RFU Disciplinary Appeal

<u>Appeal from a Panel of Inquiry Appointed under Regulation 14.1 of the</u> <u>Premiership Regulations 2012-13</u>

In the matter of a complaint against London Welsh Rugby Football Club Limited

At: Sport Resolutions, Salisbury Square, London, EC4

On: 21 March 2013

Panel: Gareth Rees QC (Chairman), Jim Sturman QC and Phillip Evans

Secretary: Samantha Dimmock

Attending from the RFU:

Polly Handford (Deputy Head of Legal)

Gerard McEvilly (Head of Discipline)

Nicky Cook (Rugby Operations Executive),

Nicol McClelland (Communications Manager)

Attending from London Welsh:

Tony Copsey (CEO)

Bleddyn Phillips (Chairman)

John Taylor (Vice-Chairman)

Andrew Herring (Pinsent Masons)

Trevor Watkins (Pinsent Masons)

Charlotte Lonsdale (Pinsent Masons)

Counsel: James Segan, RFU

Tom De La Mare QC with Tom Richards , London Welsh

Observing: Nicole Mirmelli (Intern)

Decision

The effect of the decision of the first panel, which comprised Jeremy Summers (Chairman), Peter Budge and Mark McCafferty ("the panel"), was to deduct ten Aviva Premiership League points, five

of which were to be suspended until the end of the 2013-14 season and only to be activated in the event of a similar specified breach. In addition a fine of £15,000 was imposed. The sanctions were to run concurrently in respect of each of the 10 breaches the panel identified. The decision of this Appeal Panel is that the sanction should be substituted with a five point deduction with no part suspended and as a total sanction for the breaches London Welsh ("the Club") admitted. The fine is confirmed as £15,000 to be paid within 21 days of the date of this judgment.

Judgment

Introduction

- This appeal arises out of a decision made by the panel on 7 March 2013 following a hearing on 5 March 2013. It is important to note that the parties invited the panel to deliver its decision and its judgment simultaneously, which they did. There was a great deal of material to consider and the panel heard extensive oral arguments on the issues. The panel was able to deliver its decision very quickly and we were impressed by the quality of the judgment in those circumstances.
- 2. Following a hearing on Thursday 21 March which lasted over 5 hours this Appeal Panel gave permission for the parties to file further evidence by 5pm on 22 March and, further, acceded to a repeat of the application from both parties to announce the outcome and deliver a decision simultaneously. We are very conscious of the need to settle this matter as soon as possible not least because the end of the season approaches and all parties affected by this decision are entitled to know the outcome as soon as possible.
- 3. Whilst we have varied the panel's decision and have taken a different approach in some respects we have summarised the facts and issues wherever possible in order to enable us to complete the judgment as early as possible. We have been greatly assisted by helpful written and oral submissions by both of the parties. We have considered all issues and submissions but have not included a discussion of all of those points addressed in argument which did not, ultimately, appear to us to influence our decision.
- 4. We will refer to the Appellant as the Club throughout this judgment.
- 5. The Club admitted ten breaches of Regulation 3.3(a) of the Premiership Regulations of 2012-13 ("the Premiership Regulations") in respect of the participation of Tyson Keats ("the player"), a New Zealand National, in ten Premiership matches when he did not hold Effective Registration. The offence in regulation 3.3(a) is one of strict liability.
- 6. The parties agreed that this Appeal Panel had the power to look afresh at the appropriate sanction for these admitted breaches and, in those circumstances, we approached the case on the basis that we were not limited to an analysis of the approach by the panel. There was no objection to the composition of the Appeal Panel.

7. We were not invited to hold a de novo hearing and we relied on written submissions, the materials placed before the panel and further material provided to this Appeal Panel. In respect of one Ground of Appeal, referred to below at 8(iv), we allowed two witnesses to give some further oral evidence to deal with a discrete factual issue. This procedure was adopted with the agreement of the parties.

Grounds of Appeal

- 8. The Club's Grounds of Appeal were placed before us in the form of an amended Notice of Appeal dated 21 March 2013, a Skeleton Argument dated 19 March 2013 and in oral submissions on 21 March 2013. We hope to do justice to those submissions in the following summary. The essential Grounds of Appeal are to be found in the Notice of Appeal and are as follows:
 - (i) That the panel was in error in deciding that the Club had acted intentionally.
 - (ii) That the panel was in error in attributing the dishonesty and fraud of Mike Scott ("MS") to the Club when, on the contrary, the Club and the RFU had been the victims of fraud by MS.
 - (iii) The panel was in error in deciding that MS's dishonesty and fraud was both an aggravating and a mitigating factor.
 - (iv) The panel had proceeded upon an inaccurate factual premise that the RFU was not informed in December 2012 that the player lacked a valid visa. This was dealt with by the recalling of witnesses as referred to above.
 - (v) The panel was in error in failing to take into account as a mitigating factor the fact that but for MS's fraud, the player could and should have been properly registered with the RFU by the beginning of the season, such that the Appellant had obtained no "sporting advantage" properly so called by virtue of fielding the player.
 - (vi) The panel was in error in its approach to the issue of negligence and in its conclusions that the Club had failed to put in place adequate systems. This ground was developed because the panel had decided that a Club should comply with 'standards reasonably to be expected of a professional club' (See Decision paragraph 55 panel decision). The Club submitted that it was not negligent or at fault because, like the RFU, it had relied on registration documents that were the result of fraud, in particular by a convincing forgery, committed by MS.
 - (vii) The Panel was in error in its approach to an issue of the treatment of breaches of immigration law and MS's lack of authorisation to deal with the UK Borders Agency and should not have treated it as an aggravating factor. It was submitted that this was inconsistent with the RFU's own approach to the player's lack of a visa in December 2012 and/or internally inconsistent with an observation in the panel's decision that

there was no evidence that it was necessary for the Club to sponsor the Player's visa application.

- (viii) On a proper construction of the Premiership Regulations 2012-13, the panel had no contractual or other power to impose a points deduction other than to adjust the extent of unfair sporting advantage, whether on grounds of deterrence of or punishment for negligence or otherwise. Any such power, by reason of the arbitrariness of such a sanction, would need to be expressly stated in the clearest form of words. (This ground was added just hours before the hearing of the appeal on 21 March 2013 and was inserted as ground 7A into the Notice of Appeal)
- (ix) The sanctions were disproportionate in all the circumstances.

Discussion

- 9. In our judgment the following matters are those which should guide our approach when considering our decision on the correct sanction in this case.
 - The factual issues
 - Mike Scott
 - The Premiership Regulations and Player Registration
 - Strict Liability and Clubs responsibilities for Player Registration
 - The "sporting advantage" point
 - The role of the RFU

The Factual Issues

10. The table below was included in the panel's decision and it is very helpful to see the results and the points relating to the ten matches in question where the player took part in a Premiership match:-

DATE	FIXTURE	TK ON FIELD	RESULT	LEAGUE POINTS
		Minutes of Game		WON
7.9.12	Harlequins (A)	61	Loss 40-3	0
16.9.12	Exeter Chiefs (H)	80	Win 25-24	4
21.9.12	Sale Sharks (A)	75	Win 19-29	4
30.9.12	Gloucester (H)	74	Loss 25-31	1
7.10.12	Saracens (H)	80	Loss 23-28	1
28.10.12	London Wasps	80	Loss 29-19	0
4.11.12	Bath (H)	80	Win 16-9	4
24.11.12	Northampton (A)	80	Loss 23-16	1
1.12.12	London Irish (H)	80	Win 15-9	4
6.1.13	Harlequins (H)	30	Loss 26-31	1
		as replacement		

11. Between July 2012 and January 2013 there were a number of significant events that were relevant to an understanding of how the player was thought to be properly available for

selection when he was not registered. The panel heard evidence which they assessed and to which the panel refers in its decision. We were greatly assisted by that analysis as well as written submissions by the parties on appeal. It is important to note that the parties spent very little time in the oral submissions on the factual evidence.

12. This Appeal Panel heard evidence from John Taylor (Vice Chairman London Welsh) and Nicky Cook (Rugby Operations Executive) on an issue involving a conversation in December 2012. In the event the submissions from both parties were that there was so much confusion by that time that it would be difficult to safely conclude which of these witnesses had the most accurate recollection. We entirely agree. Indeed, we formed the same view about a lot of the evidence. If we needed to form a view on uncertain evidence we gave the benefit of the doubt to the Club. In particular we decided that we would proceed on the basis that, but for Mike Scott's fraudulent acts, the club could have obtained the visa in September which would have avoided all of the problems. The RFU invited us to be sceptical about that submission but we reject that approach because we do not have sufficient factual evidence to safely draw an adverse conclusion against the club.

Mike Scott

- 13. At the time the panel made its decision the case against MS, who had been charged under RFU Rule 5.12 with conduct prejudicial to the interests of the Union, had not been heard. On 8 March 2013 the case was heard. MS was suspended from all involvement in rugby for life. On the evidence before the panel that was no surprise in view of the extent of his dishonesty and fraud which had such an impact on the circumstances of this case.
- 14. In his judgment the Disciplinary Officer of the RFU said as follows:

"This is a very sad case in which a respected administrator has acted completely out of character thereby bringing discredit to himself and to the club that he represented. I accept that Mr Scott would have been under greater pressure than normal for a team manager because the decision for London Welsh to be promoted to the Aviva Premiership was delayed after which the club had less time than normal to prepare for the coming season."

The judgment continued as follows:

"The actions undermine the very integrity of the game, particularly, the competition in the Aviva Premiership." 1

15. The important point for this appeal is that MS was a man of good character who embarked on a course of deceit having found himself having to cover up for his dishonest course of conduct which began in September 2012. It is the view of this Appeal Panel that this a very important factor in this case. Indeed it is what distinguishes this case from the incompetent error which is more likely to be discovered much sooner. In our view it explains why it remained uncovered for so long.

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¹ See paragraph 10 Judgment

The Premiership Regulations and Player Registration

- 16. The Premiership is the top end of the professional club game in England. It has its own Regulations which are amended each season following negotiations between the Clubs or those bodies representing the interests of the Premiership clubs. In one of the judgments (the Exeter case) referred to us by the parties we noted a part of the decision that informed us of an important distinction that exists between the Premiership (and the Championship) and the lower leagues. ² Although our attention was not drawn to this part of the judgment by either party during the course of argument we regard it as important. It notes that the RFU Regulations provide that for a breach of Regulations by selecting an ineligible player there should be a deduction of not less than 5 points.³ The RFU Disciplinary Officer and his colleagues (both of whom were members of the panel in this case) decided that these guidelines should not apply to the Aviva Premiership or the Championship. The panel in the Exeter case decided this because, as the panel explained, it is much easier to cheat in the lower leagues where scrutiny is less onerous and because the deduction of points at the elite level can have a disproportionate effect. That panel went on to determine that in cases of administrative error, where there is no intention to gain competitive advantage or cheat, the appropriate sanction is 2 points.
- 17. Regulation 3.3(a) of the Premiership Regulations, which is the Premiership equivalent of Regulation 13.4.1(a) of the RFU Regulations, provides that:

"A club in a match may only play or select as a replacement, players who hold Effective Registration for that club or are an England Academy Player contracted to that club or its academy."

The Regulations include provision as to how to achieve Effective Registration for a player born outside the EU (as in this case). In effect the requirement is for a working visa. In this case the deceit practised by MS on the club and the RFU was to tell lies and make forgeries of important documents to falsely represent the player as having been born in the UK.

- 18. These Regulations are strict liability which is indicative of the importance attached to a breach by those who drafted them. This applies at all levels of the game. This Appeal Panel is entirely satisfied that the need for these rules goes beyond the proper administration of the competitive game of rugby. It also goes to the fundamental need for fairness and for credibility of the sporting competition. In other words it is a very strict test to ensure the integrity of the competition and the sport itself.
- 19. We received submissions about the unfairness of such a harsh punishment on the Club by the panel. This may show a misunderstanding of the purposes of a sanction in a disciplinary process. The sanction is not simply a punishment but is imposed to show how important the rules are and to maintain confidence in the administration of the sport. It is why the Club must

² RFU v Exeter Chiefs 9 May 2011. See paragraph 16

³ See RFU Handbook 2012-13 page 180 for the present guidance

accept responsibility for those who act on its behalf and why a sanction will often include a deterrent element to emphasise the importance of the Regulations and to encourage clubs to ensure they have systems in place to ensure the Regulations on Player Registration are followed.

Strict Liability and Clubs' responsibilities for Player Registration

- 20. It follows that the club cannot avoid liability for breaches of the Regulations which govern Player Registration even if the breach is caused by incompetence, error or fraud. It is also not relevant to consider the capacity in which the person given the responsibility to manage Player Registration acts for the Club. The Club has agreed to be bound by the RFU Regulations and, if a Premiership club, by the Premiership Regulations. It, therefore, follows that the disciplinary process that deals with breaches will have the power to impose sanctions on a club for its failure to put in place procedures to avoid a breach of the Regulations.
- 21. It is for those reasons that this Appeal Panel does not consider the submissions made on the law on the responsibility of a corporate entity to be very helpful in this case. Nor is it relevant to consider the authorities that deal with the circumstances in which the fraudulent acts of an individual can be attributed to a corporate entity. In those circumstances the law has to identify some rules to define when, for example, a corporate entity may be guilty of a criminal offence. Here the Club (which happens to be a corporate entity) has agreed to be bound by a form of contractual agreement through its membership of the Union and the Premiership.
- 22. In the circumstances of this case the Club admitted the breach. Its central submission before us and before the panel is that it is unfair that it should suffer when the breaches were the fault of MS who had deceived both the Club and the RFU. This submission has some merit but it cannot absolve the Club of all of its responsibilities so that a meaningful sanction is not imposed. The exceptional circumstances of this case can allow for a more lenient approach to be taken on sanction.
- 23. This Appeal Panel accepts that it would be unfair to attribute MS's intent to deceive to the Club. That is not to say that we consider that the Club is without blame, especially when the danger signs began to emerge in late November and December 2012. The Club must accept that the placing of this responsibility with one person, even if they were entitled to rely on his good reputation as a Premiership team manager, was an error and was inadequate. We were told that the player had signed a blank RFU Adult Player Registration Form and was, therefore, unaware that MS had later included false information about his place of birth on the form. In the bundle provided to us the terms of the Players declaration are set out clearly, that declaration states: "PLAYER DECLARATION: I certify that all the information is correct and agree to abide by the laws of the game, the RFU rules, regulations and disciplinary requirements." We recommend that consideration should be given by the RFU to whether in future a Player signing such a declaration without checking that the information is in fact correct should face disciplinary action. We had no evidence on how widespread the practice of signing forms in blank is, but we recommend that if the practice is widespread that it should stop immediately and that Players as well as Clubs should be reminded of the importance of the declaration. The RFU is entitled to trust that participants will not treat these forms as

meaningless, and the RFU should be able to rely on the Player's declaration. The sort of circumstances where an RFU Disciplinary panel or Panel of Inquiry might need to consider the role of the club itself in fraudulent behaviour is when there is clear evidence that those who are in some executive or management control have some knowledge or involvement in the fraud.

- 24. Therefore, we agree that a Club needs to have strong systems and controls in place to reflect the need to ensure that only Players who are properly registered should play. It follows that the procedures a club puts in place must be adequate to avoid any breach whether careless or deliberate.
- 26. Having indicated that we do not propose to deal with the matter on the basis that standards in this case had fallen "significantly below the standard reasonably to be expected of a professional club" it cannot be said that the panel below erred in reaching that conclusion. Two members of the panel at first instance have substantial experience of the administration of Clubs which is not unusual because sporting disciplinary bodies are often composed of individuals who have experience of administration of the game. It is entirely proper for those panel members to utilise their experience of the game and administrative practices. As we have as encouraged by the parties considered the case afresh the members of this Appeal Panel feel unable to adopt the same approach unassisted by any evidence or experience to guide us.

The "Sporting Advantage" Point

- 27. At paragraph 8(v) and 8(viii) above the Club made submissions which were developed in oral submissions at the hearing. This Appeal Panel has formed the view that neither submission has merit although we are bound to take account of the first submission as mitigation for the Club. It must follow that we take some account of the fact that the Player could have been eligible if the visa application had been made and granted before he played his first match. The second point takes a more legalistic approach. In effect it says that the panel could only deduct points which had been obtained through unfair "sporting advantage". Any other reason would be required to be stated in the rules in the clearest possible words otherwise, it was submitted, it would result in an arbitrary sanction.
- 28. In support of this submission a number of points were advanced including the fact that the Premiership Regulations identify specific points to be deducted in the event of a club failing to comply, for example, with the release of players for England squads. It appeared to be submitted that those Regulations amounted to the only circumstances in which points could be deducted from a premiership club. We reject that argument. Reading the Premiership Regulations it is plain that the circumstances listed at that part of the rules does not purport to be an exhaustive list. We were referred to well-known authorities that stipulate the need for certainty in sports law in common with other legal jurisdictions. We also noted that, in the same textbook we were taken to by Counsel for the Club, there was authority for the proposition that the rules of sport governing bodies should not be interpreted as if they were a statute.

- 29. We see little merit in these submissions. It appeared to be suggested on behalf of the Club that it would never be appropriate to deduct points for fielding an ineligible Player unless it could be proved that there was an "actual sporting advantage" gained through the Player. We do not accept that submission. Although the absence of an "actual sporting advantage" may be capable of amounting to a mitigating factor in appropriate circumstances we reject the proposition that a points deduction is only possible where a sporting advantage is proven.
- 30. In any event Mr De La Mare's submissions on behalf of the Club conflated the issue of "sporting advantage" with the issue of whether or not points had been won. In fielding an ineligible Player a Club gains the following "sporting advantage": -
 - (a) The Club is able to put the ineligible Player on the pitch.
 - (b) The ineligible Player is able to affect the match. He may do so by assisting the team to win in which case the "sporting advantage" is clear cut, but even if the team loses he may contribute to keeping the score close in a losing effort. In a League where "tie breakers" include tries scored and points differential the first choice scrum half is likely to be a significant contributor.
- 31. Towards the end of the hearing in his closing remarks Mr De La Mare for the Club appeared to concede that there was in fact some competitive advantage in relation to the Exeter game (which London Welsh won). That concession recognises what any individual involved in rugby would see as sound common sense. However, the issue of assessing "sporting advantage" does not require an assessment of "counterfactuals" (whether they are "clear" as Mr De La Mare suggested or not) as our task involves an assessment of all of the facts and circumstances of this case.
- 32. The concession made in relation to the Exeter match recognises the reality that the Club won a game whilst fielding an ineligible player. However it is simply not tenable to argue that the Club gained no sporting advantage from fielding the player in matches when he was ineligible yet London Welsh lost.
- 33. We have no hesitation in rejecting the proposition that "sporting advantage" would have to be proved after a detailed factual analysis in every case because of an alleged lack of clarity in the basis upon which the RFU and Premiership's rules and regulations are drafted. In our judgement the rules and regulations make it abundantly clear that a disciplinary panel, inquiry or appeal panel can deduct points. We note that this argument has never been taken in any other case where a points deduction has been ordered (either at first instance or on appeal): that is because Clubs have clearly acknowledged in the past that the power exists.
- 34. The sanction we have imposed in this case is intended to be proportionate and to take into account all of the particular factual circumstances. The end result may well be a points deduction that teams in the lower leagues would consider to be lenient for a Club that fielded an ineligible Player in ten games where 20 points were won but we have sought to explain the reason why this distinction arises.

The Role of the RFU

It is the view of this Appeal Panel that the RFU was a party to the confusion in large part caused by the dishonest acts and statements of MS. We agree with the panel in its decision when it commented that the RFU could have been more robust in challenging some of the facts concerning registration. However, the RFU is entitled to trust the information provided by clubs and this point can only be a limited factor in favour of the Club in this case

Findings

- The approach we adopted was to look at the overall circumstances of this case and to 36. consider whether the arithmetical approach was appropriate. In any event we had to take account of ten breaches which would mean a substantial number of points in the game below the championship and double figures even in the case of Premiership club level. We were asked to consider the Exeter case referred to above as well as two other cases involving Sale Sharks⁵ and Grenoble⁶. In the latter case the points in an Amlin Challenge Cup match were taken away from the club (and awarded to their opponents on the day, London Welsh) to ensure they obtained no advantage from the playing of an ineligible player.
- 37. In our judgment this was a serious case which must be met by a points deduction. It was particularly serious because it had carried on for a very long period of time. We emphasise again that the question of proportionality remained central to our deliberations throughout.
- We identified the following aggravating features: 38.
 - Failure to have more than one person checking the Club's system for Player a. Registration
 - b. That it covered ten matches when the club was able to select its first choice scrum half when he was ineligible
 - The signing of blank forms by Players who should check the details included in all c. cases
- We identified the following mitigating factors: 39.
 - a. The conduct of MS could not have been predicted
 - b. The Club coach responsible for selection had no knowledge that the player was not eligible.
 - c. The Clubs attempt to remedy the situation when it became clear what had happened in December 2012.

⁴ Decision paragraph 45(e)

⁵ Sale Sharks Premiership Hearing 20 April 2009

⁶ Grenoble Amlin Challenge Cup Decision on player eligibility 31 December 2012

- 40. We have reduced the number of points to be deducted to take account of the circumstances. We have arrived at a figure of five points. We then considered whether it was possible to suspend all or any of the points and we decided that it was not because these were such serious breaches that had to attract an immediate points deduction. In our judgment it was only the exceptional background circumstances that could lead to a points deduction outside the normal range. We are of course aware of the potential impact this decision may have but we cannot do more than take that into account in our general assessment of the overall situation that persisted for so long.
- 41. We have decided to make no change to the financial penalty and therefore this appeal succeeds in part. In those circumstances we make no order as to costs.

Gareth Rees QC

Jim Sturman QC

Phillip Evans

26 March 2013