

# Decision of the Appeal Committee

## European Rugby Cup

Decided on written Submissions only  
10<sup>th</sup> August 2011

In respect of

## Biarritz Olympique Pays Basque (“the Club”)

In respect of an Appeal by the Club against the decision of an independent judicial officer (the “JO”) dated 18<sup>th</sup> April 2011 (the “Decision”) in relation to misconduct complaint that the Club failed or refused to pay the sum of €87,325.55 to Ospreys by the due date of the 10<sup>th</sup> December 2010 (which due date was stipulated in the ruling of the ERC Chief Executive pursuant to Clauses 9.2.3, 9.2.4.2 and 9.2.5 of the Commercial Rules of the 2009/2010 Heineken Cup Participation Agreement, more particularly by

- a) Failing or refusing to pay €58,979.56 until in or around the 27<sup>th</sup> December 2010;
- b) Failing or refusing to pay the remaining €28,376.00 (and interest at all);

## Members of the Appeal Committee (“the Committee”)

H Pat Barriscale, Chairman (Ireland)  
Lorne Crerar, (Scotland)  
Anthony M Davies (England)

## Decision of the Appeal Committee:

- (i) That the decision of the Judicial Officer dated 18<sup>th</sup> April 2011 is affirmed save only as it is varied by Paragraph (ii) of this Decision and the Appeal is accordingly dismissed;
- (ii) That the Club must pay to Ospreys by no later than the 31<sup>st</sup> August 2011
  - a) the outstanding amount of €28,376.00 plus interest from the 17<sup>th</sup> December 2010 until paid; and
  - b) the interest which accrued between the 17<sup>th</sup> December 2010 and the 27<sup>th</sup> December 2010 as a result of the late payment of €58,979.55 (all interest to be on the terms and at the rates specified in Commercial Rules 9.2.4.2.);
- (iii) That the Club is fined €1,000.00 such sum to be paid before 31<sup>st</sup> August 2011.
- (iv) That the Club is responsible for all reasonable costs incurred by the ERC in relation to the original hearing and this Appeal.

## Introduction

The Appeal Committee was convened by Professor Lorne D. Crerar, the Chairman of the ERC Discipline Panel pursuant to the Discipline Regulations of the Heineken Cup in respect of a misconduct complaint made by the Disciplinary Officer of the ERC against the Club dated the 10<sup>th</sup> day of February 2011. The misconduct complaint alleged that the Club failed or refused to pay the sum of €87,325.55 to Ospreys by the due date of the 10<sup>th</sup> December 2010 (which due date was stipulated in the ruling of the ERC's Chief Executive pursuant to Clauses 9.2.3., 9.2.4.2 and 9.2.5 of the Commercial Rules of the 2009/2010 Heineken Cup Participation Agreement, more particularly by

- a) Failing or refusing to pay €58,979.55 until in or around the 27<sup>th</sup> December 2010; and
- b) Failing or refusing to pay the remaining €28,376.00 (and interest) at all.

The misconduct complaint was considered by an independent Judicial Officer by way of written submissions only and he gave his decision on the 18<sup>th</sup> April 2011 (the "Decision").

The Club appealed that Decision by Notice of Appeal dated 29<sup>th</sup> April 2011. Whereas this Notice of Appeal was technically outside the time permitted by the Rules, the time was extended for good reason shown and the Notice of Appeal was accepted as valid. As is required by the Disciplinary Rules the Notice of Appeal specified the specific grounds for appeal.

As there was no objection to the Chairman's suggestion that the appeal would proceed by way of written submission, the appeal proceeded on that basis.

The following documentation and other materials were considered by the Appeal Committee;

1. Misconduct Complaint dated 10<sup>th</sup> February 2011;
2. Ruling by ERC's Chief Executive dated 9<sup>th</sup> November 2010;
3. Financial Report on the match accounts by the Club;
4. Ospreys' objection to the financial report;
5. Judicial Officer's Ruling (HHJ Jeff Blackett) dated 8<sup>th</sup> December 2010 re; misconduct complaint against Ospreys;
6. The Club's response dated 7<sup>th</sup> March 2011 with attachments;
7. ERC's written submissions dated 21<sup>st</sup> March 2011 with attachments.
8. The Club's response dated 28<sup>th</sup> March 2011;
9. The Decision (Rod McKenzie, JO) dated 18<sup>th</sup> April 2011;
10. Notice of Appeal dated 29<sup>th</sup> April 2011;

11. Submissions dated 13<sup>th</sup> June 2011 on behalf of the Club and received through John O'Donnell SC;
12. Replying Submissions dated 11<sup>th</sup> July 2011 on behalf of the Disciplinary Officer of the ERC, Roger O'Connor and received through Byrd & Byrd Solicitors together with all attachments thereto.

## **The Function and Powers of the Appeal Committee**

The procedures to be followed in Appeal Committee proceedings are as set out in Clause 7.4 of the Disciplinary Rules (DR) attached to the Participation Agreement. In particular pursuant to Clause 7.4.8 of the DR *the Appeal Committee shall be entitled to conduct and regulate the Appeal proceedings as it sees fit in the circumstances of the case and shall determine the basis on which the Appeal will proceed. Except where an Appeal proceeds as a de novo hearing pursuant to this Clause 7.4.8 the basis of the Appeal will be that the Appellant shall have the burden of proving that the Decision being challenged:*

- a) *Was in error; and*
- b) *Should be overturned or varied;*

The remainder of that Clause deals with an appeal proceeding as a de novo hearing. As no application was made for a de novo hearing in this appeal, the burden of proof lies with the Appellant to show that the Decision being challenged:

- a) Was in error; and
- b) Should be overturned or varied.

The standard of proof is on the balance of probabilities.

Further assistance is given to Appeal Committees arising out of previous decisions of Appeal Committees in cases of Marius Tincu, Alan Quinlan, Gerry Flannery and Alexandre Audebert. In particular, in the "Tincu Decision" it was stated inter alia *"except in the case of a de novo appeal, the function of the Appeal Committee is not to review all of the evidence which was before the Disciplinary Committee (JO) and then to come to its own conclusions as to whether or not the evidence established is on the balance of probabilities at the cited act or acts of foul play occurred. ERC Appeal Committees are only entitled to interfere with a determination on a matter of fact by the original Disciplinary Committee (JO) where the Appeal Committee concludes that such determination was not consistent with the evidence before it. In making the assessment as to whether the evidence was consistent with such a Determination by a Disciplinary Committee (JO) a margin of appreciation is to be accorded to the determination being challenged"*.

## The Notice of Appeal

In the Notice of Appeal dated 29<sup>th</sup> April 2011 a number of specific grounds for appeal have been advanced as is required under the DR and we will deal with each of the matters as they appear in the Notice of Appeal.

1. *The Decision recognised that Clause 7.6.3 of the Commercial Rules set out the sale or return nature of the tickets that are provided to a visiting club and the deadline for returns but it does not specify how revenue relating to such tickets should be treated in the event of a late return of tickets in breach of this Clause.*

This is correct and is a statement of fact and was indeed accepted by the Disciplinary Officer. The issue flowing from this is whether or not the Ospreys were entitled to object to the accuracy of the figures in the Club's Report and Accounts on the basis it disputed the way the Club treated the claimed loss of revenue in relation to unsold match tickets. Considerable emphasis is placed on the "accuracy" of the match figures in the submissions made on behalf of the Club. The suggestion on their behalf is that the figures themselves are completely accurate in that they state exactly the amount taken in and paid out arising from the game in question. What essentially being submitted is that because the figures themselves are accurate that Ospreys are not entitled to challenge the treatment of the same and the distribution of the monies arising from the same. This makes no sense as to follow this argument to its logical conclusion, that if the figures themselves are accurate, the Home Club are entitled to decide in whatever way they like how the amounts are to be treated. That is contrary to all reasonable commercial practice. This committee are satisfied that the provisions of Clause 9.2.3 of the Commercial Rules is in place to deal with this type of dispute/issue.

Much emphasis has been placed in the Submissions on behalf of the Club also in relation to the "sale or return" basis of the tickets and the failure of Ospreys to return the tickets on time. In the run up to this match there was constant communication between the Clubs particularly in relation to the number of tickets which had been sold by Ospreys. Indeed, from as early as the 19<sup>th</sup> March 2010, when an email was sent from Mr Wells of the Ospreys to M. Bousquier of the Club, the Club were fully aware of the number of tickets which had been sold on the categories of the same and indeed consented to an extension of the time for the unsold tickets to be returned to them. It was made perfectly clear to the Club that they were rejecting the balance of the tickets and returning them to the Club. Ospreys dispatched the tickets as agreed on the 26<sup>th</sup> March 2010 and because of the method of posting used, it is common case that they were not received by the Club until the 8<sup>th</sup> April 2010. That issue has already been the subject of a separate misconduct complaint against Ospreys which was dealt with by HHJ Jeff Blackett and Ospreys were fined €5,000. The Club knew that tickets were coming back from Wales and would not be sold by Ospreys. The Club were aware that those seats were available for sale and the returned tickets could have been distributed once they were received back from Ospreys. It was certainly assumed by all that this would be earlier than the

8<sup>th</sup> April 2010. It is not accepted, therefore, that the "property" in the tickets had passed to the Ospreys when there were delivered on the 24<sup>th</sup> February 2010 and never returned to the Club. The "property" in the tickets returned to the Club when they accepted the rejection of the tickets by Ospreys in and around the 23<sup>rd</sup> March 2010.

2. *The Decision indicates that Clause 11 of the Commercial Rules is not applicable because it is superseded by Clause 9.2.3 of the Commercial Rules. We do not accept this conclusion.*

The Club goes on from there to argue that there are a number of reasons why they did not accept this and particularly state that Clause 11 is quite clear, it leaves the determination many commercial matter for which no specific provision is made in these Commercial Rules to the Board of the ERC and not to a ruling by the ERC Chief Executive. This Committee does not accept this. We are satisfied that specific provision is contained in Clause 9.2.3. of the Commercial Rules to deal with exactly this type of dispute which has arisen here. When the figures were provided to Ospreys they raised their objections in a detailed letter to the Chief Executive of the ERC dated the 15<sup>th</sup> June 2010. They specifically made their objection pursuant to Clause 9.2.3. and detailed procedures were followed thereafter whereby it was pointed out to the Club that it was a matter for Mr Derek McGrath the Chief Executive of the ERC to rule on that objection. No challenge was made to this and no objection raised by the Club in relation to Mr McGrath's jurisdiction. Indeed, thereafter the Club actively participated in the attempted resolution of the matter between July and November 2010. They engaged in ongoing correspondence during that period and set out their position in detail. It wasn't until nearly one month after Mr McGrath had given his ruling that the first issue of his not having jurisdiction was raised. The Club were aware of his ruling at this stage, did not accept it, and sought to avoid the process that they had actively engaged in. This committee does not accept that they are entitled to do so.

3. *The figures in the financial match report were accurate and there was no dispute on the ticket face values, their numbers, with the only difference been an interpretation of the sale or return basis which, we maintain, did not require a ruling by the ERC Executive but should have been reported to the ERC Board.*

We have already dealt with this issue in detail above, both in relation to the "accuracy" of the figures and the inapplicability of Clause 11 of the Commercial Rules. We do not feel that it warrants any further comment in this regard.

4. *The Decision does not take into consideration a similar case when no ruling was made and the sale or return was based on the full value of the tickets not returned in time.*

The only mention made of another match is in Clause 1.5 of the submissions made on behalf of the Club. They refer to the 2006 semi-final between Biarritz and Bath but no details whatsoever have been given to this Appeal Committee beyond such mention. No information has been given as to whether or not a dispute arose arising from that match, and if so, how

and by whom it was dealt with. Without this information being available we are unable to comment any further as to the relevance or otherwise of the same.

5. *There has been no misconduct by our Club, we have acted in line with Clause 7.6.3. and Clause 11 of the Commercial Rules.*

This has been dealt with in the decision of the JO dated the 18<sup>th</sup> April 2011 as follows;

*"The effect of a ruling made by the Chief Executive of the ERC is to result in an obligation on the Club to pay the sum determined to be due in such a ruling in accordance with Clause 9.2.4.2 of the Commercial Rules. If payment is not made then an obligation to pay interest on the sum due arises as per the same Clause... The ruling having been made, the obligation to make payment provided for in Clause 9.2.4.2 is the consequence.... Failure to pay a sum due by the Participation Agreement is breach of the Participation Agreement and is misconduct for the purposes of Disciplinary Rule 3.3.2."*

This Committee has already decided that Clause 11 of the Commercial Rules is not applicable in these circumstances. Where such a dispute arises, it is to be dealt with under Clause 9.2.3 of the Commercial Rules and this is what was done in these circumstances. The Club has neither accepted the ruling of Mr McGrath, the Chairman of the ERC, nor complied with their obligations thereunder. We are therefore satisfied that they are guilty of misconduct as a result of the same. We agree with the findings of the JO therefore in this regard.

The JO has made certain observations in his decision of the 18<sup>th</sup> April 2011 in relation to matters, which the ERC should consider arising out of his findings. He is perfectly entitled to do so but this Appeal Committee choose not to make any comment in this regard.

Pursuant to Clause 7.2.1(b) of the DR it states as follows:-

*"The Notice of Appeal must be signed by or on behalf of the Appellant and must specify*

*The date of the decision appeal against or fixed fined penalty form*

*The time and date that the Appellant received written notice of the decision or fixed fine penalty form.*

*The specific aspects of the decision being challenged on Appeal (for example in a citing case whether the Appeal is on the finding of foul play, or on the level of sanction imposed or both)*

*The specific grounds of such challenge."*

The Notice of Appeal dated the 29<sup>th</sup> April 2011 set out very specific grounds of such Appeal. There is provision under Clause 7.4.10 of the DR that in "at the hearing the Appellant may not without the express consent of the Appeal Committee advance any ground of challenge that was not specified in the Notice of Appeal filed pursuant to Clause 7.2.1 above". In the submissions received on behalf of the Club, a number of arguments were put forward in

relation to issues, which were not specified in the Notice of Appeal. As no specific application was made to this committee to extend or enhance the grounds of appeal set out in the Notice of Appeal, we are unable to consider the same and do not propose to make any comments or observations on the matters which were raised.

It is for these reasons that our conclusions and decisions are as set out on the first page of this Decision.

Signed:- H. Pat Barriscale

**H. Pat Barriscale**

**Chairman Appeal Committee**