The Rise and Fall of the UCI Independent Commission

Geoff Steward
Macfarlanes LLP

Jamie Munk
Macfarlanes LLP

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A behind the scenes examination of the legal and political difficulties facing the Commission appointed to conduct an independent inquiry into the UCI's state of knowledge of the Lance Armstrong doping affair.

USADA's Reasoned Decision

On October 10, 2012 the United States Anti-Doping Agency (USADA) released its Reasoned Decision in the case against seven times Tour de France winner Lance Armstrong (the Reasoned Decision).

The Reasoned Decision, which ran to 164 pages, was the conclusion of USADA's investigation into what its CEO, Travis Tygart, described as "the most sophisticated, professionalized and successful doping program that sport has ever seen", run by the US Postal Service team. The evidence presented by USADA on its website, *http://cyclinginvestigation.usada.org/*, runs to over 1000 pages, including sworn testimony from 26 individuals, of whom 15 were riders.

It was in the fallout to this momentous fall from grace of one of the world's most iconic sportsmen of the last 15 years that the UCI Independent Commission was established; a fallout which saw, and continues to see, questions being raised both about how such a systematic doping programme proceeded without sanction from professional cycling's governing body, and about the best means of now steering the sport into a dope-free future.

Formation of the Commission

As Armstrong did not contest, in an open hearing, USADA's decision to impose a sanction of lifetime ineligibility and disqualification of his competitive results achieved since August 1998, it was necessary for USADA to send the Reasoned Decision to the bodies with appeal rights.[1] In Armstrong's case, these bodies were the Union Cycliste Internationale (UCI), the World Anti-Doping Agency (WADA), and the World Triathlon Corporation (WTC).

The UCI Management Committee endorsed the Reasoned Decision on October 22, 2012, and on October 26, 2012 announced that it would be establishing "a fully independent commission to look into the various allegations made about UCI [in the Reasoned Decision] relating to the Armstrong affair". These included serious allegations that donations made by Armstrong to the UCI were in fact bribes for concealing positive doping tests. It was announced by the UCI that an independent sports body would nominate the commission's members and, with the UCI Management Committee, agree appropriate terms of reference. A deadline was set by the UCI for publishing the commission's report and recommendations of no later than June 1, 2013.

The UCI then announced, on November 7, 2012, that it had invited John Coates, President of the International Council of Arbitration for Sport (ICAS), to recommend the composition and membership of the Independent Commission (the Commission). He was approached as the head of ICAS on the basis that ICAS supervises the Court of Arbitration for Sport (CAS), the world's highest sports court, and is recognised as being independent and impartial by the Swiss Federal Tribunal. John Coates recommended international arbitrator, mediator and former Court of Appeal and Privy Council judge, Sir Philip Otton, to chair the Independent Commission. Sir Philip, who has particular experience in sports arbitrations, in turn approached our firm, Macfarlanes LLP, to act as legal advisers to the Commission.

The task ahead was a daunting one. From Sir Philip's appointment in mid-November 2012, a Commission had to be constituted, it had to gather in and investigate all relevant evidence, conduct a public hearing (Sir Philip was clear with the UCI from the outset that he wanted the inquiry to be a transparent one) and deliver its written findings to the UCI in little over six months.

The first task was to actually bring the idea of a Commission into reality. The UCI directed that the Commission was to be a three member panel independent of cycling, but, significantly, it was not constituted under the statutory authority of England, Switzerland or any other jurisdiction. This meant that it would not have any powers as a legal entity, for example to compel witnesses to attend hearings to give evidence under oath, or to compel third parties to provide evidence to it. Under English law, where a government minister establishes an inquiry, it can be granted such powers under the Inquiries Act 2005, with criminal sanctions for failure to comply.[2] The members of a statutory inquiry panel, its legal team and anyone assisting an inquiry established under the Inquiries Act 2005 also enjoy immunity from suit, and

[1] Article 8.3 of the World Anti-Doping Code 2009 (the WADA Code)

[2] Section 21 of the Inquiries Act 2005 provides the Chairman of an inquiry established under its authority with the power to require an individual to appear before a hearing and/or to produce documents/other materials relevant to the matters under investigation. Failure to comply with a notice issued pursuant to section 21 of the Inquiries Act 2005 without reasonable excuse is a criminal offence under section 35 of the Inquiries Act 2005 with a maximum sentence on summary conviction in England and Wales of 51 weeks and/or a fine.

statements made and reported in the course of such inquiries will be covered by the qualified privilege defence to defamation claims.

Although the UCI gave the Commission and its legal team an indemnity from claims at the outset, the Commission lacked the statutory powers of other recent inquiries such as the Leveson Inquiry into role of the press and police in the phone-hacking scandal in the United Kingdom, which used its powers under section 21 of the Inquiries Act 2005 to require the production of evidence. Nor did the Commission have any pre-existing standing in the cycling community to gather evidence from cyclists and those involved in the sport, in contrast with USADA's position in carrying out its US Postal Service Pro Cycling Team Investigation.[3] The Commission had to rely instead on the UCI's commitment to cooperate fully with its work through the provision of evidence, and on the willingness of the wider cycling and anti-doping communities to buy into the process, neither of which proved to be straightforward.

It was clear that the Commission would have no time to lose, and in the two weeks prior to the launch of the Commission on November 30, 2012, the following key issues needed to be dealt with

1. two further individuals would need to be appointed with the relevant background, experience and availability to lend the requisite credibility and gravitas to the Commission, whilst being cycling "outsiders" to ensure neutrality and independence;
2. terms of reference would need to be fixed setting out the scope of the Commission's inquiry;
3. the Commission's procedures would need to be scoped out in order to give some structure to the process, particularly given the Commission's lack of powers by virtue of the fact this was to be a non-statutory inquiry, and to ensure it served its primary role as an independent scrutiniser of the UCI's role in the Armstrong affair; and
4. a workable timetable would need to be established if the Commission was to meet the June 1, 2013 timetable originally and insistently set by the UCI.

After much consideration of potential candidates, Sir Philip appointed the other two commission members prior to the November 30 launch. Baroness Tanni Grey-Thompson, a 11-time Paralympic gold medal winner and Crossbench Peer in the UK House of Lords, who amongst other roles, was a Board Member of UK Athletics from 2007–2012, in which capacity she undertook a full review of UK Athletics' anti-doping policies and procedures. Malcolm Holmes QC, a senior counsel and chartered arbitrator from Sydney, has been an arbitrator member of CAS since 1995, including experience as chair, sole arbitrator and panel member in numerous doping-related cases.

Macfarlanes in turn instructed Guy Morpuss QC and Patricia Edwards as counsel to the Commission (Counsel), given that a public hearing was envisaged where the UCI and other witnesses would be cross-examined.

We, Counsel and the commission members, then devised a procedural timetable which called for potential witnesses to submit evidence within a month (by December 31, 2012); the UCI would be given until January 31, 2013 to provide disclosure of all relevant documents, with the deadline of March 22, 2013 for provision of any supplementary documents. A 14-day witness hearing was scheduled for April 9–26, 2013, with the aim that the Commission would have delivered its report by, or shortly after, June 1, 2013.

Terms of Reference

From the outset, it was of key importance to the Commission to establish as broad a remit as possible to allow for a thorough examination of the UCI's role in doping during the Lance Armstrong era (from 1998–2012). The Commission wanted to be in a position to reach conclusions as to whether there was any complicity on the part of UCI, or individuals within it, in the US Postal Service team doping programme, and/or whether there had been any identifiable problems with the UCI's anti-doping policies and procedures which led to a failure to identify the systematic doping programme.[4] The Commission also wished to be able to make recommendations for the future, in order to meet the UCI's stated objective of putting cycling back on track after the Armstrong affair.

As with any commission, whether statutory or non-statutory, the Terms of Reference, was the key constitutional document in setting out the Commission's remit. The Terms of Reference had to be agreed with the UCI as the body initiating and funding the Commission's work, and in any case, the Commission was intended to be for the benefit of professional cycling, and the engagement of the UCI as cycling's governing body in agreeing the Terms of Reference was essential to the process. However, in order to ensure the Commission's independence, the Commission was clear with the UCI that its Terms of Reference was not to be a negotiated document, either with the UCI or any other third party. Although the UCI had made suggestions when it first met

[3] USADA is recognised by the US Congress as "the official anti-doping agency for Olympic, Pan American and Paralympic sport in the United States" (*http://www.usada.org/about*) [Accessed October 3, 2013]. It has powers to sanction athletes for doping as a National Anti-Doping Organization under the WADA Code.

[4] For example, criticism has been levelled against the UCI's "health check", which was introduced in 1997 at a time when there was no test for the red blood cell boosting drug erythropoietin (EPO), used by Armstrong and other cyclists. Under the health check's 'no start' rule, riders whose blood showed a higher than 50 per cent haematocrit (volume percentage of red blood cells in the blood) level were required to sit out of races for two weeks, but this was not considered to be a doping violation. It has also been argued that the health check was effectively a licence for cyclists to use EPO to boost their haematocrit levels up to 50 per cent, natural levels being typically 40–45 per cent. The first test for EPO was introduced by the UCI in 2001.

with Sir Philip as to areas the Commission might want to consider investigating, the UCI was required to accept the Terms of Reference as drafted by the Commission. With the benefit of hindsight, had we and the Commission appreciated the differing opinions from interested third parties as to what the inquiry should cover, the work of the Commission would have stood a far greater chance of succeeding had the UCI consulted those third parties before appointing any commission. The resource of the Commission's legal team was, for the first two months of its work, greatly stretched due to having to conduct shuttle diplomacy between the UCI and the third parties in an attempt to secure full buy-in to the Terms of Reference in order to enable the Commission to do the job it was appointed to do.

Third party involvement

The UCI was not the only party interested in the fallout to the Reasoned Decision, and in the work of an Independent Commission looking into the role of the UCI. Indeed, it was the Commission's declared intention from the outset that interested third parties would be approached for evidence. Although evidence was to be requested from the UCI, who had pledged to cooperate with the Commission's work, gathering evidence from third parties from within the anti-doping and cycling communities was a key task that the Commission had given itself for the first few months of its existence in order to be able to fully and objectively scrutinise whatever evidence the UCI provided. As the Commission had no actual powers of compulsion as a non-statutory body, its success in gathering evidence would only be as good as its ability to engender cooperation from key parties.

For this reason, WADA and USADA were approached early in the life of the Commission as key stakeholders in the process: USADA as the body whose Reasoned Decision had identified the issues in relation to the UCI's approach to the fight against doping; and WADA as the global organisation responsible for anti-doping in sport through enforcement of the WADA Code. In addition, a third organisation was contacted by the legal team: Change Cycling Now (CCN), a pressure group made up of anti-doping experts, former riders and other stakeholders within professional cycling calling for change in the wake of the Reasoned Decision. CCN had held a summit in London in the days immediately following the establishment of the Commission. The Commission wished to engage all three of these organisations with its work, as they clearly had a stake in the matters being investigated, as well as valuable potential evidence and opinions to contribute.

The Commission's procedural guidelines were also drafted to allow for "Permitted Participants" to make oral submissions at the Commission's public hearing and to question witnesses. This would allow parties with particular areas of expertise to question witnesses, for the benefit of the wider process.

Concerns with the Terms of Reference

The Commission's Terms of Reference turned out to be one of the most significant bones of contention of the whole process. WADA and USADA were both concerned that the Terms of Reference had been drawn up and agreed with the UCI without any wider consultation. There was also concern within the wider cycling community that the sport did not want a repeat of the 2006 Vrijman Report. The Vrijman Report, commissioned and paid for by the UCI in the wake of French newspaper *L'Equipe*'s claims that Armstrong's samples from the 1999 Tour de France tested positive for EPO, cleared Armstrong and was critical of WADA, but was widely criticised for its alleged inadequacies, not least by WADA, for "a lack of professionalism and a distinct lack of impartiality in conducting a full review of all the facts".[5] The anti-doping bodies were therefore deeply sceptical of another Commission set up and funded by the UCI.

Through our lengthy discussions with these stakeholders, as legal advisors to the Commission, Guy Morpuss QC and Geoff Steward were able to allay their initial concerns as to the independence and robustness of the Commission itself. The Commission was set up in the mould of a public inquiry, although it had no statutory basis, and in the adversarial model of English litigation. The intention was a thorough inquiry with no stone left unturned, either in terms of documentary disclosure or witness testimony. It was for this reason, and on Sir Philip's recommendation, that the UCI instructed its own separate legal team, Freshfields Bruckhaus Deringer LLP.

However, the anti-doping authorities had real concerns about the process, and in particular, the Terms of Reference as drafted.

First, they were concerned that the Commission would become a kind of substitute appeal body for the Reasoned Decision, not least because Term of Reference A1 was to determine whether the allegations against the UCI set out in the Reasoned Decision were well founded. The UCI had had the opportunity, it was argued, to appeal the Reasoned Decision at CAS, but chose not to do so, instead recognising the sanctions imposed by USADA. The issue facing the Commission, however, was that the Reasoned Decision, while including allegations against the UCI, (such as of an arrangement between the UCI and the US Postal Service team to keep positive tests by Armstrong at the 2001 Tour de Suisse hidden,[6] and of the UCI's

[5] *WADA Official Statement on Inaccuracies of Vrijman Report*, June 19, 2006 at p.9 (*http://www.wada-ama.org/Documents/News_Center/News/wada_official_statement_vrijman_report.pdf*) [Accessed October 3, 2013].
[6] Reasoned Decision, at pp.51–52 (*http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf*) [Accessed October 3, 2013].

apparent "*disdain and disinterest*" towards doping allegations made by members of the peloton[7]) was directed against Armstrong as a Respondent, rather than against the UCI itself. There were no findings against the UCI specifically. The Commission, through its Terms of Reference, wanted to use the Reasoned Decision as a springboard for scrutinising the UCI, something which the Reasoned Decision, focused on the US Postal Service team, had not set out to do.

A second concern was in relation to Term of Reference A9, which raised the question of whether persons previously convicted, admitting to or supporting riders in doping, should be able to work in the world of cycling in future, and if not, how such a prohibition might be enforced. This was a question of considerable concern within the cycling community. While some, such as David Brailsford's Team Sky, have a zero tolerance policy to doping, others within the sport, such as the Garmin Sharp team, include former dopers David Millar and Thomas Dekker as well as having as its team principal Jonathan Vaughters, a former US Postal Service team rider and member of CCN who has admitted to past doping. The concern expressed was that this Term of Reference was either intended by the UCI to discourage, or at least had the effect of discouraging, ex-dopers from coming forward with evidence against or involving the UCI for fear of retaliation, and would ensure the perpetuation of the *omertà* (code of silence) within the sport that had been characteristic of the Armstrong era, when coming forward would be to *cracher dans la soupe* (spit in the soup). The Commission felt that, as a clearly relevant and important current debate within the sport, this Term of Reference was something the Commission would want to be in a position to consider as part of its mandate without necessarily answering in the negative.

The third key criticism of the Commission's Terms of Reference was that they were too narrowly focused on the UCI's failures in respect of the US Postal Service team's doping programme, rather than delving into wider issues of doping in the professional peloton. This placed the Commission into a difficult position from the very start. While the Commission was keen to carry out as thorough an investigation into the problems of the Armstrong era as possible, during which five members of the US Postal Service team were by no means the only dopers in the peloton, the issue was that a broader investigation that did not restrict itself to the Reasoned Decision on the US Postal Service team would: (a) not be possible by the June 1, 2013 deadline that had been imposed by the UCI to submit the Commission's report; and (b) mean that the Commission would develop into a significantly more expensive investigation than had been commissioned by the UCI.

Evidence

This tension between the Commission's desire for as thorough an investigation under the terms of reference as possible, and concerns of the costs of the exercise from the UCI's perspective, became increasingly apparent. A key part of the Commission's task was to ensure that the UCI disclosed all documents in its possession and control relevant to the Terms of Reference for analysis by the Commission's legal team, and if appropriate, by experts such as forensic accountants (in respect of the allegations concerning payments made by Armstrong) and an expert haematologist (for analysing evidence in respect of anti-doping tests and controls). At the same time that USADA, WADA and CCN were pushing for as broad a commission as possible to look into doping across the whole of professional cycling during the Armstrong era, the UCI, increasingly concerned at the costs of the process it had initiated, was pushing for the Terms of Reference, which it had agreed to at the outset, to be narrowed, and for evidence only to be provided which was directly relevant to specific allegations raised against the UCI in the Reasoned Decision.

This put the Commission in a difficult position in seeking full disclosure from the UCI so as to fully investigate the various issues, including allegations of malfeasance by individuals within the UCI itself. At the same time, it became increasingly apparent that securing evidence from witnesses in the wider cycling community would be severely inhibited without an amnesty in the form of a truth and reconciliation process, an approach WADA, USADA and CCN pressed for as a condition for their cooperation with the Commission's work.

As stated above, as a non-statutory body, the Commission had no power to compel witnesses to appear. It was therefore of crucial importance to the Commission that as many individuals as possible felt able to come forward with evidence, without fear of recrimination from the UCI, WADA or USADA. It was for this reason that assurances as to confidentiality had been offered where necessary; from the start, when approaching witnesses, the Commission had stated that evidence provided would be treated as confidential unless witnesses consented to their evidence being made public. However, witnesses were still concerned that they might suffer prejudice as a result of coming forward with evidence. Aside from the concern that Term of Reference A9 was a form of veiled threat to witnesses not to *spit in the soup*, the WADA Code also presented difficulties for witnesses. Although the WADA Code provides for the ability to suspend part of an ineligibility period for giving Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations, it does not provide for an amnesty for athletes who admit to doping, and requires international federations, including the UCI, to vigorously pursue anti-doping violations within their jurisdictions.[8] The concern, expressed to the Commission by potentially

[7] See, Reasoned Decision, at p.161.
[8] Articles 10.5.3 and 20.3.9 of the WADA Code.

significant witnesses, was that taking part in and giving evidence before the Commission would risk exposing them to further sanctions.

Truth and reconciliation

It was in this context that USADA presented the Commission with a draft proposal for a truth and reconciliation process whereby cyclists would be encouraged to come forward with evidence of their experiences of doping in the professional peloton, which, where relevant, could be submitted to the Commission as evidence. The Commission supported such an idea, not only as a means of ensuring that it would receive the most complete evidence possible, but also as a positive step for the sport in general. In addition, the Commission was fully aware by that stage in its work that its investigations would be significantly limited without the collective expertise and evidence which would be provided by the participation of USADA, WADA, and others, such as CCN, who were all calling for such a truth and reconciliation process as the prerequisite for their involvement in the Commission's work.

At the same time, in his interview on the Oprah Winfrey show on the night of January 17, 2013, Armstrong himself showed the potential value of a truth and reconciliation process, As well as finally confessing to doping, he pledged that if a truth and reconciliation commission were established, he would be the first man through the door.

The January hearing

The Commission convened a public procedural hearing on January 25, 2013 at the Law Society in London, in order to try to resolve the substantial evidential issues facing the Commission. It was of regret to the Commission that such a truth and reconciliation process could not be agreed between the anti-doping bodies and the UCI prior to the hearing. The UCI had indicated that it was not willing to consider a truth and reconciliation process as part of the Commission's work. Instead, it first suggested a wider truth and reconciliation process across all endurance sports, which owing to its scope would not interact with the timescale given to the Commission for its report by the UCI. Latterly, the UCI had acceded to the idea of a truth and reconciliation body confined to cycling, but which would replace, rather than interact with, the Commission's work.

Although the UCI had therefore given some ground before the procedural hearing, agreement between the UCI and WADA was essential if a truth and reconciliation process was to get off the ground, whether within or independently of the Commission's work. As noted above, Article 10 of the WADA Code (Sanctions on Individuals) does not provide for an amnesty for athletes admitting to doping, and the UCI, as one of the bodies that enforces the WADA Code in professional cycling, did not have the power to agree to any such process independently of WADA. Indeed, such an amnesty could itself be viewed as a breach of the WADA Code. Moreover, the UCI also queried how amnesties for those involved in professional cycling, and a truth and reconciliation process, could be applied independently of input from other international sports bodies such as the International Olympic Committee and national anti-doping federations, not to mention national criminal authorities with the power to prosecute for doping violations, and sponsors.

By the time of the hearing, there appeared to be a stalemate. USADA, WADA and CCN had all announced, via their own press releases, that they would not participate in the Commission without a change to the Commission's terms of reference to include the adoption of a truth and reconciliation process, and the UCI had not appeared willing to agree to the inclusion of such a process as part of the Commission's remit.

Nor did the (at times heated) hearing achieve any resolution to this apparent stalemate. At the hearing, attended by former UCI President Pat McQuaid, the Commission noted the difficulties facing its work, both in terms of evidence from the UCI which had not yet materialised and the lack of cooperation from third parties, and reiterated its support for a form of witness amnesty/truth and reconciliation process. However, the Commission was not convinced that an agreement on a truth and reconciliation process was a sufficiently real possibility to accede to the UCI's wish for such a process to replace the Commission. It adjourned its hearing until 31 January 2013 to encourage the UCI, USADA and WADA to cooperate with each other to agree such a process, at least in principle.

The end of the Commission

But the UCI reached the conclusion, on Monday January 28, 2013, that there was not to be a role for the Commission going forwards, and disbanded the Commission with immediate effect on the grounds that it could not justify continuing a commission whose findings were likely to be rejected by WADA and USADA. It instead announced that it would be establishing its own truth and reconciliation body to examine doping in professional cycling, as well as the allegations contained in the Reasoned Decision. At the time of writing, over eight months later, such a truth and reconciliation body has yet to be established.

On his election as the UCI's new President on September 27, 2013, however, Brian Cookson stated that his

> *"first priorities as president will be to make anti-doping procedures in cycling fully independent, sit together with key stakeholders in the sport and work with WADA to ensure a swift investigation into cycling's doping culture*."

This statement is clearly to be welcomed. It is the authors' hope that any such investigation will independently scrutinise the serious allegations against

the UCI contained in the Reasoned Decision, and that willing witnesses will be able to provide their evidence without fear of recrimination. It is also encouraging that Mr Cookson recognises the need to engage with stakeholders and with WADA if such an investigation is to succeed in its task. The authors hope that in doing so he will take heed of the experience of the Commission, and recognise that the success of such an investigation will hinge on there being a far greater level of maturity and cooperation between the UCI and WADA/USADA than was witnessed during the brief lifespan of the Commission.

It is also interesting to note Mr Cookson's wish to separate anti-doping from the UCI as cycling's governing body. The Commission's Term of Reference A10 had been to investigate whether the UCI had a conflict of interest between its role as a promoter of cycling and its investigations of doping violations. In setting out his stall in this way, Mr Cookson has implied that he believes that such a conflict does exist. Such a change may be easier said than done, however: if Mr Cookson means to move the obligation of pursuing anti-doping violations away from the UCI as an international federation, this would require a change to the WADA Code. It would also raise a more fundamental question: that of the role international sporting federations should play in anti-doping, and in WADA's coordination of the global fight against doping in sport.