BEFORE AN APPEAL PANEL OF THE CRICKET DISCIPLINE COMMISSION OF THE ENGLAND AND WALES CRICKET BOARD.

1. Determination

An Appeal Panel of the Cricket Discipline Commission of the England and Wales Cricket Board (CDC) (Edward Slinger (Chairman), Ricky Needham, Cliff Pocock, Tim O'Gorman and Mike Smith) following hearings on 10 December 2012 and between 22 April and 26 April 2013 dismissed Appeals by Danish Kaneria against findings, dated 22 June 2012, of a Disciplinary Panel of the Cricket Discipline Commission of the England & Wales Cricket Board (Disciplinary Panel).

The Panel further convened on 2 July 2013 and on 9 July 2013 to hear Mr Kaneria's and Mr Westfield's appeals against the further decisions of the Disciplinary Panel:

a. That Mr Kaneria be suspended for life from any involvement in the playing, organisation or administration of any cricket under the jurisdiction of the ECB and that he pay the sum of £100,000 by way of contribution to the costs of the hearing.

b. That Mr Westfield, who had pleaded Guilty on the first day of the Disciplinary Panel hearing, be suspended for 5 years but for the final 2 years this suspension applied only to cricket "in any Team England and First-Class Cricket environment."

Mr Ian Mill QC represented ECB
Mr Jude Bunting represented Mr Kaneria.
Mr Yasin Patel, who had not appeared before the Disciplinary Panel, represented Mr Westfield.

2. Powers of the Appeal Panel

Under the terms of the Cricket Discipline Commission Regulations, the Appeal Panel shall have the same powers in relation to penalty as were accorded to the Disciplinary Panel which, in relation to a cricketer, could include suspension (for any period).

The Disciplinary Panel in determining the penalties to be imposed on Mr Kaneria and Mr Westfield stated as follows:

"Self evidently, corruption, specifically spot fixing, in cricket or any other sport for that matter, is a cancer that eats at the health and very existence of the game. For the general public, supporting the game and their team within it, there is no merit or motivation to expend time, money or effort to watch a match whose integrity may be in doubt. The consequences of the public's disengagement from cricket would be catastrophic.

Furthermore, the game of cricket simply cannot afford to have its reputation tarnished in the eyes of commercial partners. These partners could not and would not link their brand to a sport whose integrity had been so undermined.

For players who have devoted their entire careers to the pursuit of hard fought and properly competitive sport, to have those genuine achievements called into question by the corrupt actions of a tiny minority, may tend to devalue their worth.

Accordingly, we have no doubt that this is a cancer which must be rooted out of the game of cricket. As a result of this, in relation to domestic cricket, the ECB and the PCA have introduced programmes of training and education such that in 2012 there are in place for all county cricketers appropriate safeguards in the area of match fixing and corruption. These were not in place in 2009. In reaching our conclusions, we have had regard to the authorities placed before us in relation to sanctions imposed for corrupt activity in sport."

3. Sanctions Appeal of Mr Kaneria

The Disciplinary Panel stated as follows:

"We sentence for 2 offences. As we have found, they involve the deliberate corruption of a young and vulnerable player and various attempts to involve others in the net of corruption. As a senior international player of repute he plainly betrayed the trust reposed in him in his dealings with fellow team mates and we regard his persistent efforts to recruit spot fixers as being a seriously aggravating factor in his case.

Significant sums of money doubtless flow from corrupt activities such as those which we have examined this week, and we have no doubt that those involved in making such corrupt financial gains spare no thought either for those they corrupt or for the integrity of the game.

Kaneria has made no admission, has shown no remorse and sought to cast blame on other plainly innocent persons.

In all these circumstances, we regard Danish Kaneria as a grave danger to the game of cricket and we must take every appropriate step to protect our game from his corrupt activities. Accordingly, we are unanimously of the view that the only appropriate sanction in relation to both charges is one of **suspension for life** and that is the sanction we impose. This means from today Danish Kaneria is suspended from any involvement in the playing, organisation or administration of any cricket under the jurisdiction of the ECB."

"We accepted that the ECB's 2012 Cricket Discipline Commission Regulations were those which governed our proceedings as to procedural matters in relation to the case against Mr Kaneria. The ECB's 2011 Cricket Discipline Commission Regulations governed our proceedings as to procedural matters in relation to the case against Mr Westfield.

We rejected a submission that our powers in relation to costs were restricted, by reason of the application of lex mitior, to an order for not more than £2000 costs, as provided by the 2009 ECB Regulations.

We ordered that Danish Kaneria make a contribution to the costs of the hearing in the sum of £100,000."

4. Grounds of Appeal

The relevant Grounds of Appeal in relation to the outstanding issues were:

1. Without prejudice to Mr. Kaneria's appeal against the findings of the ECB Disciplinary Panel in respect of 2009 Directives 3.8.5 and 3.3, Danish Kaneria appeals against the life ban imposed on him by the ECB Disciplinary Panel. It is submitted that the life ban was excessive.

2. Danish Kaneria appeals against the order of the ECB Disciplinary Panel that he pay £100,000 towards the legal costs of the ECB. It is submitted that the 2009 Regulations were those which applied to this case. They were the only ones signed by Mr. Kaneria. Those regulations limited the costs to be paid by the losing party to £2,000.

3. Without prejudice to the argument that the 2009 Regulations should have been applied in the proceedings below, it is submitted that the figure of £100,000 awarded against Mr. Kaneria was not reasonable in all the circumstances."

5. **Evidence before the Panel**

Statements dated respectively 14 April 2012 and 15 June 2012 from Mr C.G. Clarke CBE, DL (Chairman ECB) and Mr D.G. Collier (Chief Executive) were accepted as evidence to be considered by the Panel

They both spoke of the damage caused to the game by revelations of corruption in the game both in this country and internationally, of unquantifiable damage caused to the image and integrity of the sport, of the need for the threat to be addressed pro-actively and for hard hitting sanctions, by way of deterrence, to be imposed on those found guilty of corruption offences. Corruption had the potential even to destroy sport. Public trust and commercial support of spectators, broadcasters and sponsors provided the financial bedrock of the game and, if compromised, the adverse knock-on effects on, for example, the funding of grass-roots cricket could be considerable. Each considered that the charges against Mr Kaneria, involving as they did allegations of inducement of a young player by a well-known international star, justified, if found proved, the maximum available penalties.

6. Sanctions:

Written and Oral Submissions

i. ECB

The ECB accepted that any sanction must be proportionate. The very grave nature of the corruption offences committed by Mr Kaneria and the sanctions commonly imposed by CAS and other sporting tribunals for similar offences justified the maximum available sanction under the ECB regulations.

a. Both Disciplinary Panel and Appeal Panel were utterly damning of Mr Kaneria – the Appeal Panel specifically recording that he was fully aware of and encouraged the details of the arrangements put to Mr Westfield.

b. A severely aggravating factor was that Mr Kaneria had plainly and deliberately ignored the warning given to him by a representative of the ICC Anti-Corruption and Security Unit.

c. The grooming of Mr Westfield was not an isolated incident. The Appeal Panel found "a clear and overwhelming picture" of approaches to other players including another young player, Varun Chopra, In this case, also, the welfare of Mr Westfield had clearly been affected as a result of the offence – having lost both his liberty and livelihood.

d. There had been no evidence whatsoever of remorse.

e. Match and spot fixing were an increasing problem in cricket and in sport generally. That an effective deterrent was necessary had been widely recognised internationally. Life bans were commonly considered the standard sanction for corruption offences of this kind. Life bans had been upheld in cases of failures to report corrupt approaches and attempts (whether successful or not) to corrupt.

f. In considering whether a distinction should be drawn between match fixing and spot fixing, it was vital to remember that both were forms of corruption and accordingly affected the integrity of the game.

g. In deciding seriousness, the test was not whether a match result had, in fact, been affected but whether it had the potential to be affected.

h. Tackling corruption offences was now the biggest priority for cricket's administrators. There continued to be widespread allegations of corruption including in the Indian Premier League and the Bangladesh Premier League.

i. Any serious adverse effects upon Mr Kaneria whether by way of reputation, career or financial loss were entirely the result of his own actions including his continued denial of guilt.

ii Mr Kaneria

a. The life ban imposed by the Disciplinary Panel was "*excessive"*, the life ban should be quashed and a lesser sentence substituted

b. The costs order of £100,000, imposed by the Disciplinary Panel, was wrong in law;

c. The costs order of £100,000, imposed by the Disciplinary Panel, was not reasonable in the circumstances.

The Life Ban

Mr Kaneria accepted, in principle, the general submissions that (a) spot-fixing was a serious disciplinary offence, and (b) the ECB (including its senior officeholders) and the ICC had particular concerns about corruption in the sport of cricket.

It was further accepted that a policy of zero tolerance approach to corruption cases was justified but there were different levels of corruption and a life ban was not appropriate on the facts as found by the Appeal Panel.

i Factual findings of Appeal Panel differed from those of Disciplinary Panel which:

a. "Referred to sentencing for two offences. It was unfair to sentence for two offences when the Appeal Panel had recognised that the charges relied on the same facts and did not allege separate illegality.

b. "Referred to the corruption of "a young and vulnerable player", "relatively unworldly and unsophisticated" and "an insecure 21 year old". Whereas the finding of the Appeal Panel was that Mr Westfield had constantly lied at various stages, had underperformed willingly and, although insecure and easily influenced was streetwise and devious. On a finding by the Appeal Panel that both men acted corruptly, did so willingly and both lied in evidence there could be no justification for the disproportionate penalties.

c. The Appeal Panel made no finding that Mr Kaneria applied any particular pressure on or threat to Mr Westfield.

ii. In suggesting that there were no mitigating factors upon which Mr Kaneria could sensibly rely upon, the ECB failed to apply the list of aggravating and mitigating factors contained in the ECB Anti-Corruption Code for Players and Player Support Personnel". Apart from fact that the offences involved more than one player, the other main aggravating factors were not present.

iii. Lack of remorse was acknowledged – but this was due to continued denial of guilt.

iii. Character. Mr Kaneria was a highly regarded international cricketer who had never previously been found guilty of any disciplinary offence at all.

v. Spot–fixing was recognised as much less serious than match-fixing which involved the complete corruption of entire game. There were no recorded cases of a life-time ban for spot-fixing. There were frequent references to match- fixing being the most serious form of corruption, including the case of Salman Butt v ICC in which the approach of the original disciplinary panel that spot-fixing was the less serious was not challenged by the CAS.

vi. This was not the most serious form of spot-fixing:
   a. There was no evidence of financial gain from the offence. There had been detailed financial investigation both by ECB and Police including enquiries in Pakistan.
   b. The amounts concerned were not substantial - Mr Westfield being said to have received £6000
   c. There was no evidence that the commercial value of the game was affected.
   d. The result of the game was not affected and Mr Kaneria had himself performed well in the match which was won by Essex.

vii. In view of the findings that he was a willing participant, it could not be sensibly asserted that Mr Westfield's welfare was endangered. The Panel should weigh carefully their competing criminality

viii. Personal Mitigation.
Mr Kaneria had suffered serious, irremediable, reputational damage having been vilified in the international press. He had suffered the personal tragedy that his father had died knowing that the Appeal Panel had rejected the appeal. He had lost his career and suffered severe financial damage including payment of substantial Commercial Court costs and funding his own defence.

ix. Although the ECB had sought to draw the Appeal Panel's attention to a large number of cases from the world of sports law, none of these cases provided an accurate analogy for the level of offending in this case. The ECB had not been able to point to any authority in which a life ban had been imposed for offending of this level. The cases of Butt and others in which shorter bans were imposed, had involved more serious corruption, had involved important international test matches in which Mr Butt had been the Captain.

x. A life-time ban would remove any hope of rehabilitation. Mr Kaneria was a player of great skills who, if given a lesser penalty might in the future be able to put those skills in helping others as had another international player who had been under considerable suspicion but was later employed by the ECB to train young players. The ECB had supported a reduction for Mr Westfield partially on that basis,

7. Panel Decision on Sanction Appeal.

The Appeal Panel had no hesitation in dismissing this Appeal and upholding the life ban imposed by the Disciplinary Panel. It approves and adopts the findings on sentence of that Panel as set out in Paragraph 6 supra.

In particular this Panel emphasises the deliberate and planned approach, in conjunction with professional corrupters against whom Mr Kaneria had been warned.

Mr Westfield was a young, comparatively modest paid player, on the fringes of the First Class game and, therefore, vulnerable to temptation offered to him through Mr Kaneria, a massively experienced international player, with considerable status in the Essex set-up.

The Panel has taken full account of the cases drawn to its attention and, in particular, the more modest sentences imposed in the cases of Butt and others. Each case must be considered on its own merits and within the context of the problems faced in the relevant jurisdictions. It is noted that that Mr Butt's appeal to the CAS was on technical grounds and CAS was not asked by the ICC to consider whether the sentences were unduly lenient.

The Panel, whilst noting the authorities which suggest that spot-fixing might be less serious than match-fixing, consider that, in the circumstances of this case, the distinction is not significant. Spot-fixing, being easier to arrange and harder to detect is an on-going evil as are recent trends further to extend corruption to less high-profile cricket.

Many of the aggravating features, now enshrined in the ECB Anti-Corruption Code, are present in this case.

Although Mr Kaneria is a man without a previous disciplinary record, this Panel finds that no lesser penalty than a life ban is appropriate both as a deterrent to others and also to ensure that he has no further opportunity to damage the game.

This Appeal is dismissed.

8. Costs including costs of Proceedings before Appeal Panel.

The Panel, in the absence of Mr Smith, further convened on 9 July 2013 to hear the Appeal of Mr Kaneria in relation to costs and cross applications by him and the ECB in relation to the costs of the Appeal Panel hearings.

a. **Disciplinary Panel Hearings**.

1. The Applicable CDC Regulations

Written and Oral Submissions

i. ECB

"The 2012 CDC Regulations should apply to these proceedings rather than the 2009 CDC Regulations. The 2012 CDC Regulations were published by the ECB and came into force and effect on 9 March 2012 and therefore were in force and effect when both the ECB disciplinary proceedings against Mr Kaneria and Mr. Kaneria's appeal proceedings were commenced.

We remind the Appeal Panel that, aside from a change between the 2009 CDC Regulations and the 2012 CDC Regulations on the issue of the Disciplinary Panel's (but notably not the Appeal Panel's) power on costs awards (and specifically from a £2,000 cap to "reasonable costs or expenses"), the changes in the CDC Regulations do not have any substantive relevance to these appeal proceedings.

The ECB rejects the assertion made by Mr Kaneria, in his November 2012 Submission, that the 2009 CDC Regulations should apply as being the regulations in force at the time of his breaches of the ECB"s Directives.

Under the 2009 ECB Directives, which Mr. Kaneria has accepted have binding application to him and whose provisions have over-arching application to the Charges brought against him, it is expressly clear from 2009 ECB Directive 3.1 that Mr. Kaneria agreed to be bound by the ECB Directives and CDC Regulations as in force from time to time:
"*Each such person* [subject to the jurisdiction of the ECB] *shall comply in all respects with all Rules, Regulations, Directives (including this Directive* [3]*) and Resolutions of the ECB for the time being in force*".

Accordingly the words "*for the time being in force*" should be read into the end of 2009 ECB Directive 3.8.1 which explains how breaches of the anti-corruption Directives will be dealt with procedurally and reads as follows: "*Any breach of these Directives shall be dealt with under the Cricket Discipline Commission Regulations*".

This also simply reflects the standard and customary practice of sports governing bodies applying the procedural rules in force at the time of the start of the relevant proceedings, rather than historic procedural rules. Indeed this is obviously the standard approach taken in other judicial and quasi-judicial contexts. For example, the issue of a civil claim in the English High Court today would of course be subject to the Civil Procedure Rules in force today, not for example the 2009 Civil Procedure Rules or the old Rules of the Supreme Court.

Mr. Kaneria has sought, in his November 2012 Submission, to support his contention that the 2009 CDC Regulations are the procedural regulations which should apply in respect of these proceedings, by reference to the alleged application of the principle of "*lex mitior*". This proposition is plainly misconceived and is not accepted by the ECB.

**Lex mitior* is a criminal law principle which is invoked to prevent a defendant being made retrospectively subject to offences and sanctions which have become more stringent in the period from the commission of the alleged offence to the date of the relevant proceedings. The leading English sports law text sets out the parameters within which *lex mitior* can be applied in sports disciplinary cases as follows:

"if the rules change in favour of the athlete between the time the acts in question occur and the time the hearing panel comes to determine the charge, either in terms of what constitutes a violation...or in terms of what the sanction is for a particular violation..., the CAS jurisprudence is clear that the criminal law doctrine of lex mitior applies by analogy, i.e. the athlete is entitled to the benefit of the more lenient rule."

The doctrine of *lex mitior* therefore cannot be applied to a purely procedural issue such as the provisions in the relevant rules as to the award of costs, but applies to the issue of what constitutes a violation or the applicable sanction (i.e. in this case the length of the ban imposed on Mr. Kaneria). It is unsurprising that Mr Kaneria has not at any stage in the disciplinary or appeal proceedings sought to broaden the alleged application of *lex mitior* to such issues for the simple reason that the ECB Anti-Corruption Code (which has been in force since 1 April 2011), if anything, assists the ECB"s position on applicable violations and sanctions.

In further support of the ECB"s position on *lex mitior*, a 2005 CAS Advisory Opinion underlined the position that *lex mitior* was not applicable to procedural or evidentiary rules by providing as follows:

> 80. With regard to the procedural rules (including those concerning the "methods of investigation") to be applied by sports authorities in anti-doping proceedings, the Panel points out that, according to CAS jurisprudence, the prohibition against the retrospective application of law and the principle of lex mitior are not relevant, as they apply only to substantive rules. Indeed, in the award CAS 2000/A/274, S./FINA, the CAS stated clearly that "laws and rules relating to procedural matters apply immediately upon entering into force and regardless of when the facts at issue occurred" (in Digest of CAS Awards, II, 405). In another award, the CAS affirmed that "as a general rule, transitional or inter-temporal issues are governed by the principle „tempus regit actum", holding that any deed should be regulated in accordance with the law in force at the time it occurred. As a consequence, procedural actions […] should be done in compliance with rules and time limits in force when they are performed" (CAS 2004/A/635, Espanyol/Velez, unpublished).
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> 81. In particular, as evidentiary rules pertain to procedure, in any anti-doping proceeding the evidentiary rules to be applied are those in force at the time of the proceeding and not those in force at the time of the possible doping offence. The CAS expressly stated that an anti-doping provision setting forth "an evidentiary or procedural rule [should] be applied in this case notwithstanding the fact that the doping control at issue occurred before this provision came into force" (CAS 2000/A/274, S./FINA, in Digest of CAS Awards, II, 406).
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> 82. As a consequence, any current anti-doping disciplinary opened by a sports authority which approved and adopted the WADC, and thus all anti-doping proceedings opened in Italy nowadays, should apply the procedural and evidentiary rules currently in force as provided by the WADC.

Mr. Kaneria, in his November 2012 Submission, accepted that the scope of the *lex mitior* principle in his case was as detailed above (*) and therefore limited in its application to what constitutes a violation and the applicable sanctions. However he then constructs an entirely artificial and unsustainable argument to assert that the Disciplinary Panel's £100,000 costs order

is in fact a "sanction". In doing so, he asserts that the *lex mitior* principle applies to enable him to benefit from the costs cap in the 2009 CDC Regulations and that the decision of the Disciplinary Panel to impose a £100,000 costs order was therefore "*wrong in law*".

Mr. Kaneria develops this argument on the basis that the words "sanction" and "penalty" are synonymous and that because the CDC Regulations use a generic defined term of "*Financial Penalty*" to describe "*fines, costs and/or expenses*" that this means that, under the CDC Regulations, costs = penalty = sanction. This contention does not however bear any scrutiny, not least because CDC Regulation 8 (the Regulation governing the Disciplinary Panel's powers) is headed "*Disciplinary Panel Hearings – penalties and costs*", which makes it clear that the ECB does not view "costs" as being a "penalty" and that the defined term "*Financial Penalty*" is purely a drafting device designed to simplify the drafting of the CDC Regulations. It does certainly not follow that this somehow means that costs automatically equate to a "sanction" for the purposes of the *lex mitior* principle.

Mr. Kaneria supplements this submission with the observation that CDC Regulation 6 includes a costs contribution in a list of penalties. However, Mr. Kaneria chooses not to point out that CDC Regulation 6 is concerned with the "summary procedure" which self-evidently did not apply to the Disciplinary Panel proceedings. CDC Regulation 8, which did apply to the Disciplinary Panel proceedings, does not include "costs" in the list of penalties at CDC Regulation 8.1. Instead, the Disciplinary Panel's powers as to costs are detailed in the separate 2012 CDC Regulation 8.4 (and 2009 CDC Regulation 8.3).

Mr. Kaneria further asserts that 2009 CDC Regulation 9.15 and 2012 CDC Regulation 10.15 (which deal with the Appeal Panel's powers) "*treat penalty and costs before an appeal panel as inter-changeable expressions*". That is plainly not the case because, as per paragraph 45 above, if "costs" were a "penalty" there would be no need to refer to them separately. As stated above, it is notable in this regard that in both the 2009 and 2012 CDC Regulations, there is no financial cap or limit on the Appeal Panel's power to award costs.

In the event that any further corroboration of the ECB's position on this issue is needed, we refer to 2009 ECB Directive 3.8.19 which provides that "*the Cricket Discipline Commission retains the absolute discretion to impose any penalty within its general powers* [for the time being in force] *in respect of any proven allegation of breach of these Directives, save that the maximum penalties to be considered by the Commission in relation to an individual engaging in conduct covered by these Directives shall be as follows*". The maximum "penalties" which are then expressly listed from Directives 3.8.20 to 3.8.29 consist exclusively of bans of varying length (and/or, in some cases, the imposition of a fine). No reference whatsoever is made to "costs" in these "maximum penalty" Directives for the simple reason that costs are plainly not deemed to be a "penalty" by the ECB (and nor could the relevant Regulations and Directives be construed as such). Indeed, as per paragraph 13 above, Directives 3.8.24 and 3.8.26, being the Directives which justified the Disciplinary Panel's imposition of the life ban on Mr. Kaneria, expressly provide as follows by way of maximum "penalty":

"*Penalty*

Suspension for life from any involvement in the playing, organisation or administration of any cricket under the jurisdiction of [the ECB]*."*

The ECB therefore re-iterates the oral submission of its Leading Counsel at the 22 June 2012 Disciplinary Panel hearing that the issue of costs is "*an administrative decision consequent on the fact that there has been a contested hearing*" and that a costs order is not a penalty but "*simply a function of the fact that someone has to bear those costs*". The sanction/penalty against Mr. Kaneria is the ban imposed by the Disciplinary Panel (and any ban and/or any fine imposed by the Appeal Panel). The award of costs is a separate consequence of Mr. Kaneria's voluntary decision to contest the disciplinary proceedings in a manner which has put the ECB to very significant cost, in circumstances where the charges against Mr. Kaneria have been resoundingly proved (twice).

Strikingly, Mr. Kaneria's Leading Counsel was even forced to accept the unsustainability of his *lex mitior* argument when asked by the Disciplinary Panel Chairman, Gerard Elias QC, at the Disciplinary Hearing on 22 June 2012 whether there was any authority as to whether costs in a civil action are or are not regarded as a sanction. Mr. Kaneria's Leading Counsel replied: "*ordinarily they wouldn't be, sir, it's only because it's in this and that's as far as I can take it*". Mr. Elias then ruled as follows on the *lex mitior* submissions of Mr. Kaneria's Leading Counsel:

> "We are satisfied that the 2012 regulations apply. We are satisfied that our ability to award costs on, if you like, an open-ended basis applies under the terms of those regulations. We do not regard costs as being a sanction to which the principles of lex mitior would apply. We have regard in this case to the costs which are submitted to us and have regard to the reason that we have been sitting here for a week, and in all the circumstances we think it appropriate that we should order Danish Kaneria to make a contribution towards those costs - but not to pay the whole of them – to make a contribution towards those costs in the sum of £100,000."

Mr. Kaneria's final argument in support of his *lex mitior* argument, at paragraph 31 of his November 2012 Submission, is perhaps the most far-fetched. It states that "*were a cricketer to know that he could be subject to such a severe costs penalty, this would undoubtedly influence any decision as to whether to reach the disciplinary code...and therefore allows a cricketer to regulation* [sic] *his own conduct*". This highlights another fundamental flaw in Mr. Kaneria's logic on the *lex mitior* issue by trying to merge the manifestly separate voluntary acts of committing a violation (which carries a prescribed sanction) on the one hand and the later voluntary decision as to whether or not to accept the costs risk of defending disciplinary proceedings (under the procedural rules in force at that time) which ensue as a result of the commission of that violation."

ii Mr Kaneria

"Mr Kaneria did not sign and was not a party to the 2012 CDC Regulations. Mr Kaneria accepted that he as bound by the 2009 ECB Directives, but not by any subsequent regulation or directive. The Disciplinary Panel made a finding to this effect.

As the ECB points out, at paragraph 37 of its written submissions, Directive 3.1 of the 2009 ECB Directives provides that:

> "*Each [person subject to the jurisdiction of the ECB] shall comply in all respects with all Rules, Regulations, Directives (including this Directive) and Resolutions of the ECB for the time being in force"*.

The final words of Directive 3.1 are clear. Mr Kaneria accepted that he was subject ECB Regulations that were in force "*for the time being"*, i.e. at that time. He did not accept that he was subject to any future Regulations.

This is a point of fundamental importance. If Mr Kaneria had been investigated and prosecuted under the 2009 ECB Regulations, the maximum costs penalty was £2,000 [Regulation 8.3.1]. If the Appeal Panel concludes that the 2012 Regulations apply, then Mr Kaneria can be subjected to an order for costs that is limited only by what is "*reasonable"* [Regulation 8.4.1].

The obvious unfairness in that contrast is underlined by the following issues:

a. Both Mr Kaneria and Mr Westfield have faced the same charges in the same proceedings. Yet Mr Westfield has been prosecuted under the 2011 ECB Regulations, and so is subject to a maximum costs order of £2,000. It flies in the face of fairness for Mr Kaneria to have been placed at such a significantly different risk of costs than Mr Westfield, when both have been prosecuted at the same time;

b. The ECB first sought to investigate Mr Kaneria for these disciplinary offences during the summer of 2010. On 27th May 2010, Mr Collier wrote to Mr Kaneria on behalf of the ECB. Mr Collier wrote:

"*We understand that you have been arrested on suspicion of conspiracy to commit fraud in relation to a Pro 40 cricket match which took place in September 2009 and have now been bailed pending a hearing in September.*

"This is clearly a very serious allegation which could, if proved, also constitute a serious breach of the Cricket Discipline Commission Regulations."

Mr Collier invited Mr Kaneria to attend a meeting at Lords, which was also attended by a partner from the ECB's solicitors, Onside Law, Mr Jamie Singer. During this meeting, the ECB discussed suspending Mr Kaneria's registration from cricket and referred to a possible disciplinary offence under the 2009 ECB Regulations. Although this meeting took place on 1st June 2010, the ECB did not proceed with the prosecution of Mr Kaneria until 2012. It is not known why the ECB chose to wait until the 2012 ECB Regulations were in force before proceeding with the prosecution of Mr Kaneria.

Certainly, the ECB appears to have been aware long before the coming into force of the 2012 ECB Regulations of the central building blocks of the case against Mr Kaneria (including, in particular, the alleged confession by Mr Westfield to Mr Palladino). It is obviously unfair to penalise Mr Kaneria with such a stringent costs order simply on the basis of the timing of the ECB's investigation.

However, this obvious unfairness can be avoided by the proper application of the correct legal principle, namely *lex mitior*.

The ECB accepts that the principle of *lex mitior* applies to a sanction or penalty imposed by a disciplinary panel. Lewis & Taylor set out the following parameters for the application of this criminal law principle:

"*… if the rules change in favour of the athlete between the time the acts in question occur and the time the hearing panel comes to determine the charge, either in terms of what constitutes a violation … or in terms of what the sanction is for a particular violation …., the CAS jurisprudence is clear that the criminal law doctrine of lex metior applies by analogy, i.e. the athlete is entitled to the benefit of the more lenient rule".*

For reasons which are unclear, the ECB has not provided the Appeal Panel with any definition of "*sanction"* for these purposes. A *"sanction"* is defined in the Concise Oxford English Dictionary 2008 as "*a threatened penalty for disobeying a law or rule*". The same dictionary defines a "*penalty"* as: *1 a punishment imposed for breaking a law, rule, or contract. 2 (in sports and games) a handicap imposed on a player or team for infringement of rules.*

According to either of these definitions, an award of costs of £100,000 is selfevidently a "*sanction"* or *penalty"*. It is a punishment imposed on Mr Kaneria as a consequence of a finding that he has broken the disciplinary rules. If there had been no finding that Mr Kaneria had broken the disciplinary rules, he could not be made subject to a costs penalty.

This conclusion is entirely consistent with the wording of the ECB Regulations themselves, which treats and defines costs as a "*financial penalty"*:

a. Regulation 1.1.16 of the 2009 Regulations defines a "*Financial Penalty"* as "*any liability imposed by any Disciplinary Panel and/or any Appeal Panel to pay any fine, costs and/or expenses"* ;

b. Regulation 6 of the 2009 Regulations treats "*penalties and costs"* under the summary procedure as being the same. Accordingly, Regulation 6.1 states that, "*The penalties available under the summary procedure shall be any one or more of the following:…*

6.1.6 a contribution to the costs and expenses incurred by the ECB in connection with the Complaint, limited to £250" .

This provision plainly provides that "*costs"* is a "*penalty"* for the purposes of the ECB Regulations. The ECB attempts to distinguish this provision on the basis that it, "*… self-evidently did not apply to the Disciplinary Panel proceedings"*. However, that is a distinction without a difference. The ECB has not provided any principled basis as to why "*costs"* would be treated as a "*penalty"* in the summary procedure, but not in disciplinary panel hearings. Indeed, paragraph 7 of the 2009 ECB Regulations guidelines provides that it is intended that "*the penalties available under the summary procedure are less than if the matter proceeds to a Disciplinary Panel Hearing";*

c. Regulation 8 of the 2009 Regulations also treats "*penalties and costs"* in disciplinary panel hearings as part of the same regulation. Regulation 8.4 refers back to Regulation 1.1.16 and requires that an order for costs as a "*Financial Penalty"* is payable forthwith unless otherwise stated. This underlines that "*costs"* is a "*penalty"* for the purposes of the 2009 ECB Regulations;

d. Regulation 9.15 of the 2009 Regulations also treats "*penalty and costs"* before an appeal panel as inter-changeable expressions.

The ECB has no principled response to these submissions. At best, the ECB suggests that the use of the phrase "*Financial penalty"*, which the ECB accepts includes costs, is *"purely a drafting device"*. However, it is a "*drafting device"* that provides a definition of what a financial penalty is. Such a penalty includes costs. It follows that an order for costs is plainly a sanction.

The ECB seeks to get around this difficulty by relying on the 2009 ECB Directives (at paragraph 48 of its written submissions). However, the Directives are of little assistance, as they do not purport to provide an exhaustive definition of every available penalty, but rather simply to summarise what the maximum available penalty is. It is implicit in paragraph 3.8.19 of the 2009 ECB Directives that a disciplinary panel has the power to make an order for costs as a penalty:

> "*The Commission retains the absolute discretion to impose any penalty within its general powers in respect of any proven allegation of breach of these Directives, save that the maximum penalties to be considered by the Commission in relation to an individual engaging in conduct covered by these Directives shall be as follows:"*

The ECB has also failed to draw the Appeal Panel's attention to the treatment of "*costs"* as a "*sanction"* in its own *"Anti-Corruption Code"*. Article 6 of the ECB "*Anti-Corruption Code"* is entitled "*Sanctions".* Article 6.2 defines the permissible range of ineligibility periods for a number of offences, and explains that "*IN ALL CASES: the Anti-Corruption Tribunal shall have the discretion to impose an unlimited fine on the Player…"*. Article 6.3.3 refers to "*a fine and/or costs award"* inter-changeably as available sanctions. The phrase, "*a fine and/or costs award"* is repeated on two occasions in Article 6.3.3 and on a further occasion in Article 6.7. This means that the ECB "*Anti-Corruption Code"* is entirely consistent with the ECB Regulations in defining "*costs"* as a "*sanction"* or "*penalty"*.

The ECB, in its written submissions has failed to draw the Appeal Panel's attention to any authority that suggests that costs is not a "*penalty"* or "*sanction".* Rather, the ECB's assertion that a costs penalty is "*an administrative decision consequent on the fact that there has been a contested hearing"* is unsupported by any authority or regulatory reference. Moreover, this bold assertion runs entirely contrary to the ECB Regulations and the ECB "*Anti-Corruption Code"*. It also runs entirely contrary to the commonly accepted dictionary definition of a "*sanction"* or "*penalty"*.

It is also clear that, in the wider civil law, an order for costs can be imposed as punishment for conduct on the part of one of the parties. Treating costs as a penalty is consistent with the Civil Procedure Rules 1998, which provide that the "*general rule"* on costs is that *"…the unsuccessful party will be ordered to pay the costs of the successful party…*".Obviously, as with any penalty, the civil courts have a discretion about whether to make a costs order against a party, but the usual approach is that an unsuccessful party will be penalized with a costs award if it loses a civil claim. Where a party engages in litigation in an unreasonable manner, the civil courts can punish such behaviour with an order of indemnity costs, pursuant to CPR r. 44.4. The ECB is plainly

aware of the concept of punishing vexatious conduct of litigation with an order for costs on the indemnity basis, as it seeks such an order against Mr Kaneria at paragraph 47 of its written submissions (despite the obvious absence of any finding in the 29-page written reasons of the Appeal Panel that Mr Kaneria's appeal was vexatious).

The final reason as to why a costs order should be subject to the principle of *lex mitior* is that this is the approach that the CAS takes to administrative issues that penalise a party. In the case of *FK Probeda and others*, an issue arose over whether the appellants should be put to the additional costs of translators in their disciplinary proceedings. The CAS considered this issue at paragraphs 65 to 71 of its written reasons, and found that the principle of *lex mitior* applied to the issue of translation costs, no doubt because such costs put a party to a penalty:

> *"When the Club registered for the 2004/2005 Champions League tournament, it signed a mandatory form called "Recognition of the Court of Arbitration for Sport" in which it undertook, inter alia, "to be bound by and observe the UEFA Statutes and relevant regulations, including the Disciplinary Regulations and relevant UEFA club competition regulations, as well as any other essential decisions taken by the competent bodies regarding the competition in question". The match which was allegedly fixed took place on 13 July 2004 when the 2004 edition of the UEFA Disciplinary Regulations was in force. The Club acknowledged those regulations when registering for the 2004/2005 UEFA Champions Leagues qualifying rounds by signing the abovementioned document.*
> *Thus, the Club submitted to the 2004 edition of the statutes and regulations of UEFA.*
>
> *The present case relates to a disciplinary procedure because of the alleged participation of the Appellants in a match fixing scheme during a qualifying round of the Champions League, a competition organized by UEFA. According to article 2 of the 2004 and 2008 DR, this disciplinary case is thus subject to the UEFA Disciplinary Regulations. The officials and the players of the Club are compelled to abide by the statutes, rules and regulations of UEFA when they participate in the UEFA Champions League. This follows from article 3 2004 DR. … It is true that the UEFA Control and Disciplinary Body applied the 2008 DR because of the principle of the lex mitior which it deemed applicable in the present case. The UEFA Appeals Body then applied the 2004 DR, "except in specific cases where the 2008 edition is considered to be more favorable towards the appellants, for example the payment of the interpreter costs."*
>
> *Considering that (i) the Appellants never formally acknowledged the 2008 DR, as Pobeda did not participate in UEFA club competitions in the 2008/2009 season, and (ii) that regarding the involvement of players, officials or clubs in active or passive corruption, neither the nature nor the extent of the measures the disciplinary bodies may take have changed in the 2008 DR, the Panel adopts the same approach as the UEFA Appeals Body and applies the 2004 edition of the UEFA Statutes (hereinafter "the 2004 Statutes") and the 2004 DR except in specific cases where the 2008 DR are more favorable to the Appellants."*

The ECB would no doubt describe the issue of interpreter costs as a "*purely procedural issue*". However, the CAS plainly considered that it would penalise the appellants to require them to pay the costs of interpreters simply on the basis that the relevant UEFA disciplinary rules had changed between 2004 (when the offence was committed) and 2008 (when the offence came before the disciplinary tribunal). As a result, the CAS applied the principle of *lex mitior* to the interpreter costs in that appeal.

It follows that the Appeal Panel should adopt the same approach to the issue of costs (which, before the Disciplinary Panel, included the costs of an interpreter for Mr Kaneria). That is what the principle of *lex mitior*, when properly applied to this case, requires.

It follows that it would be an error of law and an abuse of the English language for a costs order of £100,000 to be treated as anything other than a "*penalty*". The principle of *lex mitior* therefore clearly applies to costs orders made by the disciplinary panel. This is consistent with the policy behind the

principle of *lex mitior*, which is that a person should know in advance of carrying out any action what punishment he will receive should he commit any offence. This enables cricketers to regulate their conduct accordingly.

The Appeal Panel is therefore respectfully invited to replace the costs order made by the disciplinary panel with an order for costs of up to £2,000."

In his oral submissions, Mr Bunting emphasised, inter alia, what he submitted was the contractual nature of the undertaking document signed by Mr Kaneria in April 2009 and submitted that the wording indicated an agreement to be bound only by the then current Rules and Regulations.

Decision of Panel

The Panel is satisfied that the procedures in relation to both the Disciplinary Panel hearing and the current Appeal are governed by the Regulations in force in 2012 - at the time of the institution of proceedings against Mr Kaneria in 2012.

Under the terms of the 2009 Regulations to which he agreed to be subject in signing his undertaking, he accepted that he was required to comply with all Rules, Regulations and Directives "for the time being in force."

The 2009 Directive, in dealing with breaches of the Regulations, provided for breaches to be dealt with under the Cricket Discipline Commission Regulations. The proceedings were begun in 2012 and the 2012 Regulations were those then in force.

The Panel does not accept, even if the form of undertaking were to be accepted as forming a contract as between the ECB and the player that the wording "present Rules ……" dealing with, for example, behaviour override the procedural provisions of later disciplinary proceedings and the provision for the costs of such proceedings.

The relevant regulations in 2012 were significantly different in relation to costs and Mr Kaneria has, therefore, become liable under the terms of those regulations to pay a substantially higher amount than the capped 2009 figure of £2000.

It is argued on Mr Kaneria's behalf, that, in any event, his liability, should, under the terms of lex mitior be limited to £2000.

Lex mitior is a well-recognised principle that if the law be changed in relation to offences or sanctions and becomes more stringent, a defendant should be subject only to the less serious offence or sanction.

The general principle of lex mitior is not challenged in these proceedings – the issue, however, turns on whether or not, under the terms of the ECB rules, regulations or directives, an order for costs is properly to be considered a sanction or penalty.

The Panel has considered, with care, the submissions made on Mr Kaneria's behalf but is satisfied that the ECB Regulations, governing these proceedings clearly distinguish between sanctions/penalties which constitute a form of punishment and the costs incurred during the course of proceedings. It is true that the definitions section refers to Financial Penalty as being a liability imposed by a Panel to pay any fine, costs and/or expenses but this is to seen in light of the specific distinction drawn between penalties and costs. When in Par 8 it is stated that "any Financial Penalty shall be paid forthwith" it is quite clear that this section refers only to the recouping of any financial debt owed to the ECB whether by way of fine (a specific penalty) or the costs/ expenses provided for separately in the Regulations.

The Panel has considered the case law drawn to its attention including the case, in another jurisdiction, of Probeda.

Superficially, the case would appear to have similarities to Mr Kaneria's case. Mr Mill had sought to distinguish the Probeda case on the basis that that CAS on appeal had adopted a loose reference to lex mitior whereas a close examination of the case made it clear that the Probeda decision was founded on the wording of the two sets of Regulations. It was not an authority, he submitted, for any proposition outside the terms of the particular statutes involved.

The Panel considers that, at the most, Probeda is potentially persuasive but, in the Panel's judgment, the ECB regulations are clear and applicable.

Accordingly, the Panel rules that the costs and expenses in relation to the proceedings are at large and not capped to a £2000 limit.

2. Reasonableness of Costs Order

Written and oral submissions

i. ECB

"Under Regulation 8.4.1 of the 2012 CDC Regulations, the Disciplinary Panel may "*require the Accused [i.e. Mr. Kaneria] to pay the reasonable costs or expenses incurred by the ECB in connection with the Disciplinary Panel Hearing*".

At the Disciplinary Panel hearing in June 2012, the ECB submitted a costs schedule in connection with those proceedings in the total sum of £140,665 plus VAT. These costs were inherently reasonable and represented a significant discount from the standard fees of both the ECB"s solicitors and the ECB"s Leading and Junior Counsel.

The charges against Mr. Kaneria were resoundingly found by the Disciplinary Panel (and now the Appeal Panel) to have been made out. In the circumstances, we submit that the Disciplinary Panel's costs order of £100,000 was eminently reasonable (representing as it does less than 60% of the costs incurred by the ECB).

Mr. Kaneria's submission in his November 2012 Submission that the amount was excessive "*given that the proceedings were brought as a prosecution by the ECB"* is not understood. The ECB was in possession of very compelling evidence that Mr. Kaneria had committed a corrupt act and was duty-bound to bring its prosecution. The fact that the ECB brought the prosecution before the Disciplinary Panel is entirely irrelevant to the costs which it was forced to incur in obtaining a corruption finding against Mr. Kaneria to the equivalent of the criminal standard of proof in the face of Mr. Kaneria's consistent flat denial of any wrong-doing (which denial continues to this day)."

In oral submissions, Mr Mill confirmed that a separate schedule, for payment by the ECB had been prepared separating the costs and Counsel's fees etc. in relation to Mr Westfield from those which had been claimed against Mr Kaneria.

ii. Mr Kaneria

"Without prejudice to the submissions set out above, the Appeal Panel is respectfully invited to conclude that the costs order of £100,000 was unreasonable in all the circumstances of the case. In particular:

a. The proceedings before the Disciplinary Panel were described as a "*prosecution"*. Mr Kaneria had no choice over the venue, the administrative arrangements, or the means of this prosecution;

b. Given the ECB's assertion, at paragraph 55 of its written submissions, that "*The ECB was in possession of very compelling evidence that Mr Kaneria had committed a corrupt act"*, it is not understood why the ECB chose to instruct such a senior Queen's Counsel as well as a leading junior and experienced solicitors.

c. It is wholly unclear why Mr Kaneria should face an order for costs of £100,000 whereas no order for costs was made against Mr Westfield. Mr Westfield plainly sought to contest the issue of sanction and also appears to have required a full oral hearing before the Disciplinary Panel in order to clarify the scope of his own guilt, given his repeated lies about his own involvement in the spot-fixing agreement. It flies in the face of fairness for Mr Kaneria to be required to pay for Mr Westfield's disciplinary hearing, in addition to his own;

d. Mr Kaneria reserves his right to develop these submissions orally, by reference to the ECB's schedule of costs for the Disciplinary Panel proceedings, at the oral hearing."

In oral submissions, Mr Bunting emphasised the financial difficulties inevitably faced by his client. The earnings of professional cricketers were limited and he had now lost his livelihood. There was no evidence that he had received any financial benefit from his behaviour and he had already been faced with payment of the Commercial Court costs and the costs of his own representation.

Decision of Panel.

The Panel confirms the costs order made by the Disciplinary Panel. The amount claimed had not included separate costs incurred in relation to Mr Westfield who had pleaded Guilty at the outset of those proceedings. Even so, the claim had reflected a substantial deduction from the total costs payable by the ECB.

The extent of these costs reflected the work necessary to prove the disputed proceedings and are found to be reasonable.

The Appeal against the Disciplinary Panel's costs order is, therefore, dismissed.

b. Appeal Costs

Cross applications for costs were made.

ECB sought costs incurred in the successful prosecution of the Appeal Re-hearing.

Mr Kaneria claimed costs against the Board relating to the abortive proceedings in December 2012 when Mr Westfield failed to appear as the Board's witness.

Schedules of Costs were prepared by each side.

The ECB's case as set out in written submissions was:

"As ECB‟s Leading Counsel confirmed at the appeal hearing on 26 April 2013, the ECB seeks a costs order against Mr. Kaneria in respect of its costs of Mr. Kaneria's appeal proceedings. Accordingly the ECB has filed contemporaneously with this submission its month-by-month costs schedule for the period from 11 July 2012 (being the date of receipt of Mr. Kaneria's Notice of Appeal) to the end of the 2 July 2013 hearing. The ECB‟s costs of the High Court application which it was forced, due to Mr. Kaneria's opposition, to make in March 2013 to secure the witness summons in respect of Mr. Westfield are obviously excluded from this costs schedule. Mr. Kaneria has made a part payment of those High Court application costs (as ordered by the Court) but the balance has not been agreed by Mr. Kaneria and is now to be the subject of detailed assessment proceedings.

It is clear that neither the 2012 nor the 2009 CDC Regulations impose any cap or limit on an Appeal Panel costs order. Mr. Kaneria was found by the Appeal Panel in its decision to be a "*thoroughly devious and dishonest witness*". The ECB has been forced, in the face of this protracted deceit and dishonesty, to incur further very significant costs in defending Mr. Kaneria's appeal proceedings (including numerous interim applications and hearings) in circumstances

where two independent panels have now found him guilty beyond a reasonable doubt of the corruption charges against him. Mr. Kaneria's appeal therefore, on any view, borders on the vexatious and the ECB submits that its costs should be covered by Mr. Kaneria on an indemnity basis. "

Mr Kaneria's written submissions were as follows:

"Given that these appeal proceedings are only part concluded, it is inappropriate to set out detailed grounds for opposing the costs order sought by the ECB in these submissions. Indeed, it is noted that the CAS regularly makes no order for costs where a party's appeal has been partly successful.

Without prejudice to (the), above, Mr Kaneria does not accept that it would be reasonable to impose a costs order against him for the sum sought in the ECB's schedule of costs. Indeed, it is noted that the ECB seeks costs for interim applications that it lost and that were necessary only because of the non-compliance of its primary witness, Mr Westfield (in circumstances in which the Appeal Panel has described Mr Westfield's reasons for his non-cooperation as "*specious*"). It appears, at this stage, that the ECB again seeks an order for costs only against Mr Kaneria, and not against Mr Westfield, despite the fact that both men have brought appeals against the decision of the Disciplinary Panel. Such an approach is highly unfair.

Mr Kaneria shall set out full submissions in respect of the ECB's proposed costs order at the hearing on 2nd July 2013, in the event that this remains a live issue."

The ECB claimed a total of just over £241,500 exclusive of VAT consisting of approx. £88,800 solicitors cost, £110,000 Counsel's fees and £42,600 other disbursements. These figures, Mr Mill suggested fully reflected the work done although he accepted that, on a formal assessment in Court proceedings, the full figure might not be granted. In addition, he accepted that approximately £60,000 in total had related to the work done in connection with the December proceedings and that, in principle, Mr Kaneria should not be called upon to bear those costs. There was no costs duplication as a result of the abortive proceedings. The case had been of major importance to the Board and justified appropriate representation.

Mr Bunting did not challenge hourly rates or calculations of time spent in relation to solicitors' costs but suggested that the proceedings had not justified the instruction of Leading Counsel of the standing of Mr Mill. He also suggested that the legal fees generally might have been inflated by repetition of charges in relation to the same preparatory work for the December and April hearings respectively.

Mr Bunting who, together with Mr Moloney QC and their instructing solicitors, had represented Mr Kaneria under a fixed fee agreement, sought, in relation to the December hearing, both a reduction of the costs sought by ECB and also payment by the Board of Mr Kaneria's own costs. The adjournment, he submitted, had been caused solely by the failure of the Board's witness to attend, no warning had been given until the morning of the hearing although, it transpired, the Board had been aware of the problems for some days. Finally, the Board had sought to make a number of unmeritorious legal arguments in an attempt to bolster its case weakened by Mr Westfield's absence. He sought an order for approx. £31,000.

In reply, Mr Mill acknowledged the fact of wasted costs. He emphasised, however, that the totality of costs had been unnecessarily incurred as a result of Mr Kaneria's determination to fight the proceedings. A middle ground, he suggested, was for each side to be responsible for its own costs in relation to the December hearing.

Both sides agreed that, if it were thought appropriate for the ECB to be responsible for any of Mr Kaneria's own costs, it should be done by way of a set-off calculation rather than Counter Orders.

Decision of Panel

The Panel has considered the question of costs with care. A very considerable amount of work has necessarily been incurred in these high profile and significant proceedings. The case has been fiercely contested, at all stages, by Mr Kaneria and these costs have been incurred as a result.

The Panel is satisfied that the use of lawyers of the highest quality has been entirely justified. This inevitably has meant substantial costs.

In deciding the amount to be paid by Mr Kaneria, the Panel is conscious of the waste of costs directly resulting from Mr Westfield's failure to attend in December. It is satisfied that there has not been unnecessary repetition of work. Costs, however, were thrown away by the non-attendance and some incurred in dealing with the ECB's last minute applications on the first scheduled day.

There has been no challenge to such costs aspects as hourly rates and time spent by solicitors but the Panel thinks it right to give weight to Mr Mill's entirely proper concession as to the likely outcome of a court based assessment of costs in a case of similar weight.

All in all, the Panel has decided that Mr Kaneria should pay the further sum of £100,000 towards the costs of the Appeal proceedings and orders accordingly. This order is in addition to the Disciplinary Panel costs order.

9. Sanctions Appeal of Mr Westfield.

Mr Westfield was charged with a breach of 2009 Directive 3.8.15 in that he received a reward, resulting from his conduct in the Durham Essex match, which could bring him or the game of cricket into disrepute.

This charge was said to reflect Westfield's admission to the Crown Court that he had been paid £6000 for agreeing deliberately to concede a given minimum number of runs in his first over as a bowler in the Durham v Essex Pro 40 match.

He pleaded Guilty on the first day of the Disciplinary Panel proceedings and was suspended for 5 years, but for the final 2 years this suspension applied only to cricket "in any Team England and First-Class County cricket environment."

10. Determination of Disciplinary Panel

The Disciplinary Panel in determining the penalty imposed on Mr Westfield stated as follows:

"For the avoidance of doubt, we wish to indicate that were Westfield to have committed the offence to which he pleaded guilty, in 2012 - when the education and training programmes were in place – on a fully contested basis, we would have imposed a suspension of 9 years. Let no one underestimate the seriousness of failing to perform - or agreeing so to do – on ones merits.

We bear in mind the fact that his conduct occurred in 2009, that he, an insecure 21 year old, was targeted and pressurised by a senior team mate. To the ECB's charge he pleaded guilty at the first opportunity and is entitled to significant credit for that.

His evidence to this Panel was the core evidence which has exposed and led to the conviction of Kaneria and we accept that this has taken some courage.

We bear in mind also all the matters urged upon us by Mark Milliken-Smith QC with regard to his character and we note his stated willingness to assist PCA in any future anti-corruption education programme.

Accordingly, we conclude that the appropriate sanction in his case is

Suspension from involvement in all cricket under the auspices of the ECB **for 5 years** but we shall, exceptionally, mitigate that penalty by permitting him to participate in club cricket (on terms which we set out in detail below*) for the last 2 years of that suspension period.

This suspension in relation to Westfield is effective from 17th February 2012.

*In relation to Mervyn Westfield, the Panel has imposed a suspension of 5 years. For the first 3 years, this suspension applies to any involvement in cricket under ECB jurisdiction at any level including playing, coaching and administration.
For the final 2 years, the suspension applies only to cricket in any Team England and First-Class County cricket environment including First-Class County Second XI, Unicorns or any other team participating in ECB First XI or Second XI competitions, Minor County cricket and any involvement in First-Class County Academy or age-group cricket.

For the avoidance of doubt, the Panel would not wish to restrict Mervyn Westfield's ability to participate in PCA anti-corruption educational programmes or videos"

11. Grounds of Appeal

By Notice of Appeal dated 5 July 2012 Mr Westfield appealed as follows:

"Mr Westfield appeals against this sanction upon the basis that it is manifestly excessive in all the circumstances of his case. For the assistance of the ECB the primary, though not exclusive, grounds of this appeal are as follows:

Ground 1
1. Given its ultimate sanction it is submitted that the starting point in terms of suspension alighted upon by the Disciplinary Panel was markedly too high if it then gave appropriate credit to Westfield for the significant mitigating factors applicable to his case.

Ground 2
2. In the alternative it is submitted that the Disciplinary Panel failed to give Westfield sufficient credit for his giving evidence against Kaneria at the Disciplinary Panel in circumstances where, as the Disciplinary Panel found that:

(i) Westfield's account "was obviously central and vital to the prosecution case"; and
(ii) "Westfield was plainly telling the truth".

3. It is important to note that the ECB, in their submissions as to sanction made to the Disciplinary Panel, highlighted the importance of this aspect of Westfield's mitigation. Indeed there is no issue that but for Westfield's evidence there would have been no sustainable case against Kaneria.

4. Moreover, it is contended on behalf of Westfield that it is proper to attach significant weight to this factor not only to reflect Westfield's courage in his actions, but also because it must be right to encourage others who might be in a similar position to Westfield not only to come forward (as they are now duty bound to do) but, if necessary, to give sworn evidence.

5. It is noteworthy that Westfield has confirmed to the ECB that he will again give evidence in any appeal lodged by Kaneria against the findings of fact of the Disciplinary Panel.

Ground 3
6. It is submitted that, taken either separately or together with Ground 2, no or insufficient credit was given by the Disciplinary Panel to Westfield for his plea of guilty at the first opportunity.

Ground 4
7. Given the approach taken by the International Cricket Council to sanction in the case of Mohammed Amir (namely a suspension for the minimum term of 5 years), and considering the written submissions of the ECB as to sanction in the case against Danish Kaneria, it is submitted that the suspension imposed Westfield is disproportionate in comparison.

8. There are significant factual distinctions between these cases which reduce the seriousness of Westfield's position as against Amir:

(i) Westfield's corrupt behaviour is accepted to have been limited to one over in the game against Durham – Amir's criminality was significantly more extensive;
(ii) as was recognized by the Disciplinary Panel, there were no education and training programmes in place in 2009 in County cricket – however such programmes had been in place for a considerable time in international cricket at the time of Amir's offending;
(iii) this offence occurred in the context of county cricket and not in international cricket;
(iv) from Westfield's perspective, this corruption cannot fairly be termed "carefully prepared" as that in the Lord's case was.
9. Quite apart from the above, and very importantly, Amir neither pleaded guilty nor, obviously, gave evidence against any of his co-perpetrators.

Ground 5
10. Given all of the above it is submitted that the Disciplinary Panel failed to give sufficient weight to Westfield's character and in particular the Panel's own finding, namely "we are satisfied that in September 2009 he was both vulnerable and naïve – relatively unworldly and unsophisticated." As the Disciplinary Panel found this was "the deliberate corruption of a young and vulnerable player."

11. The character testimonials submitted on Westfield's behalf, as well as the evidence led by the ECB before the Panel, not only supported these findings but spoke volumes as to his wider positive qualities.

12. Not only has Westfield already indicated his willingness to participate in an educational and awareness programme regarding corruption for the Professional Cricketers' Association, but we understand that the ECB are also keen, notwithstanding these proceedings, to utilize Westfield's services in a similar way.

For these reasons, which will be amplified in oral argument, it is submitted that the sanction imposed upon Westfield is excessive."

13. Evidence before the Panel

A Mr Collier:

Mr Collier wished to emphasise that the ECB supported the appeal in the context of its priority of encouraging a flow of information from which the major corrupters could be identified and prosecuted. As long ago as January 2012 an amnesty had been granted waiving any sanctions for delay in reports of corruption or corrupt approaches and the support for the appeal was consistent with that policy.

There was grave concern both in cricket and other sports at the continuing level of corruption fuelled by massive sums of money being bet on games. There was evidence that even in domestic, as opposed to international, l cricket hundreds of millions of pounds were being bet on a single game. The recent ICC conference had spent a full day discussing means of encouraging people to come forward with information and corruption had probably been the number 1 item on the last IOC Agenda. The loss of integrity would destroy sport.

Although distinctions might be sought between match and spot – fixing, it was the instigation of corruption and attempts to corrupt young players which were the most heinous offences especially when committed by senior and influential figures.

There was a very delicate balance between zero tolerance and encouraging reporting but a harsh ban was likely to be counter-productive. Prison sentences imposed on Mr Westfield and others had been a real deterrent round the world and it was now important to encourage reporting on the basis that penalties in discipline proceedings should reflect help given.

Mr Westfield's evidence had been crucial, from the outset, in establishing the case against Mr Kaneria

He believed he could now play a vital role in the PCA educational system developed closely with ECB and do valuable work in the recreational game.

B Jason Ratcliffe .(Deputy Chief Executive of PCA) also supported the Appeal.
A major element of his work was overseeing the education and support services for professional players. A major recent initiative has been an anti-corruption programme seeking to ensure players were aware of rules, methods and prevention strategies. In May 2012 he had discussed with Mr Westfield taking part in programme aimed at alerting cricketers and others to dangers and consequences of corruption in cricket. Mr Westfield had agreed to take part in a video filming session dealing experiences from approach, underperforming, prison and impact on lives self/family. The video was to be used in multiple ways to enhance education in cricket and other sports.

Unfortunately, contact with the PCA had broken down. The Westfield family, particularly his parents, had been deeply resentful of his prison sentence and the decision of the Disciplinary Panel. They were dissatisfied with the legal representation arranged by the PCA and shut off contact with the PCA. He believed it was the parents who had influenced his lack of co-operation with the appeal proceedings and had been largely influential in the press release issued in April. He had now made direct contact Mr Westfield who, he now believed, was anxious to get his life back on track and to co-operate fully in the educational programme. It was of the greatest importance that a player tell of his own experiences – just as Addictive and Mind Matters tutorials had had an enormous effect because players who had been convicted of drugs or suffered mental stress had spoken out. He had no doubt that Mr Westfield's account of his experiences in HMP Belmarsh would have a real effect.

It was hoped that the programme with Mr Westfield would include the video, similar tutorial programmes, pre-season meetings at each county and attendance at the Rookie Camp arranged each year for 1st year professionals.

He hoped that Mr Westfield could re-integrate quickly into club cricket – in Mr Ratcliffe's view, his professional career was, in practical terms, over.

C, Mervyn Westfield

Mr Westfield had written to the Panel to express his deep remorse. In evidence he acknowledged he had not behaved properly in his failure to co-operate and in the press release. He and his family had suffered greatly from what he had done. Cricket had been his whole life since the age of 6 and it had been hard to come to terms with his sentence and the ban. He knew that he had done great damage to the game and now wanted to give something back – both to young people in coaching and to professionals by telling of his experiences. He was keen to do anything required of him.

14. Written and Oral Submissions

a. Sentence

i. ECB

1. The ECB wished to see a reduction in the lengths of suspension. It did not support such a reduction or reductions for reasons specific to Mr Westfield's case but because of its concern that the length of such suspensions might have an adverse impact on its efforts to tackle corruption in cricket.

2. Tackling corruption in cricket was one of the ECB's very highest priorities. Detecting corruption was notoriously difficult and the ECB wished to do everything to encourage its registered cricketers and other members of the wider cricketing

fraternity to report corrupt or suspicious activity and thereby expose those who are corrupting (or seeking to corrupt) the game.

3. The ECB needed to be able to encourage those who, in the future, were in a similar position to Mr. Westfield to come forward and give evidence.

4. The corollary of that ECB policy was that it wished to avoid, to the extent possible, circumstances arising which in any way would be likely to discourage or deter whistle-blowing.

5. The ECB believed that the length of the bans imposed by the Disciplinary Panel on Mr Westfield was unhelpful in that context. While in no way condoning Mr Westfield's conduct in connection with the current appeal, it was highly possible that his behaviour since June 2012 was due to grievance with the ban.

6. The ECB would wish its disciplinary process to be seen by all concerned as a positive feature of its fight against corruption, and one which encouraged the involvement of those who were in a position to provide material assistance.

7. In specific terms, the ECB was concerned that the decision of the Disciplinary Panel in relation to Mr. Westfield's sanction:

   (i) did not give sufficient weight to the importance of Mr. Westfield's evidence in proving the case against Mr. Kaneria nor to the significance of such evidence and the Disciplinary Panel's decision when viewed in the wider context of the sporting imperative of rooting out corruption from cricket; and

   (ii) did not give sufficient credit to Mr. Westfield for his courage in voluntarily giving evidence against his corrupter at the Disciplinary Panel hearing in June 2012. He had volunteered his original statement which had enabled the process to begin.

8. A continuing flow of information was vital in the fight against corruption and in conjunction with the PCA, the ECB were trying to create a reporting culture amongst players.

ii. <u>Mr Westfield</u>

Mr Patel sought:

i A reduction of the suspension from involvement in all cricket (including playing, coaching and administration) under the auspices of the ECB from 5 years to 1 year

ii A reduction of the suspension from involvement in all cricket involving Team England, First-Class County cricket including First-Class County Second XI, Unicorns or any team participating in ECB First XI or Second XI competitions, Minor County cricket and any involvement in First-Class County Academy or age-group cricket under the auspices of the ECB from 5 to 3 years.

He submitted that the suspensions should be reduced because:

i) <u>Mr. Westfield's Role in the Disciplinary Proceedings against Mr. Kaneria</u>

Mr. Westfield's role in the disciplinary proceedings against Mr. Kaneria was crucial. Had he not given evidence against Mr. Kaneria on behalf of the ECB, then it could not have been successful in its action against Mr. Kaneria. He gave detailed statement s as to his role and that of Mr Kaneria and accomplices.

ii) England and Wales Cricket Board Submissions.

It was particularly important that the ECB, with its responsibility for the integrity of the game, supported the appeal. He would take a full part in the educational programmes arranged by the PCA and it was hoped play a significant part in dissuading others from getting involved.

iii) Character and Testimonials

He had a previous good record and there were substantial and impressive letters of support including one from a Vice-President of the English Schools' Cricket Association. Although he had been found to be streetwise and devious in his actions after being approached, he had also been accepted as insecure and easily influenced. The MCC World Cricket Committee had recommended more leniency and understanding for young players targeted for corrupt activity.

iv) Imprisonment and Repetition of Punishment

He had been punished by two different and separate bodies and the impact of a prison sentence should be reflected in the Panel's decision.

v) Personal Circumstances and Change

He had suffered extensively in the loss of his full time career and even in his current work had had to change work places on a number of occasions due to the attitudes of public and other staff on being recognised. There would be on-going shame – he would always be remembered for going to prison for what he had done.

vi) Remorse, Loss and Suffering

He pleaded Guilty at first opportunity, has suffered financially, lost his home and lives with parents and his chances of ever playing first class cricket again were remote.

vii) Spot, not Match-Fixing

It was accepted that there were different levels of corruption within the game and it was submitted that spot-fixing had been accepted in a number of cases as not being the most serious form of offending. In this case, too, the so-called 'spot-fixing' was not delivered as per the agreement.

b. Costs

No application was made by the ECB for costs against Mr Westfield.

15. Panel's Decision on Sentence Appeal

This appeal has caused this Panel great concern.

On hearing Mr Westfield's evidence in April, the Panel was satisfied that once he had succumbed to the approaches of Mr Kaneria and his fellow conspirators, he took part willingly in the plot and felt no remorse until confronted the following year.

Even then, he sought to evade responsibility and it was not until a late Guilty plea in the criminal court that he revealed the full extent of his wrongdoing.

To his credit, he then assisted the ECB in bringing proceedings against Mr Kaneria. It is accepted that without this help, the ECB would not have been able to institute proceedings or to succeed before the Disciplinary Panel without the vital direct evidence given by him.

Thereafter, however, despite the assurances given to the Disciplinary Panel that he would assist the PCA in its educational programme, he failed to co-operate with the PCA or to assist the ECB in connection with the Appeal. As a result a very substantial amount of costs and professional and voluntary time were wasted. Even when compelled to give evidence, he was not honest in peripheral matters not directly impinging on the final decision. Furthermore, during the course of the Appeal proceedings, he caused substantial embarrassment to the ECB, PCA and the Essex County Cricket Club by issuing a widely circulated press statement which he now accepts was ill-advised and unjustified.

In these circumstances, the Panel has found difficulty in considering a variation of a sanction which it considers to have been wholly justified in the circumstances as known to the Disciplinary Panel and which, in conjunction with the prison sentence, sent out a powerful deterrent message to future transgressors.

Mr Westfield has been extremely fortunate that the PCA, in line with its responsibility for the pastoral care of its members, had through Mr Ratcliffe, and despite many rebuffs, continued its efforts to make contact with him.

The testimony of Mr Ratcliffe, as summarised in Paragraph 14 supra, provided powerful evidence for a revision of sanction. He is an extremely experienced administrator with a wide knowledge of the difficulties and temptations faced by young players in the game. He believed that Mr Westfield's remorse was now genuine and not fuelled by resentful family influence and that Mr Westfield was now anxious to make some recompense for the serious harm that he had caused. The pastoral programmes initiated by the PCA and featuring former players had been powerful tools in dealing with the problems of drug abuse and of mental stresses. Corruption was now the most dangerous threat to the stability and integrity of the game and full participation by Mr Westfield in the PCA programme would be a unique and powerful tool in that battle. He urged the Panel to reconsider the length of suspension.

Mr Ratcliffe's evidence was supplemented by the submissions of the ECB and the evidence of Mr Collier. It is highly unusual, if not unprecedented for a prosecuting authority to support an appeal against a sanction, which, appears to accord precisely with a stated need for a strong message of deterrence to go out to all involved in corruption at any level.

The Panel accepts that the ECB, together with other national bodies, is deeply worried at the extent and scope of corruption currently threatening the game and that it is privy to alarming evidence worldwide. In those circumstances, the Panel noted its concerns at any sentence which it considers might inhibit the flow of information.

The Panel, has therefore, decided to amend the terms of the suspension imposed in June 2012. The five year ban from all forms of cricket beginning from 17 February 2012 will remain but the period before which he can return to involvement with the recreational game will be reduced to enable a return not before 1 April 2014.

This return is conditional on a full and active participation by Mr Westfield in an educational programme developed by the PCA in conjunction with the ECB and approved by the Chairman of the CDC. The precise details of that programme have not yet been finalised but would be expected to include:

a. Attendance at, and participation in, the annual Rookie Camp

b. Completion of a Training Video incorporating testimony as to the effects on his personal life

c. Attendance at, and participation in, the PCA pre-season road shows to the Counties, and the PCA Annual General Meeting.

It must be clearly understood that this decision has been taken for the wider benefit of the game and that the suspension will not be lifted until the Chairman of the CDC is entirely satisfied that the work has been done conscientiously. The Panel has complete confidence in the integrity of the PCA and knows that no assurances will be given until the PCA also is entirely content with that participation. Until the conditions of the decision are met, the ban will remain in force.

The formal terms of the decision are:

1. The Determination of the Disciplinary Panel of the Cricket Discipline Commission of the England & Wales Cricket Board ("Disciplinary Panel") be varied, to the extent that the date upon which the period of the limited suspension granted by the Disciplinary Panel is to commence is to be no sooner than 1 April 2014 but then only in circumstances where there has been received by the Chairman of the ECB's Cricket Discipline Commission ("CDC") prior to that date a written confirmation from the Chief Executive of the Professional Cricketers' Association ("the PCA") that the Appellant has, to the satisfaction of the PCA, cooperated with such requests as may hereafter be made of him by the PCA in pursuance of the PCA's education programme, the terms of participation having first been approved by the Chairman of the CDC.

2. Until the Chairman of the CDC has received written confirmation from the Chief Executive of the PCA that Mr Westfield has fully complied with the condition in Para 1 above, the period of limited suspension will not take effect.

Edward Slinger (Chairman)
Ricky Needham
Tim O'Gorman
Cliff Pocock
Mike Smith

July 2013.