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EUROPEAN RUGBY CUP**DECISION OF DISCIPLINARY COMMITTEE**

**Held at IRB Boardroom, Huguenot House, Second Floor, 35-38 St Stephen's
Green, Dublin
Friday 5th May 2006**

IN RESPECT OF:

Benoit August ("the Player") and the purported citing complaint that the Player's actions breached Laws 10-4(e) and 10-4(k) of the Laws of the Game.

MEMBERS OF THE DISCIPLINE COMMITTEE: ("the Committee")

Rod McKenzie (SRU - Chairman)

Mike Rafter (RFU)

Richard McGhee (SRU)

DECISION OF THE COMMITTEE:

- (i) The Committee found that the purported citing complaint made against the Player and the complaint made against the Player by the Disciplinary Officer were both invalid, accordingly the Committee determined not to consider the purported citing complaint and the complaint by the Disciplinary Officer to the Committee and dismissed same.
 - (ii) The Committee determined that each party to the proceedings should bear their own costs.
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INTRODUCTION

The Committee was convened by Professor Lorne D Crerar, the Chairman of the ERC Discipline Panel, pursuant to the Disciplinary Rules of the Heineken Cup 2005/2006 in respect of a purported citing complaint made by John West, who The European Rugby Cup Limited ("ERC") purported to appoint to act as the Citing Commissioner for a semi-final Match between Biarritz Olympique and Bath Rugby in the 2005/2006 Heineken Cup on 22nd October 2006 at the Estadio D'Aneota in San Sebastian ("the Match"). The purported citing complaint alleged that the Player had committed a dangerous tackle on the Bath number 5, Daniel Grewcock, and that during the alleged dangerous tackle, contact had been made by the Player with the eye of Mr Grewcock. The Citing Commissioner purported to cite the Player for infringement of Laws 10-4(e) and 10-4(k).

Present at the hearing on 5th May 2006, in addition to the members of the Committee, interpreters and a sound engineer were:-

Roger O'Connor (Disciplinary Officer, ERC)

Max Duthie (Solicitor for Disciplinary Officer)

The Player

John O'Donnell S.C. (Counsel for the Player)

M. Marcel Marten (Biarritz Olympique)

HEARING

At the commencement of the hearing the Chairman confirmed the identities of all present and established that the Player was before the Committee to answer a complaint by the Disciplinary Officer pursuant to a purported citing complaint arising out of the Match for which the ERC had

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purported to appoint Mr West as Citing Commissioner. The Chairman noted and confirmed that the solicitor appearing for the Disciplinary Officer, Mr Duthie, and that Counsel appearing for the Player, Mr O'Donnell S.C., were both experienced in and very familiar with the procedures adopted by Disciplinary Committees of the ERC including in the case of a citing complaint.

The Chairman identified that both sides had in their possession all relevant written materials which had been provided to the Chairman in connection with the purported citing complaint.

In the preliminary submissions as to jurisdiction two preliminary issues were identified on behalf of the Player on which Mr O'Donnell wished to make submissions to the Committee. The Committee determined, with the agreement of Mr Duthie and Mr O'Donnell, to consider as a first preliminary issue the submission made on behalf of the Player that the appointment of Mr West as Citing Commissioner was invalid and that as a result Mr West was not entitled to cite the Player, had no jurisdiction to do so and that the purported citing complaint was invalid. It was further submitted on behalf of the Player, that there being no valid citing complaint that there was no properly convened Disciplinary Committee and that the Disciplinary Committee had no jurisdiction to determine the purported citing complaint.

This matter had been initially referred to on behalf of the Player in the outline submissions of Mr O'Donnell dated 3rd May 2006. In response to those outline submissions, Mr Duthie, on behalf of the Disciplinary Officer, submitted additional submissions dated 5th May 2006, together with copies of decisions of Disciplinary Committees in a case against *Patrick Furet* dated 2nd February 2005 and in a case involving *Dimitri Scarzewski* dated 8th November 2005. In response to the additional submissions on behalf of the Disciplinary Officer, Mr O'Donnell expanded his outline submissions on behalf of the Player and an amended version of those outline submissions was

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provided to the Chairman in advance of the meeting of the Committee and was circulated to the other members of the Committee at the commencement of the meeting on 5th May.

There was, in addition, other items of documentation and material before the Committee relating to the merits of the purported citing. However, given the decision of the Committee on the first preliminary issue as set out below, it was not necessary for the Committee to consider the second preliminary issue or merits of the purported citing complaint and the documentation relating thereto.

The Heineken Cup 2005 Disciplinary Rules comprise schedule 4 to the Heineken Cup 2005/2006 Participation Agreement. Appendix 1 to the Disciplinary Rules is part of those Rules and part of Schedule 4. Schedule 4 is a component of the Terms and Conditions. Each Club which takes part in the Heineken Cup accepts and agrees to be bound by and to comply with all of the provisions of the Participation Agreement, including the Schedules thereto, per clause 1.3 of the Participation Agreement. Per clause 1.4 each participating player, amongst others, is taken to have agreed to and to be bound by and comply with the Participation Agreement. It was accepted by all parties that ERC, each of Biarritz Olympique and Bath Rugby and the Player were contractually bound by the terms of the Participation Agreement with respect to the respective involvements of each of them in the Heineken Cup 2005/2006, including the semi-final, of the Heineken Cup 2005/2006.

The provisions concerning the appointment of referees in matches in the Heineken Cup is in the Laws of the Game at Law 6.A.1 which provides, so far as relevant:-

“The referee is appointed by the Match organiser.”

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ERC appointed Alain Rolland of the IRFU as referee for the Match. The person appointed to be the Citing Commissioner, Mr West, was also from the IRFU. Paragraph 4 of Appendix 1 to the Disciplinary Rules provides as follows:-

“Citing Commissioner’ means a person with appropriate rugby experience from a neutral country (ie not the country of either Club or the referee) and not an officer or employee of the Union of either Club, who has been appointed by ERC to act in that role for a Match.”

Both parties were in agreement that the reference to “country” in the definition of Citing Commissioner should be taken as a reference to the Rugby Union by whom the Citing Commissioner was nominated to be an appropriate person and available to take up that role. In the case of Mr West, that union was the IRFU.

It follows that each of the Match referee, Mr Rolland and the Citing Commissioner, Mr West, were from the IRFU and the parties agreed that each of them was from the same country.

In order to meet the criteria for being a Citing Commissioner, as defined in Appendix 1 to the Disciplinary Rules, it is necessary that a person meet the following criteria:-

- (a) he must have appropriate rugby experience;
- (b) he must come from a neutral country which, for ERC purposes, is exclusively defined to be a country which is not the country of either of the Clubs taking place in any given Match or the country of the referee for that Match; and

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(c) that the person so appointed not be an officer or employee of the union of which either of the Clubs taking part in the Match is a member.

In the event that a person appointed as a Citing Commissioner does not meet every element of each and all of these criteria then the person will not meet the definition of being a Citing Commissioner and in these circumstances the person concerned will not, as Citing Commissioner (as defined) have taken any of the steps which a person meeting the criteria of a Citing Commissioner and being so appointed is permitted to take in accordance with the Disciplinary Rules.

In paragraph 4 of Appendix 1 the ERC has made a decision to specify precisely what the ERC regards as being a neutral country for the purposes of a Citing Commissioner in the Heineken Cup 2005/2006. Unless the person appointed as Citing Commissioner comes from such a neutral country, as the meaning of same is exclusively defined in paragraph 4 of Appendix 1, the criteria for being a Citing Commissioner are not met.

The Committee were taken by Mr Duthie to the provisions of other sets of rules etc of other rugby bodies in which it was not required that a person appointed to act in the role of Citing Commissioner comes from a country other than that of the referee. Whatever may be the position adopted by other rugby bodies is of no direct relevance in determining whether or not a person appointed as such meets the definition of Citing Commissioner in Appendix 1 to the Heineken Cup 2005/2006 Disciplinary Rules. For whatever reason, and there was no attempt to provide us with an explanation for same, the ERC has determined that one of the mandatory qualifying criteria for a person to act as Citing Commissioner is that the person so appointed must not come from the same country as the referee.

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Whatever may be thought about the efficacy of such a policy, on which we express no opinion, there is at least one logical basis for same in Disciplinary Rule 6.3.2 where it is provided that a Citing Commissioner may cite a player for any act or acts of illegal or foul play identified by the Citing Commissioner and that whether or not the incident was or was not observed by any third party. A Citing Commissioner may therefore make a decision which is in conflict, in effect, with a decision of a referee where the referee has seen an incident and the Player concerned has not been sent off.

Clause 1.4 of the Disciplinary Rules provides:-

“Capitalised terms used in these Disciplinary Rules shall, unless defined elsewhere in these Rules, have the meaning ascribed to them in Appendix One to these Rules.”

Accordingly, the ERC, each of the Clubs involved in the Match in question, the Citing Commissioner for the Match, the Player, the Disciplinary Officer and this Disciplinary Committee have no choice but to ascribe to capitalised terms in the Disciplinary Rules of the Heineken Cup 2005/2006 the meaning given to such terms in Appendix 1 to the Disciplinary Rules. It follows, therefore, that a person purporting to act as a Citing Commissioner cannot in fact be a Citing Commissioner, for the purposes of the Disciplinary Rules of the Heineken Cup 2005/2006, unless that person meets the definition provided for in Appendix 1 of those Rules. Mr West did not, for the reasons given above, meet all of the components of the mandatory criteria.

Disciplinary proceedings under the Rules can only arise, in the case of a citing, where a Player has been cited by a Citing Officer or a Citing Commissioner per Disciplinary Rule 4.1.2. Only a

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citing arising under clause 4.1.2 of the Disciplinary Rules may be referred to a Disciplinary Committee for consideration in accordance with section 6 of the Rules per Disciplinary Rule 4.3.

Only where a Citing Commissioner is not appointed by the ERC may a Club participating in a Match cite a player for an act or acts of illegal or foul play, see Disciplinary Rule 6.2.1.

A Citing Commissioner is obliged to act independently of *inter alia* Match officials and others per Disciplinary Rule 6.3.1. Only a Citing Commissioner, where one is appointed by the ERC, is entitled to cite a player for any act or acts of illegal or foul play per Disciplinary Rule 6.3.2. Disciplinary Rule 6.3.4 expressly provides that a Club does not have the power to cite a player during a Match attended by a Citing Commissioner per Disciplinary Rule 6.3.4. The Citing Commissioner's decision on whether or not a player should be cited is final and binding on all parties per Disciplinary Rule 6.3.5. Only a Citing Commissioner may make a citing complaint per Disciplinary Rule 6.3.6. Disciplinary Rule 6.4.1 requires *inter alia* that any citing complaint made by a Citing Commissioner is brought before a Disciplinary Committee by the Disciplinary Officer. That action is to be undertaken on behalf of the ERC and not on behalf of any Club.

Per Disciplinary Rule 6.4.3 the Chairman of the Disciplinary Panel is obliged to appoint a Disciplinary Committee where a complaint is received from the Disciplinary Officer. In this case a complaint was received from the Disciplinary Officer and accordingly the Chairman of the Disciplinary Panel was obliged to appoint a Disciplinary Committee to hear the complaint. The Committee duly convened on 5th May for that purpose. A Disciplinary Committee has jurisdiction to determine the complaint which it has been appointed to determine. That process of determination includes determination as to whether or not a citing complaint, which forms the basis of the Disciplinary Officer's complaint, is a valid citing complaint. In order for it to be a valid citing complaint made by a Citing Commissioner the Citing Commissioner must meet the

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mandatory criteria in paragraph 4 of Appendix 1 to the Disciplinary Rules, otherwise there is no Citing Commissioner. For the reasons set out above there was no Citing Commissioner in the case of the Match in question.

Since Mr West was not a Citing Commissioner (as defined) the Match was a Match in relation to which Disciplinary Rule 6.2 applied, ie a Match in which the ERC did not appoint a Citing Commissioner. However, as we understand the position, neither of the Clubs participating in the Match have yet cited the Player for an alleged act or acts of illegal or foul play. Accordingly there was no consideration by a Citing Officer of any citing complaint. There being no such citing complaint considered by a Citing Officer, there was no basis for the Disciplinary Officer to bring a complaint before a Disciplinary Committee in terms of Disciplinary Rule 6.4.1.

In paragraph 2.4 of the additional submissions on behalf of the Disciplinary Officer it was stated:-

"The two Clubs playing in the Match are from France and England, respectively. John West is from the Republic of Ireland and is not an officer or employee of the RFU or the FFR. However, the referee, Alain Rolland, is also from the Republic of Ireland. So ERC acknowledges that in that one respect (coming from the same country as the referee) Mr West did not comply with the criteria for Citing Commissioners as set out in the definitions section of the disciplinary rules. (We are unaware of any allegation that Mr West's appointment is invalid on any other basis)."

Accordingly it was not in dispute by the Disciplinary Officer that Mr West did not comply with the criteria for being a Citing Commissioner as set out in the Disciplinary Rules.

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However, it was argued on behalf of the Disciplinary Officer that the effect of Disciplinary Rule 8.8 was that such a circumstance had no negative consequences for the validity of a purported citing complaint by Mr West, unless the Player could satisfy the Disciplinary Committee that the proceedings had been rendered unreliable or that a miscarriage of justice had been caused. In making this submission reliance was placed on the decision in the case of *Patrick Furet* dated 2nd February 2005. Disciplinary Rule 8.8 was the subject of consideration in the *Furet* case. The Disciplinary Committee in that case held that in circumstances where Disciplinary Rule 8.8 applies, the discretion given to the decision maker is not to determine whether disciplinary proceedings should be approved to continue where a deviation and/or omission etc has occurred. Disciplinary Rule 8.8 does not require that an application requires to be made as such to the decision maker to allow the proceedings to continue. The proceedings continue unless, and until a person and/or body having jurisdiction to do so, determines that the proceedings have been rendered unreliable and/or a miscarriage of justice has occurred. In circumstances where Disciplinary Rule 8.8 applies and where no such determination has been made disciplinary proceedings against the Player continue before the Disciplinary Committee.

Mr O'Donnell did not seek to argue that the decision of the Disciplinary Committee in the *Furet* case was wrong. Rather Mr O'Donnell argued, on behalf of the Player, that this was a case in which Disciplinary Rule 8.8 did not apply because, properly construed, there had not been a deviation and/or omission etc as provided for in Disciplinary Rule 8.8. Mr O'Donnell did not seek to argue that there had, in the case of the Player, been any unreliability in any proceedings and/or a miscarriage of justice. He did not do so because, as he argued, he did not need to do so. In his submissions considerations of that nature were irrelevant because, in the circumstances of this case, Disciplinary Rule 8.8 had no application.

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Mr O'Donnell referred us to certain reported cases arising under the judicial review jurisdiction of the Irish courts where a decision had been set aside on the basis of certain invalidity in the appointment of a decision maker. We did not derive a great deal of assistance from these cases because we considered that the issues in this case were not concerned with the statutory validity of an appointment which is a public law question involving statutory interpretation.

Disciplinary Rule 8.8 is in the following terms:-

"Any deviation from any provision of these Disciplinary Rules and/or any irregularity, omission, technicality or other defect in the procedures followed shall not invalidate any finding, procedure or decision unless it is shown to render the proceedings unreliable or to have caused a miscarriage of justice."

We are here concerned with the interpretation of a contract. Private law rights and obligations are in issue. It is a written contract comprised wholly within the Participation Agreement. Per Halsbury's Laws of England, Deeds and Other Instruments, paragraph 164:

"The object of all interpretation of an instrument is to discover the real intention of the author, the written declaration of whose mind it is always considered to be and that consequently, their construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit."

The text goes on to note that the law is not concerned with subjective intentions, but rather with the objective meaning of the words which the author has used. What is important is what the words would objectively have been understood to mean. In this case the author of the contract was exclusively the ERC. Other parties to the contact were not permitted to propose amendments

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to the contract, but were required to accept same in toto, as drafted by the ERC, in order to be entitled to participate in the Heineken Cup 2005/2006.

Whilst extrinsic evidence may be admissible to ascertain the objective meaning of words used, no extrinsic evidence was offered to us. We were therefore required to interpret the words of the agreement as they stood free from any assistance that we may have obtained from evidence as to what the objective intention of the author of the contract had been when it was drawn up.

In interpreting the meaning of Disciplinary Rule 8.8, in the context of the definition of Citing Commissioner in paragraph 4 of Appendix 1, we bore in mind the need to interpret the Participation Agreement as a whole.

We reached the conclusion that the purported appointment of a person who did not meet the mandatory criteria to be a Citing Commissioner was not a deviation from a provision of the Disciplinary Rules and/or an irregularity, omission, technicality or other defect in the procedures followed.

Dealing firstly with the second part of the first part of Disciplinary Rule 8.8, mandatory criteria qualifying a person to hold a particular office cannot be considered to be a procedure followed. Mandatory qualification criteria are not procedures. There was no complaint, at least so far as this part of the submissions of Mr O'Donnell was concerned, directed towards the procedures which had been adopted by Mr West in purporting to make the Citing Complaint or even the procedures adopted by the ERC in purporting to appoint Mr West as Citing Commissioner. No matter what the procedures used or followed may or may not have been, Mr West was not and could not, for this Match, have been a Citing Commissioner in the event that and for so long as the Match referee also came from the IRFU.

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The Committee then considered whether the purported appointment of a person who did not enjoy the mandatory criteria for appointment as a Citing Commissioner for the Match in question could be regarded as a deviation from a provision or provisions of the Disciplinary Rules. We concluded that this was not, properly construed, a deviation from a provision of the Disciplinary Rules. If the person purported to be appointed did not enjoy one or more of the mandatory criteria for appointment then the person could never be appointed as Citing Commissioner. There was not a deviation from a provision of the Disciplinary Rules in appointing Mr West because in fact Mr West was never appointed as Citing Commissioner since he did not meet the mandatory criteria to be a Citing Commissioner. The act of appointment was, in effect, no act at all. The purported appointment of Mr West was not a deviation from a provision of the Disciplinary Rules, it was an act not permitted or recognised by the Rules. In short Mr West was not and did not become a Citing Commissioner.

This is not a situation in which the Disciplinary Officer did something which was not in accordance with the Rules, but which he could have done in accordance with the Rules had he done it differently i.e. if he had not deviated. Equally there was nothing which Mr West did in connection with his purported appointment as a Disciplinary Commissioner or failed to do in connection with that appointment. There was no deviation from any provision of the Disciplinary Rules in the context of the actions, inactions or words of either the ERC or Mr West. For so long as Mr Rolland was the referee for the Match Mr West could not be appointed as Citing Commissioner and could not become the Citing Commissioner.

Since there was no Citing Commissioner, Disciplinary Rule 6.2 applied and continues to apply and either Club could have cited and may still cite the Player and the Citing Officer would have been and would now be obliged to consider the complaint. Plainly such a complaint would now

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be outwith the time period provided for in Disciplinary Rule 6.2.2(c) but such a circumstance would, on the basis of *Furet*, have no invalidating effect unless and until it was determined that the proceedings had been rendered unreliable and/or that a miscarriage of justice would have occurred.

The scheme of the Rules envisages either a Club citing or a Citing Commissioner citing circumstance. The Rules are drafted in such a way as to preclude a situation in which both schemes may operate in relation to the same Match.

In our judgment it cannot have been the intention of the author of the Participation Agreement that a person who was not neutral, as defined by the ERC, could be the Citing Commissioner. Disciplinary Rule 8.8 cannot have been intended to operate so as to lead to precisely the opposite policy result on neutrality than was the apparent intention of paragraph 4 of Appendix 1. Neither can it have been intended to create a situation in which there could be one or more citings by a club or clubs and separately by a Citing Commissioner perhaps involving the same incident(s).

The Committee noted that both teams played in the Match knowing that Mr West was purporting to act as Citing Commissioner having purportedly been appointed to that office by the ERC. The Player took part in the Match without raising any objection to Mr West's purported appointment as Citing Commissioner. On inquiry from the Committee it was expressly stated that no estoppel argument was advanced on behalf of either party and we were not addressed on waiver. Any such argument would have required to be analysed in accordance with the principles of Irish law.

An application for costs was made by Mr O'Donnell on behalf of the Player against the ERC. The Committee referred Mr O'Donnell to the terms of Disciplinary Rule 6.6.33. Mr O'Donnell advanced no argument that the ERC and/or the Disciplinary Officer had acted frivolously or in

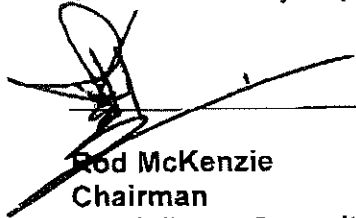
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bad faith. In these circumstances the Committee determined to make no order as to costs so the legal and other costs of the parties shall lie where they fall, per Disciplinary Rule 6.6.33.

Parties are reminded of their right to appeal this decision in accordance with Disciplinary Rule 7.

This decision may be publicised.

Date 11/05/2006



Rod McKenzie
Chairman
Disciplinary Committee