RUGBY FOOTBALL UNION

APPEAL PANEL HEARING

At: 10 Greycoat Road, Victoria London, SW1 P 1SB

On: Thursday 10 April 2008 at 6.30pm.

JUDGMENT ON APPEAL

Player: Seru Rabeni Club: Leicester Tigers

Match: Leicester v Saracens

Venue: Welford Road **Date of match:** 15 March 2008

Panel: Adam Lewis (Chairman), John Brennan, Mike Rafter

Secretariat: Bruce Reece-Russel

Liam McTiernan

Attending: By Video-Link: the Player, his Counsel Richard Smith QC and Head

of Operations at the Club, Simon Cohen

In person, Counsel for the RFU James Segan and Kitty Arbuthnot, of

the RFU.

The Appeal

- 1. The Player's Notice of Appeal dated 3 April 2008 contains a single ground of appeal. The ground is that the Disciplinary Panel was wrong on the evidence before it to find in its 15 March 2008 Judgment that the Player's actions in making contact with Andi Kyriacou's eye were reckless as opposed to accidental and were an offence under IRB Law of the Game 10.4(k). Under Disciplinary Regulation 11.5.1 it is for the Player to establish on the balance of probabilities that the decision appealed against is wrong.
- 2. The Notice of Appeal specified that a de novo hearing was not sought, and that it was accepted that the evidence before the Disciplinary Party was properly recorded in its Judgment. No new evidence was adduced. The Player's case was that on the video recording and the evidence recorded in the Judgment, the Disciplinary Panel was wrong to conclude that the Player's actions were reckless as opposed to accidental.
- 3. The Notice of Appeal specified that the appeal was confined to the finding of foul play. No appeal was made against the Disciplinary Panel's decisions on entry point, mitigating factors or sanction, following its decision that the Player's actions were reckless

- 4. Two other issues arose. First, the RFU contended that on the proper construction of the RFU Disciplinary Regulations, the fact that the Player chose under Disciplinary Regulation 11.2.2(b) to limit his appeal to the finding of foul play, did not have the effect of limiting the powers of the Appeal Board under Disciplinary Regulation 11.1.1 to reduce or increase sanction on such an appeal. The Player contended that it did have that effect.
- 5. Secondly, the Appeal Panel by Directions dated 3 April 2008 asked for submissions on a further issue. If the actions of a player are accidental, does that mean that there is no act of foul play, or that there is an act of foul play but no sanction applies to it? This question arose out of the wording of Appendix 9, Guidance Issued by the RFU Disciplinary Officer, Guidance Note 1.

The Decision of the Disciplinary Panel appealed against

Charge and Plea before the Disciplinary Panel

6. The Player was charged with conduct contrary to good sportsmanship contrary to Law 10(4)(k), namely that he made contact with an opponent's eye. Before the Disciplinary panel, the Player pleaded not guilty.

Citing Complaint before the Disciplinary Panel

- 7. Since it is the Player's case that the Judgment of the Disciplinary Panel accurately sets out the evidence on the basis of which the Appeal Panel is asked to conclude that the Disciplinary Panel erred in deciding that the Player's conduct was reckless as opposed to accidental, it is necessary to set out the relevant passages in full. The Disciplinary Panel recorded the complaint evidence before it as follows:
 - '2. The Player was cited by RFU Citing Officer Ken Pattison whose citing report stated:

"Saracens hooker (No 2) Kyriacou was tackled by Leicester's No 12 S Rabeni. As they go to ground one can observe the arms and hands of S Rabeni close to the face of Kyriacou. Whilst they are both locked together on the ground one can observe the tackled player make a very unusual movement of the head as though to avoid something happening to his face and in particular his eye. Subsequent viewing of the face and photographs after the match indicated that the probability was there had been contact with his eyes in this tackle. He was treated by the Saracens medical team and continued to play after receiving treatment to stop eye-watering and bleeding. He was replaced in the 61st minute and subsequently suffered closure of the eye and other medical problems." The match officials saw nothing of the incident.

3. The panel watched the video recording of the incident which corroborated the citing officer's report. As both players fell to the ground in contact after the tackle the Player's hands were clearly moving near Kyriacou's face. As they hit the ground the Player's hand jerked up with the palm inwards across and above Kyriacou's face. Once the ruck formed over them it is difficult to see exactly what occurred, although the Player's hand can be seen at one point in the vicinity of Kyriacou's face just

before his head jerks backwards. Attached to the citing report were 9 photographs of Kyriacou's face taken on the day of the match and on each of the two days thereafter. The first showed significant bruising around the closed eye, the second showed some improvement and the third showed the eye open. There was significant bruising around the nose around the near side of the eye and the half of the white of the eye furthest from the nose was completely red. There were no scratch marks around the eye area.

- 4. Kyriacou gave evidence live before the panel. He said that he felt a finger go across his eye as he fell to the ground but that did not hurt too much. However when he got into the squeeze ball position he felt a finger go into his right eye – it went into the eye by his nose and then dragged along the out part of his open eye. It was a pretty sore sensation and he jerked his head back just before the whistle blew to stop play. He was attended by the team physiotherapist who washed his eye out. He said his eye was leaking fluid and he had glazed vision. He said he complained about an eye gouge to the referee who said he had not seen anything and could do nothing about it. He carried on playing until half time, when the team doctor cleaned his eye again and he carried on during the second half. He said he couldn't focus properly and after about 20 minutes he was replaced. After the game his eye closed and continued to leak fluid. He said the doctor put some dye into his eye to check for scratches. Two days after the event his eye was open and he has no permanent damage. He did not miss any games as a result of the incident. However the panel observed that his eye was still slightly red 16 days after the incident. In answer to questions from Mr Bennett while the video played in slow motion, Kyriacou said that nobody else was close enough to his face to poke him in the eye and it must have been the Player who committed the act. He accepted there was no animosity between the players, that he had not complained about the Player to the referee. He did not accept that the ball was near his head throughout the incident and suggested that he had pushed it down towards his stomach when he adopted the squeeze ball position.
- 5. Kyriacou also presented a note from Dr Curtin which was not disputed. It said that Kyriacou's eye was painful, watering profusely, blinking uncontrollably and he was experiencing some visual disturbance. Treatment was necessary throughout the duration of half time and he continues to require prescription only medication.
- 6. Dan Vickers, the Saracens physiotherapist stated that he was about 10-15 metres away from the incident. He saw the Player land on top of Kyriacou after the tackle and then saw the Player draw his hand across his face. It was very quick, the hand flicked quickly across the face like a cat lashing out with its paw, but he could not see whether it was a flat hand or clawed. He went onto the pitch after play had stopped to tend Kyriacou who complained to him about being "eye gouged". He said the eye was full of mud and fragments and was weeping profusely but he could not immediately identify any scratching around the eye. He washed it out and then went to the referee to report contact with the eyes. Kyriacou continued to play and Vickers said that he took every opportunity to wash out the eye.'

The Defence Case before the Disciplinary Panel

- 8. The Disciplinary Panel recorded the evidence adduced by the Player as follows:
 - '7. The Player gave evidence on his own behalf. His defence was that first he could not be sure that it was his finger which caused the injury, but if it was there was not intent and the contact was accidental. He said he had not realised anything had

happened during the game but he was contacted by a Saracens player (captain of Fiji) shortly after and told that he was going to be reported for eye gouging the Saracens hooker. He heard officially at training the following Thursday and was very shocked about the allegation.

- 8. Using the video to describe what occurred the Player said that as he went into contact and fell to ground his sole concern was to wrest the ball away from Kyriacou. Once he was on top of Kyriacou he continued to scrabble for the ball but a Saracens player (Glen Jackson) put his arm round his neck and tried to pull him backwards. At the same time another Leicester player stood above the ruck and also attempted to get his hands on the ball. He said he could not see what was going on below him, but he could feel the ball and continued to try to get his hands on it. He said he couldn't remember putting his finger in anyone's eye and didn't feel anything. If he did make contact it was accidental as he tried to get the ball.
- 9. As part of his defence case he also prayed in aid his good character. He said he was not the sort of person who would commit insidious acts of foul play. Marcelo Lofredo, the Leicester club coach, described the Player as a gentleman. He said he was a very hard man on the pitch who may be guilty, on occasion, of a high tackle, but he would not deliberately eye gouge anyone. The Player had been a teacher before becoming a professional rugby player and had played in Fiji, the Super 12 and the Guinness Premiership for the last 4 years. He has 6 caps for the Pacific Islands, 26 for Fiji and has played in 2 Rugby World Cups.
- 10. Mr Bennett reminded the panel of RFU Disciplinary Regulation 6.5.2 which requires a higher standard of proof for more serious allegations this being a case where the standard required would be at the upper end of the sliding scale. He said that the injuries depicted in the photographs and described by the witnesses were consistent with accidental contact because there was no scratching around the eye. He submitted that the DVD footage was inconclusive it shows Kyriacou's head jerk backwards but not what actually occurred. He said that no complaint was made about the Player during the game. There was no animosity between the players and no motive for deliberately attacking Kyriacou's head. Finally, the Player was of good character (notwithstanding a recent citing for a dangerous tackle) and he was not the sort of person who would eye gouge another player. In short, he submitted that it was impossible to discount accidental contact or to be sure who actually caused the injury.

The Findings of the Disciplinary Panel

9. The first finding of the Disciplinary Panel (paragraph 11) was that it had no doubt that the injury was caused by the Player. This is not now in issue on this appeal. The Disciplinary Panel went on to conclude in paragraph 11 that:

'The video clearly showed the first incident described by Kyriacou (the hand flicking across his eyes) and it is possible to discern the Player's hand near Kyriacou's face just before his head jerked backwards. The panel thus had to decide whether the contact was accidental, reckless or deliberate.'

10. The second finding of the Disciplinary Panel (paragraph 12), also not in issue on this appeal, was that:

'Having heard his own evidence and the assessment of him by his coach, the panel accepted the character evidence that the Player was not the sort of person who would deliberately gouge an opponent's eye.'

11. The third finding (paragraph 12) was in relation to the "first action". It is not in issue on this appeal. It was that:

'[The panel] accepted that the first action may have been an attempt to wrest the ball from Kyriacou.'

12. The fourth finding (paragraph 12) was also in relation to the first action. The Player contends that on the balance of probabilities the Disciplinary Panel was wrong to make the fourth finding. It was that:

'However, on his own evidence he knew the ball was near Kyriacou's head and thus he must have realised that there was a risk that the action may lead to contact with the eye.'

- 13. During the course of the Appeal hearing, the question was raised as to whether the Disciplinary Panel had found that the Player had been reckless during the first action. The Player's case was that it had so found. Attention was drawn to the words of the fourth finding set out above, and in particular the use of the word "however" as qualifying the third finding that the first action might have been an attempt to wrest the ball from Kyriacou, and the statement that on the Player's evidence he must have realised that there was a risk that the action might lead to contact with the eye, which reflects the definition of recklessness in IRB regulation 17.37.11(b) and RFU Disciplinary Regulation 8.2.5(b). Attention was also drawn to paragraph 18 of the Disciplinary Panel's Judgment, in which in determining sanction, it took into account "that there were two separate contacts". The RFU also submitted that the Disciplinary Panel found that the Player was reckless during the first action, but also submitted that "the focus of the Panel's decision was on the second action".
- 14. The Appeal Panel accepts both parties' submission that there was finding of recklessness in relation to the first action and accepts the RFU's submission that the Disciplinary Panel's focus was on the second action. As described below, the Disciplinary Panel viewed the second action as more serious than the first, in that while the first may have been a genuine attempt to secure the ball, the second would in the view of the Disciplinary Panel have been a deliberate offence if the Player had been able to see what he was doing. It appears that the Disciplinary Panel viewed the first action as towards the lower end of recklessness, and the second as towards the higher end.
- 15. The fifth finding (still in paragraph 12) was in relation to the second action or contact. The Player contends that on the balance of probabilities the Disciplinary Panel was wrong to make the fifth finding. It was that:

'In relation to the second contact the panel accepted that the Player could not see what he was doing because his head was being pulled back and other players had joined the ruck. This was an important determination because had the Player been able to see then the panel would have concluded that he deliberately made contact with the eye. The panel concluded, however, that although he could not see he

continued to scrabble for the ball using his hands and fingers recklessly. He believed the ball to be near Kyriacou's head (and told us so) and thus in scrabbling for the ball he must have realised that there was a risk that his fingers would have made contact with Kyriacou's eyes.'

16. In paragraph 13, the Disciplinary Panel drew together its conclusions in paragraph 12, and held:

'In those circumstances the panel concluded that contact was not accidental. An act of foul play was committed and the panel upheld the citing complaint, finding the Player guilty of making contact with an opponent's eye.'

- 17. The validity of that conclusion is challenged.
- 18. Late in submissions in reply, Mr Smith for the Player raised the suggestions that the charge was duplicitous and that the Disciplinary Panel was in some sense precluded from reaching a conclusion that there were two actions involving recklessness. The Appeal Panel does not accept this submission. The charge was that the Player "made contact with the eye... of an opponent during ... 40^{th} minute of first half...". The citing report was a little more specific stating that the incident happened at 40 minutes 37 seconds. It is however apparent from the video tape that the first and second actions took place within seconds of each other and were in reality both part of the same incident. The reference in the charge to the player making contact does not preclude a finding that there were two contacts, and the conclusion in paragraph 13 of the Disciplinary Panel's Judgment that the Player was guilty of making contact was not inconsistent with a finding of two contacts.
- 19. The Disciplinary Panel then went on to deal with mitigation and sanction. These are not the subject of the appeal made by the Player.

Extent of Appeal Panel's powers on an appeal confined to the finding of foul play

- 20. On the question of the Appeal Panel's powers on an appeal confined to the Disciplinary Panel's finding of foul play, the Player submitted:
- a. Disciplinary Regulation 11.2.2(b) provides that the Notice of Appeal must specify "whether the appeal is against the finding and/or the sanction imposed". On the ordinary meaning of those words, it was therefore open to a player to confine the appeal to the finding of foul play, or to confine it to sanction, or to appeal against both. Why else, it was said, should the provision require such specification.
- b. If the player so confined his appeal to the finding of foul play, that must mean that only that finding was in issue, which must in turn mean that the Appeal Panel could not exercise a power under Disciplinary Regulation 11.1.1 to increase the sanction.
- c. The player here had expressly and clearly confined his appeal to the finding of foul play.
- d. Disciplinary Regulation 11.1.1 contained a list of the powers of the Appeal Panel, but it did not mean that all those powers were available in all types of appeal.

- e. Any ambiguity in the rules should be construed in favour of players and against the RFU. If the rules were to provide that the Appeal Board could increase sanction when a player had only appealed against the finding of foul play, they ought to do so in clear express terms.
- f. If the RFU is concerned about the sanction imposed, it has power under Disciplinary Regulation 2.6.4 itself to appeal against the sanction.
- 21. The RFU first made clear that it was not seeking an increase in the sanction in the circumstances of this case. Its position was rather that for the future it should be clear that whenever there was an appeal, even an appeal expressly and clearly confined to a finding of foul play as in this instance, the Appeal Panel was to be able to increase, or reduce, the sanction imposed. The Appeal Panel ruled during the course of the hearing that it would not impose an increase in sanction irrespective of its decision as to whether it retained power to do so on an appeal confined to the finding of foul play.
- 22. The RFU submitted:
- a. Disciplinary Regulation 11.1.1 contained a list of the powers of the Appeal Panel that were available to it in all types of appeal.
- b. In order to limit that clear provision of powers, there would have to be clear words.
- c. Disciplinary Regulation 11.2.2(b) does not provide such clear words. All that it provides is that a player may chose what he does and does not complain about. It does not provide any limitation on the ambit of the Appeal Panel's powers.
- d. If the Player's construction were accepted, players might be able to "play the system" by making unmeritorious appeals against the finding of foul play only, suspending the operation of any ban in order to play in a particular important match, safe in the knowledge that the Appeal Panel would be unable to express its dissatisfaction with the unmeritorious nature of the appeal by increasing the sanction.
- e. Regulation 2.6.4 was too narrowly drawn to provide effective protection from unmeritorious appeals.
- f. If the Appeal Panel were unable to make any change to sanction, it would not be able appropriately to reflect any change that it made in the finding on foul play.
- 23. The Appeal Panel concludes, first, that it is plain from Disciplinary Regulation 11.2.2(b) that a player may choose whether he wishes to complain about the decision of the Disciplinary Panel on finding of foul play, or on sanction, or on both. A player cannot be made to complain about something about which he does not wish to complain. The question is rather whether the effect of that choice, for example only to complain about the finding of foul play, is to preclude the Appeal Panel re-opening sanction itself.
- 24. Secondly, the Appeal Panel concludes that it is not much assisted in construing the rules by the proposition that players might "play the system" by making unmeritorious appeals against a finding of foul play in order to suspend sanction so as to be able to play in important matches. If the rules allow for that, then

they allow for it. Players cannot be deprived of a right to limit their appeals under the rules simply because such a right is potentially inconvenient for the RFU. The point would only be relevant to construction if it could be said to form part of the factual matrix against the background of which the rules were promulgated, such that they should be construed as being designed to cater for it. However if the rules had been designed to cater for this point, then they would have done it more clearly. There was no evidence adduced to establish the background against which the rules were adopted. Furthermore, we have considerable doubt that it would in any event be legitimate to increase a sanction to express displeasure at an unmeritorious appeal, especially absent a clear provision that this could be done. Any Appeal Panel before which sanction was in issue, on whatever basis it came there, would in our view confine itself to applying the Regulations to the facts disclosed. At most it could be said that a player who made an unmeritorious appeal against a finding of foul play alone, might run the risk that the Appeal Panel might take a different, harsher view, on sanction to the Disciplinary Panel.

- 25. Thirdly, in the view of the Appeal Panel, the need to protect the interests of individual players dictates that ambiguity must be resolved in their favour. There is such ambiguity here. A player could legitimately take the view, based on Disciplinary Regulation 11.2.2(b) that a narrow appeal could be made with the consequence that aspects not appealed against would not be re-opened unless Disciplinary Regulation 2.6.4 was invoked. If the RFU wishes to ensure that Appeal Panels can re-open sanction when a player chooses to appeal only against a finding of foul play, then the RFU should make it clear in the Regulations. What is more, if the intention of the RFU is that unmeritorious appeals can be deterred by increased sanctions, for example as an aggravating factor, that would at the very least have to be made the subject of an express provision. We say at the very least because in our view there would remain a question as to the validity of such an approach.
- 26. We record that the strongest point in favour of the construction placed on the rules by the RFU was that if the finding on foul play of the Appeal Board on a liability only appeal was different to that of the Disciplinary Panel, the Appeal Board ought to be able to make changes to sanction. However, we do not consider that this consideration is strong enough to overcome the points set out above. First, in the normal course, a finding that there was no foul play (for example as the incident was accidental) has the automatic result that no sanction can stand. Secondly, again in the normal course, a finding that there was foul play (for example because the Disciplinary Panel's finding that the incident was reckless is upheld) has the result that sanction stands but is left unexamined. Neither of these situations pose any It is however conceivable that a situation might arise where an Appeal Panel's being confined to a decision on liability alone might cause problems if sanction could not also be addressed. For example if there were two incidents and the Appeal Panel overturned the finding of foul play in respect of one but not the other, then that might have an effect on sanction. It is also conceivable that a Disciplinary Panel on a liability only appeal might take a different view of where on the spectrum of recklessness short of deliberate action the incident fell, and might want to change the Disciplinary Panel's view on that, either up or down. We consider that instances of each type of situation are likely to be rare. In the second situation, it seems to us that the Appeal Panel would be trespassing onto sanction. Those acting for players

should be cautious in confining an appeal to liability only, and should satisfy themselves that in so doing they do not unintentionally create a situation where the Appeal Panel might be deprived of the opportunity to reduce a sanction, as well as to increase it.

27. The Appeal Panel therefore concludes that where a player limits his appeal to the finding of foul play, and specifically states that no appeal is made on sanction, the Appeal Panel cannot reduce or increase the original sanction because that issue is not put before it.

Effect of a finding that a player's actions were accidental

- 28. Both the Player and the RFU contended that purely accidental play does not amount to foul play. Both the Player and the RFU contended that many RFU Disciplinary Panel decisions, including that in this case and others provided to the Appeal Panel, were premised on a finding that a player's actions were accidental having the consequence that no offence was disclosed. Both the Player and the RFU contended that none of the offences in IRB Regulation 17 Appendix 1 or RFU Disciplinary Regulations Appendix 2 could be committed accidentally.
- 29. Even if those contentions were incorrect, it is evident that a finding that a player's actions were accidental on any basis means that under RFU practice, no sanction applies (see Appendix 9, Guidance Issued by the RFU Disciplinary Officer, Guidance Note 1, 1st 2nd and 3rd paragraphs).
- 30. The point was therefore not in issue between the parties.
- 31. In these circumstances, the Appeal Panel makes no finding on this issue. The RFU may however consider that clarification of this point would be worthwhile.

Whether the Player has established that on the balance of probabilities the Disciplinary Panel was wrong to conclude that the Player's actions were reckless

- 32. On the substantive issue on the appeal, the Player submitted:
- a. The accepted findings in paragraph 12 were that the first contact was an attempt "to wrest the ball from Kyriacou" and the second contact involved the Player scrabbling for the ball whilst unable to see the same by reason of his head being pulled back by an opposing player.
- b. On the balance of probabilities, contact with the eye consequent upon such actions in the context of a fast moving sport were more likely to be accidental than reckless.
- c. The definition of recklessness in RFU Disciplinary Regulation 8.2.5 and Regulation 17.37.11(b) as explained in Appendix 9 provides that offending was reckless if the player should have known there was "a risk of committing an act of illegal and/or foul play". However the magnitude of the risk taken on by the player in the context of assessing whether he was reckless cannot be judged in isolation from the dynamics of a fast moving contact sport.

- Identification of <u>any risk</u> must be insufficient on its own to justify a finding of recklessness.
- d. In the circumstances of the Disciplinary Panel's having found the Player had made genuine attempts to play the ball in both instances, the Panel erred in concluding that such risk as was posed by his actions in the context of a fast moving sport amounted to reckless conduct. The Panel had allowed too slight a risk to constitute recklessness and had given insufficient weight to the fact that the Player acted in the heat of play.
- e. Contact must not be removed from this phase of the game, which is what would happen if a player had to avoid contact if there was any risk of contact with another player's eye. It was perfectly possibly that injury, and indeed serious injury, could be caused accidentally.

33. The RFU submitted:

- a. In circumstances where no new evidence is called and the factual findings of the Disciplinary Panel are accepted, one would expect to see a case mounted that the Disciplinary Panel had erred in principle in going on to conclude on the basis of those findings of fact that the player had acted recklessly, but none was advanced here.
- b. An Appeal Panel should take into account that the Disciplinary Panel heard the evidence and reached its conclusions "as a matter of expert determination".
- c. An Appeal Panel should require cogent reasons in these circumstances before determining that the Disciplinary Panel was wrong, and the reasons offered by the Player were not such cogent reasons.
- d. It was accepted that "a risk" in Disciplinary Regulation 8.2.5 could not mean absolutely any risk at all. However it was for the Disciplinary Panel to determine whether there was a sufficient degree of risk to render the action reckless. It was for the Appeal Panel to review that determination. Here the Disciplinary Panel had been correct that there was a sufficient degree of risk.
- 34. The Appeal Panel first concludes that the test for it to apply is simply whether it considers that the Disciplinary Panel was wrong on the balance of probabilities to conclude on the basis of its findings of fact that the actions were reckless as opposed to accidental. There is no question of the test being whether the Disciplinary Panel reached a conclusion that was not reasonably open to them. There is no question of the Appeal Panel deferring to the Disciplinary Panel's expert determination. Nor is there any question of the Player having to allege "an error of principle": although in any event the Appeal Panel considered that Mr Smith had as part of his submissions in fact alleged such an error, namely that the Disciplinary Panel was prepared to accept too low a level of risk and failed sufficiently to take into account that the sport is a fast moving contact sport.
- 35. The Appeal Panel approaches its task by examining the findings of the Disciplinary Panel, in paragraphs 2 to 13 of their Judgment, set out above. Apart from the video recording, which the Appeal Panel watched under the guidance of the Player's Counsel, these findings in the Disciplinary Panel's Judgement are the only evidence before this Appeal Panel. The Panel asks itself whether it regards each of the two contacts, as described by the Disciplinary Panel and revealed on the video

recording, as involving the Player taking such a degree of risk of contact with Kyriacou's eye as to constitute his actions reckless.

- 36. The Appeal Panel agrees with the Player that in judging whether the degree of risk taken is sufficient to amount to recklessness, significant weight must be attached to the fact that in a fast moving contact sport (in particular in the relevant phase here) a player has very little time in which to make fine distinctions as to what degree of risk is being adopted. The faster the play and the less time to make decisions, the harder it is to say that a player "should have known", still less knew there was a significant risk of foul play.
- 37. However, even taking this into account, the Appeal Panel is very comfortably satisfied on the balance of probabilities (taking into account the seriousness of the offence) that the Disciplinary Panel was correct to conclude on the basis of its findings of fact that the Player had taken on such a degree of risk of foul play as to constitute his actions reckless, both in relation to the first contact and in relation to the second. The Appeal Panel concludes on the basis of the Disciplinary Panel's findings of fact that in relation to each instance of contact, the Player should have known that there was a significant risk of his actions involving foul play, even in the heat of fast moving play.
- 38. In relation to the first contact, the Appeal Panel was struck in particular by the Disciplinary Panel's conclusion in paragraph 3 of their Judgment, clearly correct from the video recording, that as the players hit the ground "the Player's hand jerked up with the palm inwards across and above Kyriacou's face". While the Disciplinary Panel concluded (paragraph 12) that this "may have been an attempt to wrest the ball from Kyriacou", and the Appeal Panel proceeds on this basis, it is evident that the motion used, and the hand position used, in order to do so this, carried with it a significant degree of risk of contact with Kyriacou's eye, and the Player ought to have realised this. A more conventional, and much less risky, movement would have been for the Player to try to wrest the ball out by placing his arm over it with the palm facing away from Kyriacou, pulling the ball towards him, as opposed to trying to rake it out with the cat-like lash found on the evidence in paragraph 6 of the Disciplinary Panel's Judgment.
- 39. In relation to the second contact, the Appeal Panel concludes that the Disciplinary Panel was correct to find (in paragraph 12) that a player who continues scrabbling around in the vicinity of another player's head when he cannot see with what he is coming into contact, is taking on and ought to know that he is taking on a sufficient degree of risk of contact with the other player's eye as to constitute his actions reckless, even taking into account the heat of play.

Disposition on appeal

40. For the reasons set out above, the appeal is dismissed.

Costs

41. The original costs award of £250.00 will stand. There will be no order for costs for the appeal other than the forfeit of appeal monies of £500.00.

Signed: Adam Lewis Date: 14th April 2008

Chairman