

Decision of the Independent Judicial Officer

ERC

Decided on written submissions only

8 December 2010

In respect of

Ospreys (the Club)

And

A misconduct complaint that the Club failed to return a number of unsold match tickets to Biarritz by the deadline of 27 March 2010 in breach of ERC Commercial Rules Clause 7.6.3, in advance of the match between Biarritz and Ospreys on 10 April 2010.

Judicial Officer appointed to hear the case:

His Honour Judge Jeff Blackett (England)

Decision of the Judicial Officer:

- (i) The Club, by their own admission, is guilty of misconduct under ERC Disciplinary Rules 3.3.2 and 4.1.5;
- (ii) The Club is fined £5,000, such sum to be paid within 14 days of the date of this decision; and
- (iii) There is no order for costs

Introduction

1. The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2010/11. The Judicial Officer was appointed to consider the misconduct complaint against the Club. All parties agreed that there was no requirement for an oral hearing and that the Judicial Officer's determination should be on the basis of written submissions. Written submissions on behalf of ERC and the Club were received by the Judicial Officer on 6 December 2010.

2. By letter dated 6 December the Club acknowledged that there was a technical breach of ERC Commercial Rules Clause 7.6.3.

Agreed Facts

3. The facts are contained in the submissions from both parties and are not in dispute. Biarritz were due to play the Club on 10 April at Estadio Anoeta. Biarritz sent the Club 3901 tickets on a sale or return basis in accordance with the ERC Commercial Rules, with a deadline for return two weeks before the match (27 March

2010). The Club did not sell as many as expected and returned about 2900 (total value £95,000) on 26 March. The tickets did not reach Biarritz until 8 April which is two days before the match and they did not have enough time to resell them. When they arrived they were not accompanied by a manifest and they were in an uncoordinated mess. The Club said that when they were despatched they had been bundled up neatly and appropriately.

4. When calculating the share of the gate that each club should receive, Biarritz complied with the mathematical calculation provided by the Commercial Rules and then deducted the sum of £95,000 from the Club's share on the basis that they were not given the opportunity to resell the returned tickets. The Club disputed this assessment and entered negotiations with Biarritz which ultimately failed. The dispute was referred to CEO ERC. He noted that Biarritz had not sold out their own allocation of the more expensive tickets but had sold out of those costing £35 and £25. There were tickets in those price categories returned by the Club to the value of £33,430. CEO ERC determined that had Biarritz received the unused tickets from the Club two weeks before the fixture, as required by the Commercial Rules, they would have had the opportunity of selling all of the returned tickets in the lower price categories. He ruled that Biarritz were entitled to deduct £33,430 from the Club's share of the gate to reflect Biarritz's lost opportunity. He then referred the Club to the ERC Disciplinary Officer for breaching ERC Commercial Rules Clause 7.6.3 by not returning unused tickets by two weeks before the date of the match.

Submissions

5. The Club submit that although this was a breach of the Commercial Rules it was only a technical breach. They were in constant communication with Biarritz before the match about ticket sales. On 16 March a Club official, Rhodri Wells informed Biarritz that Ospreys had sold 830 tickets. Biarritz were surprised at the low figure. Both parties were keen to maximise sales and Biarritz agreed that the returns need not be despatched as originally expected on 22 March. On 23 March Biarritz requested the Club to return the unused tickets (minus an agreed number to be retained) and the Club despatched the unused tickets from Swansea on 26 March. Biarritz were informed of the date of despatch and were content. The Club used a service provided by the Royal Mail called "Airsure". The Club states that it has used the service in the past without any problems. Unfortunately, although the package arrived in France within two days of despatch it took a further eleven days to reach its destination. The Club submits that once they had despatched the tickets their progress to the destination was completely out of their control. The Club did make every endeavour to track the package containing the tickets.

6. The Club acknowledges that the eventual delivery date of the tickets was unacceptable and that their condition on arrival was "less than adequate", but they submit they could not be held responsible for the loss in transit for two weeks and the state in which they arrived. They also submit that the financial impact on the Club, as the result of CEO ERC's adjudication, was "extreme" and that is punishment enough. Finally they aver that they have acted honestly throughout.

7. ERC submit that Airsure entries on the Royal Mail website (<http://www.royalmail.com>) show that the service is advertised as a fast and secure

mail service and not a courier service. I have investigated that website and it appears that postage by Airsure requires payment of an additional £4.90 above normal postage rates. It has an online tracking facility and a target of delivering into Western Europe within two working days of posting. However it does not guarantee such delivery and the website contains a specific recommendation that customers requiring an express or guaranteed service use another service: Parcelforce.

Decision

8. There is no dispute that the Club breached Clause 7.6.3 by failing to return unused match tickets to Biarritz by 27 March 2010. However the Club was in regular dialogue with Biarritz who agreed that there could be some delay in the return of those tickets. Nevertheless, Biarritz were entitled to expect that the tickets would be returned in sufficient time to be put up for sale before the match. It is also agreed that the tickets were despatched using Airsure by the Club on about 26 March 2010 and that they took 13 days to reach Biarritz.

9. The Club's error in this case is that they failed to take sufficient action to ensure the prompt delivery of the tickets. It is that error which makes the breach of Clause 7.6.3 more serious. The Club should have done more to guarantee delivery within two days by using a courier service. Although they argue that they have used Airsure successfully in the past, Airsure is in fact an enhanced postal service and Royal Mail recommends the use of Parcelforce if a customer requires express or guaranteed delivery. Had the Club ensured that delivery was guaranteed through Parcelforce, the fact that the tickets arrived two days after the deadline would have been a technical breach of Clause 7.6.3 meriting no sanction because of Biarritz's agreement to a short delay. However, by failing to use an appropriate courier the Club is, therefore, responsible for the late arrival of the tickets and for the loss of potential ticket sales for the match.

10. In these circumstances a sanction is necessary to reinforce the requirement to comply with obligations required by the tournament, to mark the Club's failure to assist Biarritz in maximising the opportunities to sell their unused tickets and to deter other Clubs from disregarding their obligations.

11. The Club submit that they have already been penalised sufficiently by the CEO ERC's decision that they should effectively pay Biarritz £33,430 for the ticket income lost by the lack of opportunity to sell the cheapest tickets returned. ERC submit that the breach should be marked by a fine of between £5,000 and £10,000. In my view the lower figure is sufficient to mark the Club's failure, while taking account of background of this case and the fact that the Club have not been dishonest or intentionally obstructive. **In those circumstances I order the Club to pay a fine of €5,000, such sum to be paid to ERC within 14 days.**

Costs

12. As all parties agreed that this matter should be determined by papers only, for which I thank them, there is no order for costs.

Right of Appeal

13. Both parties are reminded of their right of appeal against this decision.

Signed on original

**HHJ Jeff Blackett
Judicial Officer**

8 December 2010