

AMLIN CHALLENGE CUP

DECISION OF DISCIPLINE COMMITTEE

HELD AT THE OFFICES OF IRB, HUGUENOT HOUSE, 35-38 ST STEPHEN'S GREEN, DUBLIN,
IRELAND.

WEDNESDAY 13th APRIL 2011

IN RESPECT OF:-

Newcastle Falcons ("the Club")

and

An allegation of misconduct ("the Misconduct Complaint") arising out of The Amlin Challenge Cup ("the Tournament") Round Six match ("the Match") between Club Sportif Bourgoin-Jallieu ("Bourgoin") and the Club first scheduled to have been played on the 22nd January 2011 at Stade Pierre Rajon in that the Club refused and/or failed to participate in the Match (on its rescheduled date, 23rd January, or at all), more particularly by departing Bourgoin on 23rd January (a) before the 12 noon pitch inspection had been conducted, and (b) without the Match having been played or postponed. That represented a breach of clauses 3.5 and/or 3.10 of the Tournament Rules ("the Tournament Rules in the plural "TR" in the singular), which constitutes misconduct under clauses 3.2 and/or 3.3.2 of the Disciplinary Rules ("Disciplinary Rules" in the plural "DR" in the singular).

Members of the Disciplinary Committee ("the Committee") :

Roger Morris (Wales) (Chairman)
Robert Williams (Wales)
Mark McParland (Ireland)

The Decision of the Committee

- 1.1 That the Club had committed the act of misconduct as alleged in the Misconduct Complaint
- 1.2 That, under TR 3.10 and as is required by that rule: the result of the match is deemed to have been a 28-0 (4 try) loss by the Club; the Club be awarded no match points for the Match and Bourgoin be awarded 5 match points.
- 1.3 That, also as required under TR 3.10, the Club be expelled from the Amlin Challenge Cup Tournament for Season 2010 – 2011.
- 1.4 That the Club be fined € 25,000 to be paid within 28 days of the date of this written judgement.
- 1.5 That the Club be expelled from ERC competitions for the period of one year such expulsion to be suspended for a period of five years up to and including season 2015-16 , to be activated if the Club commits any further act of misconduct in breach of TR 3.10 or any other rule substituted for it.
- 1.6 That the Club pay ERC's proper legal costs in relation to the Hearing together with half the cost of convening the Committee for the Hearing.

Introduction

The Committee was convened by Professor Lorne D. Crerar the Chairman of the ERC Disciplinary Panel pursuant to the Disciplinary Rules of the Amlin Challenge Cup 2010 – 2011 in respect of a misconduct complaint made by Mr Roger O'Connor Disciplinary Officer of the ERC.

Present at the Hearing on the 13th of April 2011 in addition to the members of the Committee were the following persons:

Roger O'Connor (Disciplinary Officer, ERC)
Max Duthie (Solicitor representing the Disciplinary Officer)
David Thompson (Chairman, Newcastle Falcons)
John Stokoe (Manager, Newcastle Falcons)
Kingsley Hyland (Honorary Discipline Officer representing Newcastle Falcons)

Preliminary Matters and Procedure

At the commencement of the Hearing the Chairman confirmed the identities of all present and established that the Club was before the Committee in relation to the Misconduct Complaint. The Chairman asked if there were any objections to the composition of the Committee. There were none.

The Chairman reminded all parties that the Tournament Rules and the Disciplinary Rules found in the Participation Agreement for the Amlin Challenge Cup 2010 – 2011 would apply and confirmed that all present agreed to the Hearing proceeding under those rules.

The Chairman established what written material had been placed before the Committee prior to the Hearing and enquired as to whether all had received the same in time for it to be considered before the Hearing. It was confirmed that it had been so received. The written material comprised :

- Letter of complaint dated 16th March 2011 from the Disciplinary Officer to the Chairman of the ERC Disciplinary Panel
- Notice of Hearing dated 28th March 2011
- Written statement of Neil Patterson, the referee appointed to officiate in the Match
- Letter dated 25th January 2011 written by John Stokoe
- E Mail communication dated 31st January 2011 from Esteve Fernandez to Tom Walsh
- Note dated 24th January 2011 from Cyril Lafon to Tom Walsh
- Various correspondence between ERC and the Club and between ERC and Neil Patterson
- The Club's schedule of admitted facts

- The Club's position statement in accordance with the Disciplinary Rules
- The Disciplinary Officer's response to the Club's position statement
- Bourgoin's schedule of expenses

The Chairman established that there were no preliminary issues to be argued by either of the parties and narrated the terms of the Misconduct Complaint.

Plea

Mr Hyland, on behalf of the Club, confirmed that the Club accepted it had committed an act of misconduct and therefore admitted the Misconduct Complaint but on the basis that it had failed to play the Match and not that it had refused to play the Match.

Mr Duthie and Mr Hyland confirmed that the Hearing could move immediately to the consideration of sanction but the basis of the Club's acceptance that it had committed the act of misconduct meant that there were important factual issues to be determined and evidence would be presented. However, the time afforded to the parties by the Committee before the Hearing had commenced had been fruitful in allowing the parties to narrow the factual issues and therefore, ultimately, shorten the proceedings.

ERC's Case

Mr Duthie referred to the provisions of DR 6.7.23. The Club had admitted the Misconduct Complaint and it was now for the Committee to hear and review the evidence before proceeding to hear submissions as to the sanction to be imposed.

Mr Duthie said that, in a congested rugby calendar, ERC, rightly, has a strict policy regarding the scheduling of matches and the re-scheduling of postponed matches. Results of matches have a bearing on other teams and it is very important that all matches are played. The competition has many and various stakeholders – other clubs, supporters of the teams themselves, supporters of other teams, sponsors, the press, commercial partners and many others – all of whom are affected in different ways if a match is postponed. There is a high burden placed on home clubs which illustrates the strict policy followed by ERC. Mr Duthie referred to TR 3.5 which sets out clearly what is expected of the teams participating in the Tournament.

Mr Duthie also pointed to TR 3.10 which provides that, in the absence of exceptional circumstances, a wilful refusal and/or failure to play a match must lead to expulsion from the Tournament. This further illustrated the seriousness with which ERC takes such matters.

Mr Duthie's summation of the factual position as between ERC and the Club was as follows.

It was not in dispute that the Club left Bourgoin without ERC permission and therefore had no intention to play the Match at 2.00pm on Sunday 23rd January. Nor was it in dispute that the Match had not been postponed when the Club left Bourgoin. ERC maintained that this demonstrated that the Club had no intention to play the Match at all, for example on the following Monday. The Club disputed this.

At the time the Club indicated its decision to leave Bourgoin, ERC said that the referee had not himself decided he was leaving and was intending to stay. Ultimately, said Mr Duthie, the Club left and made it clear they were going. In Mr Duthie's submission, even if the referee had said the game could not be played and confirmed that he was leaving, the Club had an obligation to stay. It was not unprecedented for clubs to have to wait in situ whilst matters surrounding postponements were being resolved. He referred, as examples, to matches involving Toulouse/Glasgow, Edinburgh/Castres, Prato/Bayonne and Sale/Brive. It was also not unprecedented that replacement match officials had been provided by ERC.

Mr Duthie went on to outline the various factual issues which had been agreed between ERC and the Club.

One of the issues between the parties was whether or not the referee had told the Club there was no possibility of the Match going ahead on Sunday at 2.00pm. ERC accepted that the referee thought there was little or no realistic prospect of the Match being played at 2.00 p.m. but maintained that the referee had not postponed the Match and was waiting to inspect the pitch again at noon. The question to be determined was not only who actually left first but who had first declared to the other that they were leaving, although, Mr Duthie maintained, this did not matter in terms of guilt because the Club should have stayed in any event. However, the parties had reached an accommodation in relation to this factual issue and Mr Duthie handed to the Committee an agreed summary of the position between the parties as follows:

“ Newcastle concede that before the referee communicated his decision to leave Bourgoin, Newcastle may, by their word and actions, both in the course of the 8.00am pitch inspection and in the course of John Stokoe's discussions with Tom Walsh the previous evening, have conveyed the impression to ERC and the referee that they were leaving Bourgoin and that the referee acted accordingly in leaving Bourgoin himself although Newcastle's decision to leave was in fact taken by David Thompson after John Stokoe returned to the team hotel.”

The next factual issue between the parties was whether or not, by leaving Bourgoin, the Club had merely failed to play or failed and refused to play the Match. The Club accepted its guilt on the basis of failure and not refusal. It therefore remained an issue between the parties as to whether or not, by leaving, the Club had demonstrated it did not intend to play at all. There must have been a period of time, if only because of travelling, during which the Club could not have played. The issue, however, was whether the Club, having left on Sunday morning, was willing to go back to France to play a re- arranged match.

Mr Duthie maintained that the Club's failure to play the Match was wilful and that there were no exceptional circumstances that justified the Club's decision to leave Bourgoin. If those were to be the Committee's findings, TR

3.10 contained an obligation to suspend the Club although ERC accepted that such suspension, in the circumstances of this season's tournament, would be a symbolic gesture only

Mr Hyland, on behalf of the Club, confirmed the basis upon which the Club had accepted the Misconduct Complaint, namely that it had failed to play the Match but had not refused ever to play the Match. It had made its decisions based upon the 8.00 a.m. pitch inspection. The pitch was unplayable at that time and not likely to have changed in the near future. The Club was adamant that the referee had asserted there were no realistic prospects of the match being played and that he had received advice from his superior in Scotland to go home.

ERC Evidence supplemental to the written materials received in advance:

i) Neil Patterson (appointed Match referee)

In light of the agreed position as between ERC and the Club, it was unlikely that Mr Patterson would be needed to give evidence in person, although he was available at his dental practice by telephone if necessary. In the absence of Mr Patterson, but subject to the agreed position as between ERC and the Club, Mr Patterson's evidence would be as per the written report circulated to all the parties before the Hearing.

The Chairman indicated that the Committee would consider in due course, as the Hearing proceeded, if it needed to hear from Mr Patterson in person but would release him as soon as possible.

ii) Tom Walsh

Mr Walsh had been the ERC representative charged with the responsibility of resolving operational issues arising out of the arrangements for the Match including dealing with the implications of postponement.

Mr Duthie referred to the statement of Mr Walsh circulated prior to the Hearing and read three parts of it.

First a section relating to the dialogue that occurred on Saturday evening reading as follows:

"I also spoke with John Stokoe to understand what Newcastle planned to do. They were adamant that the pitch would not be playable and was in fact dangerous and though aware that ERC would have to investigate the matter if Newcastle failed to show for the Sunday rescheduled KO, he felt that they would be able to defend their position at a later date if required to do so. I did remind John that Newcastle were bound by the tournament's participation agreement to remain in Bourgoin until the match (though a dead rubber) was played but again Newcastle felt that the pitch would not turn in time for 14.00 and they were mindful of having to prepare for their subsequent domestic competition match and that to wait in Bourgoin until the pitch was ready (which they felt might not be until Monday) was not an option. The 12.00 noon pitch inspection was discussed at which point Newcastle asked for another inspection to take place at 08.00 ahead of their planned departure from Bourgoin at approximately 09.30-10.00."

Second, the section from his statement timed at 19.35 on Saturday 22nd January. The section read:

“Spoke to Neil who confirmed that the game was to be postponed due to an unplayable pitch and that following discussions Bourgoin were to work at having the pitch ready for a 12.00 noon inspection on Sunday 23rd with a view to KO at 14.00 on the Sunday. Newcastle informed me that they did not feel that even with work that the pitch was saveable but that they would meet to discuss their options (1) to stay for the Sunday 14.00 rescheduled KO or (2) to depart Bourgoin on the Sunday to return to Newcastle per their travel plans”

Third, a section relating to a dialogue between Mr Walsh and David Thompson reading as follows:

“I also spoke with Newcastle Chairman David Thompson who was adamant that unless ERC indemnify Newcastle against player injury etc, they would not play on the Bourgoin pitch which they felt was dangerous. It was not going to improve. He also stated Newcastle discussed Bourgoin’s lack of protection of their pitch and he felt that the game had now descended to farce. The ERC should accept the situation and not pursue the Club and further compound the sorry episode.”

Mr Walsh was called to give evidence in person.

Mr Walsh gave evidence by reference to his statement. The essence of his oral evidence was as follows:

- On Saturday evening he was at the Montpellier –v- Exeter match when he heard that the Bourgoin match had been postponed after being contacted by the match referee.
- After talking with the referee, a 2.00pm kick off on Sunday was an agreed position with a pitch inspection arranged for noon.
- Mr Walsh had communicated the decision about the match to John Stokoe and, by reference to his written statement, confirmed that he had been told at 7.30pm on Saturday evening by John Stokoe that it was an option for the Club to return home. The options were either to stay or be gone for the 12.30pm flight from Lyon.
- Nothing was said about the Club returning to Bourgoin. Mr Walsh did not consider that an option because they would be in the air by 12.30pm and on their way home.
- He had been told that the Club , if it stayed, would not get away until Monday to return home for Tuesday and would therefore not be back in time for its proper preparation for its match the following Saturday.
- A Monday kickoff would have been an option had it not been for the fact that the Club left on Sunday.
- It was not a question of whether the Club had said that they were prepared or not prepared to play on the Monday. As far as Mr Walsh was concerned, they simply would not be there and so Monday was not an option.
- Any discussion about playing, other than on the Monday did not take place because by then the difficulty was that Bourgoin were scheduled to play a France Top 14 match on Thursday.

- In his discussions with Bourgoin he had been told that the nearest alternative venues would be 100km from Bourgoin. He could not recall discussing another venue with the Club and there was no discussion either about any other time for kick off.
- The Club had indicated to him that it was happy to leave on the scheduled flight. In that event, Mr Walsh had told the Club, a report would be made to ERC who would need to consider matters.
- The Club had requested the 8.00am pitch inspection after the noon inspection had already been, as far as Mr Walsh was concerned, agreed. The 8.00am inspection was to see how the pitch was doing and he had agreed to that inspection so as to mollify the Club.
- ERC had not agreed any circumstances under which the Club could leave Bourgoin and as far as Mr Walsh was concerned, more weight had been placed on the need for the noon inspection than the earlier inspection.
- He had informed the Club that its non-appearance for the match on Sunday would have to be looked into by ERC. As far as Mr Walsh was concerned, the Club fully understood the position but was still happy to leave.
- In the event of postponed matches, ERC tries to hold on to the travelling team and match officials with the aim of the match taking place as close to the scheduled time as possible.
- When Bayonne played in Italy, they played on the Monday instead of the Saturday and Bayonne had stayed in situ so as to play.
- In round 4 the Newcastle –v- Exeter match had been moved to Galashiels and replacement officials had been used as had also happened for a match between Sale and Brive.
- ERC could have secured match officials to officiate even though the original officials had gone.

In response to questions from Mr Hyland, Mr Walsh gave the following evidence:

- He confirmed he had spoken with Mr Thompson on the Saturday evening and was sympathetic to the Club's position. Mr Thompson was mollified by the covering the pitch. Mr Walsh confirmed he agreed with the Club's representatives that there should be an 8.00am inspection.
- As far as Mr Walsh was concerned the 8.00am inspection was to see if the pitch was responding but, again, as far as Mr Walsh was concerned there would be a noon inspection in any event.
- As far as Mr Walsh was concerned, the noon inspection was not conditional upon the 8.00am inspection, despite the word "possibly" being used in Mr Patterson's report of which he was aware. As far as Mr Walsh was concerned, there was always to be a noon inspection.
- Mr Walsh confirmed that at no time on the Saturday evening did he directly say that the Club must stay but also pointed out that he was dealing with matters at some distance as he was in Montpellier and having to deal with all of the different parties by telephone.
- On Sunday morning he had spoken to John Stokoe who was using Neil Patterson's phone. At that point he was told that the Club was leaving. At that point also, Mr Walsh had said that if the Club left the matter would be investigated.
- As far as Monday was concerned, Mr Walsh maintained that there had been a discussion about Monday in which the Club had said it was not an option. (Mr Hyland, disputing this evidence, suggested that the discussion must have been with Bourgoin and not with the Club).

- It was probable that during the 8.00am telephone conversation, he said to Neil Patterson that he thought the Club was going to leave but also that the matter would have to be looked into.

In response to a question from the Committee, Mr Walsh said that what needed to be looked into was the fact that the game had not taken place because ERC would need to determine the result and deal with things generally.

The Committee also asked what would have happened if the pitch had been playable at 8.00am. Mr Walsh thought that in that event, there would have been no need for a noon inspection but he would have expected it to take place in any event.

Mr Walsh was also asked by the Committee whether the Club had asked ERC's permission to leave. Mr Walsh said that the Club had not requested such permission.

The Club's Evidence

i) John Stokoe

In answer to questions from Mr Hyland, Mr Stokoe gave the following evidence:

- He had been involved with Newcastle Falcons for 8 years and was now Team Manager.
- The 8.00 a.m. pitch inspection had been requested by the Club direct to Mr Walsh because the Club had scheduled travel plans as, the Club also knew, had the referee.
- If there had been any prospect of play the Club would have stayed for the noon inspection.
- There had been numerous conversations with the parties and with Mr Walsh. Mr Walsh's attitude was very sympathetic about the Club's frustration at Bourgoin's preparation or lack of preparation for the Match.
- Had Bourgoin taken proper preventative measures they would have got the game underway on the correct date and time.
- Although Mr Walsh had made the Club aware of the Participation Agreement, at no point was the Club told, in terms, to stay in Bourgoin.
- It was his understanding that, in turn, it was Mr Walsh's understanding, after the 8.00 a.m. inspection, that the referee had determined the game could not go ahead.
- The Club was aware there was no alternative venue.
- He was aware that Bourgoin had expressed concerns about a further delayed match date because they had a French Top 14 commitment during the next week.
- The decision to leave Bourgoin had been made by the Club's Chairman, Mr Thompson, after Alan Tait and Mr Stokoe had returned to their hotel after the 8.00 a.m. inspection.
- There was no discussion about playing the match on Monday or Tuesday.
- The Club had no issue with its own domestic fixtures if the Match was scheduled to be played on the Monday. Bearing in mind the Club's next fixture, playing on Monday would have been within the parameters advised for the gap between matches involving professional players.

In response to questions from Mr Duthie, Mr Stokoe gave the following further evidence:

- He is in charge of travel plans for the Club and made the travel arrangements for the Bourgoin trip.
- He was aware of the Amlin Challenge Cup Tournament Regulations although he had not read them in detail. He kept a copy of the Participation Agreement for reference.
- He was aware of the Tournament Rules and the provisions of Tournament Rules 3.5 and 3.10 but not by reference to their numbers.
- He knew that there is an obligation that all matches be played and was aware that failure to play could lead to sanction. The Club would not have needed to be reminded that sanctions existed.
- The Club booked on the 12.25 flight from Lyon to Heathrow, which flight was booked at the beginning of January.
- The cost of the flights was £10,000 for a full party of 33 with British Airways but the flights were transferrable upon payment of an additional fee, although Mr Stokoe did not know what that fee was.
- The Club had asked (through Mr Stokoe) for the 8.00 a.m. pitch inspection.
- He had understood that the 8.00 a.m. inspection was to ascertain if there was any chance of the game being played that day. Had there been any chance, the Club would have stayed.
- Mr Stokoe felt that the noon inspection was conditional on the 8.00 a.m. inspection and that the pitch was deemed unplayable at 8.00 a.m.
- Mr Walsh was wrong when he said he had discussed the participation of the Club in their English domestic competitions with Mr Stokoe.
- Had there been any chance of the game being played the Club would have stayed.
- The Club had not said it was not an option to wait.
- The possibility of playing the game on Monday was never discussed with the Club. Had there been a suitable pitch the Club would have stayed in Bourgoin.
- The Club could have chartered a flight and travelled back on Monday but at no point was Monday mooted as an option.
- The only option advanced was that the match would be played on the Sunday.
- The Club presumed the match would be rearranged. Had ERC rescheduled the game the Club would have played. The Club wanted to play. The only reason for not wanting to play would be player safety.
- The Club did not know if the Match would be played. That was a matter for ERC to decide.
- So far as English Premiership Welfare Guidance is concerned, the five days gap between matches is not a rule but a guideline.
- The following weekend the Club was due to play away to Bath in the LV Cup.
- This was the only postponed ERC match of which Mr Stokoe had any knowledge. The only match in which he had been involved concerning the Club that had weather difficulties was when it moved a match to Galashiels which had under soil heating. Mr Stokoe had no other experience of ERC postponing matches. His understanding was that ERC would rearrange matches as soon as possible.
- He did not recall what time the connecting flights were at Heathrow. As best he could remember it was 2 hours to the UK which, with the time difference, meant that they arrived at Heathrow at about 3.30 p.m. He thought

that they would have left for Newcastle at about 4.30 p.m. for a 50 minute flight home. The team dispersed at Newcastle Airport.

- The Club could have returned to play on the Monday by chartering a flight which in his experience would be 4 or 5 times more expensive than scheduled flights. The Club did not look into the possibility but could have turned it around had they needed to. Getting back to Bourgoin for the Monday was theoretically possible had the Club been told to do so.
- He had notified ERC of the Club's intentions by telephoning Mr Walsh. He had told him that, in the Club's opinion, there was no chance of the game being played and he had told him that the Club was travelling. That had been a statement to Mr Walsh and not a question.

In response to questions from the Committee Mr Stokoe said that, if at the 8.00 a.m. pitch inspection the pitch was improving, the Club would have stayed.

The Club had provisionally held its hotel rooms and looked at the options to return to England on Monday 24th January. There were 2 or 3 flights from Lyon to Heathrow and had it been necessary to rearrange their plans it could have been done by a telephone call on the Sunday. There were no flight options on the Sunday other than the one on which they were originally booked.

ii) David Thompson

In response to questions from Mr Hyland, Mr Thompson gave evidence as follows:

- He was chairman of Newcastle Falcons Limited and had been since 1999.
- He had been present with the team in France and travels to nearly all their games.
- Decisions relating to players' safety would be made by the Coach but decisions in relation to the larger picture would be made by him.
- He was aware of the 8.00am inspection and understood it was taking place to ascertain if the game was likely to be played at all. If not the Club would go home.
- Illustrative of the fact that the Club was taking the game seriously and the possibility of playing on Sunday seriously was the fact that no player was allowed to leave the hotel and there was an alcohol ban for Saturday evening.
- He was not at the pitch inspection himself as he thought it was too intimidating of the referee to have too many people there at the same time and therefore he preferred not to be there.
- He was told that the referee had deemed the pitch unplayable during that day and that the referee was leaving.
- His reaction was one of disappointment. The Club was not told to stay but would have stayed had it been.
- The Club desperately wanted to play because of a lack of fixtures in December. Although this was a "dead rubber", it was still an important game.
- The best scenario from the Club's point of view was to stay and play.
- He thought that the fixture would be rescheduled and recalled a match from 2002 when Newcastle Falcons played Leinster. The Club's pitch had been unplayable on the designated day. Leinster had left and came back to replay on the following Wednesday.

- During the round 4 matches, the Club had arranged an alternative ground and moved its match to Galashiels, losing an estimated £79,000 as result.
- There was no suggestion that the game should be played on the Monday but the Club would have accepted a rescheduling to that day.

In response to questions from Mr Duthie, Mr Thompson gave the following evidence:

- The Club had asked for the 8.00am pitch inspection and if the pitch was not fit to play, it was going to leave. They were not told to stay. He thought that the inspection at 8.00am was to assess if the pitch was potentially playable at all.
- When the Club left, it did not know when the game was to be rescheduled but knew that Bourgoin had no standby ground.
- When they left, he thought that they might have to come back and if that had been necessary, they would have chartered a flight.
- He had not heard of any match that had been cancelled then not being played at all.
- His opinion as to a rescheduled match was that it would be played on Monday. He did not want the players hanging around a French hotel on the Sunday and felt it better for the team to be at home. He felt this even though he also thought that they might be going back to France the following day.
- He was also aware that if the Club had stayed, it might have been travelling elsewhere, possibly 100kilometres to an alternative venue.
- The Club expected the game to be on the Monday but it was still the best thing for the players to go home. Chartering a flight would cost £15,000 - £20,000.
- In his assessment, it was better not to have the players cooped up in a hotel. That situation is highly combustible. He had travelled to almost every game and knew what went on. He did not agree with Mr Duthie that going home, with the intention of returning on Monday, was an implausible arrangement.
- Playing on Monday would not have had any impact on the forthcoming LV Cup match. The Club was desperate for a game of rugby. Time was not an issue between Monday and the following Saturday.
- They sometimes have to accept a short turnaround. He knew the fixture would have to be played and the Club would have fulfilled the fixture. It was not Mr Thompson's responsibility to reschedule the fixture, he was awaiting to be told when the game would be played. In his mind it would be played on the Monday but even if it had been the Tuesday or the Wednesday, the LV Cup was not a factor that would have prevented the Club from playing.

The Parties' Submissions

Submissions by Mr Duthie

Mr Duthie referred to DR 6.7.29 and TR 3.10 as being the relevant regulations containing the sanctioning powers of the Committee. He suggested that a proper approach to sanction would follow the same broad principles as the approach to determining sanction in disciplinary cases. The Committee should first weigh the facts of the case to

determine the seriousness of the misconduct and then look at factors which might be considered as aggravating the offence as well as factors that might be taken as mitigating of the offence.

In relation to TR 3.10, he suggested that the actions of the Club were clearly wilful and that the circumstances in which it had acted were not exceptional. He specifically suggested that the Match being a "dead rubber" was clearly not an exceptional circumstance. Nor was the ultimate failure to reschedule the Match at all. An "exceptional circumstance" as contemplated by TR 3.10 would be something very unusual and very serious, for example an epidemic illness amongst the team or a force majeure. He noted that, in the absence of exceptional circumstances, the Committee would be compelled to expel the Club from the Tournament. That was something the Committee should do even though, in the circumstances, it would be merely a symbolic expulsion.

In terms of the sanctions available under DR 6.7.29, it was open to the Committee to suspend the Club from next season's Tournament but ERC did not think that would be appropriate. The Club, after all, had gone to Bourgoin to play and it was beyond its control that the scheduled time on Saturday was not adhered to.

ERC did, however, invite the Committee to levy a fine upon the Club.

It was not disputed, said Mr Duthie, that the Club failed to play the match at 2.00pm on Sunday 23rd January because the Club had already left Bourgoin. By leaving on Sunday, although aware of ERC policy that matches should be rescheduled to be replayed as soon as possible, it meant, effectively, that the game could not be played on the following Monday. He pointed to what he termed the "absurdity" of the idea that the Club was going home on Sunday with the thought, according to Mr Thompson's evidence, that the Match was likely to be rescheduled for Monday.

In relation to the level of fine, Mr Duthie cited two previous cases. The first was an ERC case involving Calvissano in which Calvissano were originally fined €5,000 but which fine had, on appeal, been expunged and replaced by only a caution. That decision, when it was made, was heavily criticised, said Mr Duthie, and led to the ERC Board deciding to amend the Tournament Regulations to emphasise the seriousness of clubs failing to fulfil their fixture commitments and was the genesis of the minimum fine of €30,000 required to be levied for a breach of TR 3.8.

The other case was in the Magners' League relating to a match in which Ospreys were fined £100,000. Copies of that case and the appeal against the original decision (together with the Calvissano case) were handed to the Committee.

In all the circumstances of the present case, ERC suggested that an appropriate level of fine should be somewhere between €15,000 and €25,000.

Further, the Committee would need to consider a claim for compensation by Bourgoin who had submitted a schedule of expenditure in support of their claim for compensation.

In relation to costs, it was ERC policy to seek to recover costs even in cases where there is a guilty plea.

Submissions by Mr Hyland

Mr Hyland wished to place matters in their factual context. It had been the Club that alerted ERC to the unfitness of the pitch early on Saturday 22nd January and so everyone was alerted in good time to the situation and therefore to what action was needed. There was no alternative venue and ground conditions continued to deteriorate during Saturday.

On the referee's evidence, at 8.00am on Sunday the air temperature was -6°C and therefore, in Mr Hyland's submission, there was but a remote prospect of significant improvement. Bourgoin's anti frost measures were totally inadequate.

The temperature remained below 0°C throughout Sunday 23rd January and even at 4.00pm ERC seemed to accept that the Match could not have taken place.

Mr Hyland referred to Mr Walsh's evidence and commented that his answers were hesitant and vague and indicative of the difficulties that the Club found itself in in trying to deal with matters at the time.

He referred to the use of the word "possibly" in the referee's written evidence and suggested that the word confirmed that the 12.00 noon pitch inspection was conditional upon the 8.00am inspection providing positive hope of play. Again, from the referee's evidence, the referee had relayed to the Club the sentiment "just let them go" expressed over the telephone by Mr Walsh to the referee. This was supportive of the Club's assertion that it was not told to stay and that there was no discussion of a Monday or Tuesday alternative. Mr Thompson's evidence about returning to Newcastle might raise an eyebrow, but the Club could have been told to play elsewhere in France and that would, in any event, have involved altering its travelling plans.

Mr Hyland invited the Committee to view the evidence such that ERC had not discharged the evidential obligation upon it to prove that the Club had refused to play the Match.

He went on to make the following points:

- That the Match was not played was a result of the weather and Bourgoin's lack of preparation. On any realistic assessment of the situation the Match could not have gone ahead at Bourgoin on the Sunday.
- The Club was given no clear directions to remain in Bourgoin and there was no discussion about the Match being played on Monday. The Club knew that Bourgoin did not want to play on Monday.
- The Club takes the competition very seriously. They have always played their matches and would not do anything to damage the brand of the Tournament.
- The Club was anxious to play because it had lots of fixtures cancelled and it was not in the Club's interests to return home because match time was much needed.

- The Club takes seriously its duty to fulfil fixtures as it had demonstrated with the efforts made for previous matches. The Club's efforts to play three other matches in difficult weather conditions had cost the Club large sums of money.
- The Club operates on a relatively small budget and a significant financial penalty would be most hurtful to it.
- The Club had consistently demonstrated its commitment to ERC tournaments and to playing its matches but the weather and player safety had trumped its efforts on this occasion.
- The Club deserved credit for co-operating with ERC. John Stokoe had offered to remain in Dublin to act as a witness in the case against Bourgoin to be heard later that day.
- Whilst the integrity of the tournament is important, the consequences of the Match not being played were not disastrous and ERC had not insisted that the Match be played.

Mr Hyland reiterated that all that had happened had been brought about by the weather. It should be accepted that regardless of the Club's actions, the Match could not have been played.

In relation to the cases cited by ERC, he accepted that the Calvissano case had a different significance. He urged the Committee to ignore the Ospreys case as being of an entirely different character.

He suggested that, had Bourgoin fulfilled its obligations under TR 3.8, the Match would have been played. That, he said, amounted to an "exceptional circumstance" allowing it to be applied to TR 3.10.

In terms of DR 6.7.29, Mr Hyland suggested that a reprimand and warning as to the Club's future conduct would have a chastening effect on the Club and not be as lenient a punishment as it might seem at first sight. Although levying a fine was a sanction available to the Committee, he pointed out that the episode had already cost the Club a significant sum of money.

Finally, any expulsion from ERC tournaments should properly be suspended.

Decisions of the Committee

The Committee had heard a great deal of evidence about the facts surrounding the Match and reminded itself that the applicable standard of proof in determining factual issues is the balance of probabilities. In light of the Club's plea of guilty to the Misconduct Complaint (albeit, in terms of TR 3.10, it did so on the basis that it had failed to play the match and not that it had refused to play the match) the Committee's assessment of the evidence was needed to assist it in arriving at the proper sanction. The Committee determined that its assessment of the evidence was required, specifically, for the following purposes.

1. To decide, under TR 3.10, whether the Club's refusal and/or failure to play was "wilful";

2. If “wilful”, to decide , again under TR 3.10, if the Club had established there were exceptional circumstances so as to avoid the otherwise mandatory sanction of expulsion from this season’s tournament;
3. To decide, in setting the appropriate level of sanction, whether the club failed and refused to play or simply failed to play the match; and
4. To decide what effect the surrounding factual issues should have in determining the proper sanction,

The Committee made the following determinations as pertinent to the matters to be decided:

- The Match, scheduled to be played at 20.45 on Saturday 22nd January, was postponed because the referee deemed the pitch unplayable.
- After the Match was postponed on Saturday evening, there was liaison between ERC (Mr Walsh) the two teams and the referee. Following Mr Walsh’s initial conversation with the referee and in accordance with TR 3.5.2 , the game was rescheduled to be played at 2.00pm on Sunday 23rd January .
- A pitch inspection was first arranged for noon on Sunday 23rd January. A noon inspection was a sensible provision to ensure that spectators were given adequate notice of what was to happen about the Match. Subsequently, after a request from the Club and after the Match had been rescheduled, an inspection of the pitch was also arranged for 8.00am on Sunday 23rd January. The Club requested an early inspection because of its travel plans.
- The Club had alerted Mr Walsh to its travel plans on Saturday evening after being told about the rescheduled match. The Club conceded (as per the agreed position between it and ERC reproduced above) that it had conveyed to ERC and the referee on Saturday evening the impression that it intended leaving Bourgoin at the time it had already scheduled.
- It was not surprising that confusion arose as to the purpose of the 8.00am inspection. Mr Walsh was in Montpellier and attempting to deal with all the parties by telephone. It is undoubtedly the case that things would have been much clearer if there had been an ERC representative at Bourgoin.
- However, much of the confusion was created by the Club itself. All participants in the Tournament , largely well established, well run, professional clubs, just like the Club, have a responsibility to act in accordance with the Tournament Regulations without being prompted by ERC. Mr Stokoe said the Club was aware of the Tournament Regulations and kept a copy for reference. The Club had also said that it had participated in the large majority of ERC tournament seasons and so, by its own implication, should have been well versed in what was expected of it.
- The provisions of TR 3.5 and TR 3.10 are perfectly clear and had the Club followed those provisions it would and should have seen that its duty and responsibility to the Tournament was to stay in Bourgoin.
- At 8.00am on the relevant Sunday the referee declared the pitch, at that time, to be unplayable and expressed the opinion that the pitch would not be playable at 2.00pm. However, that could only, at 8.00 am, have been an opinion and nobody was in the position, then, to say with any certainty that the Match could not be played at 2.00pm.

- Whether the Club or the referee declared to the other first that he or it was leaving is irrelevant in the sense that if the referee left there could still have been a match. After the Club had left, there could not have been a match. In any event, the limited concession by the Club of the facts was sufficient for the Committee to conclude that the Club would only have stayed had the pitch been playable at 8.00am such that a match could theoretically have been played at that time.
- When the Club left Bourgoin, the Match had not been postponed. The Club says that no one told it not to go. However, the Club is a signatory to the Tournament Participation Agreement; had been reminded by Mr Walsh that it was bound by that Participation Agreement and had also been told that, if it left Bourgoin, matters would need to be investigated by ERC. The Club is a competently run, professional rugby club (as is amply demonstrated, as described by the Club's witnesses, by the manner in which it had dealt with its own weather affected match and also by the manner in which it had dealt with and conducted itself before and during the Hearing) and should not have been in any doubt that its full responsibility under the Participation Agreement was to wait until either the Match was played or postponed by ERC.
- The Club's witnesses said that when they left Bourgoin on Sunday they were expecting to have to return the following day to play the Match. At the time the Club left, Mr Walsh was in transit from Montpellier to Bourgoin. The notion, with the Club also by then in transit, that Mr Walsh, on arriving in Bourgoin, would have rescheduled the match for Monday is fanciful. In the Committee's estimation, by leaving on Sunday morning, the Club was effectively ruling out the possibility of the Match being played on Monday and, therefore, also, in the light of forthcoming matches, for Bourgoin if not for the Club, was effectively ruling out the match being played during the subsequent week.
- In the Committee's view, the Club leaving Bourgoin, as it did, effectively, made it impossible to reschedule the Match during the subsequent few days and amounted to a refusal by the Club to play the fixture over the designated, extended weekend window during which this round of the Tournament would normally have been expected to have been played. Semantically, that clearly does not amount to a refusal ever to play the game but it is difficult to imagine circumstances in which a refusal to play a match on a particular date or within a particular time frame might be said to be a refusal ever to play that match.
- In the circumstances of this case, the Committee were satisfied that by leaving Bourgoin, not only did the Club make it inevitable that it would fail to play the Match, but was also, in the context of TR 3.10, effectively, refusing to play the game.

In summary the Committee found that the Club failed and refused to play the Match, that its actions were wilful and that the Club had not established there were exceptional circumstances to justify its failure and refusal to play.

In terms of TR 3.10, the Committee was bound to expel the Club from the Amlin Challenge Cup for season 2010/2011, to award the Match to Bourgoin with a notional score of 28-0, to confirm that the Club be awarded no match points for the Match and also to confirm that Bourgoin be awarded 5 match points.

In terms of DR 6.7.29 the Committee was attracted by the approach suggested by Mr Duthie in that it should first assess, by reference to the facts of the matter, the seriousness of the misconduct before looking, in turn, at factors

which might aggravate that initial determination and then mitigate it. This approach, the Committee considered, also had the merit of being consistent with the approach generally taken in rugby in discipline cases.

Having considered how the Club acted and the options open to it under DR 6.7.29, the Committee decided that a fine and expulsion from the tournament were the two appropriate sanctions in this case.

So far as expulsion from the tournament is concerned, and quite apart from the “symbolic” expulsion from the current tournament required under TR 3.10, the Committee thought this an important signal to remind all participating clubs that they have a responsibility to all the tournament stakeholders as described by Mr Duthie in his original submissions. However, in view of the Club’s previous record of participation in ERC tournaments, its acceptance of the Misconduct Complaint and the manner in which the club had conducted itself before and during the Hearing, the Committee felt able to suspend the expulsion.

The Committee decided that the Club would be expelled from ERC tournaments for one year (represented by one ERC tournament season) but the expulsion would be suspended for five years, that is, up to and including season 2015-16, and would only be activated in the event of the Club committing another act of misconduct contrary to TR 3.10 .

The Committee also thought it appropriate that a fine should be levied.

In calculating the proper level of fine, the Committee did not take into account the Calvissano decision cited by Mr Duthie, other than to note that, following it, ERC changed the Tournament Regulations so that an offence under TR 3.8 now has a mandatory, minimum penalty of €30,000. This illustrated to the Committee the seriousness with which the custodians of the Tournament brand consider the failure, for whatever reason , to fulfil a fixture and in the Committee’s view, particularly because it refers to a minimum fine, the provisions of TR 3.8 provided a helpful indicative starting point for a proportionate fine arising out of misconduct contrary to the provisions of TR 3.10.

The Committee was also assisted by the Magners’ League case involving Ospreys in which Ospreys were fined £100,000 although the circumstances of that case were different from the case the subject of the Hearing. The level of fine, adopted by the committee in that case, had been suggested by the tournament organisers themselves, partly, as proper in light of the potential damage to the tournament’s brand of a fixture being postponed without reasonable justification. It was, in the Committee’s estimation, indicative of the level of seriousness with which such matters should be approached. The Committee also noted that the level of fine in the Ospreys case had been upheld on appeal.

In the circumstances of the facts established during the Hearing and the Committee’s assessment of the Club’s behaviour, it decided that a fine of €50,000 was the correct and proportionate sum to be levied in this case.

However, adopting the approach suggested by Mr Duthie and accepted by the Committee as sensible and proper, the Committee then considered, in turn, if any matters were aggravating of the Club's behaviour, so that the fine should be increased, or mitigating of the behaviour so that the fine should be reduced.

The Committee did not conclude there were any features of the case that should lead it to increase the fine but did think there was substantial mitigation. First, the Club had accepted it had committed an act of misconduct and conducted the proceedings, before and during the Hearing, with exemplary clarity and helpfulness. It was also not the Club's fault that the Match could not be played at the first scheduled time on the Saturday evening. These considerations justified the Committee reducing the fine by 50% so that the fine to be levied on the Club would be €25,000. That sum would be payable within 28 days of the date of this written judgement.

Costs were to be awarded to ERC including half the cost of convening the panel and ERC's proper legal charges, to be assessed if not agreed.

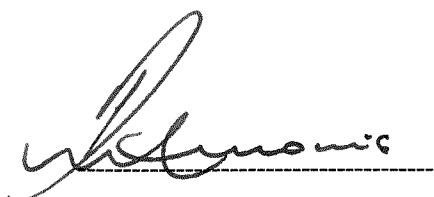
The Committee decided it would reserve its decision in respect of Bourgoin's claim for compensation until after hearing the case involving Bourgoin to be heard by the same committee later that day.

The Hearing was reconvened and the Committee's decisions related to the parties.

Before the Hearing was closed, the parties were reminded of their right of appeal against the Committee's decisions.

Reserved matter

The Committee later considered the matter of Bourgoin's claim for compensation as presented to ERC. The Committee decided that no award of compensation would be made. The schedule of expenditure placed before the Committee was neither supported by evidence nor distinguished between Bourgoin's expenditure for Saturday and Sunday such that the Committee could attribute any of Bourgoin's expenses to the Club's misconduct.



Roger Morris (Chairman)



Date