Participant’s degree of Fault the circumstances must be specific and relevant to explain the Participant’s departure from the expected standard of behaviour. Thus for example the fact that a Player would lose the opportunity to earn large sums of money during a period of suspension or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of suspension under the provisions of Part 8 [of the FAADRs]’.

c) FAADR Regulation 69(a) provides

‘This Regulation 69 may be applied to any [ADRV] except those where intent is an element of the violation ...’

(D) Factual background: an overview of Mr Miller’s health as at March 2019

30) Before we consider

- a) How the analysis of the sample came to disclose the presence of BZE, and
- b) The correct approach to sanction in this case

it is appropriate to set out certain background facts. Those facts provide important context to the presence of BZE in the sample. They also provide important context to Mr Miller’s state of mind and cognitive capacity in March 2019.

31) We have not set out every detail of the evidence that we heard on these matters. Much of that evidence was deeply personal to Mr Miller, and there is no need for us to record it. We assure Mr Miller however that we very much had that detail in mind when approaching and determining the issues before us.

- 32) In her Written Submissions on behalf of Mr Miller, Ms Potts described Mr Miller as an individual who in March 2019
- a) Was suffering from a medically-diagnosed, severe substance use disorder and depression, and
 - b) Was struggling with addictions to alcohol, cocaine and gambling.
- 33) We find that description to be an accurate one. It was clear from the evidence before us – both from Mr Miller himself and from Dr Rogers – that as at March 2019
- a) Mr Miller had suffered – with varying degrees of severity – with mental ill health for many years. We were told about serious eating disorders, periods of anxiety and recurrent major depressive disorders. Dr Rogers described Mr Miller as having a ‘*long history of complex mental ill health*’ prior to March 2019, and expanded on that in his oral evidence. We accept that description
 - b) Mr Miller had for many years (since about the age of 17) been a regular user of, and addicted to, cocaine. He had also used a variety of other drugs, including alcohol, over a long period prior to March 2019:
 - i) Dr Rogers categorised Mr Miller as suffering a severe substance use disorder as at March 2019, and we accept that evidence
 - ii) Dr Rogers also opined that Mr Miller’s substance use may well have represented an unhealthy coping mechanism for his difficulties with his wellbeing – as Mr Miller put it, he had for many years used alcohol and drugs to ‘*self-medicate*’ and to escape reality
 - c) Mr Miller was also struggling to control his gambling. While Dr Rogers gave less evidence about this (because less had been said to him by Mr Miller about it)
 - i) Mr Miller’s unchallenged evidence was that he had lost significant sums of money gambling online in and before March 2019 (and money that he could not afford to lose), and
 - ii) It appeared to us that as at March 2019 Mr Miller had certainly been a ‘problem gambler’ and was in all probability also addicted to gambling.

34) While it is not necessary for us to make any finding in such regard, it seems likely from the evidence before us that the origins of Mr Miller's mental ill health are historic:

- a) There are [REDACTED]
[REDACTED]
- b) Mr Miller also suffered various events, losses and traumas in his youth which, Dr Rogers believes, are likely to have shaped Mr Miller's mental well-being and life choices during and after late adolescence.

His chronic mental ill health also made Mr Miller vulnerable to acute incidents; we describe below how certain incidents in early March 2019 impacted on Mr Miller.

35) The treatment received by Mr Miller prior to March 2019 for his substance use disorder and mental ill health was limited.⁷ It appears to have comprised

- a) [REDACTED]
[REDACTED]
- b) A total of 12 counselling sessions organised with the assistance of the PFA in 2018, and
- c) Attendance at Alcoholics Anonymous, Narcotics Anonymous and Gamblers Anonymous meetings in 2018.

Mr Miller had ceased to engage with any treatment by the end of 2018, and (it appears) only began to receive treatment again relatively recently.

(E) How the sample came to contain a Prohibited Substance

i) Mr Miller's original explanation for the presence of BZE in his urine sample

36) Mr Miller responded to the FA's letter dated 26 April 2019 on 8 May 2019. In his letter he explained

'... on 2 March 2019 I was mentally in a bad place. I went home, got changed and went out to meet some friends in a local pub.

We started drinking at around 8pm and continued until the early hours of the morning. During that evening, under the influence of alcohol, I took cocaine.

On Wednesday 6 March 2019 I was still struggling mentally. I went out with my friends again that evening until the early hours, had a lot to drink and took cocaine again.

⁷ It appears to have been triggered by – or was certainly coincident with – Mr Miller testing positive for cocaine in out of competition test in April 2018, which was dealt with by the FA under its social drugs policy.

This had nothing to do with football and I was not trying to gain any sporting advantage by taking it'.

37) Thus Mr Miller's original explanation to the FA for the presence of BZE in the sample provided by him on Saturday 9 March 2019 was that he had taken cocaine on Saturday 2 March 2019 and Wednesday 6 March 2019. There was no suggestion by him that he had taken cocaine after Wednesday 6 March 2019.

38) On 13 May 2019 Mr Miller was interviewed by the FA. During the interview he described the following sequence of events:

a) On Saturday 2 March 2019

i) he had received news that [REDACTED]

ii) he had been extremely disappointed to have been left on the bench during a match following what he believed to be an assurance from his manager that he would play

b) He took those matters very badly and as a result, decided to go to the pub that night, where he drank heavily. When he returned home

i) He continued drinking

ii) He took cocaine – probably 2 grams – that he had bought during the evening. He did so between about midnight on Saturday 2 March 2019 and 06.00 on Sunday 3 March 2019

iii) He spent the majority of the rest of the night gambling online, losing a considerable sum

c) On Tuesday 5 March 2019 he had again spent the evening in the pub

d) On Wednesday 6 March 2019 he had played for Port Vale reserves and played well, scoring a good goal, following which he had again

i) Spent the evening in the pub, and then

- ii) Returned home, where he had continued drinking, had again taken cocaine (once again, probably 2 grams) between about midnight and 06.00, and had spent much of the night gambling online, again losing a considerable sum
- e) On Thursday 7 March 2019 he had stayed in bed. During the day he had been told that a teammate had been injured and that he would therefore be starting for Port Vale on Saturday 9 March 2019. As a result, knowing that he had taken cocaine, he tried to ‘sort himself out’ – eating healthily, drinking significant amounts of water to try to ‘flush all the shit out of me’ and exercising to try to ‘sweat a bit more out of me’
- f) On Friday 8 March 2019 he trained with Port Vale. He made no mention during his interview of any cocaine use on that day
- g) On Saturday 9 March 2019 he played against Mansfield FC, and was selected after the match to provide a urine sample to the UK Anti-Doping Control officials. As soon as he was selected he knew that he would test positive for cocaine.

39) In September 2019 Mr Miller served with his Reply Form

- a) A witness statement dated 19 September 2019, whose contents he confirmed (by signing that witness statement) were true. In the Witness Statement Mr Miller
 - i) Repeated (broadly) the sequence of events that he had described to the FA at his interview,⁸ although he corrected the date on which he had played and scored in the Port Vale reserve team match (Tuesday 5 March 2019, not Wednesday 6 March 2019),
 - ii) Made it clear that he had never used cocaine in an attempt to improve his performance in a football match, and
 - iii) Specifically stated (emphasis added)

‘I spent the Thursday and Friday [7th and 8th March 2019] doing as much as I could to get myself into a competitive state for the weekend. I did not consume any alcohol or cocaine during those days ...’

⁸ He also explained that during the week between 2 March and 9 March 2019 he had discovered that his ex-partner had started a new relationship, and that his contact with his son was likely to be reduced. That was, understandably, upsetting for Mr Miller; it was clear from the evidence before us that Mr Miller values his relationship with his son very highly.

- b) Written Submissions drafted by Counsel. Those Written Submissions had as a central premise
- i) The fact that Mr Miller had taken cocaine on Saturday 2 March 2019 and Wednesday 6 March 2019,
 - ii) The ‘fact’ that Mr Miller had not taken any cocaine between 6 March 2019 and the occurrence of the post-match testing on 9 March 2019, and so
 - iii) The fact that Mr Miller’s cocaine use had been ‘*out of competition*’ and in a context unrelated to sporting performance.

ii) The FA’s challenge to the accuracy of Mr Miller’s original explanation

- 40) The FA subsequently served a report from Professor Kim Wolff, Head of the Drug Control Centre at King’s College London. In that report Professor Wolff provided her opinion on *inter alia*
- a) Whether the concentration of BZE in the sample analysed could be consistent with Mr Miller’s explanation for his ingestion of cocaine, and
 - b) Whether a back calculation was possible to determine whether the concentration of BZE was due to use of cocaine before or after midnight on 8 March 2019 (and so before or after the In/Out of Competition threshold).
- 41) The opinion expressed by Professor Wolff in that report was that
- a) The analytical data was indicative of cocaine use in the 24 hours before the sample was provided on 9 March 2019, and was inconsistent with Mr Miller’s evidence that he had last used cocaine approximately 59 hours prior to the urine sample collection; as Professor Wolff put it ‘*[Mr Miller’s] explanation ... cannot be true*’
 - b) The absence of EtG above a threshold level also called into doubt Mr Miller’s account of how and when he had last used cocaine
 - c) It was however (for a variety of reasons) ‘*extremely difficult*’ to interpret BZE elimination in this case in order to provide a back-calculation of the likely pattern of cocaine use.

Professor Wolff concluded

‘The presence of a cocaine peak in [the sample] ... is indicative of cocaine use in the 24h before urine sample collection

The concentration of BZE in [the sample] alongside cocaine supports the use of cocaine in the last 24 hours

The present od EtG above [the specified concentration] was not confirmed for [the sample] calling into doubt [Mr Miller's] account

Cocaine use most likely occurred after 17.46 on 8 March 2019 that is within 24 hours of the urine sample collection.

Based on the reported pattern of use of the Player cocaine use may have occurred during the In-Competition period (commencing at midnight on the day of a match): 00:00 9 March 2019

The presence of cocaine [in the sample] determines that the account given by [Mr Miller] is implausible'.

iii) Mr Miller's subsequent explanation

42) Having received Professor Wolff's report

- a) Mr Miller served a further witness statement. In that second witness statement Mr Miller '*corrected*' certain matters in his first statement. In particular
 - i) He corrected the chronology of his conduct in the week leading up to Saturday 9 March 2019:
 - (1) He again confirmed that he had taken cocaine on the night of Saturday 2/3 March 2019
 - (2) He explained that he had taken cocaine on the night of Tuesday 5/6 March 2019 (after the Port Vale reserve team match, which had been on Tuesday 5 March 2019 not Wednesday 6 March 2019), not 6/7 March 2019
 - ii) He gave a detailed description of how he (with a friend) had spent the evening of Friday 8 March 2019 drinking beer and using cocaine (which the friend had brought to his house) before going to bed at about 11pm. Mr Miller described ingesting 2 lines of cocaine during the course of the evening. We return to consider the events of that evening in greater detail below
 - iii) He accepted that what he had said in his first statement about having not used cocaine on 7 or 8 March 2019 was not correct – as he put it '*I can barely remember the conversations I had with the PFA and the lawyers ... or what I said to them. However, I now understand that what I said was not correct*', and
 - iv) He apologised to lying '*to the PFA, my solicitors and the FA about the date on which I consumed the cocaine ... I was so used to hiding my addictions that I just continued in the same way ...*'

b) Supplemental Written Submissions were served on Mr Miller's behalf. Those Supplemental Written Submissions continued to be made on the premise that Mr Miller's cocaine use was 'out of competition' (albeit now on the evening of 8 March 2019) and in a context unrelated to sporting performance.

43) Mr Miller's detailed description of the events that occurred on the evening of 8 March 2019 – provided for the first time in his second witness statement, and so almost 12 months after the relevant events – is as follows:

'On the evening of Friday 6 March 2019 after I had returned from my run at around 6pm, a friend of mine (who lives a few doors down) called me and asked if I wanted to watch the Friday night football game with him on Sky ... As I had no plans I invited my friend [REDACTED] round to watch the match at my house. [REDACTED] is someone I used to see regularly, but given how hard I have been working to overcome my addictions I barely speak to him anymore.

[REDACTED] arrived just before kick off with 4 cans of beer and offered me one. I initially refused but after 10 minutes or so of seeing him drink I could not help myself and opened one of the beers. My intention had been not to drink or take cocaine given how focussed I was on the match the following day, but as an addict I simply was not able to say no.

Quite early on during the first half [REDACTED] also offered me cocaine. At the time he was also a habitual user of cocaine. I initially refused, but having had a drink, the overwhelming nature of my addiction took over and after I had finished the can of beer, I took a line of cocaine. [REDACTED] continued to take cocaine and drink more beer during the football and at this stage I felt I had lost all self-control. I had one more can of beer and took a second line of cocaine during the second half.

After the game had finished [REDACTED] went home. I was really angry with myself for what I had done. Once [REDACTED] had left I did not take cocaine or drink any more alcohol and went to bed around 11pm.'

44) That version of events was challenged by the FA in cross-examination. Although the detail varied a little – for example, in his oral evidence Mr Miller

- a) Described having been able to resist accepting a beer from [REDACTED] until well into the first half of the match (rather than early in the first half)
- b) Described having been able to resist accepting a line of cocaine from [REDACTED] until into the second half of the match (rather than during the first half)

- c) Described having had the second line of cocaine shortly after the match had concluded (rather than during the second half)
 - d) Described going to bed immediately after the match, rather than at around 11pm
- the substance of the oral evidence given by Mr Miller about the events of the evening of Friday 8 March 2019 remained consistent with that witness statement.

45) Mr Miller also described graphically in his oral evidence the turmoil that he had faced during the course of that evening. According to his oral evidence

- a) He was determined not to drink or take cocaine that evening. His motivation for that was really twofold:
 - i) First, he badly wanted to play well the following day. There were 2 principal reasons for that, over and above the ‘normal’ wish that every footballer has to play well in every match:
 - (1) To show his new manager (who had left him on the bench for each of the 3 matches for which he had been in charge since starting to manage Port Vale) that he merited a regular place in the Port Vale first team line up. Mr Miller understood that the match on Saturday 9 March 2019 was his chance to get his season back on track
 - (2) To show Mansfield – by whom he felt he had been badly treated in the past – that they had been wrong to dismiss his talents
 - ii) Secondly, he did not want to break the ‘unwritten rule’ that as a player you simply do not on the night before a match drink or do anything that might impair performance the following day
- b) He was successful in resisting [REDACTED] offers of beer and cocaine during the early part of the evening, and only accepted [REDACTED] offers as the evening went on and his self-control was eroded
- c) After [REDACTED] had left (shortly before 10pm) he was angry with himself for having succumbed to temptation.

iv) Mr Miller’s cocaine use before the match: our findings

46) We accept Mr Miller’s evidence that he took cocaine

- a) On the night of Saturday 2/3 March 2019, and
- b) Midweek during the following week, on the night of Tuesday 5/6 March 2019.

47) We accept that each of those occasions followed a very similar course:

- a) Mr Miller spent the evening in the pub, drinking heavily, following which
- b) He returned home and telephoned a dealer to buy cocaine himself, and then
- c) He took that cocaine over the course of several hours, while continuing to drink and engage in online gambling.

48) We also accept that on each of those 2 occasions Mr Miller's state of mind was one of what we characterise as depression and despair:

- a) Underlying everything was his chronic mental ill health and substance misuse disorder
- b) Overlaying those matters was a belief that his season as a first team professional footballer was already over and that he would not be playing for the Port Vale first team again that year despite assurances by the manager to the contrary. His attitude was (as he graphically put it) '*Fuck it*'
- c) He had been deeply affected by the bad news that he had learned on 2 March 2019 and in the days that followed, as summarised above.

49) We also find that Mr Miller took cocaine on the evening of Friday 8 March 2019. Had Mr Miller not eventually admitted to taking cocaine on the night of Friday 8 March 2019, we would in any event have found as a fact that he had done so. We would have seen no reason to reject Professor Wolff's unchallenged evidence that the analysis of the sample was only consistent with Mr Miller having used cocaine in the 24 hours before the match, and wholly inconsistent with the explanation originally offered by Mr Miller that he had last used cocaine several days prior to 8 March 2019. Had he not changed his evidence as to when he had used cocaine that week, we would have rejected any assertion maintained by Mr Miller

- a) that he had not taken cocaine on the evening of Friday 8 March 2019, or
- b) that the last occasion on which he had taken cocaine prior to the match on 9 March 2019 had been on the night of either 5/6 or 6/7 March 2019.

- 50) Given the significance of midnight on 8 March 2019 (as the cut off between In-Competition and Out of Competition) it is however not enough for us to find simply that Mr Miller took cocaine on the evening of 8 March 2019; we must determine
- a) Whether that use ceased before midnight on Friday 8 March 2019 (as Mr Miller contends), or
 - b) Whether that use had continued past midnight into the early hours of Saturday 9 March 2019 before Mr Miller finally went to bed, or
 - c) Whether Mr Miller ceased taking cocaine before midnight on Friday 8 March 2019, but had started again on Saturday 9 March after he had awoken that morning and so shortly before the match.
- 51) The burden of establishing that the Prohibited Substance was used ‘*Out of Competition*’ for the purposes of FAADR Regulations 50 and 51 rests with Mr Miller; in other words, it is for Mr Miller to persuade us that he did not use cocaine after midnight on Friday 8 March 2019.
- 52) The evidence available to us to determine that question was as follows:
- a) We heard evidence from Mr Miller. His evidence was of course that he had ceased using cocaine prior to midnight on 8 March 2009. We consider Mr Miller’s evidence in detail below. While he gave his evidence in a manner that was often emotional and not always focussed, we concluded that he was doing his best to help us and give honest evidence; we did not conclude that he was positively trying to mislead us
 - b) Mr Miller did not provide any other evidence or documents to corroborate his position. In particular
 - i) No statement was served from ██████, the individual with whom Mr Miller had spent the evening of 8 March 2019 drinking and taking cocaine, and ██████ did not give evidence before us. That is not surprising; one can well see why ██████ – who we were told is married and has a daughter – might not want to admit to involvement in drug use. It was however to Mr Miller’s credit that (he told us)
 - (1) he had given ██████ contact details to his solicitors in the hope that they might be able to contact him, and

(2) he had himself ceased contact with [REDACTED] as part of his wider attempts to distance himself from drug use

ii) No phone or messaging records were served. Given Mr Miller's evidence that on each occasion earlier in the week he had telephoned a dealer to deliver cocaine, one might have expected to see phone records showing that such behaviour had not been repeated by Mr Miller on the night of Friday 8 March 2019. Such records could have corroborated, at least in part, Mr Miller's evidence that he had gone to bed at around 11pm. However, ultimately we placed little weight on the absence of such records; it was for us to decide the issue on the basis of the evidence that we did hear and see, not on the basis of what else there might have been

c) We had Professor Wolff's report. That did not assist one way or the other, not least because it was served before Mr Miller changed his evidence and admitted to having used cocaine on Friday 8 March 2019; the conclusion in Professor Wolff's report was that (emphasis added)

*'Based on the reported pattern of use of the Player cocaine use **may** have occurred during the In-Competition period (commencing at midnight on the day of a match): 00:00 9 March 2019'.*

Ms Potts sought to characterise that evidence as '*consistent with*' Mr Miller's evidence.

We preferred to characterise it as not undermining Mr Miller's evidence.

53) At the end of the day therefore we were left to answer the stark question – do we accept Mr Miller's uncorroborated evidence that he did not use cocaine after midnight on Friday 8 March 2019 ?

54) As a starting point, it of course cannot be overlooked that, despite having had at least 4 opportunities to do so (in his letter responding to the FA's 26 April 2019 letter, in his interview, in his first witness statement and in his discussions with Dr Rogers), Mr Miller made no mention whatsoever of having used cocaine at all on Friday 8 March 2019 until the spring of 2020. Indeed, as we have set out above, in his first witness statement he positively asserted that he had not used cocaine at all on that day and confirmed that that assertion was true. It was only when his version of events was shown by Professor Wolff's report to be plainly false that he disclosed his further use of cocaine on Friday 8 March 2019.

- 55) Mr Miller accordingly accepted that he had lied, repeatedly, prior to March 2020 by concealing his use of cocaine on Friday 8 March 2019.
- 56) People lie for many different reasons. In this case, in his second witness statement Mr Miller had explained that he had lied about using cocaine on 8 March 2020
- a) Because he had been '*in such a bad place mentally*', and
 - b) Because he was '*so used to hiding his addictions that I just continued in the same way*'
- Mr Miller was cross-examined on the veracity of those explanations – in particular, as to how those explanations for concealing his cocaine use on Friday 8 March 2019 could be reconciled with the very open manner in which he had described (in his letter responding to the FA's 26 April 2019 letter, in his interview, in his first witness statement and in his discussions with Dr Rogers) his far greater cocaine use on other occasions that week and his cocaine addiction more generally. Why, it was asked, if he had been willing to admit so freely to his wider cocaine addiction and to his binges on 2/3 March and 5/6 March 2019, had he not mentioned taking 'only' 2 lines of cocaine on 8 March 2019 ?
- 57) In cross-examination Mr Miller provided answers to those questions. He explained that he had not wanted to admit to having drunk and taken cocaine on 8 March 2019 – even though the quantities involved were far less than those which he admitted using, twice, earlier that week and even though he had admitted to being addicted to cocaine – because he did not want to admit to having drunk alcohol and used drugs the night before a match. As he put it, he was embarrassed as a professional footballer to have done that when he knew that he was playing the following day – far more embarrassed than he was about his far greater excesses earlier during the week when he was 'only' training and playing for the reserves. He did not want to appear 'unprofessional' as a footballer, taking cocaine the night before a match; as he put it, he did not want to 'bow out' of football as an embarrassment.
- 58) The FA rightly pointed out that, if this was correct
- a) It highlighted yet another example of Mr Miller having lied, or at least having not been open and frank previously, namely when providing his original explanations for why he had said nothing about his cocaine use on 8 March 2019, and
 - b) That could be interpreted as yet further damaging the reliability of Mr Miller's evidence *per se*.

However, we felt that this latest explanation for his previous reluctance to admit to drinking and cocaine use on 8 March 2019 was genuine and honest. His role as a professional footballer was one of the few things that Mr Miller held dear in spring 2019, and was one of the few positives that he was clinging to in his life at that time. We can well see that he would have wanted to do almost anything to avoid the shame of having to admit to being ‘unprofessional’, and to being a player who would drink and use drugs on the night before a big match. We also accepted Mr Miller’s evidence that he was, to a degree, a different person now to that which he was even as recently as this spring; he has made real efforts to cease his cocaine use and to seek treatment. He is in a new relationship and has found a new job. He has found a new focus – physical fitness. He has been able to develop his relationship with his son. We therefore accepted that what Mr Miller was now telling us in this regard was genuine.

59) The FA suggested that the real reason that Mr Miller

- a) Had repeatedly and dishonestly concealed his use of cocaine on the evening of 8 March 2019, and
- b) Even now was dishonestly (on the FA’s case) denying use of cocaine beyond midnight on 8 March 2019

was because Mr Miller knew that a finding that he had taken cocaine after midnight on a match day would attract a more serious sanction than a finding that he had used cocaine before that time. Mr Miller denied that. His understanding, he explained, had been that the gravity of his conduct would be judged not by reference to when he had taken cocaine (before or after midnight) but by reference to when the sample had been taken. His understanding was that a sample taken after a match that disclosed the presence of a prohibited substance would be punished more severely than a sample taken in training, regardless of when the drugs that resulted in that positive sample had been taken by him.

60) We accept that Mr Miller genuinely held that view in March 2019 and in the months that followed, particularly in light of his earlier cocaine positive in April 2018 which was dealt with under the FA’s Social Drugs Policy Regulations. We accept that Mr Miller did not at that time appreciate that it would make any difference under the FAADRs when he had taken the drugs that had resulted in the positive sample; he appears to have come to understand that only after Professor Wolff’s report had been served and its references to the importance of midnight on 8/9 March 2019 had been explained to him. It therefore

follows in our view that Mr Miller's conduct in concealing the fact that he had used cocaine on 8 March 2019 was not motivated by a belief that, if he could persuade the FA to accept that he had 'only' used cocaine on 2/3 March and 5/6 March 2019, he would incur a more lenient sanction.

61) So, what of Mr Miller's evidence about the events of the evening of 8 March 2019 ? While conclusions

- a) That Mr Miller lied on 4 occasions about when he had last used cocaine before the match, and
- b) That Mr Miller had not until his oral evidence been entirely frank about why he had concealed the truth for so long

do not of themselves mean that Mr Miller must be lying about exactly what happened on the night of Friday 8 March 2019, the FA submitted, with some force, that such matters do mean that we should approach the reliability of Mr Miller's evidence about the events of that evening with considerable caution and should consider carefully whether Mr Miller's evidence that while he had in fact taken cocaine on 8 March 2019, he had ceased doing so before midnight was motivated not by a wish now to tell the truth but by a desire to minimise the consequences of his actions.

62) As a starting point, we record

- a) That history has already shown that Mr Miller's memory of events from the week prior to 9 March 2019 is not terribly reliable. His evidence about events during that week has varied over time
- b) That Mr Miller's claim now to be able to remember the events of that evening can be contrasted with his claims to be able to '*barely remember the conversations I had with the PFA and the lawyers*' around that time.

63) However, such matters are less significant than at first blush they might appear:

- a) As regards the first, the inconsistencies in Mr Miller's evidence about the week leading up to 8 March 2019 primarily related to dates; his evidence about 'events' – in particular, the acute events that occurred that week to push him into 2 cocaine and alcohol binges - and the fact that those binges had happened after matches and before rest days remained consistent

b) As regards the second, the week leading up to the match on 9 March 2019 was plainly etched on Mr Miller's mind. The weeks and months after 9 March 2019 were in contrast desperate times for him. We do not see it as implausible that Mr Miller could have a memory of the former but not of the latter.

64) In addition, as we have already noted, the fact that Mr Miller's oral evidence about the precise timings of events on the evening of 8 March 2019 does not match precisely the timings set out in his second witness statement is in our view not as significant as the FA submits. The substance of the events that Mr Miller describes during that evening, and their sequence, has remained consistent since he first admitted to cocaine use on the evening of 8 March 2019.

65) The FA also submitted that it was inherently unlikely that Mr Miller could have exercised the 'self-control' that he claims to have exercised on 8 March 2019, and so

a) Stopped taking cocaine after only 2 lines, and

b) Gone to bed by no later than 10pm (as he said in his oral evidence) or 11pm (as he said in his second witness statement)

given the serious nature of his mental ill health and substance misuse disorder at that time. The evening that he describes, it was said, is so completely at odds with the 2 occasions earlier that week when Mr Miller had admitted to drinking to excess and using cocaine, and with the bigger picture of Mr Miller's addiction to cocaine at that time, that it is inherently implausible.

66) While that submission has superficial attractions, it does not stand up to closer scrutiny:

a) We heard helpful evidence from Dr Rogers about the relationship between substance misuse disorder and self-control. That evidence showed that it is too simplistic to conclude that an individual who suffers from substance misuse disorder cannot exercise any self-control or restraint; while such an individual will certainly find it harder to do so than an individual who does not suffer from such a disorder (and will find it harder still to 'stop' if they are exposed to the substance to which they are addicted and/or start to use the substance), they do still have the capacity to show restraint and exercise self-control. Such an individual can always make his 'best effort' not to use cocaine

- b) The capacity of such an individual to exercise self-control would not (or would not necessarily) be constant. To put it another way, whether the ‘best effort’ to abstain that such an individual could make would be sufficient to enable him in fact to refuse to use/stop using on any particular occasion will depend on a variety of factors, including
- i) The severity of the individual’s dependence and underlying mental ill health at the time; the greater the severity of the underlying dependence and health issues, the harder it will be for that individual to exercise self-control and say no
 - ii) The existence of any factors that might undermine whatever desire or ability to exercise self-control that individual might otherwise have retained
 - iii) The strength of the motivation that the individual might have at the particular time for exercising, or trying his best to exercise, restraint
- c) While it was unlikely that Mr Miller’s underlying mental ill health and/or the gravity of his dependences had varied materially during the course of the week prior to 9 March 2019, Dr Rodgers considered that, from what he had learned from interviewing Mr Miller,
- i) In the early days of the week commencing 2 March 2019 Mr Miller had little motivation for exercising self-control. The distressing acute events that we have described above, overlain on Mr Miller’s underlying mental ill health and substance use disorder, would have exacerbated any lack of self-control on Mr Miller’s part. Bluntly, he would have seen no reason not to indulge in 2 drink and cocaine binges early in the week commencing 2 March 2019 and every reason to do so, while
 - ii) In contrast, (1) learning that he was starting for Port Vale on Saturday 9 March 2019, and (2) the fact that that match was against Mansfield, could have been positive factors
 - (1) That could have stimulated a desire on Mr Miller’s part to want to abstain from alcohol and cocaine (i.e. to ‘do his best’ to abstain), and so
 - (2) That could have enhanced what had earlier that week been an impaired ability/desire to exercise self-control.
- Being a father and being a footballer were 2 things – and apparently the only 2 significant things at that time – that mattered to Mr Miller at the relevant time. Those 2 matters could therefore well have strengthened his desire and ability to exercise self-control at the end of that week.

- 67) Therefore while Dr Rogers quite properly could not express a view on whether or not Mr Miller had in fact been able to exercise self-control on the evening of 8 March 2019 (and so stop after taking 2 lines of cocaine), or whether Mr Miller had in fact been trying hard to do so, his evidence did make clear that it would be unsafe for us to conclude that
- a) Simply because Mr Miller was suffering from the underlying substance use disorder and mental ill health issues that he was at that time, and
 - b) Simply because Mr Miller had been unable or unwilling to exercise self-control and avoid using alcohol or drugs earlier in the week, and
 - c) Simply because Mr Miller had started to drink alcohol and use cocaine on the evening of 8 March 2019

it would automatically follow that he could not have exercised any self-control on the evening of 8 March 2019 and stopped after 2 beers and 2 lines. Dr Rodgers' evidence was that it was possible that Mr Miller *could* have done so.

- 68) The question for us was therefore – did Mr Miller in fact exercise the self-control and restraint that he claims on the evening of 8 March 2019, and so stop drinking and using cocaine before midnight rather than relapsing into binge behaviour of the type that he had exhibited earlier in the week ?

- 69) In his second witness statement Mr Miller described

- a) That he had '*lost all self-control*' during the evening,
- b) That it was the '*overwhelming nature of his addiction*' that had caused him to take a line of cocaine after he had had one beer, and
- c) That '*as an addict I simply was not able to say no*'.

That might be said to suggest that Mr Miller had not been able to exercise any self-control that evening. However, those descriptions did not tell the whole story. In his oral evidence Mr Miller described the mental torment that he had gone through before he accepted [REDACTED] offer of a beer and a line of cocaine while watching the match that evening, and of the internal agonies that the contrasting desires to 'say no' and 'say yes' had caused him. We accept that evidence. We accept that, unlike earlier in the week (when he had simply 'given in' to his addiction and embarked on lengthy alcohol and cocaine binges), on Friday 8 March 2019 he had reason to fight, and did in fact fight, his demons and try his very best to exercise self-control. We accept that although he was unsuccessful in saying no

altogether to [REDACTED] offers of beer and lines of cocaine, he was successful (1) in limiting his consumption during the match, and (2) in stopping that consumption once [REDACTED] had gone home after the match (or perhaps to put it more accurately, he was successful in preventing himself from telephoning his dealer and having cocaine delivered to enable him to continue using that night).

70) There is one further factor that played heavily on our thinking. If the FA was right that Mr Miller's mental ill health and substance use disorders were such

- a) That he was unable to exercise self-control on the evening of 8 March 2019, and
 - b) That he had been unable to stop drinking and taking cocaine as he claimed that evening
- it would logically follow that Mr Miller would, on the FA's case, have continued to binge on alcohol and cocaine throughout the night until the early hours of the following morning, just as he had on the 2 occasions earlier in the week. However, after each of those binges Mr Miller's unchallenged evidence was that he had been good for nothing on the following day, and had stayed in bed. That was not the case on Saturday 9 March 2019. Mr Miller played against Mansfield, scored twice and was awarded Man of the Match.

71) As the FA submitted we must, we did indeed examine Mr Miller's evidence about the evening of 8 March 2019 with real care. Although it is fair to say that uncertainties remained in our mind about precisely what had occurred that evening, we concluded that Mr Miller had satisfied on us the balance of probabilities that his description of his cocaine use that evening was true. We therefore concluded that Mr Miller had not used cocaine after midnight on the evening of Friday 8 March 2019 (or to put it another way, he had not used cocaine on Saturday 9 March 2019).

72) We now turn to consider the consequences of that factual finding.

(F) Sanction: what period of suspension, if any, should be imposed ?

73) Mr Miller admits that he has committed an ADRV – a breach of FAADR Regulation 3(a). We are satisfied to the appropriate standard of proof that that admission is appropriate; the documentary evidence provided by the FA clearly demonstrates by reliable means that an ADRV has taken place.

74) Having set out our conclusions as to how BZE came to be present in the sample, we turn to the question of sanction.

i) The starting point

75) The starting point for our consideration of sanction is FAADR Regulation 51. Since the present ADRV does not involve a Specified Substance, the imposition of a 4 year suspension is mandatory *unless* Mr Miller is able to establish that the violation was not ‘*intentional*’ within the meaning given in FAADR Regulation 50. The burden falls on Mr Miller in that regard.

ii) Was the ADRV ‘Intentional’? The final sentence of FAADR Regulation 50

76) The appropriate starting point for a consideration of this question is the final sentence of FAADR Regulation 50. That sentence reads

‘An [ADRV] resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Participant can establish that the Prohibited Substance was Used Out of Competition in a context unrelated to sport performance’.

77) Cocaine

- a) Is indeed a substance which is only prohibited In-Competition, and
- b) Is not a Specified Substance

Accordingly, the ADRV will not be considered intentional if Mr Miller is able to establish

- i) That the Prohibited Substance was used Out of Competition, and
- ii) That the Prohibited Substance was used in a context unrelated to sport.

78) We accept that Mr Miller’s use of cocaine was in a context unrelated to sport. He did not perceive that he would gain any sporting advantage by its, and he did not do so.⁹ The use of cocaine was entirely independent of sport and unrelated to sports performance. The FA did not suggest to the contrary.

⁹ We were referred to various authorities in which findings to such effect have been made. We considered it unnecessary to dwell on those authorities in this case; given that Mr Miller’s use of cocaine was inextricably linked to excessive drinking, it was plain to us that there could have been no positive effect on performance.

79) For the reasons that we have already set out above, Mr Miller was able to establish to the requisite standard that his use of cocaine took place Out of Competition i.e. before midnight on Friday 8 March 2019.

80) It therefore follows that

- a) Mr Miller is entitled to benefit from the deeming provision contained in the final sentence of FAADR Regulation 50, and so
- b) What would otherwise be a mandatory period of 4 years' suspension is reduced to 2 years' suspension by virtue of FAADR Regulation 51(a).

iii) The other limb of FAADR Regulation 50

81) Although not necessary for us to do so in light of our findings above, we record that Mr Miller argued in the alternative that, had we not found that he had established that his use of cocaine had taken place Out of Competition, we should still have concluded that his use of cocaine had not been 'intentional' within meaning given in FAADR Regulation 50.

82) It is certainly correct that, just because a participant is unable to take advantage of the 'deeming provision' in the final sentence of FAADR Regulation 50, it does not automatically follow that a Regulatory Commission is bound to conclude that the participant's ADRV was intentional (or not Not Intentional). Determining whether or not the ADRV was 'intentional' for the purposes of FAADR Regulation 50 in such circumstances requires consideration of a number of factors:

- a) First, whether the participant can properly be described as a '*Participant who cheats*'. Insofar as that is intended to describe an individual who has sought to gain a sporting advantage from the use of a Prohibited Substance, then as we have already said that description is not an apt one for Mr Miller; we accept that he did not seek to gain, and did not in fact gain, any sporting advantage from his use of cocaine. Indeed, it is clear from the evidence that he gave before us that his abuse of cocaine and alcohol was detrimental to his sporting performance
- b) Secondly, whether the participant engaged in conduct
 - i) which he knew constituted an ADRV, or

- ii) which he knew involved a significant risk that the conduct might constitute or result in an ADRV, and manifestly disregarded that risk.

83) On behalf of Mr Miller Ms Potts submitted that that is a subjective test; the focus is thus not on what a reasonable individual in Mr Miller's position knew or ought to have known or appreciated, but rather on what Mr Miller in fact knew and appreciated. Her submission was that as at March 2019 Mr Miller's substance misuse disorder and underlying mental ill health meant that he simply had not had the necessary *mens rea* to satisfy the requirements of 'intention'; the degree of cognitive impairment by which he was affected at that time prevented him from being able to weigh up the choices facing him or form the necessary intent.

84) Ms Potts placed considerable weight on the decision of the Independent Regulatory Commission in *The FA v Lacey* (2017) in support of her submissions. However, while that decision has relevance in the context of FAADR Regulation 69 (see below) we did not derive assistance from it for the purpose of interpreting or applying the second sentence of FAADR Regulation 50. Given that *Lacey* was an Out of Competition test, and a case in which the FA had made a number of key concessions, we did not find it useful for that purpose.

85) Dr Rogers's report and evidence certainly made reference to

- a) Mr Miller suffering from various '*cognitive impairments*', and
- b) Those cognitive impairments being such that Mr Miller was '*unable to make decisions about his professional conduct and behaviour in the way that he would otherwise have done had he been mentally well*' (emphasis added).

However, in our view Dr Rogers' evidence, particularly when developed orally in cross-examination and in answer to our questions, fell a long way short of providing a sound evidential basis for Ms Potts' submission. While the cognitive impairment from which Mr Miller was suffering at the time undoubtedly diminished Mr Miller's ability to make 'good' decisions (i.e. decisions that others, who were not suffering from such impairments, would have considered objectively to be the 'right' decision to make) the evidence fell well short of demonstrating

- i) that the extent of that impairment meant that Mr Miller did not appreciate that his conduct involved a significant risk of being or resulting in an ADRV, or

- ii) that Mr Miller could not be said to have ‘*manifestly disregarded that risk*’ or to have had ‘no choice’ (because of the extent of his cognitive impairment) but to give in to his cravings to take cocaine, or
- iii) that the extent of Mr Miller’s cognitive impairment at the relevant time wholly prevented him from being able to appreciate that his conduct carried with it ‘risks’ or wholly prevented him from being able to make ‘right’ choices in light of such risks.

As we have found above (indeed, as a necessary precursor to finding that Mr Miller did exercise self-control and stop using cocaine after taking 2 lines on Friday 8 March 2019) Mr Miller did retain the ability to weigh up his options, did retain the ability to assess risks, and did retain the ability to make ‘right’ decisions.

86) Thus while we accept Dr Rogers’ evidence that Mr Miller’s ability to say no was likely to have been impaired to an extent on the evening of Friday 8 March 2019 by his underlying mental ill health and substance misuse disorder, we find that it was not so impaired as to disable him from having been able to form the requisite intention or take him outside the scope of the second sentence of FAADR Regulation 50. In that regard it is to be noted that

- a) In his evidence Mr Miller effectively accepted that he was aware of the consequences that would or might follow if he took cocaine that night and was then tested after the match
- b) Mr Miller had tested positive for cocaine less than 12 months previously. While that positive test had been dealt with by the FA under its Social Drugs Policy, that experience plainly demonstrated to Mr Miller that use of cocaine was impermissible
- c) He regarded his regular use of cocaine that season as meaning that he had been playing ‘*Russian roulette*’ with the Anti-Doping testers
- d) Mr Miller’s description of his behaviour on the night of Friday 8 March 2019 – doing his best not to drink or use cocaine because he was playing in a match on the following day, yet ultimately succumbing before stopping – demonstrated not only awareness on his part that use of cocaine was impermissible and that its use would constitute an

ADRV, or carried with it a significant risk of an ADRV, but also of the risk that he would be taking if he took cocaine that evening

e) Mr Miller's description (during his interview and in his first and second witness statements) of his behaviour on the days after he had taken cocaine (including on the morning of 9 March 2019) demonstrated attempts on his part to try to 'disguise' the fact that he had taken cocaine. Why do so if he was unaware that use of cocaine might carry with it a risk of an ADRV ?

f) Mr Miller's description in interview of the dilemma that he faced when learning on 7 March 2019 that he would be playing on Saturday 9 March 2019 demonstrated knowledge on his part that his use of cocaine earlier that week was or might well be an ADRV:

'I was just telling myself, "they [UKAD Doping Control Officials] won't be in, don't worry", but there's nothing I can do. I can't tell the gaffer. I can't say to him "Gaff, I can't play today, because if I get tested, I'm fucked". This is my one chance ... I've been waiting for this. Even though I thought my season was over, this is my chance to prove that I can and then I can start playing again ... I had to play, I had to put it to the back of my mind. Forget about it, try and play the best I can'

g) Mr Miller's reaction on being selected to provide a sample after the match (as described by him in his interview) demonstrated awareness on his part that his use of cocaine was an ADRV. He described how, immediately he was selected for testing, he knew that he was in deep trouble (*'walking off to a massive round of applause, feeling on top of the world, thinking this could be the one, this could be the turning point ... Then I got a tap on the shoulder and then everything came crashing down again'*) – indeed, he suggested

i) That he told a friend/fellow player of the trouble that he was in, and

ii) That he even admitted *'I'm giving you a heads up, I'm going to fail the drugs test'*.

87) We therefore reject the suggestion that Mr Miller

a) Did not know or appreciate (or to use the word used on his behalf, intend) that his use of cocaine on 8 March 2019 constituted an ADRV,

b) Did not know or appreciate that his use of cocaine on 8 March 2019 might constitute an ADRV,

- c) Did not manifestly disregard the risk that use of cocaine on 8 March 2019 might constitute an ADRV.

88) Accordingly had we not found that Mr Miller was able to bring himself within the deeming provision in the final sentence of FAADR Regulation 50, we would have found

- a) That Mr Miller had been unable to persuade us that he fell outside the scope of the second sentence of FAADR Regulation 50, and
b) That Mr Miller had accordingly been unable to establish that the ADRV was not intentional.

(G) Are any of the FAADR Part 8 conditions satisfied ?

89) Given our finding that Mr Miller has been able to establish that the ADRV was not intentional (in light of the deeming provision in the final sentence of FAADR Regulation 50) we must further consider whether any reduction in the 2 years' suspension is applicable by virtue of any Regulation in Part 8 of FAADR.

i) No Fault or Negligence: FAADR Regulation 66

90) Mr Miller did not invite us to conclude that there was 'No Fault or Negligence' on his part in this case. That is realistic; there would have been no prospect of him establishing that.

ii) No significant Fault or negligence: FAADR Regulation 69¹⁰

91) Mr Miller did however invite us to conclude that there was 'No significant Fault or Negligence' on his part, and that FAADR Regulation 69 therefore operates to reduce below 2 years the period of suspension that we might otherwise impose on him. The burden is on Mr Miller to establish that he bears no significant Fault or Negligence for the ADRV. He seeks to establish that in this case on the basis that

- a) His mental ill health and addictions, and consequent cognitive impairment, as at March 2019 should be considered to reduce the degree of Fault resting with him in this case to such a degree that it was not in fact 'significant', and

¹⁰ As both parties accepted, had we concluded that Mr Miller had failed to establish that FAADR Regulation 50 applied in this case (1) FAADR Regulation 69 would have been of no relevance: FAADR Regulation 69(a), and so (2) we would have had no power to reduce the mandatory period 4 years' suspension under any provision in Part 8 of FAADR.

b) Such matters were inextricably linked to the circumstances surrounding the commission of the ADRV.

92) Before we turn to consider those matters, one pre-condition to establishing No Significant Fault or Negligence in the context of a violation of FAADR Regulation 3 is that the Player must establish how the Prohibited Substance entered his system. Here Mr Miller satisfies that pre-condition; the Prohibited Substance entered his system when he used cocaine on the evening of 8 March 2019.

93) The FA drew our attention to the approach to determining ‘degrees of Fault’ advocated by CAS in Cilic v ITF (CAS/2013/A/3327 & 3355 paras 69-77) and FIS v Johaug (CAS/2017/A/5015 & 5110 paras 208-209). We accept that that approach is the approach that we should adopt, and confirm that that is the approach that we in fact adopted:

a) The starting point when considering the degree of Fault is to consider fault objectively (i.e. by reference to the standard of care that could have been expected from a reasonable person in the player’s position)

b) Once the degree of fault has been identified by reference to that objective test, a subjective assessment is then carried out i.e. Fault is considered from the player’s perspective, to assess the standard of care that could have been expected from that player in light his personal capacities/incapacities

c) The outcome of that subjective assessment will then move the player ‘up or down’ within whatever category of Fault had been assessed using objective criteria (or exceptionally, move the player into a different category of Fault altogether).

94) There can be little doubt that if one considers ‘Fault’ objectively in this case, the level of Fault implicit in taking cocaine less than 24 hours before a match is significant. The question for us therefore is whether that assessment changes – in particular, whether Mr Miller is moved ‘down’ in the category of fault assessed using objective criteria – when matters are considered from Mr Miller’s perspective.

95) We were shown a number of authorities where sporting Disciplinary Tribunals had concluded that a player's mental health at a material time could (and in several examples, did)

- a) Impact on a participant's cognitive functioning at the relevant time,
- b) Amount to an 'impairment', and so
- c) Be relevant to a consideration of
 - i) The participant's degree of Fault, and
 - ii) Whether Fault/Negligence on the part of a player had been significant or not significant.

As one might expect, the focus in such cases has tended to be on (1) the extent to which cognitive abilities of the participant had in fact been impaired at the relevant time by such mental health issues, and (2) the extent to which such cognitive impairment could be said to explain the participant's departure from an expected standard of behaviour i.e. whether a link could be established between the cognitive impairment and the circumstances surrounding the commission of the ADRV.

96) While those authorities were useful illustrations of the principles to be applied, ultimately each case will turn on its own facts. In this case, as we have found.

- a) Mr Miller had suffered with mental ill health for many years prior to March 2019. He had suffered serious [REDACTED]
[REDACTED] We accept Dr Rogers' description of Mr Miller having had a '*long history of complex mental ill health*' prior to March 2019
- b) Mr Miller had for many years [REDACTED] been a regular user of cocaine, a variety of other drugs and alcohol. By March 2019 he was addicted to cocaine and alcohol. We accept Dr Rogers' categorisation of Mr Miller as suffering a severe substance use disorder as at March 2019
- c) By March 2019 Mr Miller also had a substantial gambling problem. We suspect that that problem was also an addiction and that, had Dr Rogers had a greater opportunity to investigate the same with Mr Miller, he would have included that within the scope of Mr Miller's disorder

- d) Mr Miller's addictions are likely to have represented an unhealthy coping mechanism for his difficulties with his mental wellbeing
- e) In the week prior to 9 March 2019 a number of additional, acute triggers had occurred which operated to amplify the issues already facing Mr Miller as a result of his chronic mental ill health and addictions.

97) We accept that such matters

- a) Meant that, as at March 2019, Mr Miller's cognitive functions and judgment were to a degree impaired. As Dr Rogers put it, Mr Miller's '*cognitive impairment ... was such that he was unable to make decisions about his professional conduct and behaviour in a way that he would otherwise have done had he been mentally well ...*' (emphasis added). On the basis of that evidence in isolation one can say that, when viewed from Mr Miller's perspective, the level of Fault would be less than would be assessed on a purely objective basis
- b) Go some way to explaining Mr Miller's departure from what can be termed the 'expected standard of behaviour' of a player in Mr Miller's position. We therefore accept that, as Dr Rogers explained, there was to an extent a causative link between
 - i) the cognitive impairment resulting from Mr Miller's mental ill health and addictions, and
 - ii) the circumstances surrounding the commission of the ADRV.

98) However

- a) Whether or not Fault was or was not '*significant*' is to be viewed '*in the totality of the circumstances*', and
- b) '*Impairment*' is but one of the factors to be taken into account when assessing a participant's degree of Fault.

What we must therefore determine is whether, viewed in the totality of the circumstances existing at the time, Mr Miller was able to satisfy us that the level of Fault that he exhibited (and accepts that he exhibited) when taking cocaine on the evening of 8 March 2019 was reduced by his impairment to such an extent that that residual level of Fault was '*not significant in relation to the [ADRV]*'.

99) We were not so satisfied. Even accounting for the fact that Mr Miller's cognitive impairment might be said to have reduced his degree of Fault by comparison with an individual not suffering from such an impairment, the level of Fault (as defined in Schedule 2 of FAADR) on his part in our view remained 'significant', meaning that Mr Miller did not cross the threshold into the territory of '*no Significant Fault or Negligence*'. In reaching that conclusion we had in mind that

- a) Mr Miller had been a professional footballer for many years; he was not young or lacking in experience
- b) Mr Miller had already experienced a positive Out of Competition test for cocaine in April 2018
- c) Mr Miller had been offered and provided with treatment for his cocaine addiction after that previous positive test
- d) Mr Miller had chosen not to complete the residential rehabilitation course that he had begun, had chosen to cease attending AA, GA and NA meetings and had chosen to cease seeing a counsellor
- e) Mr Miller had thus chosen not to continue treatment for his mental ill health and substance misuse disorder, despite knowing that those underlying issues remained
- f) Mr Miller had spent 2 days in the week prior to 8 March 2019 bingeing on alcohol and cocaine before learning that he was to start against Mansfield and resolving to 'get clean' for that match
- g) Mr Miller had nonetheless chosen to spend Friday evening with ■■■■, an individual with whom he was accustomed to take cocaine
- h) For a period approaching 1 hour before he began to drink and use cocaine (both brought to his house by ■■■■ Mr Miller could have brought the evening to an end simply by asking ■■■■ to leave and so distancing himself from the source of temptation
- i) Although Mr Miller's underlying mental ill health and substance use disorders continued to impair his cognitive functioning to a degree on 8 March 2019, the 'positive' events at the end of that week to which we have alluded above did enable Mr Miller to use his very best efforts to exercise self-control on the evening of 8 March 2019, with a considerable degree of success. The degree of impairment from which he was suffering as at 8 March 2019 must therefore have been less (and significantly less) than

- i) The degree of impairment from which Mr Miller might otherwise have suffered had those positive events not occurred to motivate Mr Miller, and
- ii) The degree of impairment from which Mr Miller had been suffering earlier that week when he engaged in 2 alcohol and cocaine binges

To put it in simpler terms, the fact that Mr Miller did not in fact ‘say no’ altogether on 8 March 2019 suggests that a degree of impairment continued to operate on his cognitive function on 8 March 2019 in comparison to how an unimpaired individual would have acted, but (1) the fact that he struggled so hard before ‘saying yes’ that evening, and (2) the fact that he was able to ‘say no’ an hour or two into the evening, after drinking only 2 beers and taking 2 lines of cocaine, indicates that the difference between Mr Miller’s cognitive function and that of an unimpaired individual at that time (i.e. at the time that he committed the ADRV) was far less than might have been the case at other times.

100) In the circumstances we concluded that the pre-condition to the applicability of FAADR Regulation 69 – Mr Miller establishing that he bears No Significant Fault or Negligence (emphasis added) – was not satisfied in this case. As a result there was no basis upon which we could reduce the period of 2 years’ suspension otherwise applicable. To put it another way, our view was that, even taking into account Mr Miller’s impairment on the evening of 8 March 2019, the degree of Fault on his part in relation to the ADRV remained significant.

101) Even had we concluded otherwise (i.e. that Mr Miller did in fact satisfy the pre-condition to the applicability of FAADR 69

- a) FAADR Regulation 69 does not oblige a Regulatory Commission to reduce the otherwise applicable period of suspension; it simply entitles the Regulatory Commission to do so if it considers it appropriate to do so in the circumstances of a particular case
- b) For the reasons set out above we would not have reduced the otherwise applicable period of suspension below 2 years’ suspension. That is because in our view the degree of fault exhibited by Mr Miller does not justify a reduction, and 2 years’ suspension is appropriate.

- 102) Before leaving this issue we record that we gave due consideration to Ms Potts' submissions on the decision in *The FA v Lacey* (supra) where a Regulatory Commission
- a) Did accept (as the FA had conceded) that the provisions in the FAADR Regulations in respect of '*No Significant Fault or Negligence*' were engaged on the facts of that case, and
 - b) Reduced the period of suspension that would otherwise have been imposed on that player from 2 years to 14 months.
- 103) However that case was very different from this one:
- a) As we have found, Mr Miller was unable to satisfy us that the provisions in the FAADR Regulations in respect of '*No Significant Fault or Negligence*' are even engaged on the facts of this case; unlike Mr Lacey, the level of Mr Miller's Fault was in our view significant;
 - b) Even then, impairment is not the only factor to be considered in this case when assessing the degree of Mr Miller's Fault. Asking ourselves the same question as the Regulatory Commission in that case asked itself – '*taking into account all of the circumstances of the case and the evidence before the Commission, what level of sanction properly reflects the culpability of the player ?*' – and considering (as the Regulatory Commission did in that case) '*all of the factors including the core responsibility of the player for what he ingests and his obligation to comply with [FAADRs] as well as the degree of cognitive impairment suffered by the player*', we reach a very different answer to that reached by the Regulatory Commission in that case.

iii) Conclusion

- 104) Mr Miller failed to persuade us that any reduction to the 2 years' suspension required by FAADR Regulation 51 was justified pursuant to FAADR Regulation 69 in this case.

(H) A reduction to reflect the 'exceptional nature' of this case ?

- 105) As a final submission Ms Potts contended that the circumstances of this case are so exceptional that the proportionality principle is engaged.

106) The proportionality principle can be simply stated – it is a fundamental aspect of disciplinary proceedings that there must be proportionality between the breach of the rules and the sanction imposed in respect of that breach. Thus although the Code and the FAADR Regulations already give, in the main, expression to principles of proportionality (by permitting for reductions in sanctions and scales of suspensions, albeit within defined parameters), a discretion still exists for a Regulatory Commission to depart from the confines of the FAADR Regulations in the very rare case where the sanction to which the Regulatory Commission is otherwise driven by an application of the FAADR Regulations is so harsh that it would be unjust and disproportionate: *The FA v Livermore* (8 September 2015); *Puerta v ITF* (CAS 2006/A/1025); *Hipperdinger v ATP Tour* (CAS 2004/A/690).

107) Ms Potts submitted that, were we to conclude that a strict application of FAADR obliged us to impose a substantial period of suspension on Mr Miller, we should

- a) Stand back and ask whether that substantial period of suspension was proportionate to the breach of FAADR Regulation 3(a) committed by Mr Miller,
- b) Conclude that it was not, and
- c) Use the proportionality principle to reduce the suspension to a much shorter period.

108) At the heart of Mr Potts' submission was the fact that the revised Code which will enter into effect on 1 January 2021

- a) Will provide increased focus on athlete wellbeing and lower sanctions in social drugs cases, and
- b) Will emphasise that an athlete's health should be prioritised where that athlete has a drug problem and not a performance enhancement problem that affects a level playing field, and
- c) Will incorporate a new scheme which will see athletes who abuse social drugs outside of competition in a context unrelated to sport performance penalised with a period of ineligibility measured only in months, possibly weeks.

That, she submitted, showed 'the direction of travel' in cases of recreational drug use, and that a period of suspension measured in years would be so far out of line with that 'direction of travel' that we should not impose a suspension of such duration.

109) There are 2 principal difficulties with that argument

- a) First, and most obviously, that revised Code is not yet in effect, and it remains to be seen (1) in what form it might ultimately be introduced, and (2) to what extent the FAADRs might reflect it. When determining sanction we are compelled to apply the FAADRs as they apply to this admitted breach by Mr Miller
- b) Secondly, identifying a ‘direction of travel’ in the abstract is not overly helpful when considering the particular facts of an individual case. It is necessary for us to consider not whether proportionality principle might apply in the abstract, but whether on the facts of this particular case we consider that the 2 years’ suspension that we have determined is appropriate by an application of FAADRs is disproportionate to the breach committed by Mr Miller.
- 110) Our view is that that the sanction of 2 years’ suspension that we consider should be imposed by appropriate application of the FAADR Regulations (and in particular, FAADR Regulations 50, 51 & 69) does not engage the proportionality principle in this case:
- a) This is not an ‘exceptional’ or ‘rare’ case. It is a case that fits comfortably within the structure of the FAADR Regulations
- b) An application of the FAADR Regulations does not result in a sanction being imposed that is either unjust or disproportionate or (to use the words used in a number of CAS cases, that leaves us feeling ‘*uneasy*’). Indeed, as will be apparent from what we have said above, this is not even a case where we consider the degree of Fault of Mr Miller to have been so minimal that he should benefit from a reduction permitted by FAADR Regulation 69. In our view the 2 years’ suspension that results from the application of FAADR Regulations 50, 51 and 69 is entirely appropriate to reflect the facts and circumstances of this case.
- 111) Before leaving this matter, we record that although we need make no finding on the matter, we might have taken a more sympathetic view as regards the applicability of the proportionality principle had we (for example) concluded
- a) That Mr Miller’s cocaine use had not stopped at about 10pm on 8 March 2019, but had continued until shortly after midnight, and so

- b) That Mr Miller's cocaine use had thus been In Competition and not Out of Competition, and
- c) That (given our findings about 'intention' for the purposes of the second sentence of FAADR Regulation 50) a 4 years' suspension was mandatory.

A submission that 4 years' suspension would be a disproportionate sanction to impose to reflect a hypothetical use of cocaine concluding at 1 minute after midnight, when a hypothetical use that finished 2 minutes earlier would have triggered a maximum 2 years' suspension, might well have found traction with us.

(I) Conclusions on suspension

i) Period of suspension

112) Our conclusions are accordingly as follows:

- a) FAADR Regulation 51 *prima facie* obliges us to impose a 4 year period of suspension on Mr Miller to reflect the ADRV that he has admitted
- b) Mr Miller established to our satisfaction that the ADRV resulted from an Adverse Analytical Finding for a substance
 - i) Which is only prohibited In-Competition
 - ii) Which is not a Specified Substance
 - iii) Which was used by him Out of Competition
 - iv) Which was used by him in a context unrelated to sport performanceMr Miller therefore established that, by virtue of the deeming provision in the final sentence of FAADR Regulation 50, the ADRV is not to be considered intentional
- c) As a result, the *prima facie* mandatory 4 year period of suspension is reduced to 2 years' suspension under FAADR Regulation 51(a)
- d) Mr Miller did not establish to the requisite standard that he bore no Significant Fault or Negligence for the ADRV in this case. FAADR Regulation 69 was thus not engaged. Even had Mr Miller cleared that hurdle and so satisfied us that FAADR Regulation 69 was in principle engaged, we would not have been persuaded that a reduction of the 2 years' suspension was appropriate in all of the circumstances of this case

e) There is no justification for reducing the 2 years' suspension by any other means.

113) The period of suspension that we impose on Mr Miller is thus 2 years.

ii) Scope of suspension

114) The Provisional Suspension imposed on Mr Miller covered First Team Competitive Matches and Non-First Team matches, including Friendlies; it did not cover all football related activity.

115) The suspension that we are now imposing will not be in the same terms. This is because FAADR Regulation 42(a) provides that a Participant who is suspended pursuant to these Regulations cannot during the period of suspension participate in any capacity in any Match or any other football related activity. Mr Miller is therefore suspended from all football and football related activity. This does not include 'anti-doping' education or rehabilitation programmes¹¹. If Mr Miller is in any doubt as to what is and is not permitted by such a suspension, the FA can provide clarification.

iii) From what date does the suspension commence ?

116) FAADR Regulation 39 provides that, subject to FAADR Regulations 40 and 41, a period of suspension shall commence from the date of the final hearing decision providing for suspension:

- a) FAADR Regulation 40(a) provides that where there have been substantial delays in the hearing process or other aspects of Doping Control that are not attributable to the Participant, the period of suspension may be deemed to have started at any time from the date the ADRV occurred (e.g. the date of the sample collection) to take account of such delays

¹¹ As an exception to the foregoing, The Association may (in its absolute discretion) permit a Player who has been suspended for six or more months pursuant to these Regulations to return to training and/or other football-related activity with a Club (but not participate in any Match) prior to the end of his suspension, during the shorter of (i) the last two months of the period of suspension; or (ii) the last quarter of such a period of suspension. No such return is permitted unless agreed in writing in advance by The Association.

- b) FAADR Regulation 40(b) provides that the period of any Provisional Suspension, where it is adhered to by the Participant, will count towards the total period of suspension imposed
- c) FAADR Regulation 41 provides that where a Participant promptly admits the ADRV (which means in all cases before he participates in football activity again) after being notified of it by the FA, the period of suspension may be deemed to be have started at any time from the date the ADRV occurred.

117) The ADRV occurred on 9 March 2019. The hearing took place on 4 August 2020. That period – close to 17 months - is certainly longer than one might ordinarily expect for proceedings of this nature to reach a conclusion. There are however good reasons for that in this case:

- a) The FA notified Mr Miller on 26 April 2019
 - i) That analysis of the sample had confirmed the presence of BZE, and
 - ii) That he was provisionally suspended from various matches with immediate effect
- b) Mr Miller responded promptly on 8 May 2019 and was interviewed on 13 May 2019
- c) Mr Miller was charged by the FA on 5 July 2019. He returned his Reply Form – with the various enclosures referenced above – in September 2019
- d) While Mr Miller admitted the ADRV, the factual basis upon which he did so was not accepted by the FA. That prompted the FA to obtain and serve Professor Wolff's report
- e) One might ordinarily have expected the matter to then proceed to a hearing in late autumn 2019. However, in November 2019 Mr Miller applied to have the proceedings stayed due to the risk that they were posing to his mental health at that time; [REDACTED] and his representatives were encountering difficulties in taking instructions from him. That stay was granted, and was lifted only once Mr Miller had engaged with Sporting Chance (in February 2020) and, with their support, expressed a wish for the proceedings to proceed again

- f) Mr Miller's Supplemental Written Submissions and enclosures (clarifying/correcting the factual basis upon which he admitted the ADRV) were served in March 2020. The FA's Written Submissions were served in April 2020
- g) One might have expected the matter to then proceed to a hearing in early summer 2020. However, further delay resulted from the COVID-19 pandemic.

118) Applying the principles in FAADR Regulation 40(a) to that chronology:

- a) Given (1) how he changed the factual basis for his admission of the ADRV, and (2) what we have found to be the actual factual basis for the ADRV, it is not in our view open to Mr Miller to contend that he 'promptly' admitted the ADRV in this case
- b) There was no substantial delay in the hearing process prior to autumn 2019
- c) While there was delay in the proceedings between autumn 2019 and spring 2020, that delay was at Mr Miller's request. That delay was thus 'attributable to' Mr Miller for the purposes of FAADR Regulation 40(a). But for that delay, it seems likely that this matter would have been heard in about May 2020
- d) There was further delay between May 2020 and August 2020 as a result of the COVID-19 pandemic. That delay is not attributable to Mr Miller.

119) In the circumstances we conclude that it is appropriate to deem the period of suspension that we have imposed to have started on 5 May 2020 i.e. 3 months before the date of this Decision and Written Reasons. That is our best estimate of the date on which, had the COVID-19 pandemic not disrupted these proceedings, this Decision and Written Reasons would have been handed down and so the date on which pursuant to FAADR Regulation 39 the period of suspension would otherwise have commenced.

iv) Taking account of the period the Provisional Suspension

120) Finally, we direct that in accordance with FAADR Regulation 40(b) the period of Provisional Suspension that Mr Miller has served should count towards the total period of suspension imposed. So as to avoid double-counting, that period of Provisional Suspension

shall be treated as having concluded on 5 May 2020 (i.e. when we have directed that the suspension imposed by us should be deemed to have commenced). As at that date Mr Miller had been provisionally suspended for 12 months 9 days.

v) Dates of Mr Miller's suspension

121) Mr Miller is therefore suspended from 5 May 2020 for 2 years. The period of 1 year and 9 days for which Mr Miller was provisionally suspended shall count towards that 2 year period of suspension, meaning that the period of suspension that we have imposed will come to an end at midnight on 26 April 2021.

(J) Additional matters

i) Public disclosure

122) In accordance with FAADR Regulation 36 we direct that there should be public disclosure of the penalty that we have imposed on Mr Miller. However, we are conscious that there are personal details in this Decision and Written Reasons that Mr Miller may wish to keep private. To that end, insofar as Mr Miller wishes to have parts of the Decision and Written Reason redacted, we direct

- a) That by 5.00pm on Friday 14 August 2020 Mr Miller shall provide a draft redacted version of this Decision and Written Reasons to the Regulatory Legal Department of the FA for comment and also to this Regulatory Commission (via Mr McCormack)
- b) That by 5.00pm on Friday 21 August 2020 the Regulatory Legal Department of the FA shall provide any observations on the proposed redactions to Mr Miller's solicitors and also to this Regulatory Commission (via Mr McCormack)
- c) That by 5.00pm on Friday 28 August 2020 Mr Miller shall provide any response to those observations to the Regulatory Legal Department of the FA and also to this Regulatory Commission (via Mr McCormack).

We will then consider any proposed redactions to the Decision and Written Reasons and the positions of the parties on the same and, if appropriate, we will then provide a redacted version of this Decision and Written Reasons for public disclosure pursuant to FAADR Regulation 36.

ii) A Fine ?

123) FAADR Regulation 37 permits us to impose a fine for an ADR, but only in certain defined circumstances. Those circumstances do not apply here. No fine is imposed.

(K) Order and Costs

124) We order as follows:

- a) Mr Miller is in breach of Regulation 3 of the FA Anti-Doping Regulations
- b) Mr Miller is suspended from all football and football related activities for a period of 2 years. That suspension
 - i) Will be deemed to have commenced on 5 May 2020, and
 - ii) (Taking into account the period of Provisional Suspension already served by Mr Miller prior to that date) will conclude at midnight on 26 April 2021
- c) Subject to any redactions requested by Mr Miller and approved by us, there will be public disclosure of this Decision and Written Reasons
- d) Insofar as he falls within the definition of being a Player contained in the FAADRs (which has the same meaning as the define term in Rule A2 of the FA Rules) Mr Miller should be the subject of targeted testing (1) for the duration of the period of his suspension, and (2) for a further period of 12 months thereafter i.e. until 26 April 2022

125) If either party wishes to contend that the other should pay the costs of this Regulatory Commission relating to this case, we invite short submissions by email (via Mr McCormack). Those submissions should be provided by 5.00pm on Friday 14 August 2020.

126) This decision – which is the unanimous decision of this Regulatory Committee – is subject to the relevant Appeal Regulations.

127) Before we conclude this Decision and Written Reason, we wish to make one final important point:

- a) While we have concluded that it is appropriate to impose a substantial period of suspension on Mr Miller, it is impossible not to have considerable sympathy for Mr Miller given the chronic state of his mental health and his long term addictions in the

spring of 2019. It was heartening to hear that in recent months he has taken active steps to distance himself from those aspects of his past that are associated with drug use, has functioned without using drugs and is receiving treatment. He has found employment, is in a new relationship, is focussing on his physical fitness and is working hard on his relationship with his son. We wish him every success in each of those respects

- b) We encourage Mr Miller in the strongest possible terms to focus on the future. We also encourage him to have the strength to continue to seek the help and support of others during what will undoubtedly be a difficult period ahead while he is suspended and beyond. We would hope that such organisations as are able to assist him will give him all the help and support that he needs.

Graeme McPherson QC (Chairperson)

Aisling Byrnes

Stuart Ripley

6 August 2020