

RFU

v

Michael Lipman

Andrew Higgins

Alex Crockett

(All formerly of Bath Rugby)

Hearing into allegations of misconduct

Held at: Park Inn Hotel, Heathrow and the Holiday Inn, Bloomsbury

On: 29 – 31 July and 3 August 2009

Panel: His Honour Judge Jeff Blackett (Chairman)
Mr Jeremy Summers
Mr John Brennan

Attended by:

On behalf of the RFU: Andrew Green (Counsel)
James Segan (Counsel)
Karena Vleck, RFU Company Secretary and Legal
Officer
Karen Neale, RFU Legal Officer

The defendants and representatives:

Michael Lipman
Mark Milliken-Smith QC (Counsel)

Andrew Higgins
Daphne Romney QC (Counsel)

Alex Crockett
Stephen Ferguson (Counsel)
Sam Magee (Counsel)

Malletts – instructing solicitors

Secretariat: Bruce Reece-Russel
Brenda Parkinson

The Panel heard live evidence from (Bath Rugby unless stated):

David Guyan
Steve Meehan

Dr Julian Widdowson (Bath doctor)
Wayne Harvey (Coach driver)
David Barnes
Rhys Crane
Ed Jackson
Mike Stephenson
Bob Calleja
Mr Dave Widdowson (Bath solicitor)
Rob Hawkins
Laurence Ovens
Damian Hopley (PRA)
Michael Lipman
Andrew Higgins
Alex Crockett

The panel also received written statements which were agreed from:

Mark Lilly
Caroline Jones
Olly Barkeley
David Flatman
Pieter Dixon
Bart Campbell
Carl Selavka (Forensic scientist)
John Sextone
Colin Sextone
Jan McGinty
Richard Mallett (together with notes from his case files)

Decision

The Panel find the Players guilty of failing and/or refusing to submit to internal club drugs tests without reasonable excuse on two occasions on 13 and 14 May and that this constituted conduct which was prejudicial to the interests of the Game. They are suspended from playing rugby for nine months from 2 June 2009 (the date they resigned from Bath) to 28 February 2010. They may play again on 1 March 2010.

Preliminary Matters

The Charges

1. At a preliminary hearing held on 7 July 2009, all three players had been charged with, and pleaded not guilty to, three offences of conduct prejudicial to the interests of the Game contrary to RFU Rule 5.12 in that they:
 - a. On 10 May 2009 they ingested illegal substance(s); or (in the alternative)
 - b. On 10 May 2009 they gave the impression that they had taken illegal substance(s); and

- c. On 13 May and 14 May they failed and/or refused to submit to an internal club drugs test as requested by Bath RFC.
2. The RFU case in relation to the first two charges relied on general unspecific rumour and innuendo about drug taking, the testimony of one player who said that Crockett and Higgins made certain admissions towards the end of the evening of 10 May and an adverse inference which could be drawn from the failures to attend for a drugs test. There was no direct or forensic evidence to support those charges.
3. The Panel suggested, and all parties agreed, that if the RFU failed to prove the third charge, then there would be insufficient evidence to proceed in relation to the first two charges. The gravamen of this case, in relation to misconduct proceedings, is the alleged failures to attend a drugs test. In those circumstances the Panel directed that the first two charges should be discontinued and the case proceeded solely on the basis of the third charge. If that charge failed, that would be the end of the matter. If the RFU proved that charge then the Panel could reflect any adverse inference in the sanction which would follow.
4. After hearing the RFU's case and the cross examination of witnesses, the Panel formed the view that there may be separate considerations in relation to the arrangements for 13 and 14 May. The Panel directed that the third charge should be separated into two charges to reflect the two separate occasions when the RFU allege the three Players failed to attend or refused to submit to testing.
5. The hearing, therefore, considered two charges against each player which alleged that they:
 - a. On 13 May failed and/or refused to submit to an internal drugs test as requested by Bath RFC; and
 - b. On 14 May failed and/or refused to submit to an internal drugs test as requested by Bath RFC

Request for an adjournment

6. Mr Milliken-Smith asked that the case be adjourned because Mr Mallett, the solicitor who has been personally representing the Players and who is also a witness to fact, was unwell and unable to attend. In advance of the hearing he had provided a witness statement in relation to a number of relevant matters and the RFU had submitted a statement purporting to be rebuttal evidence from Mr Widdowson, the solicitor representing Bath Rugby. Mr Milliken-Smith suggested that this latter statement went further than rebuttal and Counsel required time to take further instructions. The request was opposed by Mr Green on the basis that all of the RFU witnesses were in attendance and it would be difficult to re-assemble them, another hearing could not be arranged until after 7 September, Mr Widdowson's statement was solely provided to rebut certain assertions made by Mr Mallett and there were other ways of adducing that evidence.
7. The Panel decided that it would not be in anyone's interests to delay the hearing at that stage. It would proceed to hear the evidence which was available and

leave open the issue of adjournment if it became clear that the Players would be prejudiced by Mr Mallett's absence as a witness.

The Evidence

Background

8. On Sunday 10 May a number of Bath Rugby squad and academy players travelled from Bath to London by coach for an end of season celebration and party. The trip had been arranged by Michael Lipman and took place after Bath lost to Leicester in the GP semi final on 9 May. The arrangement was that they would be transported to a public house/club called "The Church" during the morning and that they would be transported home by bus from a public house called "The Pitcher and Piano" at 2300. They left Bath at about 0945 and during the journey they drank various quantities of alcohol. They arrived at The Church at about 1300 and left at about 1600. They dispersed to various other places but all arrived at some stage during the evening at the Pitcher and Piano. Significant quantities of alcohol were consumed and by the end of the evening all of the players were in varying states of intoxication. Towards the end of the evening there was an altercation between some of the players and some Harlequins players who were also at the Pitcher and Piano.

9. One player, Rob Hawkins, appeared to be so drunk that he was taken to St Thomas's Hospital for treatment. There was talk among some of the players that he had either taken some illicit drugs or that his drink had been spiked (in fact he was tested for drugs three days later and the tests were negative). Towards the end of the evening in the Pitcher and Piano Higgins and Crockett were at the Bar where they had a discussion with another player (player X – the Panel decided that his name should not be placed in the public domain). Player X stated that those two players gave him the impression that they had given Hawkins some cocaine, although in cross examination he could not be sure whether the word "cocaine" was used and he said that Crockett said nothing about drugs during this conversation. Higgins and Crockett said that they made no such admissions but that Hawkins accused them of giving Hawkins something and they denied the accusations. This conversation took place after a lot of alcohol had been consumed.

10. These discussions continued among some of the players on the coach home and at a team gathering the next day at an end of season BBQ and party at Bath club house.

Bath's action on hearing rumours of drug abuse

11. On 11 May a senior player told Steve Meehan that he had heard allegations that some players may have used drugs during the trip to London. Mr Meehan reported these concerns, which were not specific, to Bob Calleja who decided that they should be investigated. He was most concerned about the potential damage to the reputation of Bath, particularly in the wake of the Matt Stevens case earlier in the season. He tasked Dave Guyan, the team manager, to conduct an investigation.

12. Dave Guyan contacted as many of the players he could over the next day or so and picked up rumours that certain named individuals may have been involved in

drug abuse during the outing to London. Rumours suggested that some people had taken drugs at the back of the bus during the journey to London, some suggested that drug taking had occurred at one or more of the public houses in London, some suggested that drinks had been spiked. Player X reported his concerns about Higgins and Crockett. All of the players who gave this information to Mr Guyan wanted to remain anonymous.

13. As a result of these discussions Mr Guyan agreed with the Bath management that five players whose names had been mentioned as possibly being associated with drugs should be called into Bath and required to submit to a drugs test. He and Bob Calleja had reviewed the options of doing nothing or taking some form of action and they decided on the latter course. They acknowledged that there was insufficient evidence to prove that there had been drug taking, but given the cloud surrounding Bath following Matt Stevens positive test they decided that the tests would enable them to show that the rumours were wrong or to take action if they were correct. They were satisfied that paragraph 6.9 in the standard form player's contract gave the Club the right to require players to submit to drug testing at any time.

14. The five players who were rumoured to be involved were Justin Harrison, Michael Lipman, Andrew Higgins, Andy Crockett and Rob Hawkins. A sixth player, Ed Jackson, was added to the list as further information emerged. Hawkins took the drugs test on 13 May and Jackson took the drugs test on 14 May; both proved negative for cocaine and other illicit substances. Harrison failed to attend on either occasion and subsequently resigned from the club. He has since pleaded guilty to three counts of prejudicial conduct (ingesting cocaine, making inappropriate statements about drugs and failing to take drugs tests).

15. Lipman, Higgins and Crockett denied that any of the rumours were true and constituted no more than tittle-tattle. On 25 June Lipman and Crockett provided hair samples to be tested for the presence of cocaine at a privately arranged test with a company in Coventry. They provided hair samples and the report from Carl Selavka (Forensic scientist) stated: "the forensic drug tests for the variable-length head hair samples, representing the approximate two-and-a-half month time period from approximately early April to mid-June 2009, were reported as Negative for Cocaine and its Metabolites. This was evidence that cocaine had not been consumed in recreational doses on multiple occasions by Lipman or Crockett during the approximate 75-day time period".

16. Higgins was on holiday when the other two had arranged hair testing and he did not attend for a hair test until just before the hearing. His results were not available at the hearing.

17. On 12 May the team doctor, Doctor Julian Widdowson, was asked to arrange drug tests for those whose names had emerged during the investigation. He contacted a company called Medscreen which is ISO accredited and had been used by the NHS for illicit drug screening and was recommended by the RFU Doping Officer. The tests were set up for Wednesday 13 May at the Bath clubhouse.

Arrangements by the Club for drug testing

18. On 13 May Mr Guyan attempted to contact the players who were to be tested. He rang (and sent text messages variously to) Harrison, Lipman, Crockett, Higgins and Hawkins to ask them to come to the Club at 1100 to discuss the players' BBQ where minor damage had occurred at the Club's premises. He received no acknowledgement or reply from Higgins, although he admitted that he had read the text and spoken to Crockett before 1300. Hawkins rang to explain that he would be delayed because of some personal issues, but Lipman and Crockett attended at about 1100. Harrison has been the subject of separate proceedings and is not relevant for the purposes of this judgment.

19. There is some dispute about precisely what occurred when Lipman and Crockett arrived at the Club. Mr Guyan said that he deliberately had not told them about a drugs test because he thought they may not turn up and they would ring round other players who may not then take his calls. He said when Lipman and Crockett arrived he kept them waiting for no more than 30 minutes until Dr Widdowson attended and did not tell them why they were there. Lipman and Crockett said that they were confused as to why they were waiting for the doctor if the purpose of the meeting was to discuss damage to the club house. At 1130 the doctor arrived: Mr Guyan then told Lipman and Crockett that allegations of drug abuse had been made against them that they were required to submit to a drug test. Dr Widdowson told them that the doping control officers would be arriving within the hour and would require hair and urine samples. Mr Guyan said that he told the players this was a reasonable request under the terms of their contracts and that they made no complaint. Dr Widdowson confirmed that account. Both players said that Lipman complained about being ambushed and lied to in relation to the reasons for attending. Lipman said he was confused particularly in relation to the request for a hair sample which is something he had never experienced before.

Communication between Bath and the players about the tests

20. On 13 May Lipman and Crockett left the club after they had been told about the first drug test but said they would return at 1300 or when contacted by Mr Guyan. They did not return. At 1304 Mr Guyan sent a text message to both stating: "The testers are here – can you confirm you will or will not attend." At 1315 he sent a text to Higgins: "The drug testing team will remain at the rec until 1400 your presence is required to conduct the text."

21. Lipman responded with a text at 1328: "I am awaiting advice on this whole thing from my solicitor and also the PRA." Mr Guyan responded: "Have spoken to PRA and they agree that the conduct of the test is a reasonable request."

22. At 1511 Mr Guyan sent a text to all three players (and Ed Jackson): "You failed to attend the arranged drug test today although notified. You are given a further opportunity to attend on Thursday 14th May at 1730 at the Recreation Ground, Bath BA1 4DS. If you fail to attend this test, it will be considered a refusal of a reasonable request in the circumstances and will lead to internal disciplinary procedure. Holidays are not a reasonable excuse; this is a very serious matter. If you have any question please call me." Jackson phoned Mr Guyan to say that another player had advised him to switch off his phone and hide, but he had decided to take the test.

23. Later that evening Lipman telephoned Mr Guyan and told him that he would attend the following day to take a test.

24. On 14 May Mr Guyan left telephone messages with Crockett and Higgins asking them to call him urgently regarding testing. Crockett rang back at 1030 and said he was awaiting advice from his solicitors. He also confirmed that Higgins was aware of the tests. At about 1630 the club received a letter from Malletts stating he was representing the three players (and Jackson) and requesting a number of documents while questioning the legality of the proposed tests. This letter was sent to Mr Calleja, the Bath CEO, and not Mr Guyan who was organising the tests. At just after 1700 Mr Mallett told Mr Widdowson that the players would not attend for testing. Nevertheless Jackson arrived at 1745 and provided urine and hair samples for testing.

Michael Lipman's response

25. Lipman left the Club and immediately phoned his agent for advice. He said he was annoyed because he felt that Mr Guyan and Dr Widdowson had not been honest with him. He had planned to go to London that day and then fly to South Africa the following day, so he returned home to finish cleaning and packing. En route he telephoned his agent, Jan McGinty, who advised him that he should not do anything until he got some advice. He then received a telephone call from Ed Jackson, an academy player, informing him that he had been asked to attend for a drugs test and asking for advice. Jackson told the Panel that Lipman told him that the tests were illegal and that he should leave Bath and turn off his phone. He advised him to seek advice from his parents, but to keep in touch so that they could act on further advice. Lipman accepted that he had given this advice, but said in relation to the phone that he had advised Jackson to turn it off if he had any problems, but he, Lipman, would keep phoning him.

26. He said that at this stage he was suspicious of Bath's motives and believed they wanted to remove him from the Club. He was in a state of shock throughout the afternoon. When challenged about this in cross examination he was unable to explain how Bath might have done this. He said his main concern about taking the test was the haphazard and secretive way in which it seemed to be conducted. He had never heard of sportsmen being asked to provide hair samples and believed the proposed test would not be authorised under the WADA scheme which he was contractually obliged to comply with.

27. Lipman went to Bath railway station and caught a train to London at about midday. He ignored a call from Mr Guyan shortly after 1300 because he had still not heard back from his agent at that time. During the afternoon he ignored other attempts by Mr Guyan to contact him by phone or text.

28. Later Lipman spoke to Mark Bakewell, the Bath forwards coach, who advised him to take the test. Lipman said that having given the matter some thought he decided he would submit to the test the following day and he contacted Bob Calleja, told him he would take the test and arranged to meet during the day to discuss the issue.

29. At about 0900 on 14 May, as he was getting onto a train at Paddington to return to Bath, he received a telephone call from Richard Mallett, solicitor. Mr Mallett had been recommended to him by another Bath player, so he was not surprised to receive the call. Lipman said that he agreed that Mr Mallett should act for him. His first piece of advice in that telephone conversation was that he should not do anything until Mr Mallett told him to. He was going to ask club for documentation, club rules etc. Lipman said he felt 'hazy', but the fact that the solicitor took control made things easier. He telephoned Bob Calleja to inform him that, having taken legal advice, he would not be attending for their planned meeting. All further contact with the club that day was through his solicitor with whom he spoke a few times. He also spoke to Damian Hopley, PRA, who agreed with Lipman's approach. On advice he decided not to attend the drugs test on 14 May until it could be shown that the club were entitled to require him to take a test and the procedures were fully explained. He had not received any of that information by late afternoon and his solicitor informed the club he would not attend.

Alex Crockett's response

30. Crockett also left the Club at the same time as Lipman and drove to see his friend and informal adviser, John Sextone near Bristol. John Sextone and his father Colin had undertaken contract negotiations on his behalf for many years and Mr Sextone senior had significant experience in professional sport. Having heard what Crockett said, John Sextone sought advice from his father who said he had spoken to a sport's lawyer in Bristol. The advice was that this was an unusual request, that he had never heard of sport asking for a hair test before and that he should find out more before taking a test. In effect his advice was that he should seek legal advice. At 1310 he received a telephone call from Mr Guyan because, he said, he was still waiting to hear back from his adviser. He said in his statement that he received a call later in the day from John, although in cross examination he said that he received the advice in person when he went to visit Mr Sextone. Later he spoke to Damian Hopley whose advice was neutral. He did not contact Bath again to advise that he would not be returning to take the test. Instead he went to the Celtic Manor hotel with his girlfriend – that was not pre-arranged but he had promised his girlfriend some quality time away and this was the appropriate time.

31. On 14 May he too received a telephone call from Mr Mallett during the morning and from that time he acted under his advice. However, in cross examination he said that he had decided as early as 1245 that he would not take a hair test under any circumstances.

Andrew Higgin's response

32. Higgins woke up late on 13 May and saw he had a number of text messages and missed calls on his telephone. He spoke to Crockett just after he had left the club and said that Crockett told him he felt ambushed and was very upset. He reported that Doctor Widdowson was acting strangely and the incident had made him very suspicious of what was going on. He said that he wanted legal advice about whether the club could test like this and Higgins asked him to keep him informed. Shortly afterwards he received a text from Mr Guyan saying that he had missed the test. He tried to call his agent but could not get through to him. He said he was very confused

and in shock because everything had happened so fast. He decided not to contact the club and he did not respond to phone calls or texts even though he was well aware of the request for his attendance.

33. On 14 May he too received a telephone call from Mr Mallett in the same terms as Mr Lipman, and he left matters in his hands. He had not direct contact with the Bath management until he met Bob Calleja on 18 May.

Without prejudice meeting – 18 May

34. We heard evidence of a ‘without prejudice’ meeting between the three players and Bob Calleja on 18 May. The meeting was also attended by Messrs Barnes, Guyan and Hopley. No lawyers were present. The players suggested that there may be a solution if they submitted to future testing and took part in drugs education programmes. There was a dispute as to whether Mr Calleja suggested that the honourable thing for the players to do was to resign – the players and Mr Hopley said he did, the others said he did not. Mr Calleja said he was careful not to say anything which might prejudice his position in conducting any internal disciplinary proceedings. We were asked by counsel for the players to determine whether Mr Calleja did ask for the players’ resignations at that meeting, and if so his denial that he had said that undermined his (and Messrs Guyan and Barnes) credibility and supported the players’ concerns about the Club’s motives and conduct. We have not made any determination because, in our opinion, this meeting was not relevant to the players’ refusals to take the tests several days before. However, we heard Mr Calleja’s evidence and found him to be a compelling witness.

Finding

35. Before the players may be found guilty the RFU must prove, on the balance of probabilities, in respect of each player on each occasion that:

- The club requested him to take a drugs test;
- That request was reasonable;
- He did not take that test;
- He had no reasonable excuse for his failure or refusal to take the test; and
- His failure was prejudicial to the interests of the Union or the Game

36. In this case it is agreed that the club did request each of them to take a drugs test on both 13 and 14 May, and that they were all aware of the requests before the due time for the tests. However, it is disputed by each player that the request was allowed within the terms of their contracts or reasonable.

37. Despite Miss Romney’s submission to the contrary, we have no doubt that none of the players took a test on either occasion. The players submit that they had a reasonable excuse not to take the tests.

38. The Players argue that these failures could not be prejudicial because the requests to submit to this type of testing were not permissible under their contracts of employment or any other authority, but even if they were the position was not clear and the players were entitled to take legal advice before submitting themselves to be

tested. In the circumstances their failures were reasonable because they were not given sufficient time to obtain advice and the procedures were not properly explained to them.

39. The RFU argue that paragraph 6.9 of the standard player's contract clearly gives Bath the authority to require the players to submit to this type of drug testing and there was no reasonable excuse for the players' refusals. Further the RFU submits that these refusals were prejudicial to the interests of the Union or the Game because they led to the suspicion, which was not rebutted, that professional rugby players had taken drugs and that their Club had taken no action in relation to those suspicions. Such allegations could and would have a damaging effect on the commercial well-being and the image of the game.

40. It is clear from the evidence that we have heard that many rumours about drug taking existed in and around the Bath Rugby squad. We heard of one instance where Lipman's name was written as part of graffiti on a Bath bridge and we heard that the management of the club had been concerned for some time about other unspecified rumours and the damage such rumours might have on the club. Some players voiced suspicions about drug taking during the trip on 10 May. A named player accused Higgins and Crockett of involvement with drugs in the Pitcher and Piano on 10 May and he did not retract those accusations on 11 May when the players met again. Indeed at least one of these suspicions turned out to be true because Justin Harrison has subsequently admitted that he ingested what he believed to be cocaine on 10 May, albeit not in the presence of any other Bath players.

41. Given the background of Matt Stevens' positive test in January 2009 we believe it was perfectly reasonable and proper for the Bath management to act on rumours which reached them after the London trip on 10 May. The fact that such rumours may have been unspecified, innuendo, second hand hearsay or even tittle-tattle makes no difference. These sorts of rumours – even if entirely untrue – can become very corrosive within the club because they generated mistrust between the players and were damaging to reputations. The management was fully justified in acting upon them. Indeed, in our view it would have been irresponsible of Bath to have ignored them.

42. Having undertaken some investigations Mr Guyan received the names of six players who were rumoured to have been involved in drugs. The allegations were unspecified and there was certainly insufficient evidence – or even any evidence – which could support charges of drug abuse. However, and again given the background and the potential damage that rumours might have on the reputation of the Club, it was entirely reasonable to ask those players to take drugs tests, not least so that the rumours could be dispelled.

43. The defence has argued that the players could not be required to take a drug test because there is no contractual agreement. They say, in terms, that paragraph 6.9 of the contract, when read in conjunction with paragraph 11.1.2.2 (example of gross misconduct) means that the club's right was limited to drugs testing with a codified and agreed procedure such as in particular the WADA test administered by Sport England/UK Sport.

44. We disagree. We agree with the Bath Club solicitor Mr David Widdowson that, although he considered paragraph 6.9 to be “a little rambling,” it does place an obligation on the players to “submit at any time upon request to a drugs test administered by the Sport England body or other person or body appointed by the RFU or the Club.” This would have been our view irrespective of Mr Widdowson’s concurring opinion.

45. We are not attracted to Miss Romney’s submissions that the Bath management acted inappropriately or unreasonably or that they breached the players human rights. The Club had a perfect contractual right to require players to submit to drugs testing. Further it has a legitimate interest in doing so and its decision to do so was proportionate. In those circumstances the players’ right to privacy within the meaning of ECHR Article 8 was not compromised.

46. Notwithstanding that view, we believe that the interpretation of clause 6.9 is academic for the purposes of this hearing. Even if clause 6.9 does not impose a strict contractual obligation to submit to a drug test at any time there is no express prohibition. We take the view that it would be entirely reasonable for a club to require its players to submit to a test where allegations were received about drug abuse (as advised by Mr Widdowson in paragraph 2 Exhibit DW1.) whether or not there was a contractual obligation. Cocaine and other illicit drugs pose a significant risk to the integrity of the sport. It is a drug which is inexpensive, widely used and easily available. Its association with Rugby Union would be damaging to the sport’s reputation and well being. Clubs must be able to take steps to ensure that their players are not involved with this, or any other so-called recreational drug, particularly if there is any suspicion (from whatever source) that their players may have taken drugs. Notwithstanding that this was the end of the season, the Club are also entitled to ensure that their highly paid athletes do not ingest any substance which may be injurious to their health or put them at risk of failing an in-competition test. It was not beyond the realms of possibility that any of the players might have been called up for representational matches. Players of this level are also important role models to the game at large and in particular youth rugby.

47. Miss Romney submitted that there is no power under the contract or otherwise to permit testing for recreational drugs out of competition not prohibited by WADA. Again we disagree. If, for example, the captain of the England rugby team was pictured snorting a white substance whilst on holiday it would be an affront to common sense to suggest that his conduct would not be prejudicial to the interests of the Union or the Game if he refused to take a drugs test absent a contractual obligation.

48. The players also argue that if the Club is entitled to request them to undertake a drugs test, such a test must be undertaken in accordance with the procedures used by UK Sport/Sport England when they test under the WADA umbrella. We also reject this argument. WADA tests undertaken in and out of competition are part of the IRB and RFU anti doping programme, and thus primarily directed at detecting the presence of performance enhancing substances. The tests required by Bath were specifically arranged to establish whether any players had committed acts of misconduct by ingesting illegal or illicit drugs. It was perfectly proper to undertake non-invasive testing by taking sample of urine and hair for this purpose. No evidence

was put forward to suggest that the independent company selected by Bath was in any way lacking in expertise and experience to conduct the tests, and none of the players questioned the company's credentials at the time of the tests.

49. Finally the players argue that they had reasonable grounds for failing to take the test because:

- a. Mr Guyan lied to Lipman and Crockett on 13 May when he asked them to attend the club on the pretence that they were to discuss damage to the club house when the real purpose was to require them to submit to a test;
- b. As a result of this lie, and what they described as unfounded allegations of drug abuse against them, they had lost trust in Bath whom they suspected of fabricating a situation which would enable to release the players;
- c. Higgins was told about the lie by Crockett and thus also lost trust in Bath;
- d. They were not told which procedures were to be used for testing and it was unreasonable to require them to take a test which involved providing a hair sample until those procedures were explained because they were novel; and
- e. They were entitled to seek legal advice before submitting to any test;
- f. They acted on advice from various trusted friends, from the PRA and from lawyers not to submit to the tests until certain conditions were met.

50. In our view none of these matters constitute a reasonable excuse for failing or refusing to take drugs test in the circumstances of this case. None of the players had any reason to suspect that the Club was trying to dispense with their services. Mr Lipman and Mr Crockett were co-captains of Bath and so clearly important to the playing strength of the club. Both had quite recently been given extensions of their contracts. They all attested to being happy at the club and having good relationships with the management. Mr Guyan explained that he devised a ruse to ensure the attendance of Lipman and Crockett at the club because he suspected if he told them the real reason they would not attend. Once Lipman and Crockett attended, and after a short delay while they waited for a doctor to arrive, he told them the true reason for their attendance. We believe that this was perfectly reasonable, and his concerns were well founded by subsequent events.

51. Having listened to the evidence of each player, and particularly their difficulties when their reasons were challenged in cross examination, we have concluded that each of these three players chose not to take each drug test deliberately for reasons which were not reasonable. They all intentionally kept out of contact with the Bath management (they variously did not take telephone calls or respond to text messages) and they left their accommodation in Bath. None of them attempted to contact Mr Guyan to ask for any clarification of the procedures or to raise any of their concerns.

52. In the case of Michael Lipman, he left the Club between 1130 and 1145 and was on the train to London at or around midday. This ran directly contrary to his

promise to return at 1300 to take the test. His failure to offer an explanation for his conduct at the time led us to conclude that he had no explanation to give or no explanation which could justify his flight from Bath. We felt that a particularly telling piece of evidence which supports this view was that Lipman told Jackson, an academy player who had called his captain for advice at about that time, to turn off his telephone and get out of Bath.

53. In relation to the test on 14 May, Lipman had decided to return to Bath to take the test, but, on receipt of a telephone call from Mr Mallett, decided to do nothing until further advised. He then effectively left the matter in the hands of his solicitor but did not make any effort to explain himself to Bath or to ensure that he obtained any advice in time for the 1730 test. Given the seriousness of the matter this conduct by Lipman reinforces our view that he was trying to avoid taking the test.

54. In the case of Crockett, he too left the Club at the same time as Lipman and drove to see his friend and informal adviser, John Sexton near Bristol. John Sexton sought advice from his father who said he had spoken to a sport's lawyer, who said he should seek legal advice. Crockett did not seek further advice on 13 May and did not then contact Bath again to advise that he would not be returning to take the test. Instead he went to the Celtic Manor hotel with his girlfriend.

55. On 14 May he too received a telephone call from Mr Mallett in the same terms as Mr Lipman, and we take the same view of his conduct as we do of Lipman's.

56. In the case of Higgins, he spoke to Crockett just after Crockett left the club and then decided not to contact the club at all. He did not respond to phone calls or texts even though he was well aware of the request for his attendance. This reinforces our view that he simply wished to avoid a test.

57. On 14 May he too received a telephone call from Mr Mallett in the same terms as Mr Lipman, and we take the same view of his conduct as we do of Lipman's.

58. The purported concerns about testing procedures, the requirement for a hair sample, the efficacy of the company which was to undertake the test, the interpretation of the contract and the suspicion that Bath was trying to fabricate a reason to dismiss the players have all been constructed in retrospect. None were raised at the time and they simply lack credibility now. If the players had nothing to fear from taking a drugs test then they would have taken them. The reality of the case was that at the time when asked to take a drugs test the players believed there was a risk of positive results. This was either because they knew they had ingested drugs or they had drunk so much alcohol that they could not remember whether or not they had ingested drugs. Each of the players therefore decided to play for time, keep out of contact and then hide behind legal advice.

59. It is not for the Panel to comment on the legal advice given to the players. However, if the players knew that there was no risk of a positive test then the most appropriate advice would have been to attend the test, seek assurances from those testing about the integrity of the procedures and then, if so satisfied, take the tests. Leaving Bath and ignoring telephone calls and text messages from the Club is not the

behaviour of people with nothing to hide and we have drawn adverse inferences against the players from this conduct.

60. Case notes from Mr Mallett were disclosed late in the proceedings and submitted as evidence, but they did not take the matter further from what we had already heard from the players. In any event, the ultimate decisions not to take the tests were made by those players.

61. In the final analysis, even if only rumours, serious allegations were made that reasonably required investigation. If the players required further time to consider their positions it is notable that at no time after 14 May did they seek to assist Bath in dispelling the rumours (which by 17 May were the subject of adverse press coverage). It was, perhaps, all the more surprising that Lipman and Crockett chose to take a test on 25 June. Those tests are of limited value because they neither confirm nor refute the one-off use of cocaine and are silent on other prohibited substances.

62. In all the circumstances, therefore, we find:

- The club did request all three players to take a drugs test on 13 and 14 May;
- The players received those requests in advance of the due time for the tests;
- The club was entitled to require the players to take these tests either under the terms of the contracts or because that was a reasonable response to the reports of drug abuse within the club;
- None of the players took either of the tests;
- These failures were not reasonable; and
- These failures were prejudicial to the interests of the Union or the Game because they led to the suspicion, which was not rebutted, that professional rugby players had taken drugs and that their Club had taken insufficient steps to address those suspicions. Such allegations could and would have a damaging effect on the image of the game and would potentially have an adverse impact commercially.

63. We therefore find all three players guilty of two charges of misconduct in failing and/or refusing to submit to drugs tests on 13 and 14 May when requested by their club.

Mitigation

Lipman

64. Mr Milliken-Smith submitted that the Panel should settle on a lower starting point than in the Harrison case because it had directed that the two charges relating to ingesting drugs were not proceeded with. There was no suggestion from any source that Lipman encouraged or took any drug in front of anyone else. His behaviour on 10 May was responsible at all times, and he played a significant part in defusing the conflict that had developed between some Bath and some Quins players.

65. He said he still remains model of discipline and responsibility and there is no suggestion of this sort of behaviour occurring in season. That mitigates from starting point as does the fact that there was a considerable weight of advice given to him on

13 and 14 May. That ameliorates the gravamen of the behaviour on this occasion and lessens the seriousness of these findings.

66. The impact of the finding cannot be underestimated. The stain on his character remains with him in and out of rugby for the rest of his life. The financial loss is inevitable in any event but he has lost an extremely lucrative way of life.

67. Greatest of all is the consequences to his love of rugby and professional rugby career and a clear dent to international aspirations. Equally the prospect of obtaining a contract may sound the death knell in the Guinness Premiership if the ban were to be for a season. Finally it is relevant that Lipman has taken a negative hair follicle test so any suggestion that he was a regular abuser of recreational drugs is unsubstantiated.

Higgins

68. Miss Romney adopted all that was said in relation to Lipman on behalf of Higgins. The finding will have a damaging effect on her client in the future because he would lose his playing career.

Crockett

69. Mr Ferguson submitted that this was really a case not of cocaine abuse but of young players making errors of judgement. Those who advised them, including friends, the PRA and lawyers suggested they should take more advice before submitting to a test.

70. Crockett's conduct on 10 May was excellent and there were three separate discrete examples in helping other players who were affected by drink. Two other players who missed the first test but took the second escaped any sanction. Mr Ferguson also adopted the points made on behalf of the other players, stressed Mr Crockett's excellent character and suggested these offences were really technical breaches which could be dealt with in such a way as to allow Crockett to play at the beginning of next season.

Sanction

71. We have taken no pleasure in these proceedings – all three players are thoroughly decent young men, and if they had taken the hair follicle test there is no reason to suppose that the results would be any different from those we have seen. Those test results in relation to Lipman and Crockett are consistent with either no cocaine use or one off low dosage use and would, without any other evidence, have been insufficient to have supported disciplinary proceedings. If that had been the case no further action would have been likely.

72. We have concerns about the advice received and their reliance on it. We note, however, that an academy player who was also implicated and who received the same advice still decided to take the test. Harrison did not take the test but he later admitted that his failure was prejudicial to the interests of Rugby or the Union. We distinguish Harrison's case because his offending included making inappropriate statements

about Class A drugs to an audience which included young academy players, and his conduct on 10 May was reprehensible; this was not the case with any of these three players.

73. There are good policy reasons to sanction those who deliberately avoid taking a drugs test at the same level as those who test positive. There is also a requirement in this case to send out a strong message to deter future offending.

74. In those circumstances the starting point is a suspension of 15 months. We have reduced that to reflect the three players' good character and our concerns about the advice they received. We do not distinguish between the players in terms of sanction even though they initially acted independently of each other.

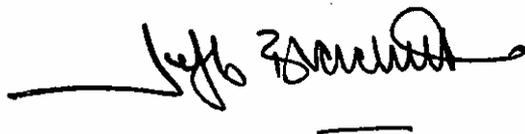
75. We therefore suspend all three players for nine months, that suspension back-dated to 1 June, the date when they resigned from Bath. They are suspended until 28 February 2010 and are free to play again on 1 March 2010.

76. During the period of suspension the players may not play rugby but they are not excluded from the sport in any other way.

Ancillary Matters

77. The players are reminded of their right of appeal which must be exercised within 14 days of the receipt of this judgment.

78. There is no order for costs.

A handwritten signature in black ink, appearing to read 'Jeff Blackett', with a horizontal line underneath it.

HHJ Jeff Blackett
Chairman

3 August 2009