

- a. Confirming or contradicting the Chairman's current understanding of the narrow nature of the appeal, and if the latter explaining the basis for, and extent of, the appeal.
- b. Setting out on what (if any) records of the evidence before the Disciplinary Panel other than its Judgment and the Video Recording, the Player relies.
- c. Setting out the Player's submissions on the facts and the law, identifying and appending any authorities relied upon, as to why the Disciplinary Panel was wrong on the balance of probabilities to decide on the evidence before it that the Player's actions were reckless.

Permission is granted for Counsel for the Player to appear by video-link.

James Bennett – counsel

Marelo Lofreda – Leicester coach

Witnesses to fact: Andi Kyriacou – Saracens No 2
Dan Vickers – Saracens Physiotherapist
Dr M Curtin – Saracens Doctor

Charge and Plea

1. The Player pleaded not guilty to an act contrary to good sportsmanship namely making contact with an opponent's eye contrary to Law 10(4)(k).

The Citing Complaint

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

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.

Finding

11. The panel concluded, without any doubt, that the injury was caused by the Player. Although there were a number of players in the vicinity of the ruck, the Player was the only one close enough to have been able to make contact with Kyriacou's eyes. 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.

12. 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. It accepted that the first action may have been an attempt to wrest the ball from Kyriacou. 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. 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.

13. 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.

Mitigation

14. The panel informed the Player that it had determined that contact was reckless rather than deliberate and Mr Bennett mitigated on that basis. He repeated the evidence given during the hearing in relation to the Player's good character. He has received one Yellow Card (in RWC 2007) for a dangerous tackle, and was cited and suspended for the same offence in early 2008 while playing for Leicester. He said that there was no suggestion that the insertion was prolonged – it was very quick. There was no effect on the game because Kyriacou continued to play until replaced at 61 minutes (and not at his request) and he has not missed any games as a result of the injury. There has been no permanent damage. He said that the Player was sorry for the injury caused and had in fact written to Kyriacou to apologise if indeed he had caused the damage. Mr Bennett cited paragraph 20 of the case of Dylan Hartley and suggested that this offence should be classified as Low End since contact was reckless.

15. When questioned about playing commitments for the rest of this season the panel were informed that Leicester's expectation was that they would continue to play fixtures until 31 May – the date of the Guinness Premiership play off final. Thereafter the Player would travel to the southern hemisphere where he expects to be included in the Fiji and Pacific Islands squads to play 5 Test Matches. That playing programme will end in the first week of July. Pre season practice matches then commence at Leicester on about 8 August.

Sanction

16. The panel reminded itself of the statement of principle in the Hartley case, paragraph 20 of the judgment which reads:

“Contact with an opponent’s eye or eye area is a serious offence because of the vulnerability of an eye and the risk of permanent injury. It is often the result of an insidious act and is one of the offences most abhorred by rugby players. Serious offences of this sort – and particularly those known colloquially as “eye gouging” must be dealt with severely to protect players, to deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson. Clearly “contact” encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury. Offences which would properly be classified as at the Lower End of the scale of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area. Offences which would properly be classified as at the Top End of the scale of seriousness would include, but not be limited to, an intentional act designed to cause serious discomfort or injury to the eye or area around the eye of an opponent. The most serious offences in this category would be where permanent damage is caused.”

17. The panel, for the reasons set out above, determined that this offending was reckless rather than deliberate. The Player’s actions were, however, grave – as any act of foul play which involves fingers going into opponent’s eyes and causing injury must be. Notwithstanding Mr Bennett’s submissions, the offending did have some effect on the victim because he was removed from the game (albeit much later) and he suffered considerable discomfort for a number of days afterwards. Although there was no reaction from the players, and therefore little effect on the game, the Player’s actions did eventually cause a replacement. Kyriacou was vulnerable during the incident – he was kneeling on the floor in the squeeze ball position with his hands attempting to move the ball backwards and unable to protect his eyes. There was clearly no provocation.

18. For all of these reasons, and particularly the fact that there were two separate contacts and significant injury was caused, the panel concluded that the offence was in the Mid Range on the scale of seriousness because it had been reckless rather than deliberate. If it had been deliberate it would have been classified as Top End and the entry point would have been well up the appropriate range. The panel accepted the submission that there were no aggravating features: although he has already appeared in front of a RFU disciplinary panel this season it was for a completely different type of offending, and that one offence is not sufficient to enable the panel to classify the Player as a persistent offender.

19. The panel did, however, give the Player credit for his generally good character and for his conduct before and during the hearing when facing very serious charges. The panel also took account of the fact that this suspension would lead to the Player missing a significant number of major fixtures – potentially three separate cup finals with his club and five international matches for his country. Although the standard of game to be missed is not a relevant factor when deciding the appropriate length of any suspension, the panel decided that the cumulative effect of all of these games was a

factor which could properly be taken into account when determining that the suspension should not be carried forward into next season.

20. The Mid Range entry point for contact with the eye is 18 weeks' suspension. The panel reduced this by 4 weeks to take account of the factors listed above and to ensure that the suspension covered the whole of the rest of this domestic season and southern hemisphere internationals. **The Player is, therefore, suspended for fourteen weeks from 1 April to 8 July 2008. He may play again on 9 July 2008.**

Costs

21. Costs of £250.00 are awarded against player/club.

Right of Appeal

22. The Players are reminded of their right of appeal which should be lodged by midday on 3 April 2008.

7.

Signed: **Adam Lewis**
Chairman

Date: **3 April 2008**