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BRITISH
ASSOCIATION
FOR SPORT
AND LAW

Sport and the Law Journal





**BRITISH
ASSOCIATION
FOR SPORT
AND LAW**

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Editorial

By Raymond Farrell

Editor

Our tenth Annual Conference was held at Lord's Cricket Ground on October 9th and was enjoyed by the capacity audience which was both educated and entertained by the speakers and panels on a variety of subjects. The keynote address was delivered by Minister for Sport, Richard Caborn. Andrew Jennings, author and journalist, delivered the expected pungent and hard hitting offering on his views relating to corruption in sport. As yet no writs for defamation have been received. Thanks are due to the sub-committee under the leadership of Fraser Reid who worked so hard to create such a successful event.

At the AGM preceding the Annual Conference the Chairman announced the retirement from the committee of Alistair Duff and Alexandra Felix. Both have been members of the committee for many years and I would like to record our thanks to them for all their sterling work. Hopefully, Alistair will continue to enlighten us as to developments north of the border as well as keeping us up to date with his mountaineering exploits.

We have been very fortunate in replacing Alistair and Alex with two leading lawyers. Murray Rosen QC was the founding chairman of the Bar Sports Law Group whilst Jonathan Taylor is a partner at Hammond Suddards and leader of the King's College, London post-graduate course in Sport and The Law. Both of them are very welcome additions to the committee.

One final point from the AGM. The Association has conferred Honorary Life Membership on Charles Woodhouse CVO and Robert Stinson, both of whom have served the Association at the highest level. We have indeed been fortunate to have had the services of Charles and Robert and we wish them well in their retirements.

Earlier in the year, on September 29th, the Association organised a well attended seminar at the British Academy in London dealing with the topical theme of Salary Caps in professional sport. Gerry Boon, a member of our committee and a partner in Deloitte and Touche, Chartered Accountants, outlined the benefits of a salary cap being introduced into English football. Paul Harris, another member of our committee

and a barrister in Monkton Chambers, dealt with the legal pitfalls awaiting such an introduction. The final speaker was Stephen Hornsby, a partner in The Simkins Partnership, formerly of the Competition Directorate of the European Commission, and his views on the subject can be read in this edition of the Journal.

The Commonwealth Games held in Manchester in July proved to be as enjoyable and successful as all Mancunians expected and also managed to avoid any legal disasters. The Sports Dispute Resolution Panel disposed of pre-Games problems whilst the Commonwealth Games Council itself dealt with the one major drugs related problem involving the winner of the 100 metres for men without involving the Court of Arbitration for Sport.

In October the latter body also dealt with the appeal of skier Alain Baxter against the decision to strip him of his bronze medal which he won in the most recent winter Olympics. Whilst recording its view that there had not been a deliberate attempt to benefit from use of a prohibited substance CAS reiterated its stance on strict liability. Athletes, particularly at the highest levels in professional sport, please take note.

Multiplex – An Apology

In Volume 10, Issue 1, 2002 we stated that Multiplex, the builder of the Wembley Stadium Project, was under investigation by a Royal Commission in Australia and that the Royal Commission was investigating allegations of corruption. In fact, the Royal Commission is investigating many contractors in connection with all aspects of the building and construction industry in that country. Multiplex has not been singled out in any way, contrary to the impression given in our story.

We also stated that the Federation Square development in Melbourne had been criticised by Victoria’s Auditor General for spiralling costs and our report inferred that Multiplex was responsible for this. This is not the case. Multiplex had no responsibility for the Federation Square budget.

Our story additionally suggested that Multiplex were to blame for the failed Perth Glory stadium project. In fact there has been no criticism of Multiplex’s conduct in relation to that project.

We apologise to Multiplex for these errors and for the damage caused to them and are glad to have the opportunity to correct them.

Common Land and Common Sense; Never The Twain Shall Meet

Tony Blair must police a Doomsday Book of playing fields to stop the great sell-off says journalist Matthew Pryor of The Times

“Buy land, they ain’t making it anymore,” Mark Twain wrote amongst other things and therein lies the rub of the green for common playing fields since man invented private property.

“This is not only a sports policy...it is a health policy, an education policy, a crime policy, an anti-drugs policy,” Tony Blair announced at the Labour party conference three years ago promising £750 million government funding for school sports facilities.

Who could argue with that? It is like saying fresh air is nice, or good is good. But whatever the Prime Minister would like to happen the perception is that the playing fields of this green and pleasant land are disappearing beneath concrete.

Because there are no proper statistics we have to rely on our eyes. That is something governments rarely favour, but any written record of the decline in open public space since the Second World War would be more frightening.

This time the powers that be have scrupulously avoided compiling a Doomsday Book. They will not legally enshrine or oversee a minimum standard for local authorities so it is left to organisations like the National Playing Field Association (NPFA) to fight a losing battle.

This is what the bleeding heart liberals wailing “remember the fields” tell us. How much should we care when some have no homes or teachers?

Whatever the soothing sentiments of the Prime Minister and whatever the talk of compromise in the modern world, of what is desirable against what is financially possible, do not be taken in, because something stinks.

Sport England’s statistics show a 45 per cent jump in the number of applications for building on playing fields during the year 2000-2001. They also show that Estelle Morris, the former Secretary of State for Education, and her predecessors, have given 195 consents to applications for the disposal of school playing fields and only six refusals.

In the case of privately owned land being sold off for development the local planning authority is legally required to consult Sport England but not listen to them. In 70 per cent of cases Sport England does not

respond.

None of this is mentioned in the new planning guidance for open space, sport and recreation (PPG 17) issued in July. “The statistics show,” it notes, “that the vast majority (92%) of the playing field planning applications submitted to Sport England over the last two years were not detrimental to sport or did not proceed – ensuring sport is the winner in the vast majority of cases.”

And where is the government funding really going? The NPFA say only £125 million is being spent on ‘sustainable community access’ to green spaces of which only £31.5 million is being spent, in a less than open way, on sporting fields.

A Review of Sports containing the views the Prime Minister will be published imminently but leaks thus far suggest it will concentrate on the high politics of an Olympic Games bid for London rather than grass roots.

Like the camera, statistics may never lie but which ones should we believe? Part of the problem is the way the figures are compiled. Until the Playing Fields Monitoring Group – comprising representatives from the Department for Education and Skills, the Office of the Deputy Prime Minister, Sport England, the National Playing Fields Association, the Central Council of Physical Recreation, and the Department for Culture, Media and Sport – was established by the DCMS in April 2000 there was no body compiling national statistics.

The figures are still patchy at best and Sport England, the quango that distributes lottery money, argue that the problem is now that all planning applications are lumped together, regardless of whether they involve playing fields being sold off for office blocks or beneficial redevelopment of a clubhouse. “The figures have fuelled a rather crude debate where concrete is rolling out across the country,” a spokesman for Sport England says, “and for that the government has no one but themselves to blame.”

At government level the issue gets fudged between three departments. The contradicting evidence and a general sense of impotence and apathy are enough to make you want to do an ostrich.

Hampden Gurney, a church of England Primary School near Marble in London, was featured in

Common Land and Common Sense; Never The Twain Shall Meet

newspapers and on television recently after the building redesign had received a Royal Institute of British Architects (RIBA) award. The new £6 million building is a beehive of glass over six levels with an indoor play area on each level. It is quite stunning and was partly funded by selling off their playgrounds.

Sport England are confused by what to make of the case study. "What is the message there?" The spokesman asks, "That confusion does happen when there are a lack of clear priorities." Like most things in life the answers are not black and white. There are plenty of grey areas and schools and local authorities are not always dealing with Satan for the fun of it, often it is about robbing Peter to pay Paul. Which only shows that this local issue with national consequences needs a more coherent central strategy. Nobody wants a nanny state but leave it to some local authorities and the only grass you will get will be sold to you on street corners. It is a cliché that everybody is wise to afterwards – once a housing block arrives and a field has gone, it is gone forever.

Sport England say their first reaction is to object to every sale, to save every blade of grass, but they have to be – yes it is that politician's word that makes the eyes roll and the hand switch the channel over – pragmatic.

Sport England say their first reaction is to object to every sale, to save every blade of grass, but they have to be – yes it is that politician's word that makes the eyes roll and the hand switch the channel over – pragmatic.

"Where we differ from the NPFA is that we know this is a modern world where everybody wants a green space at the end of the street, but they also want affordable houses, schools, a supermarket and maybe a cinema too," the Sport England spokesman says. "we

know we can't challenge everything and in order to be taken seriously we negotiate."

Sport England say the long awaited new PPG17, 11 years after the last one, is good (even if does not go far enough) because it expects local authorities to carry out a local needs assessment, which most have not done thoroughly.

The National Playing Fields Association calls it "a charter for selling off playing fields." They say it is bad because unlike the last PPG17 in 1991 it omits the previous recommendation to consult the NPFA's 'Six Acre Standard' – which provides for six acres per thousand head of population – and puts a workload of assessment on local authorities who do not have always the planning expertise to carry it out.

"What is to stop local authorities setting the standard at two or three acres," Elsa Davies, the director of the NPFA asks.

The wording – "expects" local authorities to undertake – indicates the grey area between legislation and guidance that the PPG17 falls into. Moreover, Sport England are worried that the goal posts simply get moved. In the 1980s as the ploughing up of playing fields gathered pace developers targetted schools. The 1991 PPG17 made that more difficult so local authorities became the target in the 1990s. In recent years grounds privately owned by big companies and used by their employees have been targetted.

British Nuclear Fuels Limited has attracted much criticism for the decision to sell the well used fields to Preston North End football club. The next big sales could be by the troubled communications company Marconi, who are said to about to divest some of the extensive sites, such as the one owned by a subsidiary in Huddersfield.

One small step forward in the PPG17 was to lower from 0.4 hectares to 0.2 hectares (a full size football pitch to a half size) the threshold upon which Sport England must be consulted.

The situation has improved enormously for non-profit sports clubs in the last year with the government granting tax exemption last December. More crucially clubs can now apply for charitable status if they can

prove they encourage healthy activity thus protecting their assets, ie their land. The Cabinet Office Performance and Innovation Unit is currently examining how to expand the number of clubs covered.

Hopefully, this will prevent the carpet-bagging that went on at Weybridge Cricket Club where individuals moved in and encouraged selling the land so they could

all have a slice.

Enclosure took common land away for agriculture and farming, now playing fields, sometimes the last bits of common land in inner city areas, are being covered by supermarkets.

There are examples of local authorities protecting their land and private companies showing altruism. AXA insurance recently divested their playing fields in Cumbria and Blackpool to NPFA.

A few years ago Rochford District Council decided to hand over 90 acres in Rayleigh, including the 55 acre Swayne Park, to the NPFA, who became custodial trustees whilst the council remain as the managing trustees. The NPFA has a fast track

system with the Charity Commission and make all its land charities in their own right protecting them in perpetuity.

"We concluded handing the land over to the NPFA was the most sensible and up front way of protecting it," Rochford District Council say, "It is an extremely positive way of demonstrating to the community how important open space is, it's now a green lung and once it's done, it's done."

But for a school, local authority or company particularly in a city, land is their greatest asset. Twain pithily summed up what man has known perhaps from birth. Enclosure took common land away for agriculture and farming, now playing fields, sometimes the last bits of common land in inner city areas, are being covered by supermarkets.

"The system does not protect playing fields as well as it should, we are shooting from the same trench as the NPFA on that," the Sport England spokesman say. "They are a powerful lobby but there are powerful lobbies behind new housing development and the government is committed to that too.

We argue for replacement space or alternative provision and what most communities need is indoor sports facilities. I know that drives Elsa up the wall."

Which is right, it does drive Elsa Davies and other critics up the wall. The growth of indoor projects is seen by the NPFA as one of the more insidious methods for schools and local authorities replacing outdoor space.

But indoor facilities and artificial pitches are often seen as the solution. "We want this country to go through a sporting revolution. That means we must protect the places where young people can play sport," Tessa Jowell, Secretary of State for Culture, Media and Sport said commenting on the PPG17. "Playing fields are a vital part of communities and we must have proper safeguards against moves to develop on fields which would be to the detriment of sport.

"But we should recognise that the greatest benefits will not always be achieved by preventing change. For example, when an application is made to construct an all-weather pitch on waterlogged playing field land it will increase the opportunities for the local community and schools to use a previously poor quality area. Every case must be carefully considered on its merits."

The sale of playing fields is not illegal, but some of it has been immoral and at best unhealthy. It is time to make hindsight our foresight before it is too late. So the man said this is not only a sports policy.

Sports Law Current Survey

Compiled by Walter Cairns

Senior Lecturer in Law and Languages
Manchester Metropolitan University

The Current Survey of the Sport and the Law Journal examines current world-wide developments in the field of sports law, in accordance with the following structure:

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1. General

Forthcoming conference on the right to participate in sport (South Africa)

On 6-7 February 2003, the Sports Law Project of the Faculty of Law, University of Cape Town will be joining forces with the Centre for Sports Law, Rand Afrikaans University, in organising a conference which has as its theme: "Sport: the right to participate". This will concentrate on such issues as discrimination, transformation and affirmative action in sport, as well as on various proposals dealing with contemporary legal issues.

Sports Law group of German lawyers' association holds AGM'

The Annual General Meeting of the Sports Law Group (Arbeitsgemeinschaft Sportrecht) of the German Lawyers' Association (Deutscher Anwaltsverein) took place on 12/10/2002 in Stuttgart.

Symposia on sports transfers and agents (The Netherlands)

This issue is dealt with under Item 3, "Contracts" (see below, p.45).

European Commission organises Sports Forum

This issue is dealt with under Item 9, "EU Law" (see below, p.97).

Obituaries

Mamo Wolde

In the previous issue² it was reported that Ethiopian Mamo Wolde, winner of the marathon at the 1968 Olympics, had been found guilty of taking part in the summary execution of 15-year-old Samuel Alemo after having waited an incredible nine years before his trial was held. He was released shortly after his conviction, but died shortly afterwards, in May 2002³.

Hansie Cronje

W.J. ("Hansie") Cronje, the South African Test cricketer whose involvement in the fraudulent provision of information set off the cricket corruption scandal, died in an aeroplane accident in June 2002. His death and its impact on the prosecution of this affair are documented later in this issue (below, p.20).

Alfredo Goyeneche

Alfredo Goyeneche, President of the Spanish Olympic Committee and member of the International Olympic Committee (IOC), died on 16/3/2002 in a car accident, as the vehicle in which he was travelling careered off the A1 highway in heavy rain 30 miles north of Madrid⁴.

Assessment of sporting lawyers in professional journal (UK)⁵

It may seem difficult to imagine the coexistence in one and the same person of two careers as demanding and time-consuming as sport and the law. Yet not only has this feat been accomplished by several outstanding individuals in the past, but also their numbers appear to be growing. Naturally, not all have reached such high levels of proficiency in both fields as Harold Hardman, who succeeded in winning a gold medal at the 1908 Olympics and appearing for Everton FC in two Cup Finals (not to mention steering Manchester United into European football in the 1950s as club Chairman) whilst maintaining a thriving law practice. However, a steady number of admirable people of both genders appear to be both able and prepared to face the challenge and make the according sacrifices in order to reach this goal.

In an article which assesses the mutual impact of such individuals on the world of legal practice, author Suzy Bender examines the contribution made by such performers as Brian Moore, the former England rugby international, now with London firm Memery Crystal, Ann Danson, a long jumper who competed for England at the Commonwealth Games, and who combines this with operating as a specialist in trust and taxation with leading Manchester firm Addleshaw Booth & Co. (who themselves sponsored the Games – see below, p.10), Leeds practitioner Véronique Marot, who won the London Marathon in 1989 and held the British record over that distance for 13 years, and Jonny Searle, Olympic gold medallist, a member of the winning Oxford Boat Race crew in the late 1980s and now an in-house lawyer at broadcasting company Viasat (and also a BASL committee member).

All the above have quite different stories to tell as regards the difficulties involved in, and the promise held out by, combining these high-profile activities. Generally speaking, law firms are favourably disposed towards the employment of such practitioners. These employers are aware that not only does their name and fame open doors to people who otherwise might be antagonistic towards lawyers, but also that solicitors who have reached the highest level of proficiency in sport are extremely self-disciplined and very well organised. This certainly seems to have helped Brian Moore considerably in his career to date. Yet it is not invariably easy for law firms to accommodate athletes, as runner Veronique Marot can testify. Although she was allowed time off to compete in the 1991 World Championships in Tokyo, problems arose when she was selected for the following year's Barcelona Olympics, which required her to train for three months. Faced with a choice between her sporting and legal careers, she opted for the latter.

Lawyers in sport

1. General

City firm targets sporting solicitors⁶

As if to underline the point made in the previous section, City firm Ashurst Morris Crisp was reported to have adopted a policy of targeting aspiring lawyers with sporting prowess, and were expecting the arrival of a number of trainees who would emphasise the firm's commitment to the world of sport. These include Louis Attrill, a member of the British medal-winning rowing eight at the Sydney Olympics, Ian Warner, a "paralympic" sledge hockey player, and Chris Holmes, a partially-sighted swimmer who has participated in three "paralympic" games. Also about to join is Katy Roberts, a leading hockey player and Olympic hopeful.

Addleshaws become top sponsor of Commonwealth Games⁷

That this year's Commonwealth Games have proved a success story for the host city of Manchester is a proposition now so universally recognised that it hardly needs restating in these columns. This does, however, appear to be an appropriate forum for paying due tribute to one of the organisations without whose financial support the Games could never have reached such heights of popular acclaim, to wit, leading local firm Addleshaw Booth & Co. Earlier this year, the firm upgraded its sponsorship deal with the Games to be named an official sponsor (whereas previously it was an official partner), placing it alongside such names as Microsoft, Cadbury, Asda, the Guardian Media Group and Imperial Leather. The sponsorship took the form of providing £1 million worth of services. This will enable the firm to build up its international sports and media practice.

Leeds solicitor appointed manager to MCC tour of New Zealand (UK)⁸

Earlier this year, Jeremy Henderson, Head of Personal Legal Service at Leeds law firm Lupton Fawcett, was appointed manager to the Marylebone Cricket Club tour of New Zealand, held in March/April of this year. In addition to managing the side, Mr. Henderson also donned the flannels as he has been a playing member of the MCC for almost 20 years, during which period he has competed around the world in Argentina, Australia, Corfu, Spain and Gibraltar.

Southampton firm appointed legal advisers to Hampshire CCC home⁹

In March 2002, Southampton firm Paris Smith & Randall were appointed solicitors to the Rose Bowl. This is a listed property backed company which owns, manages and operates the 150-acre Rose Bowl site, being the new home of the Hampshire County Cricket Club. The firm already acts for Southampton and Portsmouth football clubs.

Law firm sponsors horse trials¹⁰

Scoot Rees & Co., a law firm which specialises in personal injury cases, and which has offices in Lancashire and Hertfordshire, is to sponsor the Chepstow International Horse Trials for the next two years.

Feature on English RFU legal officer in professional journal¹¹

In July 2002, *The Lawyer* carried a feature article on Jonathan Hall, Secretary and Legal Officer to the Rugby Football Union of England. It concentrated on both the internal aspects of his work, which have been dominated by structural reforms carried out within the RFU, and the external aspects, such as the two venture companies which the RFU has established during the past few years and for which he instructed City firm Denton Wilde Sapte.

Do sporting hospitality packages pay for law firms? Feature in professional journal (UK)¹²

Several law firms have recently adopted the practice of offering large-scale corporate hospitality packages as part of an effort to raise their profiles. Thus in May 2002, leading firm Norton Rose arranged for a party of around 700 people, including journalists and clients together with their families, partners and staff, to attend the Heineken Cup rugby final at the Millennium Stadium in Cardiff. The feature article under review asks the question whether such massive expenditure is truly justified.

The firm referred to above certainly does not regard this exercise as a waste of money. Having learned from various reports that it was one of the least well-known "brands" among City firms, it set about finding ways of raising its profile, and associating itself with such major sporting events was one of the ways to achieve this end. However, some marketing consultants are more cautious in their assessment. They recognise that there is a place for corporate hospitality and sponsorship, but urge a good deal of careful consideration and caution on firms contemplating such campaigns.

Italian team wins lawyers' football tournament¹³

The latest football world championships for lawyers, which are held every two years, took place in Malta from 31 May to 9 June 2002. The tournament was won by the Rome (Italy) team, with the top British team, from London, only managing an unlucky 13th. However, Matthew Smith, playing for the London team, carried off the Best Player award, whilst Edinburgh shared the Fair Play Award with Bobigny Pontoise (France).

1. General

Digest of other sports journals

Latest issues of German sister journal

The second issue of the *Zeitschrift für Sport und Recht* for this year¹⁴ features as one of its main contributions a paper by H. Pfistner (Bayreuth) in which he examines the legal relations between those taking part in sporting competitions. In so doing, he focuses attention on the legal status of co-operative ventures between various forms of enterprise where they act as organisers of sporting events – be they sports clubs, sporting federations or even sports people themselves. More particularly he examines the significance of the regulatory framework in which sport operates, and the way in which this framework relates to the law of competition as well as to various provisions from the civil and the criminal law. He arrives at the conclusion that a special legal relationship of this nature exists within the scope of Article 311(3) of the German Civil Code (*Bürgerliches Gesetzbuch*).

The requirements which must be met by arbitration clauses in sporting matters are extensively examined by Oliver Knöfel (Hamburg), particularly with reference to the recent decision of the Court of Arbitration in Sport (CAS) concerning Stanley Roberts, the professional basketball player currently playing in the German league. In addition, Christian Koenig and Jürgen Kühling (Bonn) analyse the relationship between EU legislation on state aids, private sports enterprises and the promotion of sporting infrastructure, focusing particularly on the considerable amount of expenditure involved in providing the stadiums for the 2006 Football World Cup in Germany.

In Issue No. 3¹⁵, Doctor Martens and Doctor Oschütz (München) examine the various decisions made by the CAS during the 2002 Winter Olympics in Salt Lake City, more particularly those of the Ad Hoc Panel which, in accordance with International Olympic Committee (IOC) rules, is called upon to give a ruling within 24 hours of a conflict being brought before it. The authors confirm that the CAS has become a towering presence in the field of sports law, and that these arbitral rulings possess high quality levels in spite of the pressures of time involved.

In another paper, the author Dr. Hellenthal (Frankfurt) concerns himself with the question whether the European footballing union UEFA is capable of preventing the formation of a supranational European football league on the basis of Article 45 of its Articles of Association, which requires its approval for any international competition. The author arrives at the conclusion that this requirement infringes the prohibition of the abuse of dominant position as laid down in Article 82 of the EC Treaty, and that therefore a supranational football league would be permissible

without UEFA's sanction. A further contribution, by Dietrich Mayer, seeks an answer to the question whether the obligation, under German law, to report infringements of drugs legislation does not constitute an undesirable method of countering the use of drugs in sport, and clearly highlights the legal problems to which both the rules of the German Sports Federation and the legislation laid down by the public authorities on the use of drugs in sport give rise.

In the fourth issue of this year¹⁶, Christoph Wüterich and Matthias Breucker, two practising lawyers, concern themselves with some of the procedural aspects of the drugs issue, in that they advocate the introduction of a "Queen's evidence" (Kronzeuge) mechanism. After listing a number of aspects of the current system of testing which they regard as deficiencies, they explain the place occupied by the Kronzeuge mechanism in German law. They conclude that the adoption of such a system for doping practices would produce a not inconsiderable preventative effect, and formulate a number of proposals aimed at introducing it. Karl-Heinz Schneider, a leading Government official, examines the extent to which sport has become part and parcel of EU law. They propose that sport should occupy its proper place in the primary legislation of the EU (i.e. the treaties and other fundamental instruments requiring the approval of the national legislatures) and even go as far as advocating the adoption of an Article in the EC Treaty to that effect. Finally, Jürgen Bröhmer provides an exhaustive assessment of the Casey Martin rulings, highlighted in previous issues of this Journal¹⁷ (and also discussed below, p.112).

All three issues carry extensive sections featuring case reports.

Recent issues of *Sports Law Bulletin*

The third issue of this year (May/June 2002) features a contribution by Graham Conner, IC Tax Adviser, on tax relief for community amateur sports clubs, focusing particularly on the rules in the 2002 Budget implementing new forms of such tax relief. Its central Analysis feature, by James Gray (author of *Sports Law Practice*¹⁸), concentrates on risk management, which the author regards as one of the ways in which sports organisations are able to provide the safest possible environment for their participants. By applying the risk management strategies and principles proposed in the article, the rate of sporting injuries could be reduced significantly, argues the author. Those involved in major sporting programmes, such as coaches, doctors, equipment managers, trainers and administrators, should be able to recognise and understand their legal responsibilities, since they relate to four important areas of risk management – supervision, instruction, warnings and transportation. Moreover, over the past decade, the

1. General

discipline of risk management has expanded from tort liability issues to cover sexual and racial harassment laws and disability legislation.

Still on the issue of risk management, Janis Doleschal, Commissioner of Athletics in Milwaukee, Wisconsin (US), assesses the damage actually and potentially created by initiation rites inflicted on athletes at schools and colleges, and proposes strategies to deal with them. In "Sports Insurance in Australia – the Plot Thickens", Ian Fullagar concentrates on the issues raised by a study recently undertaken for the Australian Standing Committee on Recreation and Sport (SCORS) which highlights the growing concern about the availability and affordability of insurance for Australian sport and recreation organisations. A number of proposals have been formulated to remedy this undesirable situation. Finally, Luiz Martins Castro examines some general aspects of Brazilian sports law and its day-to-day applicability (an issue also dealt with in the July/August issue).

The fourth number of the *Bulletin*, the Analysis section is devoted to mediation in the sports industry. Over the past few years, the use of mediation has increased as a method of dispute resolution in a wide range of social and commercial spheres. It has many attractive features, such as a basis for compromise and consent, informality and speed. It has developed in the world of sport as an alternative to using the law courts. Author Ian Blackshaw examines this particular area of sports law, concluding that, with all its advantages, mediation should not be regarded as a universal solution for dispute settlement, but should be approached in a spirit of "horses for courses". Jon Siddall also reports on the first two years of the UK Sports Resolution Disputes Panel. He concludes that there is good reason to be positive about its functioning and the role which it is capable of playing in delivering an agenda based on best practice and modernisation in the field of dispute resolution. This will result in savings for the world of sport which can be measured in hundreds of thousands of pounds.

Latest issue of the *International Sports Law Review*

The fourth issue for 2001 starts with a valedictory editorial by Michael Beloff on the International Amateur Athletics Federation (IAAF) Arbitral Tribunal, which has now been wound up since the IAAF decided to accept the jurisdiction of the Court of Arbitration for Sport (CAS), not only at the Olympic Games, but on a general scale. The main feature article is an examination of agreements entered into by sports federations in France. It also contains an extensive section on recent case law, with particular focus on the case of Javier Sotomayor (p.254).

Sport and International relations

Mandela supports call for "truce" during forthcoming Olympics...

The present writer does not possess a crystal ball – at least not one capable of predicting the future – and it may very well be that the next few years will bring a miraculous improvement in international relations. However, the current state of relations between many of the world's nations is currently capable of vast improvement, and few are confident that the position will improve over the coming period¹⁹.

It is with this fear in mind that the Greek authorities have attempted to revive an ancient Olympic tradition, which is that of the "Olympic truce" which would require states to lay down their weapons for the duration of the 2004 Games. The guiding spirit behind this move is Greek Minister George Papandreou, a pacifist who is widely credited with having been the architect of the improved relations between his country and its traditional enemy Turkey in recent years.

Although many cynics have derided the idea as rather fanciful and unworkable, it has attracted support from many quarters. The International Olympic Committee last year allocated \$400,000 to the promotion of this idea. UN Secretary Kofi Annan expressed his hope that such a truce could present a neutral point of consensus and a window of time to open dialogue between countries locked in armed struggle. Perhaps the most impressive support of all was forthcoming from no lesser figure than former South African President Nelson Mandela, who reminded us that:

"the Games represent one of the most evocative moments of celebration of our unity as human beings in pursuit of noble ideas. Among these ideas is the quest for global peace."²⁰

In ancient times – when, it has to be admitted, the best athletes were also the best soldiers – the concept of truce was fundamental to the feuding city states which participated in the Games. For 12 centuries hostilities were suspended for the duration of the Olympics. In the modern Games, the position has tended to be reversed, in that world wars have prevented the Games from taking place in 1916, 1940 and 1944. However, there was a ray of hope at the Sydney Olympics, where athletes from North and South Korea attended the opening ceremony under one flag "all in the name of the Olympic spirit"²¹.

... but no such goodwill is extended to

1. General

Israeli/Pakistani tennis pair...

The fine sentiments expressed in the previous paragraph have obviously failed to reach the ears and consciousness of some of the less charitable governments and religious leaders of this world. This was evidenced by the treatment administered to Aisam-ul-Haq Qureshi, a Pakistani tennis professional who recently decided to team up with Israeli colleague Amir Hadad for the purpose of competing in doubles events at Wimbledon this year. For this decision he has been roundly criticised by government officials of his country. In addition, religious extremists appear to have circulated e-mails condemning the partnership²².

Nor have the country's sporting authorities been any more inclined towards tolerance. Brigadier Saulat Abbas, Director of the Pakistan Sports Board, has even threatened to ban Mr. Qureshi, and at the very least would be "seeking an explanation" from him for his action. The player in question, however, announced his intention to continue with the partnership²³.

...and has the World Cup helped or hindered in healing South-East Asian rifts?

Unlike the gaps and boarded up windows which still punctuate the route traced by the former Berlin Wall, the fact that we still refer to two countries in South-East Asia as "North" and "South" Korea continues to perpetuate some of the worst aspects of the Cold War. The Wall may have come down in Europe and the Soviet Union may start to test the memory of anyone aged under 30, but the two Korean states have remained locked in a tense eyeball-to-eyeball standoff. The two countries never signed a peace treaty following the war which raged between them between 1950 and 1953, since when the Korean peninsula has been the most militarised area in the world. Although relations thawed considerably following a successful summit in 2000, the inclusion of North Korea in the "axis of evil" by the new US administration has served to worsen relations once again.

It was perhaps inevitable that the football World Cup, shared between South Korea and Japan this summer, would acquire a political dimension in this tense relationship. During the run-up to the tournament, it was feared by some government sources in Seoul that their Northern neighbours might be tempted to engineer a military confrontation during the championship. It was with this fear in mind that Lim Dong Won, a close adviser to the South Korean President, Kim Dae Jung, travelled to Pyongyang, the North Korean capital, in an effort to salvage the fragile peace negotiations before the competition kicked off²⁴. However, some saw this event as a success story in itself, since it was the subject-matter of a joint statement between the two countries.

It also came less than a week after Mr. Kim exchanged football shirts with the nationalist Japanese president Junichiro Koizumi, who ever since his election had been a hate figure in South Korea, thus helping to heal the still festering wounds between those two countries. With China having qualified for the Cup finals for the first time, this event was clearly expected to be used as a demonstration, however superficial, of regional harmony. The joint hosts also agreed to relax visa and foreign exchange restrictions for the duration of the tournament²⁵.

This euphoria, however, received a setback a month later when, with just 40 days to go before kick-off, the Japanese Prime Minister risked a confrontation with the joint World Cup hosts by paying his respects at the Yasukuni shrine, which deifies the Japanese soldiers who fell during World War Two – including war criminals. This event gave rise to a strong backlash from Seoul and Beijing, where memories of Japanese wartime aggression remain vivid. The visit also prompted furious protests from other quarters, which included the rather bizarre ceremony by a group of South Korean gangsters who cut off their little fingers in front of the Japanese embassy²⁶.

Row over Zimbabwe's participation in Commonwealth Games...

Traditionally the Commonwealth Games have, perhaps more than any other major multi-sport event, served to promote relations between countries rather than exacerbate them – which is why they are known as "the Friendly Games". However, the Commonwealth itself has in the past not shrunk from taking action against those of its members which have shown but scant regard for democracy and human rights, as has been the fate befalling Nigeria, Pakistan and Zimbabwe in recent times. With the latter's suspension from the Commonwealth having been decreed in March 2002, the question arose whether its athletes should be allowed to compete in the Manchester Games later that year²⁷.

There were some member states which wanted the Zimbabwean athletes banned – such as New Zealand, whose Foreign Minister Phil Goff formally stating that his Government would be acting to advocate the removal of the Southern African nation from the Games. This would have been unprecedented in the Games' history, since previous absentees such as Fiji (1994) and Nigeria (1998) withdrew voluntarily²⁸. In the event, Zimbabwe did compete.

Nevertheless, it was made clear that the travel ban imposed on Zimbabwean Prime Minister Robert Mugabe by the EU would be enforced throughout the Games. This was made clear because of the manner in which Mr. Mugabe had succeeded in circumventing the ban by attending a UN summit in Rome. Opposition

1. General

sources in Zimbabwe also feared that he would attempt to send several Ministers not covered by the ban to Manchester, which is why Shadow Foreign Secretary Michael Ancram demanded Government action to prevent this from happening²⁹. There is nothing, however, to suggest that any such senior Zimbabwean officials did attend the Games.

... and its future role in international cricket

For the same reasons as those stated in the previous section, there are pressures being brought to bear on various sporting bodies by governments to isolate Zimbabwe by refusing any contact with its sporting representatives. Such pressure had already been exerted by the Australian government on the country's cricketing authorities to call off the planned tour to Zimbabwe in April. Ultimately, the Australian Cricket Board (ACB) seems to have yielded to this pressure by cancelling the tour. Although "security" reasons were cited, and the ACB denied any undue pressure had been exerted from the government, it is unlikely that the tour would have been cancelled without the wider political dimension³⁰.

An infinitely more complex issue is the status of Zimbabwe as joint host for the 2003 World Cup. As matters stood at the time of writing, and with the world cricketing community appearing to be split on racial lines, England and Australia remain doubtful starters for their group matches in Harare and Bulawayo respectively, whereas other countries, more particularly India and Pakistan, have indicated that they are giving their support to Zimbabwe as co-hosts. The matter had not yet been settled at the time of writing, but it looked capable of adding yet another fissure to the already fractured state of world cricket³¹.

AS Roma brawl strains Italo/Turkish relations

After AS Roma played Turkish side Galatasaray at home in the European Champions' League in Match 2002, fighting broke out on the pitch involving players, officials and riot police. The brawl turned into a diplomatic incident when Ismail Cem, Turkey's foreign minister, claimed that the behaviour of the Italian riot police had recalled the days of fascist Italy, whilst a spokesman for Galatasaray accused the police of behaving like pro-Roma hooligans³². He added:

*"A police that attacks and truncheons so pitilessly, that goes into our changing rooms and attacks our players and lays out our people again, as if what they did on the edge of the pitch was not enough, could only be Mussolini's police."*³³

The Italian authorities claimed in turn that they were the victims of Turkish aggression and did not rule out criminal charges for resisting the police and assault.

Other issues

Website for British Association for Sport and Law started

The British Association for Sport and Law (BASL) now has its own website, at www.basl.org. Its current format is a rather modest one of introducing itself and its activities to the world, but it will be seeking to expand its size and remit over the coming months.

2. Criminal Law

Corruption in Sport

The Sepp Blatter saga continues...

The story thus far

Seldom in the annals of sports administration can one man have dominated the headlines so intensively and for so long – all for the wrong reasons. It will be recalled from the previous issue³⁴ that Sepp Blatter, the president of football's world governing body FIFA, had during the winter of 2001-02, increasingly become the focus of accusations that he had become involved in a series of affairs which were redolent of the most far-reaching corruption. These accusations concerned more particularly the financial losses incurred by FIFA during the first six months of 2001, the role he played in the bankruptcy of its marketing company ISL, as well as various allegations of bribery and similarly dubious practices aimed at keeping both himself and his henchmen in power. These accusations generated increasing levels of interest as FIFA's executive committee had pledged to open an investigation into the affair, and Blatter's mandate was coming to an end, thus raising the question whether he would succeed in maintaining his position or be succeeded by someone with a totally different agenda and outlook.

Blatter re-elected – by fair means and foul

It would have been strange indeed if the controversies surrounding the FIFA president had not at least prompted a strong challenge from candidates pledging to rule in a totally different style when elections to the FIFA presidency were to be held in May 2002. Such a challenge was forthcoming in March, when Issa Hayatou, Africa's leading football administrator, announced his candidature. Hayatou is the president of the Confederation for African Football (CAF) and his bid for power was supported by both the influential European lobby within FIFA and his fellow African delegates. He was also supported by Chung Moon-joon, the head of the Asian football federation who had also voiced criticism at the manner in which Blatter had handled the finances of FIFA³⁵. Later, the English FA also lent its support to Hayatou's candidature³⁶. Mr. Hayatou lost no time in making clear the platform on which he would seek election. He would stand for total transparency, and open the FIFA books as well as disclosing his salary (a subject which Blatter has at all times refused to broach). However, he also pledged to continue some of the latter's pet projects, such as the Goal programme, which provides cash in order to develop the sport in the Third World (but which has also been tainted with accusations of corruption – see the previous issue of this organ³⁷) and the Financial Assistance programme, which provides cash to all national federations and constitutes the basis for

Blatter's support among smaller countries who formed the bulk of the FIFA votes canvassed by Hayatou³⁸.

Blatter's already tenuous hold on power seemed to suffer another blow when it was alleged that his re-election campaign was being bankrolled by Libyan leader Colonel Gaddafi. These claims were made by Liberian FA chief Edwin Snowe, and were bound to rekindle the controversy surrounding the African campaign waged by Blatter in order to defeat Sweden's Lennart Johansson for the presidency in 1998. It will be recalled³⁹ that during the run-up to that election, several African countries had been targeted by the Blatter campaign team, with allegations abounding that bribes were exchanged in order to secure support.

As battle was joined for the election, further allegations were made about the improper lengths to which Blatter was prepared to go in order to retain power. In late March, he announced that he had convened an extraordinary meeting of the world governing body in order to discuss the various claims made that FIFA was heading towards bankruptcy. At this meeting, he would seek to prove the veracity of the details which he had provided about the organisation's finances. This meeting was to be held in Seoul on 28 May, i.e. 24 hours before the election⁴⁰. Blatter originally claimed that he had called this meeting as a last resort. However, some sections of the media alleged that this was a pre-planned gambit, orchestrated prior to the attempts made by the FIFA Executive the previous month to hold him to account over the organisation's parlous finances. The idea was that Blatter and his allies would use the extraordinary meeting in order to undermine the Hayatou campaign during the crucial hours leading up to the election. This would be achieved through a choreographed routine in which Blatter's henchmen would attempt to pull the wool over the eyes of the footballing world. A stage-managed chorus of support would be mounted in support of the incumbent president, which would drown out dissenting voices and steamroller Blatter into re-election⁴¹.

Blatter's campaign took on an even more extraordinary turn when the FIFA President, in an action which was as undemocratic as it was unprecedented, took the astonishing step of suspending the international audit committee established in order to investigate the finances of FIFA⁴². This naturally led to a storm of protest, and David Will, the Scottish FIFA Vice-President leading the investigation, immediately proclaimed that he would not yield to this attempt to arrest the inquiry⁴³. Asked why he had proceeded to take this extraordinary step, Blatter pleaded the need to suspend the enquiry until such time as Will had ousted the "mole" whom he, Blatter, alleged to have infringed confidentiality agreements by leaking details of FIFA's finances to the outside world⁴⁴. The "mole" in question

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was believed to have been Korean Vice-President Chung Moon-jong, who had expressed his dismay at the manner in which Blatter had led the world governing body⁴⁵. In the event, Blatter's attempt to halt the inquiry failed, since Will succeeded in reconvening the inquiry⁴⁶.

In the meantime, the election campaign took on an altogether more sinister turn when FIFA's General Secretary, Michel Zen-Ruffinen, announced that he would not be travelling to a meeting of CONCACAF, the American confederation, because he had received physical threats. This followed the news that Zen-Ruffinen had initiated legal action against CONCACAF President Jack Warner and its General Secretary, Chuck Blazer, for defamation of character, after they alleged that he had attempted to raise support for Hayatou⁴⁷. Blatter fanned the flames further by issuing a thinly-veiled threat to dismiss Zen-Ruffinen unless he withdrew claims made by the latter that Blatter was personally responsible for financial irregularities, both before and after the collapse of ISL. Zen-Ruffinen had also accused Blatter of having suspended the audit committee's investigation in order to prevent the General Secretary from disclosing "dysfunctions" directly linked to the FIFA president⁴⁸. Blatter handed him a letter in which he demanded that Zen-Ruffinen should withdraw these allegations within 48 hours. Having consulted his lawyers, the FIFA General Secretary refused this demand, adding that he would present his file of evidence before the FIFA executive later that week⁴⁹.

A few days later, UEFA president Lennart Johansson made what amounted to a declaration of war against Blatter when he issued a letter to all 51 presidents of the European governing body which attacked the latter's integrity and credibility. He declared that world football would pay a heavy price indeed if Blatter were to be re-elected⁵⁰. His letter was accompanied by a five-page report accusing Blatter of running FIFA as a "one-man show", provoking conflicts, ignoring the interests of world football, damaging FIFA's reputation and exposing the world governing body to "commercial and financial uncertainty"⁵¹. Blatter responded by claiming that a campaign to destroy him had reached "unprecedented levels of defamation". He claimed that those who had known him over the past 30 years were aware that he was incapable of that of which he was being accused, to wit destroying documents, buying votes, and managing FIFA in a dictatorial fashion⁵².

However, Blatter's campaign received an unexpected and significant boost when a number of his supporters were voted onto the powerful decision-making bodies within FIFA and UEFA. Thus Michel Platini, the former French World Cup star and Blatter's special adviser for the past four years, was elected to the UEFA and FIFA

Executives, whilst Gerhard Mayer-Vorfelder, a long-standing ally of the FIFA President, regained his seat on the FIFA Executive. In addition, a major upset was caused when Norwegian Per Ravn Omdal, a long-standing critic of Blatter, was voted off the FIFA Executive⁵³. This was followed, however, by a setback when Mustapha Fahmy, General Secretary of the African Federation, alleged that the Blatter camp had offered \$50,000 for an African vote during a mission led by Blatter supporter Mohammed Bin Hammam, a FIFA Executive member and leader of the aforementioned GOAL project⁵⁴.

Shortly afterwards, a meeting of the FIFA Executive was called to discuss Blatter's decision to halt the audit committee's investigation into the organisation's finances (see above). At this meeting, Zen-Ruffinen presented a 25-page dossier to the Committee outlining irregularities committed over the previous four years, and calling for a criminal investigation into FIFA's finances⁵⁵. More particularly the report alleged that FIFA had lost nearly \$500 million during this period because of financial mismanagement, cronyism and widespread corruption⁵⁶. Blatter was given a week by the Committee to respond to these allegations, failing which the matter would be placed in the hands of the Swiss authorities⁵⁷. The president agreed to honour this request, but instead set about the task of attempting to secure his accuser's dismissal. This was interpreted as a sign that Blatter was becoming increasingly desperate in his attempts to retain his crown⁵⁸. In spite of this, legal proceedings were taken against Blatter by several members of the FIFA Executive led by Lennart Johansson, for misuse of funds. Under Swiss law, it is an offence to withhold information on allegedly criminal activity⁵⁹.

All this did not put an end to the machinations engaged in by the Blatter camp. Just a few days after news broke of this legal action, his supporters succeeded in removing financial control from Secretary-General Zen-Ruffinen. In addition, FIFA's emergency committee threatened the latter with disciplinary action should he speak to the media concerning claims that Blatter had misused funds⁶⁰. This prompted Zen-Ruffinen to accuse Blatter of operating a "reign of terror" in attempt to retain his position⁶¹. Then, in yet another twist to this extraordinary affair, the Daily Mail claimed to reveal startling allegations that bribes were paid to a senior FIFA official from a secret account controlled by a company to which they awarded lucrative marketing and television contracts. Swiss prosecutors were said to be investigating claims that almost £500,000 were paid by the Nunca Foundation, established by the ISL company (FIFA's now-defunct marketing company)⁶².

Amazingly enough, none of all this prevented Blatter from being regarded as favourite to retain his

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presidential position as it became clear that, in spite of Hayatou's support among key delegates, too many countries shared neither the African's reforming zeal nor his belief that Blatter was too corrupt and destructive to be a credible leader of the world's governing body in the sport⁶³. Blatter's opponents made a last-minute attempt to remove him from power on the eve of the election by claiming that FIFA had lost £215 million under his presidency and by proposing that the ruling body should declare itself insolvent. These were allegations made in a letter issued by Vice-President David Will. In addition, Blatter seemed almost determined to give ammunition to his opponents by his blatant attempts at preventing a free and open discussion on FIFA's finances at the Extraordinary Congress in Seoul which immediately preceded the election. After Blatter had refused to allow 15 delegates to ask potentially damaging questions on the matter, there was an encounter on the podium between Blatter and challenger Hayatou, which at a certain point looked as though it might end in physical violence⁶⁴.

Came the day of the election, which saw the incumbent President scoring an emphatic victory over his Cameroonian challenger. Blatter hailed his victory by pledging reform. More particularly he would change the manner in which FIFA is structured by transforming it from an association into a commercial company. His supporters claimed that this would render FIFA more transparent and allow it to generate more revenue. However, his opponents alleged that all the proposed reform would achieve would be to give more power to the President, since he would acquire the right to appoint a Board of Directors which could act as an "inner cabinet" and thus bypass the FIFA Executive, which had hitherto been the bane of Blatter's life⁶⁵.

Following his re-election, Blatter, as expected, lost no time in dismissing Zen-Ruffinen⁶⁶. However, Blatter's first choice to succeed the latter, South African Danny Jordaan, turned down the offer as he wished to continue heading South Africa's bid to host the 2010 World Cup⁶⁷. He also set in motion attempts to compel Britain to be represented at international football by one side, which would reduce its voting power on FIFA's ruling body from four to one⁶⁸. The fact that all four Home Unions had voted against Blatter in the presidential election was undoubtedly a pure coincidence. Blatter also set about the process of dismissing FIFA's widely respected communications director Keith Cooper, in what was seen as another instance of the president's determination to remove anyone not four-square in support of him⁶⁹.

Other allegations of corruption against Blatter and/or FIFA

The above is an account of the instances of corruption, both real and alleged, which had a direct impact on the beleaguered President's bid for re-election. However, the

catalogue of untoward activity engaged in within the world governing body by, or under the stewardship, of the Swiss administrator unfortunately does not stop there.

Thus in mid-March it was discovered that FIFA had used projected income from the 2006 World Cup to cover gaps amounting to several million pounds in the accounts for the 2002 tournament. Having had exclusive access to certain FIFA accounts, the Daily Telegraph⁷⁰ claimed that the organisation had balanced its books by "mortgaging" the 2006 World Cup marketing contracts. More seriously, some of these contracts had yet to be even performed. This appeared to contradict a statement by Blatter to the FIFA Congress in Buenos Aires in July 2001 in which he solemnly pledged that no income from the 2006 World Cup would be used to shore up FIFA's financial position in the wake of the ISL affair⁷¹. If this financial ploy had not been used, the declared profit for the year ending 31/12/2001 of £31 million could instead have turned out to be a loss amounting to anything between £36 million and £120 million.

Controversy also surrounds the question why FIFA has granted an exclusive licensing contract for the 2006 World Cup to Munich-based company EM.TV. Not only was the latter involved in the collapse of KirchMedia⁷² through a complicated web of ownership rights, but the deal was approved in spite of the interest displayed by other players such as IMG. The FIFA Executive had not been consulted over this deal. In fact, as media interest intensified, more and more unsavoury details were emerging on FIFA's role in the ISL affair. More particularly certain sources began to probe in greater depth the question of what had happened to some of the funds which had been loaned by Brazilian media group O Globo and Japanese firm Dentsu in a doomed bid to stave off bankruptcy for FIFA's marketing company⁷³. It now appears that the \$100 million in question, which took the form of advances on television rights deals, had disappeared into a mysterious Liechtenstein bank account bearing the name Nunca. This organisation had for a long time been a source of intrigue in footballing circles. It appears to have been a slush fund used by ISL to influence voters, not only in footballing federations, but also in the governing bodies of basketball and athletics. Whilst there is no suggestion that Blatter himself availed himself of the account, his campaign for the 1998 presidency undoubtedly benefited from it, more particularly by financing unprofitable football tournaments which would help him secure support. One of these was the obscure Portuguese Language Tournament held in provincial Portugal in 1998, and involved countries from the Portuguese language community such as Angola and Mozambique. Surprise surprise – both these countries ignored calls by the head of the Africa football

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federation to support Lennart Johansson instead of Blatter...⁷⁴ This deal cost ISL \$1 million for the marketing rights to the tournament, but the latter generated no income whatsoever. ISL has also paid all the expenses of the teams taking part.

“Nunca” is a Spanish word which means “never”, and this is precisely when most observers believe that FIFA will see the cash! The latter has initiated legal proceedings in Switzerland for its recovery, but few hold out any hope of a successful outcome.

A few weeks after this matter was aired in the press, there came yet further allegations of underhand dealings involving the FIFA President. Thus the *Daily Mail* claimed that the Saudi billionaire who had financed Blatter’s electioneering tour of Africa the previous month (see above) had been given World Cup television rights for the Arab-speaking world⁷⁵. For that tour, the billionaire in question, Sheikh Saleh Abdullah Kamel, had instructed that his Dallah Al Baraka firm should place a multi-million-pound Gulfstream private jet at Blatter’s disposal. Quizzed about this form of transport, Blatter had insisted that the aircraft had been donated by a “friend”. However, the FIFA President failed to mention that one of the Sheikh’s companies, Arabic Radio and Television (ART), had been awarded World Cup broadcasting rights by the now-defunct ISL company, and approved by the latter’s successor KirchMedia, for £37 million. This deal was one of the many “sweetheart” television contracts to have been called into question during the current FIFA financial crisis.

Initially, Blatter had pledged that, in line with FIFA policy, all Africa would be able to view the World Cup free of charge. However, he was compelled to make an exception when ART made an offer for the rights in question for Arabic North Africa. The highly favourable price of £37 million had been agreed even though ISL negotiators had argued with Blatter that they should be allowed to sell these rights at a commercial rate. In addition, ART was allowed to maximise its profits by a relaxation in the advertising rules. Initially, the idea was that advertisers should have but limited exposure before, during and after the matches. Blatter ordered that these restrictions should be lifted⁷⁶.

Finally, just before this year’s Presidential election, Africa’s most influential football journalist refused to answer questions concerning allegations that he accepted money from Blatter to back the latter’s 1998 election campaign. The *Daily Mail* had obtained a statement from a Zurich bank account apparently controlled by Blatter which showed a payment of £5,000 made to journalist Emmanuel Maradas shortly after the election in question. It was claimed by a Swiss newspaper that the payment was made in return for the support given by the magazine *African Soccer*, published from London and edited by Maradas and his

wife Nim Caswell, a *Financial Times* journalist. More particularly Maradas had, during the run-up to the 1998 election, written that national associations might qualify for 49 million each if Blatter won. That money would be paid direct rather than “through a third party”. Maradas had also accompanied Blatter on the controversial African campaigning tour earlier that year⁷⁷.

Stench of corruption surrounds “Blatter’s brothers”

It is inconceivable that even a person as dishonourable as the FIFA president could have woven this web of corruption all by himself. Over the years, he has enjoyed the support of a number of figures who, even though they are hardly household names in the world of football, have nevertheless wielded sufficient influence to contribute considerably towards the damage wrought on the “beautiful game” by the current football supremo.

Thus in early April of this year, attention focused once more on Blatter’s Caribbean loyalist, FIFA Vice-President Jack Warner, who has featured in these columns before⁷⁸. It appeared that he had come under investigation by the US immigration authorities for his involvement in visa racketeering. One particular focus of the investigation was the allegation that Warner had issued a bogus invitation to help a fellow Caribbean football official obtain entry to the US. This accusation arose from a letter written by Warner to Guyana official Colin Aaron, ostensibly inviting him to officiate at the FIFA Women’s World Cup in 1999 held in the US in the summer of that year⁷⁹. This letter was taken by Aaron to the US embassy in Guyana, and he was thereupon granted a visa. US immigration officials seemed unaware that, six months earlier, FIFA had ruled that all match officials for the Women’s World Cup should be women, thus rendering Aaron ineligible for obvious reasons. His name did not in fact appear on any list of match officials. This was alleged to be just one of the ways in which Warner had abused his position in FIFA to buy power and influence in Caribbean football⁸⁰. The *Daily Mail* also claims to have unearthed evidence of the extent to which Warner has over the years received special favours, not only from Blatter himself, but also from former president Joao Havelange. The most extravagant of these was claimed to have taken the form of the £11 million allocated to Trinidad and Tobago for the Joao Havelange Centre of Excellence in Tunapuna, near Port of Spain. As a result of a letter written by Havelange to Warner in May 1998, more than £4.2 million of this money ultimately took the form of a donation, although it was originally intended as a loan. This miraculous transformation took place one month prior to the presidential election in Paris, at which one of Warner’s advisers, Neville Ferguson, fraudulently cast a vote for Blatter on behalf of Haiti⁸¹.

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All this came on top of a string of other allegations of financial impropriety against Warner, dating from the time at which he became president of the American federation CONCACAF as far back as 1989⁸².

The same newspaper also claimed to have evidence that another close supporter of the FIFA president, Mohammed Bin Hammam – again no stranger to this column⁸³ – had been involved in selling World Cup tickets to England fans on the black market⁸⁴. The tickets in question were for the Group F matches with Sweden and Argentina, which had been issued to him on a personal basis since they bore his name. They were sold at £350 more than their face value. In a separate enquiry, the newspaper claimed to have acquired tickets which had originated from Bin Hammam's own Qatar FA and from the Argentinian FA – whose president, Julio Grondona, is also a Blatter supporter. The trail apparently led to the heart of FIFA's executive committee and began with a ticket agency called Razor Gator, based in the Los Angeles suburb of Beverley Hills. The tickets sold to the England fans emanated from this agency. They were available on the Internet and sold at prices ranging from \$650 to \$900. FIFA guidelines on this subject allow Executive Committee members to purchase up to 10 tickets for each group match and five per match for subsequent rounds. Nor was this the first time that FIFA Executive members had been accused of selling black market tickets, since the same allegation had been made on the occasion of the 1998 World Cup⁸⁵.

Cricket corruption scandal – an update

Two years on – Condon and the ACU take stock, but are they too complacent?

On 6 April of this year, it was precisely two years since the Pandora's Box of cricket was opened with the first revelations concerning the late South African Hansie Cronje's involvement with some of the less honourable bookmakers on the Indian subcontinent. It immediately became obvious that only the most drastic of action could repair the good name of this sport – and even that was put beyond the reach of the game's administrators by many sources.

As this column has extensively documented, the cricketing authorities have set about the task of cleaning up the game, through, inter alia, the establishment of the Anti-Corruption Unit (ACU) under the leadership of Lord (then Sir Paul) Condon, the former Metropolitan Police Commissioner⁸⁶. The second anniversary of the scandal was perhaps the appropriate moment to take stock of its functioning and achievements. Lord Condon was – perhaps unsurprisingly – extremely positive about this balance sheet, stating:

“I can confidently state that we've just had the first corruption-free 12 months in cricket for a long time, probably since around 1979”⁸⁷

However, there will be those who will regard this as too complacent an assessment, and that the ACU's work could only be regarded as complete when a few wrongdoers have been brought to justice (apart from those who, such as Cronje, gave rise to the scandal in the first place).

In addition, media investigations continue to produce compelling evidence of games which have been marred by corruption, but have thus far failed to yield any firm action. An investigation by the Daily Mail sports team suggested that the Pakistan tour of New Zealand in February 2001 had been riddled with untoward practices, the principal allegation being that a group of Pakistan players planned to win the one-day series 3-2, and then to lose the last of the three Tests, which they did in spectacular fashion (by an innings and 185 runs). Lord Condon admits that the entire matter was extremely suspicious, but reminds us that the Unit was only just becoming operational at that time⁸⁸.

Much of the ACU's work currently involves events at Sharjah, which has proved to be the epicentre of match-fixing activities. Lord Condon says that the Unit has relied principally on police intelligence and sources obtained through informers and bookmakers to clean up this particular tournament, and that it is now corruption-free.

However, there are those commentators who protest that Lord Condon takes far too complacent a view of the manner in which the ACU operates. Writing in the Sunday Telegraph, Scyld Berry⁸⁹ points to the controversy surrounding the series of five one-day matches played by Zimbabwe in India in March of this year. The same Zimbabwean team which had been comprehensively beaten by England in the autumn, led the home side 2-1 after the third match played in Cochin – the very same venue at which Hansie Cronje had complained that “the boys” had not been paid for their part in fixing a match two years earlier. During the Cochin fixture, the Zimbabwean bowling was opened by Douglas Hondo. This player had apparently been selected under the quota system benefiting non-whites, and had delivered nine overs for 66 runs against England. He quickly reduced India to 38-2, whereupon Sourav Ganguly, far from seeking to play a senior batsman's innings, came down the wicket to Hondo and attempted to hit him into the nearby seas. Hondo finished the match with figures of 4-47 as well as the man-of-the-match award. In addition, India's star player Sachin Tendulkar was officially rested for the series – which has to be judged in the light of the revelation by an Indian bookmaker that no bets would be placed if Tendulkar was batting.

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The ACU's response to the Cochin match was to dismiss any allegations of suspicious circumstances on the grounds that India's Bureau of Investigation had not reported it – which is somewhat specious since the Unit may at all times open an inquiry under its own initiative. Kenya's shock win over India in another one-day tournament also gave rise to suspicions, but once again these were dismissed by the Unit. Doubts have also been cast on the probity of events during last year's triangular series between England, Pakistan and Australia, and even England's Test victory over Sri Lanka at Old Trafford this summer⁹⁰.

The same author, however, concedes that even where the ACU attempts to operate effectively, its hands are tied by the International Cricket Council (ICC). Thus in March of this year, the Unit announced that "a former Test cricketer" and "a test umpire" were about to be named and banned from ICC venues for corruption. The identity of the Test cricketer involved was known to the newspaper in which the report appeared, but could not be published for legal reasons. The ACU were unable to reveal the name because, in the author's words,

"the ICC executive don't want the unit to be anything more than a cosmetic front to reassure punters and sponsors"⁹¹

If this case does indeed fizzle out, this would indeed be a major blow to the credibility of the Unit, since Lord Condon had contended that the ACU had in its possession sufficient evidence for the two unnamed individuals to answer allegations of match-fixing. It was to be the first occasion on which the ICC had acted on their own evidence and were able to impose suspensions without reference to the national boards, should the disciplinary panel, led by leading sports lawyer Michael Beloff, fail to be satisfied with the replies given by the accused two. In other words, it was to be a major test for the new disciplinary system⁹².

Part of the problem apparently lies in the manner in which it was structured by the ICC Executive Board. The ACU reports to the Code of Conduct Commissioner; the latter reports to the Executive Board, and the Board accepts or rejects – in other words, it makes sure nothing happens. Thus the report involving the "former Test cricketer" was not even placed in front of the Board. Scyld Berry believes that the reason for this is that the Asian bloc has enough allies to reject the allegations by the required two-thirds majority⁹³.

If the criticism of these commentators sounds quite caustic, it is positively mild compared with the scepticism, if not downright ridicule, with which his Lordship's bland assurances have been met by certain

gamblers and bookmakers in South Africa, many of whom have retained ties with the lucrative betting markets in Asia and the Middle East⁹⁴. Partly in an attempt to respond to these criticisms, the ACU is attempting to ensure that anyone suspected of match-fixing will be prevented from attending the World Cup in South Africa later this year. These could include former players who have been banned from the game. To this end, the ACU has worked in close co-operation with the South African authorities. It believes that this measure will affect around 100 people⁹⁵. Some South African commentators, however, have severe doubts as to the effectiveness of such measures⁹⁶.

Hansie Cronje dies – will the full truth now ever been known?

The death of former South African cricket captain Hansie Cronje in an aeroplane crash in early June at the age of 32 has deprived the sport of one of the most controversial figures the world has ever known. In spite of his undoubted ability as both a batsman and a captain, his name will forever be indelibly linked to the cricket corruption scandal. Whilst it would be unfair to claim that corruption in the sport started with him, it nevertheless remains a fact that the revelations about his involvement with the seamy world of match-fixing set off the train of events which has damaged the sport profoundly – some would even claim irretrievably. It is not for this column to engage in a lengthy obituary – it will confine itself to assessing the impact of his death on the many questions which remain to be answered on this affair.

It is true that, in return for indemnity from prosecution, Cronje provided ample details of his involvement in the affair at the judicial inquiry led by Justice Edwin King⁹⁷, more particularly his meetings and dealings with various notorious bookmakers such as MK, Banjo and John, and the approaches made to team-mates Herschelle Gibbs and Henry Williams aimed at inducing them to under-perform in international fixtures⁹⁸. Few will care to challenge the appropriateness of the life ban imposed on him by the cricketing authorities – indeed some will deem him fortunate to have escaped the long arm of the law.

However, there remain some unanswered questions about the exact extent of his involvement. This appears now to be irretrievably so since the various South African authorities who were continuing to probe the affair, such as the Director of Public Prosecutions and the Inland Revenue, immediately announced after Cronje's death that they would abandon their enquiries – even though they had admitted a few weeks before the tragedy that it was an extremely complicated matter which would take some time to sort out. The investigators in question even had to travel abroad to request the details of some of

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Cronje's banking accounts⁹⁹. As a result, there prevails an uneasy feeling of unfinished business. Others have been preoccupied by the question why a person who turned out to be such a hard-nosed and intelligent businessman like Cronje would have risked everything for the relatively small amounts officially revealed. This leaves a feeling that these sums must have been far greater than he cared to admit. In fact, Commissioner King has made clear his belief that Cronje had left some stories untold¹⁰⁰.

Bandhari Report clears Pakistani players of match-fixing

It may be recalled from a previous issue¹⁰¹ that, in the summer of 2001, the Pakistan government had initiated an inquiry into allegations of match-fixing said to have occurred during the two matches involving Pakistan in the course of the 1999 World Cup. The investigation was led by a Pakistan High Court Judge, Justice Bhandari, whose findings were made public in June of this year. The report in question concluded that there was no evidence that Pakistan had deliberately lost matches against India and Bangladesh. However, the report criticised South African authorities, particularly former Test cricketer Ali Bacher, who now heads his country's cricket board, for failing to co-operate with the inquiry, despite having made the original accusations¹⁰².

Some commentators expressed their disquiet at the outcome of this inquiry, calling it a "whitewash"¹⁰³.

Allegations of corruption in racing – an update

The John Egan affair

The previous issue of this column¹⁰⁴ contained a feature on various disquieting developments which seemed to taint the world of racing with the brush of corruption. The allegations in question were centred mainly around a number of people arrested in Hong Kong as a result of an operation conducted by the territory's powerful Anti-Corruption Unit (ACU) into allegations of race fixing. One of those arrested was Irish Flat jockey John Egan.

In April, it was learned that as a result of this operation, Egan had his Hong Kong riding licence withdrawn¹⁰⁵. Normally such penalties have world-wide application, but the Hong Kong Jockey Club informed its British counterpart that it did not seek reciprocity over Egan's ban, which operated until 30 June. Earlier, Egan had incurred a two-month suspension for misleading stewards in the former colony, which expired on 1 April. His passport was impounded by the Hong Kong authorities, but as a result of court proceedings it was returned to him in early March¹⁰⁶.

Once he returned to Britain, Egan was quick to protest his innocence in the most loquacious terms. The ACU officials, he stated:

"seized my documents, computer and personal stuff, and I'm sure they thought they would find something there. At the end of the day, however, it is obvious that they could not. Now I think I must be the cleanest jockey in Hong Kong because I'm the only one they have looked through and found nothing. I'm cleaner than clean. Now I'm going to stay here for the Flat season, and, please God, I'll pick up where I left off last time. I feel confident that people here realise that I am innocent. The Hong Kong authorities have had long enough to charge me or find anything on me"¹⁰⁷

The matter appeared to rest there. However, several months later it reappeared with a vengeance. In early July, a warrant was issued by the Hong Kong authorities for Egan's arrest following his failure to return to the former colony by 30 June, as required by a court directive issued following the ACU inquiry. The Hong Kong Jockey Club thereupon strongly urged Egan to return to South-East Asia in order to answer allegations that he accepted favours in return for supplying racing information¹⁰⁸. South African jockey Robbie Fradd, who had been arrested during the same investigation, had apparently already reported back to the anti-corruption authorities¹⁰⁹.

No further news on this matter was available at the time of writing.

BBC exposes widespread corruption in racing – or does it?

Stimulated perhaps by some of the issues raised above and in the previous issue, the BBC documentary series Kenyon Confronts investigated some of the allegedly shadier sides of the racing world in a programme which was broadcast in mid-June. In it, presenter Paul Kenyon posed as a prospective racehorse owner, winning the confidence of trainers and asking them whether they would be capable of pulling off a gamble for him. Of the seven trainers targeted, only one apparently refused to entertain the idea, whereas footage obtained through hidden cameras showed trainers Ferdy Murphy and Jamie Osborne discussing possible strategies with what they believe to be a fresh well-to-do owner on whom they have just succeeded in laying their hands¹¹⁰. Osborne in particular is heard to observe

"You can give yourself an edge. We don't mind cheating. It's not cheating, it's just using the system"¹¹¹

Murphy, for his part, suggests that he once made £1,600 by taking bets on his own horses, which he was convinced he could not win, on the Internet betting exchange Betfair. (Since then, Betfair has stated that no

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sum even approaching this amount was placed on the race, and Murphy has denied having an account with Betfair.)¹¹²

It is David Wintle who is ultimately selected to train for Kenyon. He describes the horse in question, Seattle Alley, as a “fiddling horse ... a jobber” and provides details on the manner in which he will run him over an inappropriate distance and on ground unsuited to the horse, so that the handicapper will drop him in weight. Matters then go wrong for everyone involved as the horse fails to win the race tipped by Wintle, and the latter, on discovering the true identity and purpose of his new partner, turns on Kenyon and assaults him.

The programme drew angry protests from the Jockey Club, the trainers involved and the National Trainers’ Federation. Indeed, the latter was consulted by the accused trainers over the possibility of legal action against the Corporation over the allegations made¹¹³. Not only the allegations made, but also the entrapment methods employed in order to attempt to substantiate them came under fire. The BBC, for its part, denied having duped trainers into making the incriminating comments featured above, claiming that the statements in question had been made quite openly without any suggestion of entrapment¹¹⁴.

Some of the press commentators were scathing about the documentary itself, but gave the impression that the allegedly poor quality of the programme deprived the allegations made in it of all substance. Certainly Ian Wooldridge¹¹⁵ and Brough Scott¹¹⁶ fell into this category, even if the latter grudgingly admits that it confirmed that people involved in racing often give the impression that they will turn a blind eye to corruption.

Shortly after the programme was broadcast, the Jockey Club announced an inquiry into the affair and requested the makers of the programme to hand over tapes of material which had not been broadcast. Initially, the latter refused on the grounds that the country’s racing authority had already made up its mind about the programme, and had said so publicly¹¹⁷. Later, however, the producers in question relented and released the tapes requested¹¹⁸.

This did not turn out to be the only confrontation which the BBC was to have with the world of racing. The celebrated investigative programme *Panorama* also decided to follow up some of the allegations made about lack of probity amongst the practitioners of the Sport of Kings. In July, the investigating team claimed to have discovered new evidence about the “Man Mood” race which set off police inquiries into race-fixing several years ago¹¹⁹. The horse in question was pulled up in the two-horse Oliver Cromwell Handicap Chase held at Warwick on 5/11/1996, which was won by Drumstick. Both the trainer and jockey in question were arrested but subsequently released by the police.

Panorama is also examining the activities of certain leading British jockeys whilst riding in Hong Kong, an affair which has already been referred to in the previous issue of this organ¹²⁰. The programme has also successfully fought off legal action brought by bookmaker Victor Chandler, who wanted letters seized by the police four years ago returned. These letters gave details of free bets being offered to trainers, a practice which is now outlawed by the Jockey Club. It appears that this kind of “insider dealing” had been proceeding for many years before it was banned¹²¹. Chandler later attempted to take the sting out of the revelations concerned by publishing the letters involved. The bookmaker hailed this as a triumph for “transparency” and attempted to play down the contents of the letters, although they seem to indicate that the practice of “free bets” was quite common at that time¹²².

The *Panorama* investigation once again brought into focus the controversial personage of Roger Buffham, the Jockey Club’s former head of security. Mr. Buffham has already been featured in these columns¹²³ on account of the circumstances in which he was dismissed from his post in the course of 2001. Whether these circumstances and this dismissal have any bearing on the matter under review can only be guessed at. However, the fact is that in June 2002, Mr. Buffham was seen at Epsom on Derby day with members of the *Panorama* investigative team. This prompted the Jockey Club to issue a statement emphasising that both Buffham and the investigative team were fully aware of an injunction obtained by the Club against its former employee the previous week, which prohibited Buffham from providing the programme makers with any information concerning the activities of the Jockey Club. Buffham had signed a confidentiality agreement when he left the Club’s employment¹²⁴. Whether Mr. Buffham had actually breached the terms of this injunction was not known at the time of writing.

Wright trial lifts the lid on corruption – and more – in racing

Any lingering doubts that there is something seriously putrid in the state of racing were quickly dispelled when reporting restrictions were lifted on one of the trials which resulted from one of the most comprehensive drugs investigations ever undertaken in this country. The trial in question was that of Barrie Wright, a former jockey, who in September 2001 was acquitted of several charges of drug-smuggling, laundering the proceeds. The information which thus became available about the various statements made in the course of the trial left former leading jockey Graham Bradley at the head of a list of disgraced people for alleged breaches of the rules after sinister links between the sport and serious criminality were exposed¹²⁵.

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Whilst giving evidence both Bradley and Wright admitted that, when they were still licensed riders, they communicated “privileged and sensitive information” to Brian Wright (no relation) for reward. According to HM Customs and Excise, Brian Wright was the mastermind of a drug-smuggling ring which imported at least 2,000 kilos of cocaine into Britain between 1996 and 1998. He was also, during the 1980s and 1990s, a well-known figure on the country’s racecourses and was widely thought to have arranged hospitality and gifts, including golfing holidays in Spain, for a number of jockeys. During his evidence, Bradley described Wright (Brian) as one of his very best friends, and that he had stayed with the latter at his home in Cyprus shortly before a number of associates of Wright – including his son – were found guilty of drug smuggling. Brian Wright is in fact currently the subject of an international arrest warrant but cannot be extradited from Cyprus¹²⁶.

It is claimed that the gang laundered millions of pounds of their proceeds through horserace betting rings. It was also believed that it was Brian Wright who instigated the doping of several horses on British courses in 1990, many of which have not been confirmed as such before these details emerged. In a postscript to a briefing paper on the background to the drugs trials, the Jockey Club stated that Dermot Browne, a former jockey and trainer, had issued statements to both the police and the Club during an investigation into alleged race-fixing and doping in the late 1990s. He admitted to having been a party to around 20 dopings in 1990, at the request of Brian Wright. These included two high-profile cases, i.e. Norwich and Bravefoot – at the St. Leger meeting in Doncaster, and another case, proven this time, which was that of Fkying Diva at Yarmouth. However, the clear implication was that at least 15 more cases of doping went undetected during the same period¹²⁷. All this also clearly showed that some severe breaches of Jockey Club rules had occurred¹²⁸.

Although the Jockey Club reacted to this news by making the right noises about this case underlining the vulnerability of racing to corruption by criminals and the potential of betting as a vehicle for laundering money, it qualified this by adding that the problem “had to be kept in perspective” and that there was “no evidence” that criminal activity or anything on a similar scale was operating on anything like a similar scale today¹²⁹. Exactly on what evidence they based these blithe statements it was difficult to say.

Skating on thin ice – was the Mafia involved in Winter Olympics imbroglio?

In the previous issue¹³⁰, attention was focused on the unseemly disagreements which marred the ice skating competition at the recent Winter Olympics in Salt Lake City, more particularly the figure-skating event which

was initially awarded to the Russian pair contrary to the opinion of most observers. Following a public outcry, the result was changed in such a way as to enable the Russian and Canadian pairs to share the gold medal. Attention focused on the points awarded by French judge Marie-Reine Le Gougne. Initially, she claimed that she had been pressurised into voting for the Russian pair, but she later withdrew the claim. Later, both she and the head of French skating, Didier Gailhaguet, were banned from the sport for a period of three years¹³¹. (See also below, p.137)

In early August, the news broke that an alleged Russian crime boss had been arrested in Italy on charges brought by the US authorities that he had attempted to fix the result in the figure skating competition¹³². The man in question, Alimzan Tokhtakhounov was arrested in Northern Italy where he was charged with conspiracy to commit wire fraud, and conspiracy to commit bribery relating to sporting contests. The US authorities lost no time in starting extradition proceedings against him¹³³.

This immediately introduced a new, and altogether more sinister, note in the entire matter. FBI investigators claimed that Tokhtakhounov, acting in collaboration with “unknown conspirators”, arranged for the French judge to vote for the Russian team of Elena Berezhnaya and Anton Sikharulidze. In return, Tokhtakhounov pledged to ensure that a Russian judge would cast his vote for the French team in the ice dancing contest¹³⁴.

Ms. Le Gougne, for her part, denied ever having had any contact with Tokhtakhounov. The Russian skaters involved also disclaimed any knowledge of the accused. If this is indeed the case, they would seem to belong to a minority in the Russian athletic community, since Tokhtakhounov’s reputation as “mover and shaker” in the world of Russian sport has become gradually uncovered as the investigation proceeds. He certainly has been involved in criminal activity such as arms dealing and antiques smuggling since the end of the Communist era. The Italian authorities were investigating the Russian in connection with a plan to launder mafia money through the American banks. The charges of fixing the Olympic result came by accident, as a result of several incriminating conversations overheard by Italian detectives in the course of their inquiry. There is, however, nothing to suggest that the skaters knew anything of his underworld activities¹³⁵.

“Bung” spectre once again rears its head in English football

The word “bung” was virtually unknown in the English language until seven years ago, when it was generally learned that this was the slang word used to describe transfer deal backhanders accepted by football

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administrators. The event which brought this phenomenon to the attention of the world at large was the banning of former Scottish international George Graham for accepting £425,000 in this manner whilst managing Arsenal. Little has been heard of any such practices ever since, which appeared to indicate that the practice in question had seriously declined, if not disappeared altogether. This impression was heightened by the fact that the English Premier League held a five-year investigation, conducted by a three-man team, into this question, which came to nothing because of perceived lack of evidence.

Any such complacency received a severe jolt in late March 2002, when a leading British newspaper claimed to have in its possession the names of five prominent football managers allegedly involved in sizeable transfer bungs¹³⁶. For legal reasons these names could not be revealed, and the FA refused to comment. Whether this allegation had anything to do with the fact that, a few days later, the FA advertised a vacancy for a Head of Investigations and Compliance, whose task will be to root out malpractices in the game and bring them to prosecution, was not known at the time of writing¹³⁷. Since then nothing further has been heard of these allegations.

Mayor banned from public office for diverting public money to Atletico Madrid

In April 2002, Jesus Gil y Gil, Mayor of Spanish town Marbella and owner of Atletico Madrid, the capital's "other" football team, was banned from public office for 28 years after having been found guilty by Spain's Supreme Court (Tribunal Supremo) of diverting £15 million worth of public funds to his club¹³⁸. As a result, he faced criminal prosecution for corruption¹³⁹. Mr. Gil has since resigned as mayor of the holiday resort¹⁴⁰.

Italian football clubs facing charges of corruption

Some of Italy's leading football clubs have recently come under suspicion of corruption. In March, A.S. Roma became enmeshed in controversy when an investigation was started by the authorities against club President Francesco Sensi and general manager Fabrizio Lucchese for "sporting fraud" after 25 Rolex watches were given to all top Italian referees. The man behind the two-year probe was Raffaele Guarinello, the prosecutor who recently brought doping charges against Juventus Turin¹⁴¹.

Barely a few weeks later, Italian football was plunged into fresh controversy when the national federation pledged an investigation into allegations of match-fixing in the Serie A (Premier Division) clash between A.C. Torino and Bologna. Television pictures appeared to show Torino star Fabio Galante calling for his team-mate Daniele Delli Carri to allow their opponents to score from a corner as his team were leading by 1-0. Bologna actually scored from the set piece, whereupon the two teams settled for a draw¹⁴².

The outcome of both cases was unknown at the time of writing.

Gymnastics judges expelled for favouring their own teams

In July 2002, four judges were expelled from the Rhythmic Gymnastics World Championships after having been found to favour their own countries' teams. The judges in question were Efi Pantazidou of Greece, Laissa Lukianenko of Belarus, Marcie Lourenco of Brazil and Choi Shin-ja of South Korea¹⁴³.

Football World Cup marred by corruption, both real and alleged

The World Cup held this year in Japan and South Korea has been pronounced a major sporting success by most unbiased observers. However, even this momentous occasion has been tainted by more than a whiff of corruption.

Even before a single ball had been kicked in anger, there was a flourishing black market in tickets for England's opening match against Sweden, with some tickets going for around £400 each. This was an almost inevitable result of the footballing authorities relaxing the ticket arrangements for the tournament. Originally, it was a requirement that all spectators should produce identification before being allowed entry, and that only those whose names appeared on tickets would be allowed entry. However, tests proved this to be an extremely cumbersome process, with some fans being required to queue for three hours before gaining admittance¹⁴⁴.

The tournament itself became mired in controversy

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as it progressed to the final stages. First, South Korean striker Ahn Jung-hwam accused the Portuguese national side of attempting to fix the outcome of the clash between the two countries by proposing a draw which would have seen both countries reach the second round¹⁴⁵. However, the joint hosts themselves then became subject to accusations of corruption as South Korea progressed much further in the tournament than even the most optimistic of its fans could have predicted¹⁴⁶. Particularly the fixture against Spain, of which more in a later section, led to accusations of match-fixing. However, to date nothing concrete has been proven. (See also below, p.128)

Hooliganism and related issues

Anticipatory measures, both planned and adopted

Football Disorder Act powers renewed (UK)

In May 2002, the UK Parliament amended s. 5 of the Football (Disorder) Act 2000 to renew, without time limit, two sets of powers which were inserted in the Football Spectators Act 1989 by that 2000 Act¹⁴⁷.

“Derby County Two” lose appeal against prevention order

As was recorded in a previous issue¹⁴⁸, two Derby County supporters, Carl Gough and Gary Smith, had banning orders made against them under Sections 14B(4)(a) and (b) of the 1989 Football Disorder Act 2000 upheld by the High Court¹⁴⁹. The claimants had unsuccessfully pleaded human rights and EU legislation in support of their case¹⁵⁰. The two unsuccessful litigants took their case to the Court of Appeal, but once again had their application rejected¹⁵¹.

The Court, presided over by Lord Phillips of Worth Matravers MR, ruled that preventing football hooligans from taking part in violence and disorder justified restrictions on freedom of movement which were justified¹⁵². He stated that the 1989 Act, as amended, was perfectly consistent with European Community law. Preventing football hooligans from taking part in violence and disorder in foreign countries was an imperative reason of public interest capable of justifying restrictions on their freedom of movement, and the scheme of the 1989 Act, if properly operated, would meet the requirements of proportionality. Banning order should be imposed only where there are strong grounds for concluding that the individual had a propensity for participating in football hooliganism. Section 14B proceedings were civil in character; however, that standard was flexible and had to reflect the consequences which would follow if the case for a banning order was made out. It had to be proved, to a

standard of proof that was practically indistinguishable from the criminal standard, that the respondent had caused or contributed violence or disorder in the UK or elsewhere, and there were reasonable grounds to believe that issuing a banning order would assist in preventing violence or disorder at, or in connection with, any regulated football matches (as was stipulated in section 14). It was true that the trial judge may not have appreciated the strictness in the burden of proof which was required, but the evidence would have justified the issuing of the order even if the correct standard had been applied. In addition, the manner in which the Football Banning Authority had approached its task appeared to be consistent with that which was appropriate, and the scheme as a whole was compliant with European Community law and was not contrary to Article 6 of the European Convention of Human Rights. The orders in the case under review were therefore justified.

It was widely expected in the media that the number of banning orders was likely to increase sharply as a result of this ruling, which was warmly welcomed by the National Criminal Intelligence Service¹⁵³.

Anticipatory measures before and during football World Cup

The measures aimed at keeping the 2002 World Cup as trouble-free as possible, some of which had already been described in the previous issue¹⁵⁴, naturally intensified as the time of the tournament drew nearer.

In mid-April, Home Office minister John Denham announced that almost 1,000 known hooligans would be required to surrender their passports five days ahead of England's first match against Sweden in Japan. These would not be returned until after the tournament had been completed. In addition, the names of other England fans who had not received any banning orders but had been convicted of football-related offences were communicated to the Japanese authorities¹⁵⁵. This was the case with people such as Paul Dodd, who had served a four-month prison sentence after leading a gang of football fans in a brawl with rival supporters. He did not have a banning order made against him and could therefore legally travel to Japan and South Korea for the tournament. During the hearing of his case, Dodd's barristers had argued that such an order could not be imposed without giving them prior notice. An application for a banning order had been made by Cumbria Police, but was not granted because the offence for which he was sentenced did not take place in a football ground. This is in spite of the fact that the relevant legislation does allow for an order to be imposed where the offences can be attributed to football related violence¹⁵⁶. Clearly, this is an area of the legislation in question which will need to be reconsidered and tightened.

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Later, the names of over 1,000 hardcore English football hooligans were passed onto major airlines in a bid to prevent them from travelling to the tournament. In addition, two Japanese intelligence officers who had been visiting the UK for a week were provided with profiles of a further 200 potential troublemakers¹⁵⁷.

With a few days to go to the tournament, the first England fans deemed to be undesirable guests at the football feast were being refused entry to Japan. Immigration officials of the host country were being assisted in this task by a specially trained team of English police officers drafted in for the purposes of helping to detect troublemakers. Thus two men were refused permission to enter the country when they arrived at Tokyo's Narita airport on a flight from Istanbul. One of them was reported to be James Rayment, who was not subject to a banning order but was one of the 349 England fans whose profiles were supplied to the Japanese authorities on account of their trouble-making potential¹⁵⁸. The previous week, the South Korean authorities had turned back one England fan on suspicion that he was on his way to Japan in order to cause trouble during the tournament¹⁵⁹. The man in question, Andrew Cooper subject to a football banning order, but Japan and South Korea had made it a matter of policy to refuse any fans who had been jailed for drugs offences or violence¹⁶⁰. Cooper was a Derby County fan who had been sentenced to four months' imprisonment in 1999 for the possession of CS gas¹⁶¹.

In another anticipatory measure, the Japanese authorities chartered a ferry normally used for the transporting of cars and lorries for use as a floating prison for English football hooligans. Any troublemakers "invited" aboard would be locked in cabins, and some could even be put in the hold before being taken to a detention centre¹⁶². The Japanese authorities were also concerned about the threat from terrorists wishing to make their mark at this highly prestigious and widely-broadcast event. This was particularly the case following warnings that France's football squad could be a potential terrorist target. These fears were prompted by the fact that ever since 11 French engineers were killed in a bomb in Pakistan early in May 2002, French interests of any shape were at risk. An attack against the national football team would therefore have represented a major symbolic blow against France. Heavy security therefore attended not only the venues where France were due to play, but also the team's hotel complex in Ibusuki¹⁶³.

One particularly original feature of Japan's public order preparations for the Cup was the use made of the so-called "lilac squad", a team of women police officers who were deployed during the key tie between England and Argentina. Any notion that this was a ploy to introduce a "gentle touch" to the policing of the

tournament was qualified by the knowledge that these were women in their twenties and thirties who were trained in a range of martial arts, who had also mastered a new arrays of anti-riot gear, including a net gun which is capable of enmeshing groups of troublemakers¹⁶⁴.

Meanwhile, the South Korean authorities were playing their part in the effort to prevent football violence, whether from hooligans or from terrorists. For each stadium where matches were to be played, around 100 police and military personnel, including black-uniformed special forces, patrolled the perimeter, searched all vehicles entering the stadium compound, whilst marksmen stood guard high in the stands. All this contributed towards the biggest security operation in sporting history¹⁶⁵.

It is a remarkable tribute to all these measures that the World Cup turned out to be one of the most trouble-free football tournaments in recent times.

Millwall FC takes steps to ban hooligans

The "New Den", home to Nationwide League club Millwall FC, witnessed more than its fair share of clashes between rival fans during the 2001-2 football season in England – some of which are detailed below (p.29). This has prompted a far-reaching review of the club's policy in this regard. In June 2002, its authorities announced that during the 2000-3 season, no away supporters would be allowed at home fixtures with Wolves, Burnley, Nottingham Forest, Stoke City, Portsmouth and Leicester City. Millwall fans would also be banned from travelling to the return fixtures¹⁶⁶.

The fixtures against Coventry City, Derby County, Reading and Crystal Palace, being regarded as medium-sized risks, would be made all-ticket and played in daylight. In addition, only season ticket holders or those subscribing to a membership scheme would be allowed to attend home matches. Although these measures would cost the club many millions, Chairman Theo Paphitis said that Millwall had no option but to take these stringent measures¹⁶⁷.

English cricket moves against potential hooligans

It is an unfortunate fact that a sport which until recently was renowned for its even-temperedness both on and off the field has shown signs of succumbing to the hooliganism virus during recent years. This has obviously caused a good deal of concern amongst the game's administrators, who are planning and taking measures aimed at turning back this pernicious tide.

Just before the season started in April of this year, the England and Wales Cricket Board (ECW) announced that any spectator who invaded the playing area during the summer's international fixtures would be fined £1,000¹⁶⁸. This is part of a set of measures, initiated by the Government, which were prompted by the unruly

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and at times violent scenes which marred the Pakistan tour of 2001¹⁶⁹. The authorities announced that they would be pursuing a policy of zero tolerance on this matter, and that they would be informing the public of the new arrangements through the press, posters and announcements on jumbo television screens erected at major cricketing venues. The measures in question were drawn up in consultation with the Home Office and the Association of Chief Police Officers (ACPO), and were issued to police ground commanders prior to the matches against Sri Lanka and India¹⁷⁰.

However, these measures were not stringent enough for some administrators, particularly those from the countries of the visiting sides. In Britain on a fact-finding mission aimed at arranging security ahead of the England tour, Indian Board joint secretary Jyoti Bajpal and communications director Amrit Mathur voiced the opinion that, in addition, fences should be erected to contain any troublemakers. They were particularly thinking of security arrangements to protect top batsmen such as Sachin Tendulkar and Sourav Ganguly, who had been the subject-matter of kidnapping threats during the previous months¹⁷¹. The English cricketing authorities did not follow up this advice, and no serious trouble arose in the course of the international fixtures involving India, although one or two incidents did occur (see below, p.28).

Meticulous planning avoids trouble at 2002 Commonwealth Games¹⁷²

The Commonwealth Games held this year in Manchester represented the biggest sporting event to be organised in this country since the 1948 Olympic Games – involving as it did 4,000 athletes from 32 different countries, with over a million spectators witnessing events spread over 17 different sports. These are traditionally known as “The Friendly Games”, and the local forces of law and order were determined that the Manchester games should live up to this description. The universal verdict must be that they succeeded splendidly in this design, and that this was made possible thanks to a meticulous exercise in long-term planning.

To this end, specialists from the Greater Manchester Police force (GMP) became involved in the development plans for the main stadium at an early stage. Security and safety measures were proposed and incorporated, so that safety certificates could be awarded for the various stage of its development. The problems surrounding the athletes’ village also needed to be attended to. Particular attention was also given to an in-depth examination at the potential for crime and disorder near the sites, as well as in those city areas where trouble was most likely to occur. Given that the Games took place at 15 different venues spread evenly

throughout the city, this was no mean challenge. The co-ordination of the policing efforts came within the remit of the Strategic Planning Team headed by Chief Superintendent Alan Prestwich.

Also in an effort to forestall trouble, Operation Clean Sweep was organised, which took place at the main city centre venues for the Games. It was aimed at tackling not only sport-related crime, but also general criminality such as prostitution, robbery, vehicle crime, begging and bogus street trading. City Centre Safe, on the other hand, was an on-going operation which tackles night-time violence.

Spanish hooligans soon to watch television with police?

One of the more original proposals to be tabled in the campaign against hooliganism recently emanated from Spain, whose most violent football fans may soon be invited to watch their favourite side free of charge – on television sets at police stations. In May 2002, the Ministry of the Interior confirmed that, arising from talks with the clubs involved, it was considering allowing the courts and the police to compel violent fans to watch matches under the vigilant eye of the police in order to prevent the violence which marred the end of the last football season in the country¹⁷³.

The relevant officials were unable to state whether giant screens would be set up at police stations or whether the fans would have to watch from behind bars. As might perhaps be expected, at least some sections of the media have been extremely hostile to any such proposal¹⁷⁴.

Forbidden fruit – banana ban at German premier league fixture

During the Hamburg v. Bayern Munich fixture during the 2000-1 German Premier League season, the visiting goalkeeper and German international Oliver Kahn was pelted with bananas. The club’s officials therefore banned this particular fruit from the corresponding fixture during the last season¹⁷⁵.

Lord’s pitch invader apprehended but let off

The various measures aimed at avoiding a repeat of last year’s cricket hooliganism, whilst largely effective, did not prevent some undesirable incidents at our cricket grounds. The most disturbing occurred at Lord’s during the Second Test against India at Lord’s, when Alistair Dobson, an Australian tourist, ran onto the pitch immediately after Sachin Tendulkar was given out and accompanied the Indian star batsman to the pavilion¹⁷⁶. Although the invader in question was apprehended, the Metropolitan Police later announced that it would not bring any charges against Mr. Dobson – much to the dismay of the MCC authorities, who felt undermined in

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their campaign to crack down on terrace and pitch hooliganism. MCC secretary Roger Knight even went so far as to consider bringing a private prosecution against Mr. Dobson¹⁷⁷.

The Metropolitan Police explained their decision not to prosecute by the fact that Dobson had shown no malicious intent towards Tendulkar. Both the Indian batsman and his captain, Sourav Ganguly, supported the police in this view. Other commentators, however, were less happy, raising the possibility that the invader could have been a terrorist rather than an over-excited cricket fanatic¹⁷⁸.

Security review follows Wimbledon court invasion (UK)

Karl Power, the serial exhibitionist from North Manchester whose immature pranks have bored the proverbial underwear off the nation for the past few years, was at it again in the summer of 2002. Having previously posed alongside the Manchester United team for photographs taken before a major European Champions league game, and emerged in full cricketing gear at a Headingley Test match, Mr. Power had on this occasion selected Wimbledon as his forum of operations.

During the first week of the tournament, he and a friend, Tommy Dunn, jumped from the stands and embarked on an impromptu game on Centre Court. They then ran off, but were intercepted by security guards, whose clutches they subsequently succeeded in escaping¹⁷⁹. Speaking after the escapade, Mr. Power declared himself "pleased" to have completed a hat-trick of high-profile stunts¹⁸⁰.

No such amusement, however, was in evidence amongst the tournament organisers. With exquisite timing and taste, Messrs. Power and Dunn had chosen to perpetrate their escapade immediately after Monica Seles had completed her second-round match. It will be recalled that, nine years ago, Seles had been the victim of a stabbing committed by a fanatical follower of her main rival, Steffi Graf, and was thus forced out of the game for two years – after which her career never fully recovered. Security has been a major headache for tournament organisers ever since. An All-England Club spokesman commented:

"We are taking this extremely seriously. It was extremely irresponsible. We will obviously be reviewing security procedures with all the relevant authorities to ascertain what happened. It would be a shame if a few show-offs were to ruin the Wimbledon experience for all the other well-behaved tennis fans"¹⁸¹

The police later decided not to take any action. The present writer will leave it to the reader to decide

whether or not this was a wise decision in view of current circumstances.

World Cup hooliganism in Russia and elsewhere

Although the tournament itself passed off in a largely trouble-free manner, thanks mainly to the preventative measure taken by all the relevant authorities as set out above, the various results obtained during this year's World Cup led to a number of violent incidents.

The most serious of these disturbances occurred in Moscow following the Russian team's humiliating defeat by host nation Japan in Group H. One man was stabbed to death as hundreds of youths went on the rampage in the worst football violence ever witnessed in the city¹⁸². In addition, dozens of cars were overturned, a Japanese restaurant attacked, shop windows smashed and a group of Japanese students were assaulted. The Japanese embassy was placed under reinforced security. At a certain point, the fans attempted to storm the State Duma, Russia's Parliament. The rampage had started among a hard core of 3,000 fans, many of whom had been drinking heavily all afternoon as they watched the game¹⁸³. Most disturbingly, it appeared that the riot had been well organised with hooligan leaders communicating with each other by mobile telephone¹⁸⁴.

During the inevitable inquest that followed, a good deal of (metaphorical) flak was hurled at the Mayor of the city, who was holidaying in Cyprus at the time. Inevitably, some heads rolled, with the Deputy Police Chief of the city being compelled to resign. This led conspiracy theorists to speculate that the riots had been deliberately incited by the secret police in order to discredit the incumbent mayor. However, this appears to have been somewhat far-fetched¹⁸⁵.

After much-fancied Argentina suffered early elimination from the tournament, at least 61 people were arrested in two Argentinian cities when drunken fans clashed with police. Around 200 angry fans threw bottles and stones at police in Cordoba, whereas in the coastal town of Mar del Plata 50 supporters took to the streets, four people being arrested after stones were hurled at a local branch of the US bank Citibank¹⁸⁶.

Alas, victory celebrations also took their toll in violent behaviour, as witness Turkey's unexpected progress to the semi-finals stage. In the case of this country, the trouble was not confined to its national boundaries. The home celebrations claimed four deaths and eight injuries in the cities of Mersin and Izmir, and 12 people were injured by bullets fired in the air¹⁸⁷. However, the Turkish community in London was also affected, as five men and a teenage boy were arrested when fighting broke out between Kurds and Turkish celebrating football fans in the Green Lanes district of North

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London, which is a Turkish stronghold. About 100 Turks and 50 Kurds hurled stones at each other and attacked each other with knives and wooden poles. One man was taken to hospital with head injuries¹⁸⁸. In addition, the Brazilian team's homecoming turned sour when angry fans pelted the team bus with rocks. The trouble occurred in Rio de Janeiro after coach Luiz Felipe Scolari cut short the victory parade because they were behind schedule¹⁸⁹.

Two unlikely items will conclude this section. In India, which had no axe to grind at all in the proceedings in Japan and South Korea, football fans ransacked an electricity station after power cuts deprived them of World Cup telecast¹⁹⁰. And in a turn of events undreamed of in recent years, Japanese police heaped praise on the manner in which the England fans had conducted themselves during the tournament, even in defeat...¹⁹¹.

Athens derbies spark violent incidents

The rivalries between the Greek capital's leading professional sporting teams often reach feverish, nay violent, proportions. Such misguided energy was once again on display at a soccer fixture between arch-rivals Panathinaikos and Olympiakos, when the match referee, Antonis Efthymiadis, was led from the field by a police bodyguard, bleeding from a headwound, after a mêlée of players, Panathinaikos supporters and staff rained blows on him as he made his way to the dressing room after the final whistle¹⁹². The staff members involved included the Panathinaikos club president and coach. Police launched an official investigation into the incident, which had been sparked off by the award of a penalty to the visiting side in the third minute of injury time, allowing the latter to secure a 1-1 draw¹⁹³.

However, the capital's basketball fans appear to be of a piece with their footballing brethren, as witness an incident which occurred nearly two months after the soccer imbroglio. Five Panathinaikos players were injured when the coach bearing them to a league play-off fixture against their arch-rivals Olympiakos was attacked by a stone-throwing mob. The hooligans surrounded the bus on the busy central Syngrou Avenue when it had to stop at traffic lights¹⁹⁴.

Police strongly opposed to Scottish clubs' access to English competitions

Various proposals for Scottish clubs such as Celtic and Rangers to be allowed access to English competitions have been made and documented in previous numbers of this publication – as well as the current issue (see below, p.127). It was inevitable that the public order implications of any such move should be considered at a certain point, and in April 2002 police authorities on both sides of Hadrian's Wall voiced their opposition to it

following a meeting in Glasgow, at which fears were expressed about the potential for an increase in hooliganism¹⁹⁵.

At the meeting in question, officials from the National Criminal Intelligence Service, which monitors hooliganism in this country, met their Scottish colleagues in order to discuss the security implications of the major Scottish clubs playing in such competitions as the Worthington Cup or the Nationwide League First Division. The meeting also discussed a closely-related problem which was that of English hooligans travelling North, following violence at the previous Aberdeen v. Rangers game which was alleged to have involved hooligans from several English clubs. Police on both sides of the border intend to increase surveillance operations¹⁹⁶.

The Millwall FC riot and its aftermath

If any further evidence were needed of the fact that hooliganism is alive and – literally – kicking in English football, it was supplied in abundance in South London during the final stages of the 2001-2 season. Millwall were at home to Birmingham City, both teams entertaining hopes and ambitions to secure a passage to that financial Shangri-La of football, to wit the Premiership. It was the side from the Midlands which emerged victorious from the contest, and unfortunately the effects of this encounter were not restricted to the Nationwide league tables.

During the hours which followed the match, running battles between rival gangs of supporters raged in the streets around the "New Den", where the home side has its ground. Birmingham fans were attacked, cars were set on fire and property destroyed by nearly 1,000 hooligans in the course of two hours of terror. Nearly 50 police officers, as well as 26 police horses, were injured in the *fracas*, which appears to have been premeditated by thugs using mobile telephones¹⁹⁷. All this was in spite of extensive precautions taken by the police authorities, who had been expecting trouble.

Several arrests were made, and police later released pictures of six other men suspected of taking part in the riot¹⁹⁸. Three of them were charged with rioting offences before magistrates sitting at Camberwell Green¹⁹⁹. Intriguingly, two brothers identified as ringleaders of the riot were the sons of a retired Metropolitan policeman²⁰⁰. Scotland Yard Deputy Commissioner Ian Blair subsequently stated that he would meet representatives of the Millwall club and of the Football League before deciding whether or not to sue the club in compensation for the injuries sustained by his officers²⁰¹. At the time of writing, no such legal action had yet been taken.

Trouble flares again at Leigh RLFC

Crowd trouble has been relatively rare in the sport of

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Rugby League, but one exception seems to be the Lancashire club Leigh. The previous issue of this organ related details of incidents which have occurred on its premises at Hilton Park²⁰²; unfortunately, this has not been the last instance of hooliganism afflicting the club. During the Kellogg's Nutri-Grain Challenge Cup quarter final in Leigh, bottles were thrown onto the pitch after Jon Roper scored a second try for the home side²⁰³. Two fans were evicted from the ground²⁰⁴. The Rugby Football League called for a report from match commissioner Tony Brown, as well as receiving the report submitted by referee Cummings²⁰⁵. At the time of writing, no action had yet been taken.

"Football hooligans, not racists, to blame for Preston riot" claim detectives

In late April 2002, a number of violent clashes of a racial nature erupted in Preston, Lancs., resulting in the arrest of ten white men and two Asians. The trouble was set off by a minor car crash after which an Asian man in one of the cars was said to have been attacked by a gang of white youths. The disturbances lasted about four hours before the police succeeded in restoring order. However, Chief Superintendent Russ Weaver claimed that, whilst the tension arose from the road accident, most of the violence was centred round the aftermath of a Nationwide First Division (football) play-off, as a result of which the local side failed to qualify for the Premiership. Some residents, however, called this version of events into doubt²⁰⁶.

Employment law issues arising from hooliganism. Feature in professional journal

This issue is dealt with under the heading of Employment Law (below, p.48).

Split in the ranks of "Barmy Army"

The rowdier element of England's cricket fans, known as the "Barmy Army", have recently experienced a split in their ranks. On the occasion of the recent England tour of New Zealand, some of the antics of the "Army" were clearly not outrageous enough for the liking of some of its adherents, who promptly established their own gang called the "Farmy Army" in deference to the bucolic origins of their founder, known simply as "Dorset"²⁰⁷.

Clearly these "fans" seemed determined to give new meaning to the term "breakaway group".

Round-up of other incidents, both at home and abroad

Belfast, UK. At least 18 people, including eight police officers, were injured in the course of serious sectarian rioting across North Belfast following the Rangers v. Celtic Scottish Cup Final. One man was shot in the leg during the clashes, which continued until late in the

evening. Some of the worst incidents took part in the sensitive Ardoyne and Crumlin Road areas of the city²⁰⁸.

Ayr, Scotland (UK). The Scottish League First Division fixture between Ayr United and Airdrie was abandoned after visiting fans invaded the Somerset Park pitch. The main source of the trouble appears to have been the anger expressed by Airdrie fans at the involvement of Bill Barr, Ayr's chairman, in their own club's problems, Barr's company having been struggling Airdrie's main creditor. A crossbar was broken in the course of the invasion, which occurred after Stewart Kean enabled the home side to take the lead. Referee Bobby Orr took the players off the pitch as fans raced on, and later abandoned the match. Diamonds Direct Action, an Airdrie self-styled "pressure group", had warned that action would be taken at the stadium in question²⁰⁹.

Stoke, UK. Hooliganism marred the Nationwide League Division Two play-off between Stoke City and Cardiff City at the Britannia Stadium, Stoke, in late April 2002. Robert Earnshaw had scored to give the visitors the lead when trouble erupted amongst Stoke City fans, and play was held up for three minutes in the second half as police rooted out the troublemakers²¹⁰.

Xi'an, China. Crowd trouble erupted in the central Chinese city of Xi'an, where Guoli fans set stand seats alight after a last-minute penalty was awarded against their team. The side from Tsingtao scored from the spot and the match finished in a 3-3 draw²¹¹.

Preston, UK. During a Nationwide League fixture (football) between Preston North End and Coventry City, a man was arrested when he appeared to attack Coventry manager Ronald Nilsson and goalkeeper Magnus Hedman. He was later charged with public order offences²¹².

Rochdale, UK. Rushden & Diamonds' fine achievement of reaching the Nationwide League Third Division play-off final was marred by a nasty incident in the match which provided them with this opportunity. At the final whistle, fans invaded the pitch, and Rushden midfielder Ritchie Hanlon, who had intervened to protect his teammate Garry Butterworth, was injured when he was struck by a police baton²¹³.

Eisenstadt, Austria. Arsenal manager Arsène Wenger threatened to take his side back to London following a pitch invasion which caused the abandonment of the game between his side and Rapid Vienna, during the London team's tour of Austria in the summer of 2002. Serious fighting between sets of local Austrian fans had caused police to order the referee to take both teams

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off the pitch²¹⁴.

Sint-Niklaas, Belgium. Hooliganism can be an expensive hobby, as a Flemish young man will no doubt learn to his cost. He sent a number of e-mails to the local police authority in which he threatened mayhem during the forthcoming off-season tournament, which he signed as Het Rellenteam (the hooligan team). This caused a massive police presence at the game in question, which nevertheless passed off peacefully. However, the sender of the e-mail was tracked down and now faces a bill of over €25,000 for the cost of the entire policing operation²¹⁵.

“On-field” Crime

“Racist assault” claim made against Bath RFC

That racism can rear its ugly head in the sport of Rugby Union has become only too evident in recent times, as witness the Azam/Andrew affair related in the previous issue²¹⁶. However, matters appear to have taken an even more serious turn during the later stages of the rugby season, an investigation has been ordered into an allegation of racist assault during a match between Saracens and Bath at Southgate. The alleged victim was the local team’s 14-year-old hooker, Ushanth Kantharuban. He spent seven hours in hospital waiting for an X-ray to his face after he claimed to have been punched and kicked to the ground. His injuries were apparently so severe that the game had to be abandoned midway through the second half. The victim has vowed never to play rugby again.

Ushant claims that he was set upon by some of the Bath forwards, of whom he also alleges that they spent much of the game racially abusing him. His family subsequently vowed to bring legal action against the club. No further news of this affair was forthcoming at the time of writing²¹⁷.

Uninterrupted local tradition justifies use of banderillas in bullfight. French Supreme Court decision²¹⁸

French public life is renowned for its centralising uniformity, which makes it somewhat surprising that some areas of the criminal law make provision for exemptions based on local customs. This is the case in relation to the provisions on cruelty to animals in the Criminal Code. As a result, it remains possible for bullfights to be held in Southern France (and cockfights in other areas!) whilst remaining in compliance with the criminal law, provided that the event concerned is part of an uninterrupted local tradition (*tradition locale ininterrompue*).

When the municipality of Rieumes, near Toulouse, decided to hold a *becerrada* (bullfight in which it is not intended that the animal be killed) it was challenged in this plan before the local judge sitting in summary proceedings (*juge des référés*) by the National Association for the Protection of Animals (*Société nationale pour la défense des animaux*) on the basis that the use of *banderillas* (barbed darts) against the animals in question infringed the relevant legislation on animal protection (Article 520 New Criminal Code). The judge considered that the municipality in question could not claim the type of local tradition demanded for the exemption to apply, and therefore awarded the action. The association which planned the bullfight brought a successful appeal against this decision; in so doing, the Court of Appeal of Toulouse gave a much broader interpretation of the exemption requirement.

The animal protection organisation applied to the Supreme Court (*Cour de Cassation*) to have this decision set aside. The Supreme Court conceded that the Court of Appeal had wrongly applied the relevant legislation on several counts; however, it had full sovereignty to judge whether or not this was a case of uninterrupted local tradition giving rise to the exemption in question. The application was therefore dismissed, and the Court of Appeal decision confirmed.

This decision has been attacked by certain commentators, such as Xavier Daverat, a lecturer at the University of Bordeaux. He considers that, by its ruling, the Court of Appeal – and therefore also the Supreme Court – has created a “bullfighting exclusion zone” in relation to the criminal law on the protection of animals, whereas the legislation in question requires specific circumstances if the exemption is to apply²¹⁹.

Police probe speedway death crash

There was a fatal outcome to a speedway fixture between King’s Lynn and Newcastle held in early May 2002, when local rider David Nix was killed in a crash. He appeared to lose control before being thrown off his machine, over the safety fence and onto the terracing

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near the pits area. The police and the Speedway Control Board launched an inquiry, the result of which were unknown at the time of writing²²⁰.

Greenpeace activists arrested after ramming America's Cup boat

In mid-May of this year, 11 Greenpeace activists were arrested after they rammed a motor-powered dinghy into the side of Defi Areva, the French challenger for the 2003 America's Cup which is sponsored by a nuclear energy company. The yacht's carbon hull was dented, causing "serious damage", according to French sources²²¹.

"Off-field" Crime

Tyson accused – once again

Mike Tyson's encounters with the criminal law have been well documented over the years. Unfortunately, this particular spectre struck again in April of this year, when he was accused of assaulting a stripper and her boyfriend in Phoenix, Arizona. This is the latest in a string of allegations made against the boxer. On this occasion, however, no sexual motive was involved²²².

(Tyson is also facing a civil suit arising from another alleged assault – see below, p.63)

Sporting personalities involved in sexual crime

Australian snooker player cleared of rape

In the summer of 2002, the Old Bailey (Central Criminal Court of England and Wales) was called upon to adjudicate in a disturbing case in which Quinten Hann, an Australian snooker player ranked 14th in the world, was accused of having raped a student at the Savoy Hotel, London in October the previous year²²³. However, the jury took just two hours to acquit the accused of the charges. The judge stated that he agreed with the verdict.

The case was the latest in a series of unsuccessful prosecutions for so-called "date rape". Fewer than one in ten allegations currently end in a conviction, as opposed to one in three 25 years ago. Where a trial results from the allegation, only 60 per cent result in a guilty verdict largely because the jury refuses to convict where the woman willingly accompanied the alleged attacker home. Government Ministers are said to be so concerned at the failure rate that they are considering changing the law to set a lower consent test²²⁴.

Top jockey found guilty of indecent assault

In April of this year, jump jockey Timmy Murphy was charged with indecently assaulting a female flight attendant during a journey from Japan to London²²⁵. Murphy, a successful National Hunt jockey who last year won the Irish Grand National and came second in the English Grand National, was also alleged to have urinated against the flight deck door and in his seat in the first-class cabin²²⁶. In late July, he was found guilty at Isleworth Crown Court, London, and sentenced to six months' imprisonment. The judge also ordered that he should remain on the sex offenders' register for five years²²⁷.

How widespread is child abuse amongst sports coaches? Investigation by Sunday newspaper²²⁸

In a previous issue²²⁹, attention was drawn to research conducted by the national Society for the Protection and Care of Children (NSPCC) which purported to demonstrate that sexual abusers were targeting children's sport. This seems to have set off a debate in the relevant circles, which in turn prompted a special investigation by the *Observer Sports Monthly* into the dangers facing children in this regard when entrusted to sports coaches. This featured a number of case studies, including that of a young footballer who survived abuse by a fully accredited coach and scout associated with several North-West league football clubs, a female survivor of sex abuse by her male swimming coach, a coach who left sport after admitting to sleeping with a 15-year-old girl whom he trained, and a coach who admitted to being a paedophile after having been convicted of sex crimes against children placed in his care.

In spite of the depressing picture painted by these examples, the article concludes that much has changed as a result of the increased awareness of this danger amongst sporting federations, most of whom currently have special guidelines for best practice by children's sporting coaches. This works for the protection not only of the children concerned but also of the coaches, who thus become less vulnerable to malicious allegations.

By way of postscript, in March 2002, a former Newcastle United youth football coach, George Ormond, appeared in court charged with ten counts of indecent assault on males aged 13 to 21²³⁰. Shortly afterwards, riding instructor Gary Hinds, who carried out a series of sex assaults on youngsters who came to his stables for lessons arranged by the riding charity Horse Rangers Association, was found guilty at Reading Crown Court and jailed for 20 years. The judge attacked what he described as the "appalling lack of supervision" by those in authority at the charity in question, who "failed abysmally to fulfil their responsibility" towards the children placed in their charge²³¹.

Rugby Union player cleared of rape

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In August 2002, Hywel Jenkins, a back row forward playing for Neath and the Wales A team, was cleared of a charge of rape when the Crown Prosecution Service admitted that there was insufficient evidence to bring the case to trial. Mr. Jenkins had been accused of raping a 28-year-old woman at a party in Bridgend, South Wales, which was attended by a host of other top rugby players. He subsequently condemned the legal system which allows him to be identified whilst the woman remains anonymous²³².

Woodgate hits the headlines again – as victim and perpetrator

The trial involving Leeds United players Lee Bowyer and Jonathan Woodgate, arising from an assault on an Asian student outside a Leeds nightclub in late 2000, has been well documented both in these columns²³³ and elsewhere. Since then, Woodgate seems to have been unable to keep out of the non-sporting headlines – even though he has been both sinned against and sinner during the period under review.

In late March of this year, the Leeds footballer was disqualified from driving for six months after a court witnessed a police recording of him driving at a speed of almost 100 mph. The ban was imposed as the player was completing the community service order imposed on him as a result of having been found guilty of affray in the infamous assault case. Woodgate had denied his fourth speeding offence in as many years, but was found guilty by magistrates at Richmond, North Yorkshire²³⁴.

Barely two weeks later, the spotlight was on him again when he sustained a broken jaw in an incident which occurred in his native Middlesbrough. Witnesses saw him being abused by Asian youths outside a pub; seconds later he was writhing in pain on the ground²³⁵. As a result, he was unable to play for the remainder of the season. The next day, Leeds United made an official statement to the effect that the attack in question had been the result of nothing more than “horseplay”, and that the player would be fined for having been on a pub crawl with his friends in his home town²³⁶. This appeared to be confirmed by the student who was said to have administered the blow, John Duffy²³⁷. However, it is legitimate to entertain some doubts on this version of events, particularly in the light of initial reports which suggested that the violence was connected with a revenge mission by Asian youths²³⁸.

Contempt of court proceedings have commenced against the *Sunday Mirror* for the part which it played in causing the original trial to collapse in early 2001. Lee Bowyer (and possibly also others involved in the trial) is currently defending himself in a civil suit arising from the case (see below, p.63).

As a postscript, it was interesting to learn that Yorkshire Television, with the exquisite decorum and taste

which have graced the British media in recent years, announced that the trial of Bowyer and Woodgate was to be made the subject-matter of a two-hour television drama²³⁹. Purely in the public interest, of course...

Manchester United legend cleared of “road-rage” attack

In the previous issue²⁴⁰ it was reported that former Manchester United and Scotland midfielder Paddy Crerand had been charged assault following an alleged “road-rage” attack. Although Manchester Crown Court heard that the former “Red” left a motorist fearing for his life as the former attacked him with a golf club²⁴¹, Mr. Crerand was found not guilty following a three-day trial. He claimed that he was acting in self-defence as the alleged victim, Mark Taylor, was “shouting and screaming his head off”, and followed this up by pushing and punching him. Former England captain Bryan Robson and Manchester City star Mike Summerbee acted as character witnesses for Mr. Crerand²⁴².

World Cup-related offences

Suffolk, UK. In late May 2002, a woman who throttled her partner with a television aerial flex when he refused to let her watch an England World Cup qualifying tie on television was given a three-year community rehabilitation order. The judge accepted that the woman in question, Zena Burton, of Felixstowe, Suffolk, had suffered years of domestic abuse with different partners²⁴³.

Japan. Two weeks before the tournament kicked off, police identified two convicted Chelsea hooligans as being the brains behind a lucrative fake football shirts scheme which was set to hit the World Cup. Talks were held between British police, their Japanese counterparts and kit manufacturers in order to prevent hundreds of thousands of fake replica shirts flooding the tournament. Police had been informed that the two were intending to use their contacts in the hooligan “community” to sell the shirts in Japan. Accordingly, Japanese police and immigration officials were warned to look out for dozens of football hooligans attempting to enter the country from Thailand – where the Chelsea pair had set up a bar and from where they were conducting their operations²⁴⁴.

Daegu, South Korea. Just as the tournament was about to kick off, it was learned that Khalilou Fadiga, a member of the Senegal national team who plays league football for Auxerre, France, was under investigation for taking a necklace worth around £160 from a South Korean shop²⁴⁵. The case has an uncanny resemblance with the Bobby Moore affair in Bogota just before the 1970 World Cup. (On the latter, see also below p.79)

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Tokyo, Japan. On the eve of England's momentous clash with Argentina, three Britons were arrested for passing counterfeit dollars. This was after they had been warned by police earlier that week for leaving a convenience store in Tokyo without paying for the goods taken²⁴⁶. The outcome of the prosecution was not known at the time of writing.

Tokyo, Japan. Two weeks after the previous incident, news broke that an England fan was held in solitary confinement for more than two weeks after having attempted to sell his friend's unwanted World Cup ticket. Later, he told a Japanese court heard that the interviewing was very aggressive, intimidating and violent. His Japanese lawyer described these proceedings as a "very serious" violation of human rights²⁴⁷.

Japan/South Korea. It was learned that, during the qualifying stages of the tournament, a total of 64 people were arrested for violence, ticket-touting and other World Cup-related offences. Ticket touting was the most frequent offence, accounting for 24 arrests, followed by obstructing the police (11 arrests). Of the people arrested, 40 were Japanese, with 12 from England and three from Ireland²⁴⁸.

Stalkers pose threat to women tennis players

Ever since a fanatical supporter of Steffi Graf attacked Serb star Monica Seles in Hamburg nine years ago, women tennis players have felt vulnerable to the danger presented by stalkers and similarly disturbed persons. This particular threat seemed to surface again this year when it was learned that Serena Williams, the world No. 2, has hired the services of an Italian bodyguard to protect her from a German fan who is infatuated with her. The man, who is known to the authorities, attended the German Open in Berlin and reappeared at the Italian Open in Rome, where he was arrested. He was also spotted at the French open in Paris²⁴⁹.

The threat reappeared during the Wimbledon tournament, when it emerged that both Williams sisters had become virtual prisoners in their rented South London house amid serious concern about their safety – once again from the same German stalker. Serena could not be left alone for even one moment and had to be accompanied everywhere by her mother and a security guard. In the event, a 34-year-old German national was arrested near the All England Club for suspected breach of the peace and alleged criminal damage. He was later bound over to keep the peace²⁵⁰.

Certain sections of the media have criticised the women's tour for encouraging would-be stalkers by publishing a new magazine used as a showcase for its top players. Thus the Washington Post and New York Times have suggested that images projected by some

players on the women's tour had invited what they described as a "creep factor"²⁵¹.

Fraud squad investigate Yorkshire CCC finances

Yorkshire county cricket has had its peaks and troughs in recent years, but its low points have not hitherto assumed a criminal character. This particular duck seemed initially to have been broken just before the start to the 2002 season, when the fraud squad were called in by the county club's authorities, who had found "serious deficiencies" in the retail operations of the club. Accounts for the previous year had shown that income from the club's shop and merchandising operations fell from £32,422 to £460, even though Yorkshire had won the County Championship for the first time in 33 years. The club's treasurer, Peter Townsend, had already apologised for its "abysmal" failure to conduct its business successfully²⁵².

However, three months later, West Yorkshire police announced that it was discontinuing its investigation, after finding a lack of evidence which was caused by "inadequacies in the internal accounting procedures" operated by the club. An internal report concluded that the losses sustained were in the region of £80,000 (stock) and £20,000 (cash)²⁵³. Exactly what happened to these missing amounts will probably never be known – at least officially.

Sentence passed on Turk who murdered Leeds fans causes concern (Turkey/UK)

Outrage greeted the news, which broke in early May, concerning the person found guilty of murdering Kevin Speight and Christopher Loftus, two Leeds United supporters who were in Istanbul in April 2000 for the UEFA Cup semi-final with Galatasaray. The 15-year sentence was much less than the culprit, 21-year-old Ali Umit Demir, had been led to expect, and this in turn could be reduced by more than half in terms of remission for good behaviour²⁵⁴. The defence had claimed that the accused had been offended by the sight of Leeds supporters dropping their trousers, urinating on the Turkish national flag and defiling Turkish banknotes. Under Turkish law, a sentence can be reduced by up to 50 per cent if provocation can be proved²⁵⁵.

John Howe, the lawyer acting for Mr. Speight's widow Susan, expressed his client's concern at the leniency of the sentence²⁵⁶.

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Round-up of other cases (all months quoted refer to 2002, unless stated otherwise)

Liverpool, UK. It will be recalled²⁵⁷ that last year, former Everton player Danny Cadamarteri had been convicted of assaulting a woman in Liverpool and fined £3,000. In July, the player was given an 180 hours community rehabilitation order at Liverpool Crown Court after admitting conspiracy to give a false alibi at this trial²⁵⁸.

Manchester, UK. In early April, it was learned that a painting of former Scotland international Denis Law worth £100,000 was stolen from Manchester United's ground at Old Trafford. The thieves were believed to have posed as business executives taking part in one of the tours of the stadium²⁵⁹. It was later recovered in the back yard of a chip shop 100 yards away from the ground²⁶⁰.

London, UK. In August, the trial of Chelsea players John Terry and Jody Morris, as well as Wimbledon player Des Byrne, commenced at Middlesex Guildhall Crown Court. The three were accused of assaulting a nightclub doorman with a bottle²⁶¹. The outcome of the trial, the background to which was set out in our previous issue²⁶², was not known at the time of writing.

Rome, Italy. In July, Juan Sebastian Veron, Manchester United's Argentinian international, was summonsed to appear before a court in Rome to answer charges of illegally acquiring an Italian passport whilst he was playing for Lazio two years ago²⁶³. The outcome of this case was as yet unknown at the time of writing.

Leeds, UK. In a previous issue²⁶⁴, it was reported that David Nelson, a former Rugby League player, was shot and killed in a Leeds pub. In May, Paul Bryan was jailed for life by Leeds Crown Court after having been found guilty of the murder of both Mr. Nelson and his friend Joseph Montgomery²⁶⁵.

London, UK. In May, a series of joint raids by Scotland Yard and Westminster Council resulted in the seizure of FA Cup Final tickets worth an estimated £30,000. Other tickets were also seized, including some for crucial matches in the later stages of the English Premiership. Nine people were arrested in the operation, believed to be the biggest yet against black market operators²⁶⁶.

Memphis, US. In June, a man was shot dead and another critically injured following the Lennox Lewis v. Mike Tyson World Heavyweight title fight. A total of 27 people were arrested²⁶⁷.

Copenhagen, Denmark. In late June, Stig Tofting, Bolton Wanderers' former Danish international, who is connected with the Hell's Angels, was charged with

assault after an incident which occurred in a Copenhagen restaurant. A disagreement arose in the Ketchup Café after singing from a group including Tofting gave rise to a complaint from staff members. When asked to leave, Tofting was alleged to have hit one employee and headbutted another²⁶⁸. The outcome of this case was not yet known at the time of writing.

Johannesburg, South Africa. The reader may recall the case of two white Rugby Union players accused of murdering a black teenager²⁶⁹. Their trial ended in May before a court in Pretoria, which jailed them for 18 years. The case had raised racial tensions, which is why the trial was moved from Northern Province to the nation's capital following angry clashes between white and black demonstrators outside buildings where previous hearings had been held. There was widespread anger that life sentences had not been imposed for what was regarded as one of the most brutal racial murders the country had ever witnessed²⁷⁰.

Hampshire, UK. In April, a warrant was issued for the arrest of Yoshi Kawaguchi, Japan's captain in the 2002 World Cup. The goalkeeper, who plays for Nationwide League side Portsmouth, failed to appear to answer a speeding charge before magistrates in Fareham²⁷¹.

Lanarkshire, UK. When a thunderstorm disabled the electronic system at Shotts maximum security prison in Lanarkshire in early April, this interrupted the showing to the inmates of the European Champions League game between Liverpool and Bayern Leverkusen. The electronic fault also disabled the locks, as a result of which prisoners went on the rampage. Prison officers later succeeded in restoring order²⁷².

Kingston, Jamaica. In June, thieves robbed the West Indies team just prior to their final one-day match against New Zealand in Kingston. Around £2,500 was stolen in cash from the dressing room whilst the players were warming up at the Arnos Vale ground²⁷³.

London, UK. In the previous issue²⁷⁴, it was reported that Gillingham footballer Marlon King had been accused of smashing a bottle over a policeman's head. He was acquitted of that charge by Inner London Crown Court in May. However, shortly afterwards he faced a charge of handling stolen goods before the same court, which had an unhappier outcome for him. He had been caught at the wheel of a stolen BMW convertible, and had repeatedly attempted to bluff his way out of any charge, informing the police that the £32,000 car was his. The player insisted that he had owned the vehicle, which had been fitted with false number plates, for two months, whereas it had been purloined from outside its

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owner's house four weeks earlier. The jury found him guilty, and he was jailed for 18 months²⁷⁵.

Ilkeston, UK. In May, Shane Warne, the Australian Test spinner, was banned from driving for three months after having been caught driving at a speed of 120 mph in Derbyshire. He was also fined £300 with £50 costs after having admitted the offence to magistrates in Ilkeston²⁷⁶.

Marseille, France. In May, Robert Pires, Arsenal's French international midfielder, was questioned by French police in connection with an investigation into the finances of his previous club Marseille. The judicial authorities in that city are looking into the transfer dealings engaged in by the club during the 1997-99 period²⁷⁷. However, no charges were brought against him²⁷⁸. In connection with the same investigation, former Marseille manager Rolland Courbis was also questioned by police about some 32 transfers²⁷⁹.

London, UK. In April, it emerged that England and West Ham goalkeeper David James was the victim of an alleged blackmail plot. His club had received a demand for £28,000 coupled with the threat of exposing alleged links between the player and a person suspected of supplying drugs. Police, who arrested a man in connection with this matter, emphasises that Mr. James had not committed any illegal act²⁸⁰.

Kingston-upon-Hull, UK. In June, police arrested Hull Kingston Rovers full-back (Rugby League) Alex Godfrey on suspicions of assault, causing grievous bodily harm, on Whitehaven winger Leigh Smith. Smith was also to be questioned concerning an allegation that he had racially abused Godfrey during the same match²⁸¹. The Hull club later issued a statement that Godfrey enjoyed their "complete support"²⁸². The outcome of this affair was not known at the time of writing.

Sussex, UK. In July, two postmen were arrested on suspicion of stealing tickets for the Wimbledon tennis championships from the Royal Mail. They had already been held for touting tickets. A search of their homes allegedly uncovered evidence of other postal thefts²⁸³.

London, UK. In March, a boy of 15 bled to death on a North-West London housing estate following a disagreement about football. The boy had just left the Acorn Youth Centre when he apparently became involved in a fracas with a group of youths on the Churchend Estate in Willesden²⁸⁴. It was reported that the boy in question, a keen Manchester United fan, had been known to be frequently involved in arguments about football²⁸⁵.

Hove, Sussex, UK. In March, the trial was held of a father who, whilst supporting his son in a football match, bit off the opposition manager's ear following a heated dispute about the game. He was also said to have racially abused one of the players of the Hove Park Colts before kneeling a spectator in the groin²⁸⁶. The outcome was not known at the time of writing.

Atlanta, US. It may be recalled from the previous issue²⁸⁷ that Olga Korbut, the legendary Olympic gymnast, had been arrested on a charge of shoplifting at her current home in Georgia, US. In the event, she paid a fine amounting to £230 and attended a course on "values" to avoid the possibility of a trial based on these charges. It is now her son who is the focus of FBI attention, after \$30,000 worth of counterfeit money was found at her former home²⁸⁸.

London, UK. In August, a breeder of Olympic horses was jailed for three months following a four-year dispute with her neighbour over a 3ft strip of land. Samantha Richards had earlier refused repeated court orders to move a fence at her home which was just inside her neighbour's property²⁸⁹.

Madrid, Spain. In May, the Basque separatist group ETA sent a violent and highly public message to the government of Spain by exploding a car bomb, which injured 17 people, outside Real Madrid's football ground, the Bernabeu stadium, hours before the kick-off to the Champions' League semi-final between the home side and arch-rivals Barcelona. The car in which the bomb had been placed was parked 150 yards away from the stadium. Hundreds of fans who had congregated near the stadium fled as ambulances and police arrived at the scene. However, following a rapid meeting between UEFA officials, representatives from both clubs and the police, it was decided to go ahead with the match²⁹⁰.

Chester, UK. In early April, former Liverpool captain Mark Wright was arrested after having allegedly harassed his estranged wife Sarah in breach of bail conditions. He appeared in court accused of a series of telephone calls which caused the ex-wife to fear that violence would be used against her²⁹¹.

Brighton, UK. Peter Taylor, the former England coach, was involved in an incident which prompted a police investigation towards the end of April. Apparently he screamed obscenities at a cameraman who was taking pictures of him as he left the training ground of Brighton & Hove Albion, whose manager he was before resigning shortly after the incident. Taylor also allegedly grabbed him by the scruff of the neck and threatened violence²⁹².

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Rio de Janeiro, Brazil. In the previous issue, it was reported that New Zealander Sir Peter Blake, one of the most prominent yachtsmen ever, had been murdered, having been shot by a gang of armed pirates in Brazil²⁹³. In June, the six men accused of this crime were found guilty and sentenced to prison terms varying between 26 and 36 years. He died attempting to protect his crew from the attackers, who had boarded his yacht and held crew members at gunpoint²⁹⁴.

Freiburg, Germany. In May, Olympic cycling champion Jan Ullrich had his driving licence confiscated following a late-night incident which took place in the centre of Freiburg, Germany. It appears that Mr. Ullrich had drunk several glasses of wine before driving his Porsche 911 into a railing, damaging several parked bicycles. Ullrich then drove off, but a witness to the incident noted the registration number of his car and informed the police, who took a blood sample off him²⁹⁵.

Other Issues

Golf ball “thief” jailed, then freed on appeal

In April 2002, a man who made a good living from recovering lost balls from the lakes of golf courses was jailed for six months by Leicester Crown Court. The latter decided that what John Collinson regarded as fair game actually amounted to theft. Collinson and his associate had retrieved 1,158 golf balls from lake using nets and put them in two sacks when the police arrived, alerted by the sounding of a burglar alarm in the clubhouse. Having been charged with theft, they argued that lost balls were no-one’s property, so that they could retrieve and then retail them²⁹⁶.

The Court heard how Mr. Collinson and his partner had initially denied that they were fishing for balls when police arrived on the scene. They claimed that they had offered the club their services and were checking the course first. The judge also informed the jury that Collinson had returned to collect the balls whilst on bail for the offence. His partner, Terry Rostron, who had since then given up collecting the balls, was conditionally discharged for 12 months and ordered to pay £400 costs²⁹⁷.

The case caused a good deal of controversy in the media, with members of Mr. Collinson’s family hitting out at what they regarded as the severity of the sentence compared to the lighter penalties imposed for more serious crimes involving violence²⁹⁸. Many golfers sent messages of support and sympathy to Lakeballs UK, the company for which Mr. Collinson worked²⁹⁹. In the event, Mr. Collinson only spent a few days in prison. He was released on bail shortly afterwards pending an

appeal against the sentence³⁰⁰. The Court of Appeal reduced the sentence to a conditional discharge³⁰¹.

The apparent severity of the sentence may have shocked many – as indeed it did the present writer. However, Laurence Toczek, a law lecturer writing in a leading professional journal³⁰², points out that the Leicester Crown Court decision was entirely in point with previous decisions. Thus in *Hibbert v. McKiernan*³⁰³, a man found in possession of eight golf balls which he had picked up on the links was convicted of theft by Stockport magistrates. The Divisional Court upheld the ruling on the grounds that the golf balls, even though they may have been abandoned by their owners, were in possession and control of the golf club and therefore belonged to the club for the purposes of theft. The author argues that perhaps the Collinson decision is perhaps more vulnerable where it comes to the accused’s “dishonesty”, which is a required element under Section 1(1) of the Theft Act 1968.

CRE head charged with threatening behaviour at Lord’s (UK)

Gurbux Singh, the former Chairman of the Commission for Racial Equality (CRE), is a keen cricket fan, and was in attendance at Lord’s when England played his native India in the final of the summer’s one-day series of internationals. After the match had finished, however, he was involved in an altercation with several police officers, one of whom Mr. Singh allegedly subjected to a tirade of drunken abuse. Both he and his wife, Siobhan Maguire, were subsequently taken to Marylebone Police Station where he was arrested for engaging in threatening behaviour under Section 4 of the Public Order Act. His wife was arrested for obstructing the police³⁰⁴.

Later, Mr. Singh was formally charged with threatening behaviour³⁰⁵, whilst Ms. Maguire received a formal caution but was not charged³⁰⁶. The trial had not been held at the time of writing, although Mr. Singh had resigned as head of the CRE³⁰⁷.

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Media Rights Agreements

The ITV Digital saga and its consequences

The background

Five years ago, the British media witnessed the birth of a new television station, i.e. ITV Digital, owned by the Carlton and Granada independent television franchises. The main commercial appeal of the new channel was that it promised an unremitting diet of football of all types. Although the jewel in its crown was undoubtedly the rights it secured to European Champions' League football, another major attraction was the deal which it struck in June 2000 with the Nationwide Football League, which contained all the original Football League clubs less those who had left for the lush pastures of Premiership football. The deal made provision for £315 million to be paid to the various clubs in the League. The lion's share of this cash – 80 per cent, in fact – was to go to the First Division, whose clubs would receive £3 million each per annum. The remainder was to be shared out between Divisions Two and Three, whose clubs would receive £750,000 and £500,000 each. Relieved no doubt at not being left too far behind the Premiership as regards television coverage, the League Chairman eagerly accepted the deal. In their hubristic exuberance, television and football bosses united in hailing this as the deal which would change the face of English football for ever. Events as detailed below proved them right, but not quite in the manner originally envisaged by them.

The deal unravels

In mid-March 2002, i.e. with a little under half the contractual period left to run, ITV Digital announced that they would seek to pay £130 million less than the £180 million they still owed the clubs under the said deal. This move had apparently already been discussed in secret talks between the executive of the League and ITV Digital representatives³⁰⁸. Accordingly, the contract would have to be renegotiated in this sense. This turn of events was blamed on poorer than expected viewing figures.

This news was naturally met with a storm of protest from the League clubs involved, most of which had based their strategies – in which pride of place was naturally taken by the numbers of players on their books, as well as the size of their pay packets – on the proceeds of the deal. Carlton and Granada, however, stated that the clubs would have little option but to return to the negotiating table, since the alternative would be for TV Digital to close down. All the clubs could then look forward to would be an expensive court case against a bankrupt organisation with few assets³⁰⁹. The League Chairmen responded by warning that they would take legal action, not against ITV Digital, but

against owners Granada and Carlton, if the full terms of the contract were not honoured³¹⁰. As far as they were concerned, the League and ITV Digital had a binding agreement, which vested Granada and Carlton with a heavy financial and social responsibility. The Crystal Palace chairman Simon Jordan commented that the sum involved would be a “drop in the ocean” for the two companies involved³¹¹. The Football League even went so far as to propose that it should set up its own TV channel in order to broadcast its matches, and had taken advice from the Scottish Premier League, who were in the process of doing exactly that³¹². Also, in a triumph of hope over experience, Football League chairman Keith Harris incited supporters of the clubs involved to switch off for soap operas such as *Coronation Street* and *Emmerdale Farm* as a mark of protest³¹³.

ITV Digital goes into administration – creating mayhem

Barely a week after announcing the need to renegotiate the Football League contract, the executives of ITV Digital conceded that its financial position was untenable and placed the beleaguered company into administration. In a further ominous development for the future of football broadcasting, Britain's largest cable television group, NTL, also admitted that it was running out of funds³¹⁴. Regulators and Government ministers said that they would be monitoring closely the attempts made by administrators Deloitte and Touche to rescue the company, but it was not expected that the company could be rescued in the form in which was constituted³¹⁵.

It later emerged that the company had considered going into administration as far back as November 2001, despite having given assurances to the Football League that they were on firm financial footing³¹⁶. The League also requested stock market regulators to investigate whether ITV Digital misled the City over its financial health shortly before being placed into administration³¹⁷.

The Government lost no time in announcing that it would not throw any lifelines to either the company or the League, thus leaving their fate to market forces. Ministers blamed a combination of greed and poor management for the crisis³¹⁸. However, all was not it seemed in this regard, since the Football League discovered that Granada and Carlton were due “digital dividends” amounting to £550 million from the Government for the next four years. This led them to protest that the owners of the doomed digital TV station could well afford to honour the remainder of the contract³¹⁹.

In the wake of the almost certain demise of ITV Digital, League chairmen warned of dire consequences for the clubs affected, predicting that up to 30 could be forced out of business as a result³²⁰, since many had spent lavishly on ground facilities and players' wages on

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the strength of the contract in question. Following a three-hour meeting in London, they decided to adopt a twin strategy in order to try to accommodate the cash crisis. On the one hand, they threatened that, unless Granada and Carlton were prepared to honour the existing contract, they would bring court proceedings with a claim for £500 million against them. On the other hand, they also made clear their willingness to enter into negotiations on the fate of the contract – in the sense that, if Carlton and Granada were to pay the £89 million due in August 2002, the League would be prepared to buy back the rights for the final year of the contract and sell it³²¹. In a show of solidarity, the Premier League clubs threatened to ban ITV Digital cameras from covering pay-per-view matches unless the contract was honoured³²².

It was widely expected that the company would go into liquidation shortly afterwards³²³. However, a last-minute reprieve was forthcoming when Granada and Carlton were prepared to provide enough money to allow the business to operate a little longer – provided there was a clear sign that a deal could be negotiated with the League within the next seven days³²⁴. The League was then said to be considering a new offer – the value of which was undisclosed – from the administrators, the League having already rejected a £60 million proposal made since the original offer of £50 million³²⁵. This revised offer then turned out to be for £74 million, this proposal having been communicated to the High Court, which would have to decide whether or not to liquidate the company³²⁶. The High Court thereupon granted a one-week “stay of execution” whilst the new offer was being considered³²⁷.

Then the administrators suddenly withdrew the renewed offer, blaming the intransigence of Football League Chief Executive David Burns. The retraction went against the wishes of the all-party football group of MPs, who had called upon ITV Digital’s owners to accept their “moral responsibility” and honour the remainder of the contract³²⁸. Both sides then did return to the negotiating table, but without agreement. One of the reasons was probably that the Football League had acquired the belief that they had found the necessary legal authority to support their claim for payment of the full contractual amount against Granada and Carlton. They argued that ITV Digital agreed the deal with the League in partnership with ITV, a limited company owned by Carlton, Granada and other ITV franchises which had assets worth £700 million. This would make the latter jointly and severally liable for the contract in question. Granada and Carlton, however, maintained that they had received legal opinion substantiating their view that they were not subject to a parent company guarantee in relation to ITV Digital³²⁹. Earlier, in another boost for the owners of the doomed broadcaster, it had transpired that they had been allowed to launch ITV Digital without being required to give a

written pledge to the Football League that they should meet their financial obligations in the event of ITV Digital going out of business³³⁰.

ITV Digital put up for sale, then switched off – BSkyB steps into breach.

A few days later, Carlton and Granada gave up the struggle to save the broadcaster and put it up for sale³³¹, and its administrators warned that the channel would be switched off if they failed to find a buyer³³². It soon became clear that there was but a poor prospect of finding any such purchaser, since the broadcaster was losing thousands of subscribers per day, and its overall value being estimated at as little as £10 million³³³. The next day, its four pay-per-view film channels were switched off³³⁴. Meanwhile, discontent was also manifesting itself amongst the shareholders of the broadcaster’s owners, with two major shareholders calling upon the Chairmen of Carlton and Granada to resign after losing £600 million apiece on the ill-fated venture³³⁵. Some more fruitless negotiations between the two sides followed. Secret talks were also said to have been conducted between Football League chairmen whereby a plan was being hatched to let all 72 clubs go into simultaneous administration in order to force the Government’s hand over the crisis³³⁶.

Finally, on 30 April, the administrators switched off the ITV Digital channels after having failed to find a buyer, potentially leaving 1,700 people without employment and 800,000 viewers without services they had paid for³³⁷. Nevertheless, Culture Secretary Tessa Jowell expressed her confidence that a buyer for the stricken broadcaster would be found within six weeks. This was not enough to prevent the resignation of Stuart Prebble, its Chief Executive. Carlton and Granada denied that Mr. Prebble was being made a scapegoat for the collapse of the venture³³⁸.

Shortly afterwards, the League’s clubs were saved from the certainty of total financial collapse when they concluded a deal worth £95 million with BSkyB for the broadcasting of their fixtures over the next four years³³⁹. Nevertheless, the First Division club chairmen were unhappy with the deal, and passed a vote of no-confidence in the League Chairman, Keith Harris, and its Chief Executive, David Burns³⁴⁰.

Football League sues – and loses

In spite of the legal weaknesses in their case as described earlier (p.38), the Football League proceeded to sue Carlton and Granada for payment of the remainder of the amount due under the original contract³⁴¹. In the event, the High Court dismissed its action. It ruled that Granada and Carlton could not be held liable for the amount claimed because the contract did not contain any legally enforceable guarantee³⁴². The judge, Mr. Justice

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Langley, made clear his view that the central plank of the claimant's case was entirely without merit. It had concluded the deal with the Ondigital, ITV Digital's predecessor, and relied on a document stating that "Ondigital and its shareholders will guarantee all funding to the Football League". However, this statement was subject to contract, never ratified in the final agreement, and amounted to no more than a gentlemen's agreement which could not stand up in court.

In a truly damning conclusion, he held that the League had started unpromisingly and finished as badly as it had begun. He expressed his surprise that the League should have relied on such flimsy documentary support, given that they had the benefit of professional advice provided by experienced management and lawyers³⁴³. This not unnaturally prompted calls for the resignation of the Football League's Chief Executive, David Burns – which he did a few days afterwards³⁴⁴.

The fallout

The full extent of the damage this entire adventure has wrought on English football cannot be assessed after so short an interval. However, in the short term there were already some indications of the shock waves which the affair had sent through the sport.

Even before the court case described in the previous paragraph had been filed, the affair had begun to take its toll in terms of lost employment. In early June it was learned that around 800 footballers were about to find themselves out of work very shortly, as League clubs who experienced the full weight of the contractual shortfall started to make drastic cuts in the strength of their playing staff. This was thought to be the highest number of players left without employment since the Professional Footballers' Association started to compile its annual "disengaged" list of unwanted players. One of the worst hit clubs, Bradford City – who had also gone into administration – had shed 19 players³⁴⁵.

The implications for the Football League itself were also ominous. The proposition that a large number of First Division clubs could form a breakaway league, which was mooted in the previous issue of this organ,³⁴⁶ once again became the topic of intense speculation. This was particularly the case in the light of the terms on which the "rescue deal" with BSkyB had been concluded, since this would provide the First Division teams with 59 per cent of the sum involved, in spite of the fact that the latter provided 10 of the 60 matches to be broadcast under the deal³⁴⁷. Hence the vote of no-confidence, referred to above (p.39) which their chairmen passed against Keith Harris and David Burns of the League.

However, regardless of whether such a breakaway move materialises or not, there is virtual unanimity amongst the commentators that the Football League

needs to take a long hard look at all aspects of its organisation. One of the most outspoken comments in this direction came from Millwall chairman Theo Paphitis, who said:

"The League has stumbled from one disaster to another with first ITV Digital and then renegotiating the contract with Sky. The League must be totally restructured. It's archaic and amateurish and needs to get professional. It's a billion pound business, but if I had a kebab shop I wouldn't let them run it. I'm not impressed with their handling of this and think the outcome could have been different. There's no doubt that Carlton and Granada have shafted us, but they were allowed to shaft us"³⁴⁸

The gloomy prediction that some clubs would fold immediately was not realised. All 72 clubs started the Nationwide League season in August as scheduled³⁴⁹, and even Bradford City survived to tell the tale (see later, p.99). This may be because they took a number of drastic measures, and not only in terms of cutting playing staff – demonstrating that perhaps the blame for the train of events described above could not be laid exclusively at the doors of Carlton and Granada on the one hand, the Football League on the other.

This certainly was the view of some of the more dispassionate commentators. Thus Trevor Watkins, writing in a prominent Sunday newspaper³⁵⁰ suggested that the anger displayed by the clubs towards these organisations was something of a smokescreen for their own shortcomings. He warns that many may still go to the wall unless they mend their ways, which are characterised by chronic financial, commercial and business mismanagement, with many happy to spend £5 million on a player on the basis of one person's opinion, i.e. that of the manager, who is then dismissed, with compensation, a few weeks later after the club has experienced a bad run. This, he states, is pure madness.

Among the changes he proposes are the following:

- salary caps: this is of course a proposal which is increasingly meeting with approval from all concerned;
- clubs should stop spending money they cannot afford – or incur "manageable losses", to use the current euphemism;
- more flexible players' contracts enabling them to be renegotiated in the light of changing circumstances;
- shorter player contracts, as is the case in US baseball;
- increased use of ground-sharing, overcoming the

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opposition of die-hard fans.

Needless to say, this column will continue to monitor the aftermath of this sorry affair with considerable interest.

BSkyB pulls out of Six Nations rugby – but who takes its place?

When, in 1997, BSkyB paid the Rugby Football Union £87.5 million for the exclusive right to broadcast live all international, representative and club matches played under the stewardship of the Union for the next five years, many thought that this was the last terrestrial television would ever see of an international rugby fixture played at Twickenham. This understandably caused much anger both amongst England fans and amongst the Celtic nations, particularly as Sky contrived to extend its deal to England's matches against France in Paris under a reciprocal arrangement with a French broadcaster. The resulting fracas almost saw England expelled from what was then the Five Nations Championship³⁵¹.

However, two developments have arisen which have changed the scenario somewhat. First of all, as was reported in the previous issue³⁵² England have – perhaps drawing appropriate lessons from the first deal – combined forces with the other members of the “Six” for the purpose of selling the rights, which were up for resale following the expiry of the Sky deal. Second, since the time when Sky started showing England's home fixtures, numbers watching television broadcasts of the tournament have dropped dramatically, from an average 5.7 million per game in 1997 (the last year of the previous BBC contract) to 2.2 million³⁵³. One of the reasons for this has no doubt been the increasing number of one-sided matches in recent years³⁵⁴.

As the deadline for bidding for the new contract approached, the BBC used these depressing figures to press for the entire Six Nations package, in preference to sharing matches with other broadcasters³⁵⁵. In fact, BSkyB failed to make a bid, preferring to concentrate on England's home fixtures with Southern Hemisphere countries³⁵⁶. This left the field clear for the BBC, since it remained as the sole bidder. Or at least so it seemed.

Negotiations on the financial details of the deal proved very difficult, and reached deadlock in early June, with both sides becoming increasingly exasperated with each other's attitude. The Six Nations organisers had dismissed the offer made by the BBC for £70 million over the following three years as “derisory”, believing as they did that the Corporation was attempting to exploit its position as sole bidder to offer much less than the £100 million which they believed the tournament was worth. The “Beeb”, for its part, was of the opinion that the tournament rulers

were expecting an unrealistic amount, given the depressed state of the sports media rights market³⁵⁷.

Shortly afterwards, it emerged that Channel Four might become a surprise rival to the BBC for the rights concerned. It held exploratory talks with the Six Nations Committee and started the process of assessing whether the tournament could attract enough advertising to justify a bid³⁵⁸. In the event, however, C4 failed to make a formal offer. The BBC responded by threatening to show Football League soccer if the Committee failed to accept its offer (at the time, the Sky deal referred to in the previous section had not yet been concluded) instead of international rugby's showcase tournament³⁵⁹.

At the time of writing, nothing had occurred to break this particular stalemate.

British racing concludes media deals with bookmakers – at last

The story thus far

Previous issues of this organ³⁶⁰ have reported on some of the travails experienced by the British racing industry in the area of media rights. Nevertheless, it is useful to recapitulate, the better to understand the context in which the entire issue is located.

In early 2000, it was announced in the House of Commons that the Government was to abolish the Levy system which had traditionally funded racing. Obviously the sport would require a source of income to replace this, and the most obvious one appeared to be the sale of racing data and pictures to the bookmakers. The question to resolve then was what price to charge for these rights. In July 2001, the British Horseracing Board (BHB) indicated that the figure it had in mind for this was 1.5 per cent of the bookmakers' turnover, which would pay for the data rights, and a further one per cent which would account for the rights to the pictures. This was unacceptable to the bookmakers³⁶¹. Thus a stalemate was reached, which not even the intervention of the Government ministers responsible could break³⁶².

Negotiations resume – but RCA deprives BHB of picture rights talks

Officially, the BHB continued to insist on a share of the bookmakers' turnover, not their profits. However, Nigel Smith, who joined them as commercial managing director shortly afterwards, felt sure that he could work out a deal based on gross profits. This followed a month of discussions with the “Big Three” bookmakers, Coral's, Hill's and Ladbrokes, as well as with the Tote. The targets Mr. Smith was thinking of were an agreement on data rights which produced more cash than the Levy, and a deal on picture rights which would produce in the region of £40 million per

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annum. If an amicable deal could be arrived at on this basis, this would also be instrumental in convincing the Office of Fair Trading (OFT) that racing was no longer a case requiring investigation³⁶³.

The bookmakers, for their part, were arriving at some kind of consensus on a solution to the problem, and indicated that they wished to meet the BHB Chairman, Peter Savill, and thrash out a deal with him (rather than with Smith, a view with which the latter heartily concurred). Accordingly, Savill met representatives from the "Big Three", as well as the Chairman of the Confederation of Bookmaking Associations. Savill suggested that the BHB might accept an agreement which would be based on the gross profits realised by the bookmakers, rather than on their turnover, as long as the total price for the use of data and pictures was appropriate. However, the bookmakers wished to negotiate separately for the data and picture rights, whilst Savill wished to link the two, as this gave him a better chance of trading a data deal based on gross profits in return for a substantial arrangement on pictures³⁶⁴.

Before Savill had a chance even to provide an outline of the deal he had in mind to the BHB Board, the Racecourse Association, on whose behalf the BHB was negotiating picture rights, informed the BHB that they no longer wanted the latter to act for them in this capacity. (The fate of the picture rights is dealt with under a separate heading below.)

Accordingly, Messrs. Savill and Smith had to return to meet the bookmakers on 28/3/2002 and inform them that they could only negotiate for an agreement on data rights. They proposed that the price for these be fixed at 10 per cent of gross profits. Following further "horse trading", a slightly lower rate (to accommodate the requirements of smaller bookmakers) was agreed upon³⁶⁵. The deal, which would net the BHB a cool £600 million over five years, was officially announced on 17 April³⁶⁶. Over this period, it would amount to considerably more than would have been obtained under the old Levy system. Savill hailed the deal as heralding a "sea change in the relationship between racing and the bookmakers"³⁶⁷.

Picture rights negotiations stall, but also end in deal

Meanwhile, the RCA, as indicated above, started to plough their own furrow as regards picture rights. They were preparing to demand an enormous increase in the amounts they had hitherto received, and obviously did not feel that the BHB was either willing or able to secure such a deal. However, some urgency was involved, as the previous deal for the broadcasting of pictures from British racetracks in betting shops was due to expire on 30 April. This made the racecourses' strategy a particularly risky one, since they faced financial disaster

should the bookmakers decide to call their bluff³⁶⁸ – particularly since ten of the country's smaller courses, to wit the GG-Media Consortium, had already concluded their own agreement on picture rights³⁶⁹.

The risk for the RCA was all the greater in view of the consideration that, whilst bookmakers would simply be unable to operate without the data provided by the BHB, they could function, albeit with difficulty, without the live pictures. They would, after all, still be able to provide pictures from the GG-Media courses, as well as from those races which were already available on free-to-air television, which includes all the major events on the calendar³⁷⁰.

The haggling began. Initially, the RCA wanted £5,000 per year for each betting shop, which was not accepted by the bookmakers. With a week to go before the aforementioned deadline, the racecourses reduced the asking price by £1,000. Still the bookmakers were unimpressed, their best offer being stuck at £3,500. Even that offer was hedged with all manner of conditions bringing the annual income to a figure less than £20 million, which was unacceptable to the RCA, since their own offer would yield £35 million. With a day to go before the deadline, the RCA decided to reject the bookmakers' offer, following a stormy meeting held at a London hotel³⁷¹. The racing punter was thus faced with the real prospect of a virtual television blackout the next day.

At the eleventh hour, however, a deal was finally reached which enabled the broadcasts to continue³⁷². Details of the deal were not released immediately. However, it was later learned that the deal was for three years, with the total income rising from £27.7 million for 2002 to £30 million in 2003. Although both sides appeared to be satisfied with the deal, the BHB chief Peter Savill attacked it, claiming that it undervalued the picture rights by around £15 million³⁷³.

Television deal saves World Cup coverage – but not Big Screen broadcasting

In the previous issue³⁷⁴ attention was drawn to the financial difficulties being experienced by Kirch Media, the group which had secured the television rights to the 2002 and 2006 World Cups, thus presenting a very real danger to television coverage of this year's tournament. However, this danger was averted in early April, when a deal was done between the media group and FIFA President Sepp Blatter. Under this deal, the rights to the two tournaments were split from Kirch Media, which would then go on to file for bankruptcy, and be transferred to a company, called KirchSport AG based in Zug, Switzerland. This move had been made with the agreement of Kirch Media's creditor banks³⁷⁵.

However, the new company did not exactly endear itself to England fans travelling to Japan, who were no doubt somewhat taken aback when they discovered that the only place where they could watch matches

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involving other countries would be their hotel rooms, rather than on big screens in public places, which had been a major feature of the 1998 tournament in France. The media agreement between the Japanese broadcasters and KirchSport expressly prohibited any outside showing of the matches³⁷⁶.

German Government bales out Bundesliga

The collapse of the Kirch empire, referred to in the previous section, also had repercussions for domestic football in Germany – in much the same way as the collapse of ITV Digital threatened to have for the English Nationwide League clubs (see above). KirchMedia had secured the rights to the first and second divisions of the German league until 2004, but now found itself unable to honour the contract which required it to pay the £220 million pledged for the current season. The Government therefore had to guarantee a bank loan to cover the £65 million required for the next instalment due on 15 May, and the one following it³⁷⁷.

European leagues face financial meltdown, according to newspaper investigation³⁷⁸

The financial perils of the footballing world threaten the long-term future of the game, not only in England and Germany, as documented above, but throughout the European continent – if a special feature in the Observer Sports Monthly is to be believed. According to this in-depth investigation, a combination of spiralling debt and unaffordable wages threaten to overwhelm even some of the most prominent names in European football, and that is even before broadcasting revenue starts to fall dramatically. The case of Italy is particularly startling. Even a team as prominent as Fiorentina has faced such mounting problems as to leave it in virtual bankruptcy, with players leaving in droves and those who remain not having been paid for months. France is also a case in point, with even as big a club as Olympique Marseille having to shed more than half its playing staff and make a drastic cut in salaries for the remainder just to remain afloat.

Until recently, the English Premiership may have felt itself aloof from this crisis, since the amounts paid by the public to watch football is vastly greater in this country than elsewhere. However, even the big names such as Manchester United and Arsenal are feeling the pinch. Players cost more on the transfer market than ever, and the famous Bosman ruling, with its concomitant freedom of movement for players, has not, contrary to expectations, led to a collapse in transfer fees. Nevertheless, the article concludes that the English Premiership looks in better shape to weather these financial storms, not only since its clubs are generally considered to be the most highly developed in business terms, but also because of its practice of

spreading television income more fairly than is the case in countries such as Italy and Spain.

Will BSkyB dump the FA Cup? (UK)

Has BSkyB become the acutest weather-vane to measure the popularity of broadcast sports? Certainly there seem to be one or two indications in that direction. Earlier, we described how Sky recently decided to pull out of the Six Nations tournament, which was no doubt the result of plummeting viewing figures. Now there are question marks over the broadcaster's commitment to one of the oldest and most famous football tournaments the world over, to wit the FA Cup. In mid-April, Tony Ball, Sky's Chief Executive, announced that the satellite broadcaster was reviewing its commitment to several high-profile broadcasting contracts, which include that for the FA Cup³⁷⁹. This column will obviously follow up any further developments in this field.

Top City law firm wins previous World Cup footage rights for Newsplayer (UK)

In June 2002, Lewis Silkin, a top City firm of solicitors, succeeded in signing up the rights to film footage of all World Cup finals to have been held over the past 40 years, for the benefit of its new media client, Newsplayer International. The latter has thus obtained the licence for all the World Cup archives from FIFA, who are the owners of this footage. The law firm in question also negotiated a deal between Newsplayer and electronics firm JVC, which will distribute the footage on DVD and video.

Although the exact value of the deal was not disclosed, Lewis Silkin have stated that, unlike other soccer signings, this one did not run into millions. FIFA were represented by KirchSport (see earlier, p.42), whereas Victoria Reid of Clifford Chance acted for JVC³⁸⁰.

Battle of injunctions in Canadian dispute over Portuguese football broadcasting rights

This case is dealt with under the item headed "Procedural law and Evidence" (see below, p.102).

Legal issues arising from transfer deals

High Court dismisses Middlesbrough compensation claim for Ziege transfer (UK)

In March 2002, Middlesbrough FC brought a claim for compensation, worth £7 million, against Liverpool FC at the High Court for the loss which they alleged that they sustained following the transfer of German international Christian Ziege to Anfield. More particularly the Middlesbrough chairman, Steve Gibson, accused Liverpool Chief Executive Rick Parry of having broken rules which he had been instrumental in drawing up in

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his previous incarnation as Chief Executive of the Premier League³⁸¹.

Earlier, the FA had conducted an investigation into the circumstances which attended Ziege's £5.5 million move to Liverpool. Liverpool had brought the player to Anfield by activating an escape clause in his contract with the Riverside club. Although the latter were cleared of two of three allegations made against them for malpractice in the affair, they were found guilty of having made an illegal approach for the former "Boro" defender (who in the meantime had decamped to Tottenham Hotspur) and fined £20,000. However, the FA dismissed Middlesbrough's claim for compensation amounting to £2 million. This prompted the latter's action before the High Court³⁸².

Two months later, the High Court dismissed Middlesbrough's action, the judge ruling that the claim was not so much fanciful as non-existent³⁸³. The full text of the decision was not yet available at the time of writing.

FIFA's "transfer windows" come into force – with Sir Alex's approval. Football League remains defiant

It was reported in the previous issue that the top European leagues had agreed to introduce "transfer windows" as from the beginning of the 2002-3 season³⁸⁴. This system, which in line with the new FIFA rules on the subject, restricts clubs to two periods during the year in which they may buy and sell players – i.e. the close season and the month of January. The same issue also related the rumblings of discontent, and indeed of defiance, which were being heard in some quarters on this subject, more particularly the English Football League and certain Chairmen of the Premiership.

Subsequently, however, it appeared that these malcontents certainly did not include Manchester United manager Sir Alex Ferguson, who hailed the system as the way in which he saw things going in the future. It would mean, according to Sir Alex, that clubs would henceforth have to prepare their squads for the start of the season and then stick to it³⁸⁵. Such enthusiasm, however, was not shared by the Football League, who continued their defiance of the system by threatening not to apply it. In this, they were supported by the English players' union, the Professional Footballers' Association (PFA)³⁸⁶.

Just before this organ went to press, it was learned that the League clubs were finalising a plan which would enable them to continue to sign on players beyond the transfer windows. League officials were said to be optimistic that FIFA would allow them to go about their business as near to normal as they could following a meeting with its representatives about the new system³⁸⁷. It is hoped to be able to disclose the full details of this plan in the next issue.

Lazio "still owe Manchester United" for full Stam transfer fee

One of the more controversial transfers of the previous football season was that which saw Netherlands international defender Jaap Stam move from Old Trafford to Lazio Roma, for a fee of £16 million³⁸⁸. However, by the end of March 2002 Manchester United alleged that so far, only £4 million of this amount had been paid. This could well be related to the financial difficulties which the Rome club is currently experiencing, and which are reported elsewhere in this column (see above, p.43). The January instalment of the fee having been missed by Lazio, United enlisted the assistance of world governing body FIFA to obtain it³⁸⁹. Whether Lazio had met their obligations as a result was not yet known at the time of going to press.

Will Ferdinand be disciplined over move to United?

Another controversial transfer involving the Old Trafford club – this time as recipients of the player concerned – was that which saw England World Cup defender Rio Ferdinand move from Leeds United, even though he had served only 19 months of a 5 1/2 year contract with the Elland Road side. He had been warned against this move by Gordon Taylor, Chief Executive of the Professional Footballers' Association (PFA), who pointed out that, under the new transfer rules introduced by FIFA, players up to the age of 28 have a three-year protection period built into their contracts. He added that Manchester United could be fined, have points deducted or even be excluded from competitions if it went ahead with this move³⁹⁰.

Whether these blood-curdling threats would be converted into specific action was not yet clear at the time of writing – although the present writer might be excused a good deal of cynical scepticism on the subject.

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Valencia sue Fulham over failed Carew transfer

John Carew is a Norwegian soccer international for whom, at a certain point during the 2001-2 winter, a transfer to English Premiership side Fulham was confidently predicted. In the event, however, the deal fell through, and Valencia were not very happy about this. In fact such is the degree of their disenchantment that they have initiated a court action against the South London club over the issue.

According to the Spanish club, who reached the final of the Champions' League two seasons ago, the relevant contract was signed by both clubs and the player concerned. However, a subsequent medical inspection by Fulham's doctors seemed to indicate that Mr. Carew was suffering from a condition known as "jumper's knee", i.e. wear and tear on the knee joint, which would have made an operation necessary. However, it is claimed that shortly afterwards, a French sporting injuries specialist almost immediately cleared Carew as being fit for transfer. Nevertheless, the transfer did not go through³⁹¹.

This prompted Valencia – albeit eight months after these events took place – to bring a claim for compensation before FIFA via their national football federation. They claim that Fulham's actions have ruined Carew's career and wrecked the Spanish club's chances of selling him to another club. The amount they claim is £8.5 million. Fulham, for their part, maintain that they have been vindicated in their decision not to go ahead with the transfer by the fact that the Norwegian hardly ever played again for Valencia after January 2002³⁹².

The outcome of this affair was not yet known at the time of writing.

Does Crawley appearance for Hampshire CCC herald transfer era in English cricket?

The troubled relationship of England batsman John Crawley with his original county club, i.e. Lancashire, has been well documented in these columns³⁹³. To recapitulate: as a result of his increasing disenchantment with the conditions of his employment at Old Trafford, Mr. Crawley announced his intention of leaving the club and thus failing to honour his contract of employment with the latter. The dispute was brought before the Contract Appeal panel of the England and Wales Cricket Board (EWCB), and, in spite of the cricketer being represented by no lesser lawyer than Cherie Booth QC, the Board decided that Lancashire had not been in serious or persistent breach of its contractual obligations with Crawley. He was therefore bound to honour the remainder of his contract.

Nevertheless, the international batsman, who had only completed one year of his contract, insisted on leaving Old Trafford. (The degree of his unhappiness

with the "Red Rose" can be measured from the fact that he was in line for a benefit during the subsequent season.) Although Lancashire could have pursued him for breach of contract, the club ultimately saw little point in clinging to a batsman who was obviously extremely anxious to leave. That the Old Trafford club was not left entirely penniless under the deal was obvious from the statement issued by them shortly before the new season started, and which read:

"Following a period of protracted negotiation, the club has agreed to release John from his contract upon the payment to the club by him and Hampshire CCC Limited of a suitable five-figure compensation payment"³⁹⁴

The amount in question, which was kept confidential, was said to be somewhere in the region of £35,000. Crawley therefore became free to join the club of his choice, Hampshire, and was "unveiled" at the Rose Bowl ground in late March.

Crawley's move has prompted the question whether this has rung in a new era of transfers in county cricket. This was particularly the case since his was not the only case of a player moving counties in mid-contract, Aftab Habib having bought out his contract with Leicestershire to be able to join Essex. The EWCB shortly afterwards stated that it was looking at the issue of compensation payments, and hinted that a new system may be in place soon³⁹⁵.

Top Euro clubs agree to limit transfer fees

This issue is dealt with below, under the subheading "Employment Law" (see p.46).

Symposia on sports transfers and agents (The Netherlands/Belgium)

The Catholic Universities of Leuven (Belgium) and Brabant (The Netherlands) have recently been joining forces with the TMC Asser Institute, Amsterdam, in the field of sports law. Their first major joint venture took the form of two symposia on transfers and agents in sport in May 2002. The first took place in Leuven, and examined the implications of the new FIFA/UEFA transfer system. The second took place in Tilburg (The Netherlands) and dealt more specifically with the issue of the position of sporting agents in the Netherlands. The intention behind these symposia was to focus attention on the practical aspects of these issues, in order to be able to involve non-lawyers in the discussions. The speakers were Roger Blanpain (Leuven and Brussels Universities), Steven Jellinghaus, a lawyer established in Tilburg as well as a lecturer at Brabant University, Wessel Weezenberg, of Prime Sportbusiness, and Frank Hendrickx, a lecturer at

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Brabant and Leuven Universities³⁹⁶.

Concern mounts at Old Trafford over the role played by Ferguson Jr.

The previous issue contained a feature which described the concern being felt in the Manchester United boardroom on the role played by Jason Ferguson, son of manager Sir Alex, in some of the transfer deals involving United players³⁹⁷. More particularly the concern was expressed that this role might land the Old Trafford club in trouble with the Financial Services Authority.

Since then, there is every reason for these concerns to have intensified, if Sir Alex's biography by Michael Crick, recently serialised in the Daily Mail, is anything to go by. In this work, Sir Alex is accused of such practices as informing players that they had no future at Old Trafford unless they used his son as an agent; threatening to let players Jonathan Greening and Mark Wilson, currently employed by Middlesbrough FC, to languish in the reserves if they did not leave their agent Mel Stein and join Jason Ferguson instead, and threatening to sell David Beckham if he did not leave his agent Tony Stephens³⁹⁸.

Clearly this is an issue which refuses to die down and could have immense consequences for the Manchester club. This column undertakes to keep the reader full informed of any further developments in this regard.

Employment Law

The John Crawley affair – the outcome

This issue is dealt with above, under the subheading "Media Rights Agreements" (see p.45).

Welsh Rugby internationals threaten, then abandon, strike action

It is not so long ago that a number of England international rugby players stood on the brink of industrial action as a result of a contractual dispute³⁹⁹. Anxious no doubt not to be outdone by their English colleagues, those selected for the Welsh international team also ventured onto this hazardous road in the course of the latest Six Nations Championship.

The dispute has its origins in the attempts made by the "Big Six" of Welsh Rugby Union – to wit, Llanelli, Swansea, Newport, Pontypridd, Bridgend and Cardiff – to induce the Welsh Rugby Union (WRU) to improve its funding to at least £1.5 million per year, and to reduce the number of professional clubs from nine to six. The clubs themselves, although in a militant mood over their demands, had resisted the notion of withdrawing their players from the fixture with England at Twickenham, preferring to hold back the threat for the home international against Scotland. However, the

international players from these clubs were intent on more immediate action, and threatened to go on strike on the day of the England game⁴⁰⁰. In fact, at a meeting held a week before the fixture in question, the players voted in favour of such strike action⁴⁰¹.

The atmosphere was further soured by allegations that the "Big Six" had brought undue pressure to bear on their international players to withdraw from the Scotland match, to the point of inviting accusations of blackmail⁴⁰². Eleventh-hour talks began aimed at averting such a strike. However, the rift between the contending sides (off the rugby field, that is) intensified when Tony Brown, the owner of the Newport club, and David Watkins, its Chairman, were both refused entry to the Gwent derby at Ebbw Vale, which is not part of the "Big Six". Nevertheless, the WRU and the clubs met again on 15 and 16 March in an effort to bridge the gap between the two sides. The players themselves then made history when a six-strong delegation, led by Wales captain Scott Quinnell, was granted an audience with the General Committee of the WRU 72 hours after their vote to take strike action⁴⁰³.

In the event, the players called off their strike action for the England game after four days of talks, as a "sign of good faith" – in spite of the fact that no agreement had been made. Nevertheless, Scott Quinnell was optimistic, claiming that there had emerged "a basis of agreement" for the way forward⁴⁰⁴. At the time of writing, however, no deal had as yet been struck.

(The question of the role to be played by the "Big Six" in Welsh rugby is returned to under the item entitled "Issues specific to individual sports" (see below, p.131).

Top Euro clubs agree on salary cap and limits on transfer fees

Amongst the reasons for the financial malaise currently being experienced by many football clubs all over Europe (see above), the exponential increase in players' earnings is generally agreed to be the most prominent. This had led a number of commentators on, and even practitioners of, the sport to moot the notion of an upper limit on players' wages – i.e. a salary cap. This restriction has already been introduced in a number of sports, such as American football and Rugby League.

Although the system can produce its own difficulties⁴⁰⁵, it is being increasingly regarded as the only way in which the game can be prevented from facing financial meltdown. Thus towards the end of the 2001-2 English football season, the Aston Villa chairman Doug Ellis, speaking at the Soccerex conference in Dubai, called for a salary cap in order to prevent more clubs from being bankrupted. However, he admitted that the major Premiership clubs were opposed to such restraints. He also conceded they were legally

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unenforceable – at least in the case of individual players. It was possible, however, to do so at the club level, by fixing a maximum amount which could be reached by the wage bill for the entire playing staff⁴⁰⁶.

Coincidentally or not, Mr. Ellis's words came but a few days before David Beckham became the world's highest-paid footballer, the latter having signed a four-year contract with Manchester United which, when all related sources of income such as advertising and sponsorship deals were taken into account, would bring his annual earnings to an astonishing £9.4 million⁴⁰⁷.

A major breakthrough in this area came in mid-May, when the G14 group of Europe's leading clubs, meeting on the eve of the Champions' League final in Glasgow, agreed to introduce a salary cap. It would operate as a gentlemen's agreement, because of the possibility of a court challenge to a formal limit. The clubs involved would agree to assign a fixed proportion of their turnovers to wages. In addition, they pledged to restrict first-team squads to 25 players.

The group also agreed to limit transfer fees. Its spokesman, Thomas Kurth, explained the motivation behind the move:

"The first aim is to reduce the competition between G14 clubs in the transfer market. It is important to avoid auctions on a player because it has an effect of raising the prices even of mediocre players."⁴⁰⁸

Under the system proposed by G14, the latter would intervene in transfer bidding wars and rule in favour of one of the bidders. If another bidding war were to occur, the group would rule in favour of the club which was unsuccessful on the first occasion⁴⁰⁹.

Details of all these arrangements were due to be finalised at the G14 Annual General Meeting at the end of August.

Contracts binding international cricketers cause problems (UK)

When, in the summer of 2000, the England and Wales Cricket Board decided to follow the Australian example and require its international cricketers to sign central contracts in order to increase their availability for the national squad, this was hailed as a major breakthrough in England's attempts to re-establish itself amongst the world's leading Test sides.

However, these agreements fell short of the Australian model in that they did not bind the players all year round. This has produced a number of undesirable consequences. First of all, it has enabled certain players to declare themselves unavailable for winter tours, as was the case with Darren Gough and Alec Stewart for the 2001 tour of India. It was also thought to be the reason why players such as Jimmy Ormond and Usman

Afzal arrived for the 2002 New Zealand tour displaying a level of fitness which was below the expectations of coach Duncan Fletcher⁴¹⁰.

For these reasons, it is unsurprising that increasingly voices were being raised in favour of year-round contracts. This would enable the board, rather than the individual cricketer, to determine when breaks would be taken. It would also enable the authorities to discipline any players who reported for tours unfit. In fact, in early April 2002, Tim Lamb, the EWCB Chief Executive, gave the strongest possible indication that the Board intended to move towards 12-month contracts⁴¹¹.

Another problem to raise its head in connection with these central contracts is that of the players' relationship with the county clubs whence they came. In May 2002, the ECWB proposed that the counties should pay the Board £2,000 for each Championship match, and an extra £500 for playing in one-day fixtures in which they fielded such players⁴¹². In return, Lord's, rather than the clubs, will pay the players' salaries. This arrangement is likely to be less expensive for the clubs than the current arrangement, whereby England players receive central-contract payments in addition to their salaries, and the county clubs are compensated whenever their players are selected for international duty.

Several counties were initially unhappy with these proposals, on the basis that they had spent a good deal of time and money developing these players in the first place, which made it somewhat hard to accept that they should pay when the players actually played for those to whom they owe their skills. However, all except Kent were persuaded to support the move by voting for it at the First Class Forum when it met in May 2002⁴¹³. The counties have also agreed that the numbers of players centrally contracted be increased to 20 (see also below, p.135).

On a world-wide level, it was learned in June 2002 that international cricketers may refuse to sign up for the 2003 World Cup unless changes are made to their contracts in such a way as to safeguard their commercial rights⁴¹⁴. The Federation of International Cricketers' Associations (FICA), the player's world body, are of the opinion that the International Cricket Council (ICC) have sold players' rights which they do not officially own. They will therefore advise members not to sign the tournament contract, which is a prerequisite for participation. At the heart of the unrest lay the use of players' images to promote the World Cup and the failure to acknowledge any private sponsorship deals to which the players are already committed. FICA joint Chief Executive David Graveney explained some of the difficulties that could result:

"If a player's bat contract overlaps with the World Cup and it is in conflict with one of the

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tournament's sponsors, he would have to remove the logos. That would then be a breach of his contract. What happens if the England team are sponsored by a mobile phone company, which we are, and is in conflict with the main sponsors of the World Cup? Do the players walk out with blank shirts? It has to go the way of football where Carling sponsored the Premiership and breweries were allowed to do deals with the teams"⁴¹⁵

The issue had not yet been resolved at the time of writing.

French racing meetings affected by strike action

In late March 2002, industrial action once again entered the sporting arena – this time in France. Employees of the country's racecourses and training centres rejected the offer of a two per cent pay increase as being inadequate, on the basis that the employers, France Galop, had sufficient funds to raise prize money by 7 per cent for the season. It was thought that employees would be satisfied only with a pay increase of 3.5 per cent.

As a result, the first Flat meeting of the year at Longchamp fell victim to the industrial action, as well as the meeting at Saint-Cloud featuring the Group Three Prix Edmond Blanc⁴¹⁶.

Hooligans and employment law – the debate continues (UK)

It may be recalled that, on the eve of the Euro 2000 football championships, a feature article in a UK professional journal asked the question whether it was fair to dismiss the football hooligan⁴¹⁷. The author set out a number of tests which should be met for any dismissal based on proven hooliganism on the employee's part to be fair. The good author must have been blessed with second sight, since shortly afterwards the question was to arise in practice – although not on the basis of incidents arising from Euro 2000, but in relation to an act of violence which occurred at the 2000 UEFA Cup final between Arsenal and Galatasaray in Copenhagen. On the basis of television pictures taken during that incident, Thomas Doherty, who had been seen kicking one person and aiming a punch at another, was dismissed by the Royal Mail from his position as a postman. He sued the Royal Mail for unfair dismissal, and won⁴¹⁸. However, his employer refused to reinstate him⁴¹⁹.

Later, it was learned that Doherty's brother Mick had also been filmed fighting on the same occasion, and that he too had been dismissed from his position with the Post Office. He too won his action for unfair dismissal, and Consignia refused to reinstate him also. Instead, he will receive a six-figure sum by way of compensation. The tribunal ruled that Consignia had

failed to follow correct procedures when dismissing him. The organisation appealed against the ruling on Thomas Doherty, and announced that it would re-employ him if he won his case⁴²⁰. The brothers, for their part, had argued that they had been defending women and small children against violent Turkish fans. Neither brother had been charged by the police.

Humfrey Malins MP, a member of the Home Affairs Select Committee, attacked the award to Mick Doherty as "disgraceful"⁴²¹. This was not the first time, however, that hooliganism had been an element in an unfair dismissal case. Readers may recall the case of Mr. Liddiard, who had been dismissed by the Post Office in similar circumstances as the Dohertys. The industrial tribunal had ruled the dismissal to be unfair, but the Court of Appeal overturned this ruling⁴²². It would appear therefore that it is unsafe to generalise in cases of this type, and that everything will depend on circumstances (and taking into account certain criteria such as those developed by the author mentioned above).

Commenting on the Liddiard case in a leading professional journal, lecturer Mandy Perry arrives very much at this conclusion. Employers who act irrationally and dismiss without proper investigation of the relevant facts and circumstances are therefore likely to face an unfair dismissal claim⁴²³.

Fit for the job? Gymnasia employ unqualified instructors, claims consumer magazine. OFT lays down standards

If an inquiry conducted by *Health Which?*, the magazine which investigates food, fitness and medical issues, is to be believed, many gyms employ fitness instructors who have little or not training in this area. One of its reporters went undercover in order to apply for positions with 10 such establishments, five in Manchester and five in Kent. Although she had no training or qualifications for the job, half the gyms in question were prepared to consider her for employment as an instructor. One particular establishment, in Manchester, even went so far as to offer her the post of manager⁴²⁴.

Researchers also posed as customers and applied to 50 gyms across the country in order to establish what qualifications were held by staff members. All claimed to employ qualified instructors, but one third were unable or unwilling to explain what these qualifications were. Twelve per cent admitted that only some of their instructors had first-aid certificates⁴²⁵.

This investigation appears to have been a timely one, coming as it does at a time when concern is rising about the standards achieved by health and fitness clubs more generally. This explains why, earlier this year, the Office of Fair Trading has issued guidance on unfair terms in health and fitness club agreements,

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together with a leaflet intended for the consumer entitled "Are they fit to join", which is intended to give practical assistance and advice on such agreements to people who are considering joining them. These guidelines followed a total of almost 200 complaints received by the OFT from consumers, and which highlighted several areas of concern about the drafting of contract terms⁴²⁶.

Thus, for example, clubs have sought to exclude their liability for death or personal injury, or for loss or damage to members' property. Other terms are unclear about the minimum membership period and the notice required for cancellation (and those that were clear imposed severe financial penalties for early cancellation, in some cases amounting to six months' notice). Others still were found to be unclear on cancellation charges and the consequences of cancellation. Some also allow clubs to make unrestricted alterations to the facilities provided⁴²⁷.

Under existing legislation, which takes the form of the 1999 Unfair Terms in Consumer Contracts Regulations, the OFT had the power to prevent the use of iniquitous terms and conditions. More particularly they stipulate that a consumer is not bound by a standard term in a contract with a seller or provider if that contract term is deemed unfair. (For an example of a health and fitness club which was recently required by the OFT to change its terms and conditions, see below, p.51).

Liz Terry, the editor of the magazine *Health Club Management*, has also voiced the opinion that a further regulator was intervening to ensure that contracts were made more equitable – to wit, market forces. This was particularly the case in relation to iniquitous cancellation costs. With growing competition in this sector, clubs could not afford to have customers leaving at the end of their contract. This meant that less use was made of hard sell techniques, and greater flexibility was being displayed where customers did leave before their term ended⁴²⁸.

Dismissed Darlington FC commercial manager wins £61,000 compensation

Readers may recall the case of Helen Coverdale, the commercial manager working for Nationwide League club Darlington FC, who was dismissed from her post following a fight with the wife of a director who accused Ms. Coverdale of having an affair with her husband. Ms. Coverdale sued for unfair dismissal, and the industrial tribunal awarded the action to her⁴²⁹. In July 2002, the tribunal in question awarded Ms. Coverdale the sum of £61,000. This amount was obtained by adding £48,789 (compensation for unfair dismissal) and £12,400 (breach of contract)⁴³⁰.

Renewed calls to compensate football clubs for internationals

The vexed question of paying leading football clubs

whilst their players are away on international duty has been adumbrated in previous issues of this organ⁴³¹. Particularly the G14 group of leading European clubs had become quite insistent on the subject. At a meeting held in mid-March 2002, the group decided to make a formal approach to this effect. Peter Kenyon, Chief Executive to Manchester United and a driving force behind this demand, explained that the objective of G14 was "not to screw (sic) the international game", but stressed the group's collective view that, since their employees are generating income for a national association, they should share in these earnings⁴³².

The reaction by the English FA to this demand was one of perplexity. One official asked the question whether, if David Beckham's transfer value rose as a result of his World Cup performances, by the same token the FA would be entitled to share in that increase. Paul Newman, the FA Director of Communications, also pointed out that to follow this demand would be to infringe FIFA guidelines on the subject⁴³³.

This is clearly an issue which refuses to die down and which this column will continue to monitor with interest.

British rail strikers ignore "spare the Games" plea

In late July, railway workers defied a plea from the Manchester Commonwealth Games not to target the sporting festival with a series of one-day strikes. Frances Done, Chief Executive of Manchester 2002, the organisation behind the Games, had urged rail staff to reconsider their intention to strike and thus disrupt an event which so many people had worked so hard to create.

However, the striking railway conductors from Arriva Trains Northern gave their reply in the form of a 24-hour walkout, to coincide with the opening ceremony. Bob Crow, General Secretary of the Rail, Maritime and Transport Union joined a picket line outside Piccadilly Station in the city centre. The conductors had been in dispute over pay since January⁴³⁴.

Olivier Bernard settles his differences with Newcastle United after arbitration

This issue is dealt with below, under the subheading "Other issues" (see p.52).

Contract between footballer and employment agent ruled illegal. Belgian court decision⁴³⁵

In the case under review, the claimant alleged that, in the course of 1995, he was approached by the defendant in order that the claimant should buy him out of the contract he had concluded with a football club. He further alleges that for this purpose, he loaned the defendant the sum of BEF 587,000. The claimant furthermore pointed to an agreement concluded a year later between himself

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and the defendant, under which the claimant would enter into negotiations to secure the defendant's affiliation to a football club. The agreement further stipulated that, if the defendant moved to another club, that club would pay the claimant a certain sum depending on the division in which that club was playing.

Two years later, the defendant resigned from S.K.E., the club which the claimant had found for him, and did so by sending the resignation form to the claimant, who was acting as the accredited correspondent of S.K.E. The claimant replied by informing the defendant that this violated the 1996 contract, and that he therefore demanded the payment of BEF 1 million by way of compensation.

The defendant, however, refused, claiming that the 1996 contract infringed a Decree of 24/7/1996 on the status of the non-professional athlete. Article 3 of this decree prohibits any payment whatsoever made by reason of the discontinuation of an agreement between the non-professional athlete and a sports club caused by his/her transfer from that club to another.

That Decree entered into effect after the said 1996 agreement. However, it is a well-established principle of Belgian law that contracts governed by a legislative provision continue to be governed by it even following its repeal or amendment. Nevertheless the Court ruled that this rule did not apply here, since the provision in question, i.e. Article 3, was a rule of public policy (openbare orde) which sought to protect the economic and moral order on which society is based. Accordingly, the new legislation applied to the 1996 contract. In addition, since the decree in question attached penalties to the prohibited practice, the claimant had in principle committed a criminal offence.

The 1996 agreement was also contrary to the 1975 Law which prohibits the operation of employment agencies against payment. Here again, the prohibited practice was in principle a criminal offence.

In the alternative, the claimant had sought to obtain repayment of the alleged loan of BEF 587,000. However, the Court ruled that this was not a loan, since it had consideration, in the sense that the defendant had agreed to accept, in return, the agency services offered by the claimant.

The Commercial Court (*Rechtbank van Koophandel*) therefore dismissed the claim.

English Court of Appeal held to lack jurisdiction to grant permission to appeal in basketball federation employment dispute

This case is dealt with under the item headed "Procedural Law and Evidence" (see below, p.102).

OFT guidance on unfair contract terms for health and fitness clubs

This issue has been dealt with earlier, under the heading "Employment Law" (see p.49).

OFT investigations of other unfair contract terms

There have recently been a number of other specific investigations into unfair contract terms by the Director General of Fair Trading, with resulting amendments having been carried out to these. (The Sections indicated are those which are part of Schedule 2 to the Unfair Contract Terms regulations, unless otherwise stated.)

***Wales National Ice Rink*⁴³⁶**

Here, the OFT identified a number of unfair contract terms in the firm's terms and conditions of sale, which were revised accordingly:

- (a) They unfairly excluded liability for injury, even in the event of the promotor's negligence, by providing that admission was at the ticket holder's own risk (thus infringing section 1(a)). This was subsequently amended to accept liability for injuries caused by the promotor's negligence.
- (b) They also contained an unfair exclusion of liability for injury caused at an event (contrary to section 1(a)). This was revised to accept liability for injury or distress resulting from the promotor's negligence.
- (c) They contained no liability to provide redress following the purchase of tickets (contrary to section 1(b)). This was revised to offer a refund where an event promoted by Welsh National Ice Rink (WNIR) is cancelled. Where WNIR acts as a ticket agent, a refund is offered if WNIR is at fault.
- (d) They contained the right to alter the programme or seating without notification or refund (contrary to section 1(k)). This was revised so that refunds will be made where alterations result from controllable factors, otherwise WNIR will endeavour to prevent consumer disadvantage;
- (e) They unreasonably prevented the replacement of lost tickets. This was revised so that lost tickets would henceforth be replaced upon proof of purchase, subject to a 20 per cent administration fee.

The Director General reserved his position on Terms 5 and 10. Term 5 fails to allow for a refund of the booking fee, and Term 10 does not reflect the firm's policy of considering claims for refunds in the event of alterations to the programme or seating.

The undertakings were accepted on 24/4/2001.

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*David Lloyd Leisure Ltd (health and fitness clubs)*⁴³⁷

Here, the OFT identified a number of unfair contract terms in the firm's membership agreement and Rules and regulations of Membership, which were revised accordingly:

- (a) Term 8d required members to give six months' written notice where they wished to cancel their membership. This was revised so that the period of written notice required is only three months.
- (b) Term 11c contained an exclusion of liability for damage to the contents of lockers where the company had removed the contents after the lockers had been used overnight and not been paid for (contrary to Section 1(b)). This was revised so that members may claim the contents of the lockers from the club reception for up to six weeks following removal.
- (c) Term 12a excluded liability for any loss or damage, however caused, to property belonging to members or guests (contrary to Section 1(b)). This was revised so that the company's liability is limited to any damage or loss incurred as a result of its negligence or failure to take reasonable care.

In addition, the company undertook not to rely on terms 14b and 16c in order to seek exclusion of liability for negligence or failure to take reasonable care with regard to the use of swimming pools and car parks. The company also made revisions to other terms which had not been challenged, and these did not raise any new concerns. Term 15 of the Membership Agreement required the company to give its members seven months' notice in writing of any change. As a result of this, all revisions, with the exception of term 8d, became effective from 1/7/2001. Term 15 was revised so that the company will be required to provide only four months' notice of any changes.

The undertakings were accepted on 17/8/2001.

United Racecourses (Holdings) Ltd. Here, the OFT identified a number of unfair contract terms in the firm's Racecourse Regulations and Notices, which were revised accordingly:

- (a) Term 1 reserved absolute discretion to the firm to decide whether someone was flouting the rules or acting in such a way that he/she could be refused admission or expelled from the racecourse (contrary to Section 1(m)). This was revised to specify the types of conduct which could lead to a refusal of admission or expulsion, and to include a requirement for the supplier to hold a reasonable opinion that such conduct has occurred before taking such action.
- (b) Term 1 also made reference to the Regulations and Rules of Racing, contrary to Section 1(i). The firm undertook to send copies of the Regulations and

Notices to pre-booking consumers (who could then cancel if they were unhappy with them). In addition, at the point of sale, copies of these documents would be displayed. The Rules of Racing were confirmed as setting out unrelated matters, save in respect of the racing being abandoned. These matters were incorporated into the Regulations document.

- (c) Term 2 had the potential to allow the firm not to provide the services contracted for, at its discretion (contrary to Section 1(b)). This was revised to specify the circumstances in which racing would be abandoned, which amount to circumstances beyond the firm's control.
- (d) Term 12 excluded liability for death or personal injury except where caused by negligence on the part of the racecourse (contrary to Section 1(a)). This was revised to accept liability for death and personal injury when caused by any act or omission by the firm and for other losses where these are reasonably foreseeable on the date of the contract.
- (e) Term 12 also excluded liability for all other losses (contrary to Section 1(b)). This was revised to accept liability for loss or damage which is reasonably foreseeable except in cases of death or personal injury.

These undertakings were accepted on 28/8/2001.

Leading law firms advise in sporting deals

The following leading law firms have recently been advising in a number of important sports-related deals:

- US firm Coudert Brothers recently advised Tottenham Hotspur FC regarding the corporate and property aspects of developing a football academy in Abridge, Essex. The village in question was advised by Richard Pearlman & Co on the property elements of the deal and by Lewis Silkin on the corporate aspects⁴³⁸.
- Nicholson, Graham & Jones, represented by Kevin McGuinness, Richard Woolich and Warren Phelps, have advised boxing promoter Frank Warren on a £10 million joint venture with Sports & Leisure Group. The latter were advised by Halliwell Landau, whereas associated fundraiser Corporate Synergy was advised by Macfarlanes⁴³⁹.
- The London office of US firm Weil Gotshal & Manges represented Bear Stearns in a structured securitisation involving the issue of £30 million privately placed notes by Everton Investments, a subsidiary of Premiership club Everton FC, advised by DLA⁴⁴⁰. Thus Everton have joined a growing list of

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Premier League football clubs seeking access funds using this method, and follows in the footsteps of fellow DLA football client Leeds United and Ashurst Morris client Ipswich Town in using debt markets for more sophisticated financing arrangements⁴⁴¹.

- D.J. Freeman advised financial services firm Liverpool Victoria in its four-year £1 million sponsorship of the county cricket championship. The England and Wales Cricket Board was represented in-house⁴⁴².
- London firm Olswang acted for Ladbrokes bookmakers in a deal with Manchester United in order to provide betting services to fans via the club's website, and at Old Trafford. United were advised by James Chapman & Co.⁴⁴³.
- Ashurst Morris acted for Jeronimo Martins SGPS in its sale of Lillywhites Group, the sports retail company, to Sports Soccer Limited. CMS Cameron McKenna acted for the buyer in a deal concluded in 12 hours from instruction following all-night negotiations⁴⁴⁴. Sports Soccer is a long-standing client of Camerons. Partner Richard Price stated that buying the well-known name of Lillywhites was one of more high-profile deals which he has handled for his client⁴⁴⁵.
- Newcastle-based firm Dickenson Dees represented Nova International, the company operated by former athletics star Brendan Foster, on the sale of its sports brand View From for an undisclosed amount to Marks & Spencer, who were advised by Slaughter & May⁴⁴⁶.
- North-West firm DWF advised Bill Archer, Chairman of Focus Group DIY, on the sale of his shares in Brighton & Hove Albion football club to the club's Chairman, Dick Knight, represented by Brighton firm Bosley & Co.⁴⁴⁷.
- The Manchester office of Hill Dickenson acquired its first instruction from Newcastle United Football Club, which normally instructs DLA. Partner Mike Morrison, who specialises in sports law and contract negotiation, acted for the club on the arbitration of its dispute with French defender Olivier Bernard, which was brought before the FA Premier League tribunal. Mr. Bernard had sought to leave the club during his contract. Following the arbitration, he agreed to sign a new contract⁴⁴⁸. (On attempts to lure O. Bernard away from Newcastle, see the heading entitled "Issues specific to individual sports", below p.129)
- Norton Rose, represented by Barbara Stephenson, advised Blacks Leisure Group on the sale of its

sports and fashion division to JD Sports for £53.2 million. JD Sports were advised by DLA⁴⁴⁹.

Jockey Club win "battle to gag Buffham" – subject to appeal

Roger Buffham is no newcomer to these columns. Last year, we reported how he was dismissed from the Jockey Club as Head of Security following an "internal inquiry"⁴⁵⁰. He subsequently lost his appeal against this dismissal⁴⁵¹. However, Mr. Buffham has continued to make the legal headlines since that time. Earlier (p.22) we described the controversies surrounding and arising from the inquiry into alleged corruption in racing conducted by the BBC investigative programme Panorama. It appeared that one of the main sources of the material on which the programme was going to base its findings was none other than Mr. Buffham himself. The Jockey Club therefore announced that it intended to seek an injunction before the High Court against their former employee in order to prevent him from giving any information to the makers of the programme⁴⁵². The Club alleged that Buffham was infringing a confidentiality agreement by so doing⁴⁵³.

The injunction applied for was duly granted⁴⁵⁴. However, Buffham appealed against this decision⁴⁵⁵, the outcome of which was not yet known at the time of writing.

World Cup officials "threaten to sue" British company over ticket fiasco

The English team and its fans may have done the old country proud on and off the field in Japan and South Korea during the World Cup. The same cannot be said, unfortunately, about its business sector. The tournament was barely into its first week when it became clear that most matches were being played to embarrassingly small crowds. Thus there were 3,500 empty seats during the opening fixture, and even half-empty grounds for some other games, such as those between Spain and Slovenia and Paraguay v. South Africa. Even for the match between one of the home sides, South Korea, and Poland, 3,000 tickets remained unsold until the very day of the fixture. Losses per match due to the unsold tickets were estimated at almost £500,000⁴⁵⁶.

So acute was the crisis at one point that even the Prime Minister of Japan had to intervene. The company which won the contract for the printing and selling of tickets was a British outfit known as Byrom Inc. The company is operated by two Mexican brothers from a shabby office in Cheadle Hulme, near Manchester⁴⁵⁷. The Korean World Cup Organising Committee (Kowoc) and at least one Japanese politician made known their intention to sue not only the company, but also FIFA over this matter⁴⁵⁸.

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Local council official had no powers to grant a lease to a golf club. Australian court decision⁴⁵⁹

Hitherto, the only way in which Brisbane City Council has ever made the sporting headlines has taken the form of that colourful character Alderman Clem Jones, who was also the groundsman at “the Gabba” where, in the 1970s, he used to prepare the pitches “in such a way as to provide an extra yard of pace” (i.e. to suit D.K. Lillee and J.R. Thomson). Recently, however, the Council has once again been prominent in sporting matters, but this time on the wrong side of a court decision in a dispute with a local golf club.

In the case under review, the Victoria Park Golf Club was laid out on land held by the Brisbane City Council under the terms of a deed of grant in trust from the Crown under the 1910 Land Act (Queensland). On the golf course, the club occupied a clubhouse which had a licence to sell wines and spirits, and accordingly operated a bar as well as holding functions, sharing the revenue from the bar with the Council. There was, however, no formal lease between the club and the Council.

In 1996, the Establishment and Co-ordination Committee of the Council (the E & C Committee) decided to redevelop the site in question. It approved a recommendation that negotiations be conducted with the club for that which was described as a Category A sporting association lease extending over a 30-year term, providing catering facilities, a function room, bar, club office and locker room. A separate playing agreement would cover playing rights and the subscriptions of club members.

The golf club was apprised of this decision by a communication, dated 7/4/1996, issued by the Council. This was followed by negotiations between the club and a Council officer, Mr. Sharry. Solicitors for the parties prepared a draft lease and agreement. In addition, certain interim arrangements were put in place pending execution of the formal instruments. Finally, terms were agreed between representatives of the two parties, which were recorded in a written document which took the form of a letter of 3/9/1999 (“the Letter”). Mr. Sharry signed the Letter on behalf of the Council.

The Council, however, repudiated the agreement in June 2000, and shortly afterwards the club started proceedings against the former claiming specific performance of the agreement. The action was dismissed by the trial judge with costs. The decision was essentially based on two grounds: (a) the claimant had failed to establish that Mr. Sharry had the authority to enter into a contract to grant a lease which was binding on the Council, and (b) the agreement of 3/9/1999 was incomplete or uncertain. The club appealed against this decision before the Queensland Court of Appeal.

The Court dismissed the appeal. The main issue to be decided was whether Mr. Sharry had authority to conclude the lease agreement with the golf club which was binding on the Council. The Court held that, ordinarily, this authority might take the form of (a) actual authority – which might be conferred expressly or impliedly – or (b) ostensible authority. It then proceeded to examine whether either type of authority applied in this case.

The Court ruled that there was no actual authority, since there was no evidence that the Council had, by resolution or in any other way, expressly invested Mr. Sharry with actual authority to conclude a contract with the club in the form of the Letter. Nor was there anything to suggest that he had authority, whether express or implied, to bind the Council to a contract in the form of the Letter providing for a 30-year lease. It could be fairly inferred that he had the power to licence the use of the venues concerned for particular sporting or other events, and maybe even to lease them for somewhat longer periods. However, that did not amount to establishing that he had the authority of the Council to lease the golf course – which was held by the council in trust – for a period as long as 30 years. The fact that he negotiated the terms of an agreement with the club did not mean that he had the power to conclude a contract on those terms which would be binding on the Council.

On the question of ostensible authority, the appellants had attempted to argue that such authority existed at the Federal and State level in Australia, where senior officers had such authority which could be inferred from the nature of their office. However, the Court ruled that it was not possible simply to transpose and apply decisions concerning governments at the federal and the state level to the structure and power of particular officers of the Brisbane City Council.

There was no evidence either of a resolution by the Council, made in accordance with Section 39 of the City of Brisbane Act 1924, delegating to, or conferring on, Mr. Sharry the power to conclude the alleged contract. Nor were there any acts by the Council capable of giving rise to any presumption that he had been authorised to make what amounted to a wholly executory contract on their behalf. He was not held out as having authority to do so.

“Mistake” ruling in golf club contract confirmed by Canadian Supreme Court⁴⁶⁰

In a previous issue⁴⁶¹, this section reported on a case decided before the Alberta Court of Appeal involving the sale and development of a golf and tennis club. This involved an appeal brought against a decision in which the claimant had successfully applied to have he relevant contract of sale rectified on the grounds that,

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when he signed the agreement – which he admitted to not having read – he was under a mistake of fact, to wit that the written agreement reflected the terms of the verbal agreement. The Court of Appeal had upheld the essence of the first court’s decision, merely overturning that part which had imposed punitive damages on the defendant. The latter applied to the Supreme Court to have this ruling overturned.

The Supreme Court dismissed the application. It was held that the claimant was entitled to rectification as it met all the conditions precedent required for this remedy. The claimant had established that the terms agreed to orally were not written down properly. The trial judge had found that the parties had made a verbal agreement in relation to a definite project in a definite location, although the parties had not discussed a metes and bounds description. The individual defendant fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that the claimant would not sign an agreement without the option of having sufficient land to create a development with two rows of housing as specified in the prior oral contract, and therefore he knew, when the claimant signed the document, that he had not detected the substitution of 110 feet for 100 yards.

The trial judge described the individual defendant’s action as fraudulent, dishonest and deceitful. The trial judge made his key findings in respect of the prior oral agreement, the claimant’s unilateral mistake and the individual defendant’s knowledge of that mistake to a standard of “beyond any reasonable doubt”. The claimant’s lack of due diligence was not a defence against rectification because the claimant sought no more than to enforce the prior oral agreement to which the defendant had already bound himself.

Concern expressed at rise in betting disputes

In August of this year, it was learned that the Independent Betting Arbitration Service (IBAS) was finding it increasingly difficult to cope with its increased workload since betting tax was abolished in October 2001⁴⁶². The resulting increase in betting turnover, which during the year that followed reached 40 per cent, was expected to lead to a rise of at least 100 per cent in the caseload befalling IBAS. The service is accordingly struggling to keep up with this increase⁴⁶³.

The IBAS general manager, Chris O’Keeffe, is of the opinion that the sharp rise in disputes has been caused in part by the number of new and inexperienced bettors who have been drawn into the betting shops since the fiscal deductions were discontinued. The football World Cup also generated a good deal of disputes, many related to the double bets placed on Ronaldo to be top scorer of the tournament and Brazil to win the Cup.

The dramatic rise in the numbers of bettors seeking

resolution of their disputes through IBAS also raises questions about the possible implications this may have as and when new legislation makes gambling debts recoverable at law (see below, p.74). It may very well be that the lower courts will be clogged up by punters seeking redress. Also, what might this mean for the “palpable error” rule which bookmakers rely upon in order to avoid making a payment when a mistake has allegedly been made over a price? If incorrect odds are placed on a slip by a cashier and processed, the court could well decide that the bookmaker is contractually bound to pay out at that price. Such legislation, if passed, may therefore have many unforeseen consequences⁴⁶⁴.

Skiing club not contractually liable for injury sustained by member training in gymnasium. French court decision⁴⁶⁵

Whilst a member of a French skiing club was training for some event in a gymnasium, he injured himself falling from a climbing wall which was one of its facilities. He brought an action against the club, claiming that the accident was due to the latter’s failure to meet its contractual obligations towards him to provide safe facilities. The matter was brought before the Court of Appeal of Lyon, which dismissed the claim. It ruled that a skiing club is only bound by obligations to provide safe equipment in respect of the events which it organises. It cannot, therefore, be held liable for the fall of a member where this accident took place in a gymnasium, particularly since it did not occur during a training session, but was solely the result of the member’s own initiative to visit the gymnasium. Nor could it be proved that the club encouraged its members to practise its sporting activity even where there was no supervision on its part.

Accordingly, the club could not in any way be accused of having failed to meet its obligations. The accident had occurred solely as a result of negligence on the part of the victim, who had not even taken such elementary safety measures as were imposed by the rules, since he was not secured by ropes when the accident happened.

Agreement over use of WWF initials “not restraint of trade”, rules English High Court

This matter is dealt with under item 7, “Property Law” (see below, p.85).

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Sporting Injuries

Former “Blade” accepts out-of-court damages for injuries sustained against Spurs (UK)

In May 2002, Ian Nolan, who used to play for Nationwide League club Sheffield Wednesday, accepted, at Lincoln Crown Court, an out-of-court compensation payment of £35,000 over injuries which he had incurred during a match against Tottenham Hotspur in 1998⁴⁶⁶.

Public school drops rugby amid increasing litigation fears....(UK)

In mid-June 2002, it was learned that King’s School, Ely, one of the country’s leading public schools, is to discontinue the playing of rugby amongst its pupils amidst increasing fears over litigation resulting from injuries. The headmaster, Richard Youdale, wrote to parents informing them that rugby would be phased out over the coming four years to be replaced by hockey, rowing and football. He explained that this decision, which he admitted would cause distress in many quarters, was the result of increasing difficulties in securing the services of referees and team coaches in the current climate of litigation – as well as the circumstance that rugby was a very difficult sport to referee⁴⁶⁷.

He insisted that the decision was not “principally” related to the fear of litigation; however, as has been extensively documented in these pages, there have been a number of cases in which pupils have successfully brought actions against their schools for injuries sustained whilst playing this sport. Thus in a recent issue⁴⁶⁸ we highlighted the case of Ramsey Elshafey, who was awarded compensation of £100,000 following a rugby tackle causing injuries to ligaments in his neck and back, thus destroying his ambition to become a dentist. However, Mr. Elshafey’s former school, Newcastle-under-Lyme Grammar School has no plans to discontinue the sport. At the majority of schools, parents contract insurance, costing less than £5 per term, which covers their children should an accident occur. This insurance is not offered to parents at King’s, because the school’s own cover entails that additional insurance is not required⁴⁶⁹.

... as other sporting activities fall victim to the “compensation culture”

Not only Rugby Union has become a sport whose future is now in doubt amongst our schools. Thus in late July it was reported that children at certain schools have been prohibited from making such pursuits as conkers, yo-yos and even skipping and running. Some local councils have also banned children from playing with a ball in case they throw it onto a nearby road and into oncoming

traffic⁴⁷⁰. Such prohibitions may soon also affect other sports and related activities. The Children’s Society, however, had stressed that litigation of the type which seems to have set off these panicky moves remains very rare, and that depriving youngsters of friendship-forming activities of this type will render them less confident and more fearful as they grow up⁴⁷¹.

School successful in appeal over ski accident ruling

Still on the subject of the liability of schools for sporting injuries, the reader may recall the case of Simon Chittock, a 17-year-old pupil at Woodbridge School, who was injured during a skiing trip organised by the school. Although he had obtained written permission from his parents to ski unsupervised, he had been reprimanded by supervising teacher for skiing off-piste; nevertheless, the next day he once again left the ski slopes, fell and was left paralysed. The High Court held the school 50 per cent liable for the accident because it had failed to confiscate Mr. Chittock’s ski pass⁴⁷².

The school appealed against this ruling. The Court of Appeal found for the appellant⁴⁷³. More particularly it dismissed the finding that the decision by Mr. Jackson, the teacher concerned, not to confiscate the pass had not been within a range of reasonable responses for a teacher in his position acting as a reasonably careful parent. Conversely it held that the decision to issue a severe reprimand to the boy and to accept his assurances not to ski off-piste was not outside the range of reasonable responses in the circumstances⁴⁷⁴.

Former Crystal palace player loses claim against Huddersfield – full judgment available (UK)

In a previous issue, this column reported very briefly the case of former Crystal Palace footballer Darren Pitcher, who lost an action against Huddersfield Town for a tackle made by one of its players. Since then, the full text of the decision has become available⁴⁷⁵.

The claim was one for damages in respect of personal injuries incurred by Darren Pitcher, the claimant, as a result of a late tackle committed by Paul Reid during a Nationwide League, Division One, game played between Crystal Palace and Huddersfield Town FC on 31/8/1996. Mr. Pitcher incurred a rupture of the posterior cruciate ligament and posteromedial capsule of his right knee as a result of a challenge by Mr. Reid, playing for Huddersfield. The injury caused the premature end of Mr. Pitcher’s career as a professional footballer.

The action concerned was brought in negligence before the Queen’s Bench division of the High Court. It was alleged that, in the course of his employment, Mr. Reid pursued the claimant, who was running towards the Huddersfield goal with the ball at his feet. Reid was

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behind the claimant and to his right. The claimant having passed the ball, Reid lunged at him with his left leg and struck him on the outside of the right knee with his left foot. As a result, the claimant incurred an injury to his right knee. The parties agreed that the time difference between the challenge and the time at which the ball was played was fractional, i.e. approximately 0.2 of a second. It was argued that professional athletes must react to events in a matter of split seconds – they have both the skill and the training at this level to do so.

The trial judge accepted that the tackle in question was no doubt late and clumsy in coaching terms. However, the claimant was unable to establish that it went any further. It was definitely a foul, but the judge was not satisfied that it was anything more than that. It was deemed an error of judgment in the context of a fast-moving match in which the defendant had to react to events in a matter of split seconds. Regardless of their level of training and skill, First Division footballers were held by the judge to be far from infallible. The tackle in question was held to be the type of tackle which, although contrary to the rules of the sport, was occurring throughout the country every Saturday (sic) of the football season in Division One. The claimant did not succeed in crossing what the judge described as the “high threshold” which lay in his path to take his case from a simple late tackle – albeit one with tragic consequences – to one which was actionable in negligence. The action therefore failed.

Illegal tackle in football game gives rise to vicarious liability. English court decision⁴⁷⁶

In a case which is at the same time similar to and different from that described in the previous section, the claimant, Mr. Leebody brought an action against the British Ministry of Defence regarding personal injuries sustained whilst participating in a football tournament organised by the Royal Navy. The claimant represented his ship and was playing a team from another ship. In the course of the match, he suffered a serious injury to his leg as a result of an allegedly negligent tackle committed by a member of the opposing team. The referee on duty took no action, and it was left to the senior officer present to forfeit the game. Mr. Leebody subsequently brought an action for personal injury against the Ministry, claiming that the latter should be held vicariously liable for the negligent tackle committed by the opposing player.

The judge awarded the action to the claimant. He ruled that the offending player went to tackle Mr. Leebody from behind using both legs, and that the tackle was deliberately aimed at the man rather than at the ball which was two or three yards ahead of the claimant. The tackle was unlawful, outside the rules of Association Football and dangerous in all circumstances. In arriving a

this conclusion, the judge followed *Condon v. Basi*, already extensively referred to in previous issues⁴⁷⁷.

Damages awarded in boating accident case⁴⁷⁸

The case under review arose from a boating accident, for which the issue of liability had already been settled. Only the attributability of the damage and the amount of compensation remained an issue. Ms. Sinclair, aged 62 at the time of the accident and 67 at trial, had suffered crush fractures of the first and fourth lumbar vertebrae. She was initially in intense pain and was treated with physiotherapy. Eighteen months after the accident, she still suffered from pain in her lower back which was caused by any task involving bending. The pain at times radiated to her buttocks, and housework had been made difficult. In addition, she could no longer indulge her hobbies of gardening, cycling, rambling and sewing, and driving had also been rendered difficult. Ms. Sinclair could not remain seated for long than approximately 30 minutes without having to rise and move about. She was taking painkillers on a daily basis.

During the trial, she described her continuous symptoms as those of discomfort and such as to compel her to stop performing the task in hand which was causing the problem. She experienced no problems when lying in bed, but could only walk a maximum distance of a mile, as compared to 10 miles previously. X-rays revealed the presence of pre-existing degenerative changes in the spine. The medical experts agreed that the symptoms experienced during the initial 18 months were entirely attributable to the accident. Subsequently there was a 50/50 split in attributability. The continuous symptoms, which were likely to be permanent but unlikely to deteriorate, could only be attributed to the accident to the tune of 40 per cent. As a result, the claimant’s ruby wedding holiday and a subsequent wedding trip were ruined. The judge would have awarded £4,500 for the first three years in isolation. He acknowledged that the correct bracket was JSB guideline (b)(ii) for moderate back injuries, commenting that even though the strict mathematical approach might have appeared unduly simplistic, a 60 per cent discount calculation could be applied in order to assist in reaching a final figure. General damages were assessed at £9,000. The award for loss of use of holidays: £500.

Netherlands law is held to apply in dispute over liability for skilift accident.

Netherlands Supreme Court decision

This case is dealt with under the item headed “International Private Law” (see below, p.104).

Footballing schoolboy injured by piece of wire awarded damages. Irish court decision⁴⁷⁹

In March 1997, the claimant in the case under review was playing football after school when a piece of wire

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propelled from a lawnmower, operated by an employee of the local council, struck him in the eye. As a result, he suffered almost complete loss of vision in the right eye. At the trial, it was argued that, within the social and educational context in which the claimant would be likely to seek employment, he would suffer a reduction in his options, in terms of not only the employment of which he would be capable but also the locations at which he could safely work. An award of damages was made. The claimant appealed against the level of damages. On appeal it was ruled that the award of £120,000 did not bear a reasonable proportion to the compensation to which the plaintiff was entitled. The appeal was allowed and the damages increased to £150,000.

Operator of indoor cricket facility not liable for eye injury. Australian court decision⁴⁸⁰

Another case involving an eye injury occurred when Mr. Woods was engaged in a game of indoor cricket conducted at the defendant's premises, when the ball ricocheted off his bat and hit him in the eye whilst he was batting. As a result, the player incurred permanent blindness in one eye. The game was being played at a sports facility owned and operated by Multi-Sport Holdings Pty Ltd. It organised the indoor cricket match, provided the bats, balls, thin hand gloves, plastic groin protectors, and charged a fee for participation.

The claim brought by Mr. Woods essentially amounted to a claim that Multi-Sport was in breach of its duty of care by failing to provide helmets or adequate eye protection or, alternatively, by failing to warn him of the risk of serious injury in the eye. It was not disputed that Multi-Sport owed Mr. Woods a duty of care.

The trial judge held that (a) playing indoor cricket without a helmet did not constitute an unreasonable disregard for safety by anyone, and (b) the risk of being hit by a ball on the head or body during a game of indoor cricket is so obvious that there was no obligation to warn the players. Similarly there was no duty to warn players of the specific risk of eye injury from being hit by a ball in the course of the match.

On the issue of the failure to provide protective headgear, it transpired that the game was governed by the rules of indoor cricket competition approved by the Australian Indoor Cricket Federation (AICF). These rules did not allow helmets to be worn during a match unless a player had permission to do so on medical grounds. The judge ruled that Multi-Sport's compliance with AICF rules concerning helmets did not represent conclusive evidence that Multi-Sport had not breached its duty of care by failing to require the use of helmets. However, she concluded that there had been no breach of the duty of care on the basis of Multi-Sport's compliance with these rules on the basis of her rulings of fact that (a) only full-face helmets, as employed by outdoor

cricketers or ice hockey goalkeepers, would be effective – the conventional helmets would be undesirable because they could increase the risk of injury due to the confined space on the court and the frequency of diving, sliding and collisions between players; (b) goggles, as used in squash, would not have prevented the injury, and (c) there was no helmet suitable for indoor cricket available on the market.

The judge considered it to be not reasonable to expect Multi-Sport to provide helmets as no suitable helmet had been designed for the game; none were worn by any players elsewhere; the rules of the game did not provide for such headwear, and the way in which the game is played means that there are reasons of safety and convenience why such headwear is not worn.

As regards the failure to warn about the risk of injury, the claimant gave evidence that he was aware of the risk of being struck on the head by a cricket ball in the course of the match. The judge found that the reasonableness requirement did not make it necessary to compile a list of all risks associated with indoor cricket; also, the risk of a player being hit by a ball was such an obvious risk that it did not require specific warning. There was evidence of an increased risk of blindness in indoor cricket because the ball is smaller and more malleable than an outdoor cricket ball, so that it can have an impact on the eye surface rather than merely on socket bones. She concluded that being hit on any part of the body, including the head, was an obvious risk and that there was no duty to warn of a specific risk of injury to the eye.

Was there contributory negligence on the part of the claimant? This was not actually an issue that required determination at trial, but the comments obiter of Chief Justice Gleeson and of Justice Callinan suggest that a mis-hit pull shot would not amount to contributory negligence. Their comments suggest that evidence that a person practises a sport badly is unlikely to be sufficient to establish that a poor player is negligent.

The Full Court of the Supreme Court of Western Australia unanimously rejected the appeal brought by Mr. Woods. The latter then applied to the High Court on the basis that the original trial judge had erred in finding Multi-Sport not negligent. The question whether Multi-Sport took reasonable care is a question of fact. To succeed in the appeal, Mr. Woods would have had to establish that the judge's finding that Multi-Sport took reasonable care was not open to her on the facts.

In determining whether reasonable care had been taken, the trial judge, being the "court of fact", had to decide what the reasonable person would have done in response to the risk of serious eye injury. This involved formulating a value judgment on normal behaviour; on the magnitude of the risk of injury; on the probability of its occurrence; the expense difficulty and the

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inconvenience of mitigating the risk.

Unfortunately, the correct approach of an appellate court to considering a finding about breach of duty was not the subject-matter of argument during the hearing of the appeal to the High Court, so it was not decided. However, by a 3:2 majority, the High Court dismissed the appeal by Woods on the grounds that the decision by Judge French was open on the facts and Mr. Woods had failed to demonstrate any error of principle in the manner in which she arrived at that conclusion.

Commenting on the decision, the author Tania Perry⁴⁸¹ points out first of all that the decision under review turned on the facts of the case, and could therefore only constitute authority in cases based on similar facts. She is, however, of the opinion that the reasoning of the trial judge, as well as the comments made by judges of the High Court, gives some guidance on that which is expected of the organisers of sporting events. Thus sporting organisers must be minded to review rules in order to ensure that every rule is appropriate and justified from the point of view of safety and convenience. These rules should be reviewed on a regular basis and improved as required. Accordingly ACF should consider designing and producing a suitable helmet for indoor cricket, or it may at some point find itself having to defend its failure to do so.

The author also points to the comment made by Callinan J, to wit that sporting injuries and duties of care owed by those involved in sporting activity cannot be approached in the same manner as non-recreational or involuntary activities. These words echo those which the same judge made in the landmark decision of *Hyde v. Agar*, which has been extensively described and commented upon in a previous issue of this organ⁴⁸². These comments are not, according to the author, very helpful in providing authority for the proposition that a less onerous standard of care is expected of sporting, voluntary and community-service organisations. However, they do seem to indicate a more flexible definition of negligence from the courts, which is welcome in the current climate.

Three of the judges concerned did not consider it appropriate to provide those taking part in indoor cricket with a list of specific risks in sport. However, two others considered it appropriate to require a warning sign detailing specific risks, including that which arises from the fact that the game is played with a softer ball capable of entering the eye socket. Callinan J also stated that the ultimate objective of sport is the achievement of physical superiority or domination by one person over another, so promoters and organisers of sporting events will rarely if ever be compelled to warn participants that they may sustain injuries if they participate. These comments suggest that general warnings relating to the risks inherent in sporting

activity should be enough to discharge an organiser's duty of care to warn participants of obvious risks. However, they should not in any way relax in their efforts to educate participants about the risks involved.

French court decisions on sporting injury

*Failure by sporting federation to inform athlete about personal injury insurance renders it liable in tort*⁴⁸³.

After a handball player was injured during a game, she was successful in obtaining compensation from the French Handball Federation (Fédération Française de Handball). However, she obtained less than she would have done had she been party to the relevant insurance policy guaranteeing compensation for personal injury. She therefore brought an action against the Federation for the latter's failure to inform her about the existence of this policy, and claimed the difference between the amount obtained and the amount obtainable under that insurance.

The Court of Appeal of Bastia awarded the action against the Federation. After having the case referred back to it by the Supreme Court (Cour de Cassation)⁴⁸⁴, it held that, where a sporting federation such as the one in question fails to provide the information which it is required to give under the French Law on Sport of 16/7/1984, the athlete affected loses an opportunity. The opportunity in question was that of being appropriately insured had she been correctly informed on the upper limits of the insurance policy in the event of personal injury. Unless the said duty to inform laid down in the Law of 1984 is to be deprived of any meaning, any athlete having been correctly informed of the interest which he/she has in contracting insurance guaranteeing compensation for personal injury, and having been provided with the appropriate forms capable of providing him/her with such insurance, will actually take out the suitable insurance. Therefore the appropriate compensation for this loss of opportunity is that which enables him/her to receive the sum which he/she would have received had he/she been appropriately insured. The Federation was accordingly bound to pay to the victim an amount equal to the difference between the sum received for personal injury and that which is contractually guaranteed by the insurance company for such personal injury.

However, the Court of Appeal, in so deciding, had failed to fix the amount of the individual guarantee contracted, or the amount of the maximum guarantee capable of being contracted, as well as its cost; nor had it established the extent of the loss suffered by the victim. The Court of Appeal had therefore failed to provide the proper statutory basis for its decision with regard to Article 1382 of the Civil Code (which lays down the basic rules of tort liability).

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The Supreme Court therefore set aside the decision and referred it to a different Court of Appeal.

*Decision not to award compensation for accident during improvised baseball game overturned by French Supreme Court*⁴⁸⁵

In the case under review, a minor, taking part in an improvised game resembling baseball, was injured in the right eye by a tennis ball which had been cast in her direction by another child, using a tennis racquet as a substitute for a baseball bat. The case landed before the Orléans Court of Appeal, which dismissed the action for damages brought by the victim's father against the parents of the alleged perpetrator on the basis that the normal use of a tennis ball, which was the author of the injury caused, did not give the injured player the right to claim damages on the basis of Article 1384(1), which is the basic provision regulating vicarious liability. It also held that by taking part in the game, the victim had accepted the risks inherent in it, which excluded the applicability of the same provision. This ruling was challenged before the Supreme Court (*Cour de Cassation*).

The Supreme Court overruled the Court of Appeal. On the one hand, the Appeal Court stated that "normal" use of the tennis ball could not give rise to vicarious liability. At the same time, however, it had accepted that the tennis ball had actually been cast in the direction of the victim by means of a tennis racquet which was being manipulated by the other child, and over which that child therefore had control as to use and direction, which means that it was in fact the racquet which was the author of the injury. The Appeal Court had therefore misapplied Article 1384(1).

The other finding of the Orléans Court, i.e. that the child had accepted the risk inherent in the game and therefore could not rely on the vicarious liability rule, was also dismissed by the Supreme Court, which held that, on the other hand, the Orléans Court had also stated that the game in question had been improvised by minors rather than taken place in the context of a sporting competition. The Appeal Court had therefore failed to provide a statutory basis for its decision.

The Supreme Court accordingly set aside the ruling and ordered it to be referred to a different Court of Appeal.

*French school not held vicariously liable for tennis ball accident*⁴⁸⁶

In another case involving personal injury caused by a tennis ball, the accident in question occurred at a private, but state-subsidised, school (*établissement privé d'enseignement sous contrat d'association avec l'Etat*). One of its pupils was injured in the right eye by a tennis ball which erred from its path in the school playground. The injured pupil brought an action in tort

against the French state, the school and its insurance company, as well as the alleged perpetrator's parents and their insurers. At first instance, before the Tribunal de grande instance (District Court), the French state was made entirely liable for the accident.

The Court of Appeal of Paris confirmed this ruling. It found that the victim had received the ball in the eye whilst watching his friends playing tennis, and that this accident – which was attributable to the alleged perpetrator who, according to a witness statement made by another pupil, had cast the ball – could only come about as a result of a clear lack of supervision on the part of the teachers at the college, who should have prohibited the playing of tennis outside an area especially intended for that purpose. This meant that the school had committed a tort, and that the State was therefore liable in respect of this fault.

The Supreme Court, however, ruled that the liability of the State may only be substituted for that of the teachers in relation to the children placed under their supervision where the latter had committed a tort which must be proved in accordance with the rules of ordinary law. By giving the above ruling merely on the grounds which it had formulated, and by omitting to establish whether there was a personal fault on the part of an individual teacher, the Appeal Court had failed to provide a statutory basis for its decision.

The Appeal Court had also absolved the parents of the alleged perpetrator from any liability, and made the French state exclusively liable for the loss caused, by finding that the perpetrator's parents had correctly claimed that, at the time of the accident, their son was not living with them, being a boarder at the college in question; they therefore no longer had the child under their care, which had been transferred to the college. The Supreme Court, however, stated that the only circumstances which may exonerate the parents of any liability for the tortious acts committed by a minor child living with them is *force majeure* or the victim's own fault. The presence of a child in an educational establishment, even where the latter is a boarding school, does not remove the presumption that the child is living with the parents. The Appeal Court had, by its ruling, infringed Article 1384(4) and (7) of the Civil Code.

The Supreme Court therefore set aside the decision, and ordered it to be referred to a different Court of Appeal.

Commenting on this decision, the author Stéphane Prigent⁴⁸⁷ writes that this decision is part of a line in the case law which interprets in a very strict manner the cohabitation rule laid down by Article 1384(4) of the Civil Code governing vicarious liability incumbent on parents, whilst on the other hand confirming the requirement (laid down by statute) that, for the liability of the state to be substituted for that of the teacher, an error on the part of that specific teacher must be established.

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*The acceptance of risk by the victim does not apply in the case of supervised sporting activity*⁴⁸⁸

In this case, a ten-year-old child who occupied the position of goalkeeper during a game of football organised by a sporting club, became injured by a shot performed by the supervisor in charge of the game. The victim's parents brought a court action in tort against the supervisor, the sporting club and its insurers. The first instance court, supported by the Court of Appeal of Bourges, dismissed the action, applying the acceptance of risk theory in conjunction with Article 1384(1) on vicarious liability. Both courts ruled that the victim in question had sufficient powers of discernment to be aware of the risk involved in a sport such as football, and had consciously chosen to take part in the club's activities, as well as occupying the position of goalkeeper. The Court of Appeal added that the notion of risk acceptance was not confined to sporting competitions but also applied where the victim took part in any recreational activity (activité ludique).

The Supreme Court, however, excluded the possibility of applying the acceptance of risk theory in this case, since the sporting activity in question could be qualified as an educational activity which took place under the authority and supervision of a supervisor (moniteur). Therefore the attribution of powers of discernment to the victim, which to the Court's astonishment continued tenaciously to survive in the French courts, was inappropriate here. Since no acceptance of risk applied here, the case fell within the scope of Article 1384(1) on vicarious liability, and the victim was not bound to prove a fault on the part of the author of the loss (who, with consummate irony, was the supervisor himself).

The anonymous annotation to this decision⁴⁸⁹ asserts that this decision confirms the continuing decline of the acceptance of risk theory in sporting matters, and accordingly serves to develop further the notion of "sporting liability". Previous case law has made it inapplicable to such activities as non-violent sports or friendly fixtures. Acceptance of risk accordingly seems now to be confined to sporting competitions and any abnormal risks inherent in the sport under review. Such abnormal risks can be identified on the basis of various criteria: the origin of the risk (such as a failure to observe the rules or spirit of the game), or the aggressive or malicious attitude of the player responsible, or even the seriousness of the injury suffered. With this decision, it is now excluded from application to supervised educational sporting activity.

Snooker commentator Everton accepts out-of-court libel settlement (UK)

In April 2002, snooker commentator Clive Everton accepted "undisclosed damages" over offensive and untrue allegations that he had conducted a deceitful and vicious campaign against the World Professional Billiards and Snooker Association (WPBSA). The action stemmed from the publication of an "open letter", written by former WPBSA Chairman Geoff Foulds, in the *Pot Black* magazine in 1999⁴⁹⁰.

This follows a series of other misadventures which have befallen the WPBSA and those associated with it in the field of libel law, as has been documented in previous issues of this organ⁴⁹¹.

Victoria Beckham sued over alleged slander regarding husband's "forged" signatures (UK)

That footballer David Beckham is hot commercial property is no more than the obvious truth. Some of the manifestations of this phenomenon were obviously not to the liking of his wife, singer Victoria Beckham, who is currently involved in court proceedings for slander and malicious falsehood as a result. In March 2001, she allegedly engaged in a "rude, loud and unreasonable outburst" when she observed photographs of her husband on sale with what she described as "forged signatures"⁴⁹².

Retailers Timothy, Glynis and Anthony McManus assert that the turnover at their shop in the Bluewater Mall in Kent slumped following the outburst. Their Counsel, James Price QC, claims that at least five people witnessed the outburst, after which the news spread very quickly. Ms. Beckham's denial of slander and malicious falsehood was upheld in the High Court, but the retailers in question have taken the case to the Court of Appeal⁴⁹³.

The outcome was not yet known at the time of writing.

Romanian athlete loses drugs slander case

In a previous issue⁴⁹⁴, it was reported that, in the course of a television programme on the occasion of the World Athletics Championships in Edmonton, Canada, Romanian Gabriela Szabo, the Olympic 5,000 metre champion, had called her compatriot and colleague Violeta Szekely a "druggie". Initially, the object of her invective had withdrawn an action for slander arising from this outburst, but had hinted that she could resume it later – which she did. The matter has been further complicated by the fact that Szekely called Szabo "hunched" in another interview, for which Szabo has in turned sued her rival⁴⁹⁵. The outcome of this case was not yet known at the time of writing.

In the meantime, however, Ms. Szabo seems once again to have fallen victim to her own particular strain of "foot-in-mouth" disease by claiming, in an interview

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with the magazine *Playboy*, that athletics coach Carmen Hodos had attempted to drug her by tampering with her coffee. The inevitable action for slander followed, and in early April of this year the relevant Bucharest court found against Ms. Szabo, ordering her to pay £6,800 by way of damages. Under Romanian law, Ms. Szabo could also have been imprisoned for a maximum period of five years⁴⁹⁶.

Bruce Grobbelaar case goes to Round Three...(UK)

The trials (sic) and tribulations of former Liverpool, Southampton and Zimbabwe goalkeeper Bruce Grobbelaar in the civil courts of this land have been extensively documented – both in the media and in this worthy organ⁴⁹⁷. It will be recalled that, in July 1999, the High Court had awarded Grobbelaar the sum of £85,000 by way of damages in a libel suit against the *Sun* “newspaper”, which had claimed that he had “thrown” a match between Liverpool and Newcastle played in 1993 for the sum of £40,000. In January 2001, however, the Court of Appeal overturned this ruling in a historic decision, since it represented the first occasion on which the Court had set aside a libel verdict.

In July 2002, the former goalkeeper took his case to the Law Lords, assisted by North West law firm Cuff Roberts and Andrew Hartley QC. The News International consortium, which owns the *Sun*, has bypassed instructing a firm of solicitors by working directly with media specialist Richard Spearman QC. Mr. Spearman has restated to the Law Lords the Sun’s belief that articles which it had published in the mid-1990s accusing Grobbelaar of match-fixing were accurate. The Sun had relied on video evidence showing Grobbelaar talking about accepting cash for deliberately causing the loss of matches as evidence of its claims⁴⁹⁸.

The outcome of the appeal was not yet known at the time of writing.

Printer wins damages in snooker hall defamation case (Ireland)

In early March 2000, the claimant in the case under review⁴⁹⁹, a printer, had been informed by two of his friends that they, in turn, had been told by a person employed in the local snooker hall that he had been barred from the club since he had been smoking cannabis there the previous Saturday night. People in his local pub had been talking about the claimant, as well as teasing and jeering at him over this matter. The claimant asserted that he had felt shocked and distressed over the incident, and stated that when, the next day, he attempted to gain access to the snooker hall he was informed by the manager that he would not be allowed to play there because of his action on the previous Saturday night. The defendants denied publication of the slander.

The Dublin Court ruled that the defendants’ employee had incorrectly identified the claimant, that the only way in which the two friends mentioned above could have found out about him being barred was through that employee, and that these two friends may have unintentionally spread the story round the pub. The Court held that the claimant had suffered distress, shock and embarrassment owing to the actions of the defendant’s employee, and awarded him €12,000 with costs.

Insurance

AIG company pays Olympic-related costs (US)

In the summer of 2002, National Union Fire, a unit of major insurer AIG, paid \$4 million for the purpose of reimbursing the costs incurred by the Salt Lake City Winter Olympics committee in defence of federal charges of bribery. The Committee had launched a court action against the insurance company last year alleging that the latter was engaging in “manoeuvres to avoid its obligations”. The reimbursement has now been agreed and the original charge dismissed. However, an appeal brought by the US Justice Department against the dismissal has been brought⁵⁰⁰. It had not yet been decided at the time of writing.

Motor vehicle insurance also covers accidents in non-competitive conditions on motorcycle track. French Supreme Court decision⁵⁰¹

In the case under review, a collision had taken place between two motor cycles which were riding on a motorcycling track operated by a sporting club. The accident took place at a time when the vehicles were being driven outside the context of any sporting or competitive event, or even any preparations for such an event. One of the riders who was taken to the lower

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criminal court (Tribunal correctionnel) for involuntary injuries caused to the other rider made a claim on his multi-risk home insurance policy, which also covered his personal third-party liability, rather than his compulsory motor vehicle insurance⁵⁰². He did so on the basis that the accident occurred on a route closed to the ordinary traffic, which meant that his vehicle was not "in circulation" within the meaning of the motor vehicle insurance policy; therefore, it could not be covered by any compulsory vehicle insurance. Accordingly, the third party insurance entered into play. The Court of Appeal had endorsed this view and therefore ordered the third party insurers to pay the appropriate compensation.

The Supreme Court (Cour de Cassation) disagreed. It conceded that Article 211(1) of the Insurance Code states that anyone whose tort liability may be engaged because of any physical injury or damage to property caused by his/her vehicle must, in order to be able to circulate this vehicle, be covered by motor vehicle insurance which covers such liability. However, it ruled that the scope of this compulsory insurance is the same as the scope of the Law of 5/7/1985 on traffic accidents. By this token, a motor cycle is by virtue of its very nature a vehicle subject to compulsory vehicle insurance, even if it was being driven in the circumstances in which this particular accident occurred. Therefore it was the motor vehicle insurer who was liable for the payment of compensation.

Other Issues

Bowyer case goes to civil courts (UK)

The case of the "Leeds Two" who were accused of having beaten an Asian student unconscious outside Majestyk's nightclub in Leeds two years ago has been extensively documented both here and elsewhere⁵⁰³. As a result, Jonathan Woodgate was convicted of affray and Lee Bowyer acquitted of all charges. It was widely expected that Sarfraz Najeib, the victim of the assault, and his family would not let the matter rest there, and this was confirmed in April 2002 when both Mr. Najeib and his brother Shahzad brought a civil action before the High Court against Lee Bowyer for assault, battery, conspiracy to injure and conspiracy to pervert the course of justice⁵⁰⁴. Later, lawyer Imran Khan indicated that similar claims could be brought against Woodgate and two others⁵⁰⁵.

A few days later, in a bizarre twist to an already remarkable case, Mr. Bowyer requested his lawyers to consider claiming compensation from the Sunday Mirror for the allegedly prejudicial report which caused the first trial to collapse. This would enable him to recover the £1 million legal costs with which he is faced from the criminal trial (which were awarded against him by the

judge on account of the lies with which his testimony to the police was littered)⁵⁰⁶. The newspaper in question is already involved in contempt of court proceedings brought against it in respect of this affair by the Attorney General, Lord Goldsmith (the outcome of which was not yet known at the time of writing)⁵⁰⁷.

This column will monitor further developments in this case with considerable interest.

Jockey Cochrane brings action over plane crash which ended his career

Two years ago, Ray Cochrane, the former Derby-winning jockey, was compelled to retire as a result of injuries suffered in a light aircraft crash at Newmarket racecourse two years ago. In June 2002, he brought court proceedings against the estate of the pilot (who died in the accident) and the racing stables which chartered the aeroplane. Mr. Cochrane was travelling in the aircraft with fellow-jockey Frankie Dettori when it crashed on take-off. He was later awarded a bravery medal for having removed Mr. Dettori from the wreckage and his attempt to save the pilot's life⁵⁰⁸.

The outcome was not yet known at the time of writing.

Tyson faces civil action over alleged assault (US)

The legal implications of various physical encounters in which former World heavyweight champion Mike Tyson has become involved over the years have hitherto been confined to the criminal courts. However, Tyson now faces a new legal tussle after having a civil action brought against him for an assault allegedly carried out against former Golden Gloves boxer Mitchell Rose. The latter claims that Tyson became involved in a scuffle with him outside a New York nightclub, leaving him (Rose) with a shredded fur coat and a sprained neck. Tyson had not been criminally charged in connection with this incident⁵⁰⁹.

The outcome was not yet known at the time of writing.

French Prime Minister adopts Decree on tort liability of sporting agents⁵¹⁰

In April 2002, the French Prime Minister, using his constitutional regulatory powers, adopted a Decree regulating the tort liability of sporting agents, the parent legislation for which is the general Law on Sport of 16/7/1984. Under this decree, the agent must at all times be able to demonstrate that he has contracted appropriate insurance to cover his/her professional tort liability.

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Politician who used photograph of athlete for election purposes held liable for damages (France)⁵¹¹

In October 2001, the Court of Appeal (Cour d'appel) of Besançon, France, ruled that any person has an exclusive right to object to the unauthorised reproduction of his image. It is for the person who publishes or publicly displays this image to establish whether or not such publication has been authorised or not. The consent of the person concerned is at all times necessary and essential, so that, if such consent has not been requested and obtained, such a loss-causing situation justifies the award of damages. In the case under review, although the photograph of the athlete in question had unquestionably been taken on the public highway in the course of a public sporting event, its reproduction in a political leaflet, even though it had already been published in the local press, had at no time been authorised. As an athlete and a council employee, the person photographed had no desire to be associated with any election campaign. The fact that this leaflet was widely distributed aggravated the loss caused.

The electoral candidate is the only person responsible for the leaflet which has been published and distributed in his name – the more so because no precaution had been taken in this case when this picture had been used in a very specific context. Thus the use for electoral and political purposes of his picture had caused real and substantial loss to the person photographed, which had been reinforced by the distribution of the leaflet in question. This loss needed to be rectified by publishing within the shortest possible time limit a local press statement at the expense of the electoral candidate concerned.

Apology over Euro 96 assault may ease path to compensation (UK)

In the previous issue⁵¹² attention was drawn to the case of John Wilson, a student who was knocked unconscious during the Euro 96 football championships, and whom the Court of Appeal found to have been the victim of a deliberate unlawful assault by the police. Because the Metropolitan Police refused to admit liability, Mr. Wilson's family were compelled to take legal action in order to obtain compensation for this incident. Scotland Yard seemed to have paved the way for the success of this court action when it was learned that a senior officer had written to Mr. Wilson expressing regret at the "collision" with the officer concerned. Mr. Wilson is suing for over £100,000⁵¹³.

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Sports policy, legislation and organisation

Wembley: the farce continues...(UK)

The background

At this stage in the saga, it is perhaps useful to provide a synopsis of the story thus far, since the developments which have occurred during the period under review can only be properly understood against the background of the previous history of this seemingly jinxed project.

Wembley Stadium, that venerable English footballing institution, had for some years now been literally falling to bits, which is what prompted the English Football Association to plan the construction of an entirely new stadium on the same site. Initially, it was the Bovis consortium which had been contracted to carry out this work, but in September 2000, just a few weeks before the final match was to be played at the old stadium, the consortium pulled out of the project, to be replaced by Multiplex, the Australian company which had constructed the Stadium Australia complex for the Sydney Olympics. However, attempts by the bankers financing the plan, Chase Manhattan, to attract the finance required ran into difficulty.

This was the start of a long series of fits and starts, during which almost every aspect of the new stadium seemed to change from one week to another – even the question as to whether there actually would emerge a new stadium. Still the finance was not forthcoming, and the project underwent various changes in personnel (the most notorious being the resignation of Chelsea Chairman Ken Bates, whose interpretation of the project differed sharply from some other personalities involved – notably the then sports minister Kate Hoey, whom he accused of constant interference in the project). Another issue which bedevilled the project was the vexed question whether the new Wembley would also feature an athletics track and facilities, or whether it was preferable to build a specific stadium for this purpose at nearby Picketts Lock. The constant hesitancy on the part of those responsible on this issue caused London to lose the hosting of the 2005 World Athletics Championships. The position was further complicated by the claims of other cities, most prominently Birmingham, that they were equally suitable as a venue for the new national stadium. The project also seemed to be mired in murky financial waters, not least because of the £120 million National Lottery funding which Sport England seemed increasingly to regret having ever bestowed on the benighted plan.

When this column last reported in the latest developments in this long-running epos⁵¹⁴, only three things were certain (or as certain as they could be in this monumental farce):

(a) Culture Secretary Tessa Jowell had announced that

no definite decision on whether – or where – the new stadium would be built would be forthcoming until April 2002, in view of the emergence of a confidential report raising certain questions on the propriety of manner in which the redevelopment contracts had been awarded;

(b) Problems continued to beset the project as regards the prospect of raising the necessary cash for the venture;

(c) Australian firm Multiplex had offered to provide £350 million in return for a 20 year lease on the new stadium;

(d) It was still not clear whether the new stadium would feature an athletics track or not.

The project lurches from crisis to crisis...

It was not long before the project was plunged into a fresh crisis when, barely a month before the deadline set by Ms. Jowell was due to expire, fresh doubts began to fester in the City as to whether those in charge of the project would be able to raise the finance required for its completion. Although Barclays, the bank which had assumed the task of forming a syndicate of lenders in order to raise the sum of £300 million, confidently continued to maintain that it could raise the cash in time for the deadline, sources close to the bank acknowledged that the timing would be tight. Other City institutions voiced doubts as to whether the Wembley business plan would present a financially viable proposition, insisting that the venture was running out of time⁵¹⁵. The future of the project was thrown into even greater turmoil a few days later when Sir Rodney Walker, the man who was brought in to replace Ken Bates after his ill-fated leadership of the project and was put on charge of the task of raising the £300 million referred to earlier, announced that he was “considering his position”⁵¹⁶. This led MP Steve McCabe to call for an immediate suspension of the Wembley Stadium bid, claiming that Sir Rodney’s threatened walkout meant that he had no confidence in his own people. He accordingly called for an immediate investigation by the Public Accounts Committee into the competence and financial probity of this stadium bid⁵¹⁷. The present writer is absolutely convinced that the fact that Mr. McCabe represents a Birmingham constituency is a pure coincidence.

In the event, Sir Rodney actually did quit his position following a Board meeting of the Wembley National Stadium Limited (WNSL) company, but it was a question of being pushed rather than jumping⁵¹⁸ – in fact, Adam Crozier, Chief Executive of the Football Association (FA) who own WNSL, had been believed to

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be canvassing opinion as to whether Walker should stand down, and to have informed the latter that he should quit two months before the Board meeting. In fact, a reorganisation of the Board had been one of the conditions imposed by Ms. Jowell before she would bestow Government approval on the rebuilding project⁵¹⁹. Walker's place was taken by Michael Jeffries, Chairman of the engineering company W.S. Atkins. The Board was also strengthened by a number of people with financial backgrounds, such as David Ross, Chief Operating Officer of Carphone Warehouse, Football League chairman Keith Harris (a somewhat surprising choice in view of his involvement with the ITV Digital disaster – see above, p.38) and Clive Sherling.

Matters seemed to go from bad to worse towards the end of April when Barclays Bank pulled out of the project after having attempted for six months to find a commercial way of financing the project. It had hoped to secure the co-operation of various City banks in order to spread the risk, and withdrew just hours after it emerged that a German bank, WestLB, was putting together an immediate deal with the Football Association and was said to be prepared to raise the cash from its own reserves⁵²⁰. The person behind the WestLB approach was Robin Saunders, an American-born financier who raised £1,000 million for Bernie Ecclestone's Formula One at a time when many City financiers had walked away from it. One of the attractive features about the German bank's bid, from the point of view of the much-needed stability of the project, was that it was ultimately supported by the German state of Nordrhein-Westfalen, which guarantees the bank's business⁵²¹.

Meanwhile, of course, time was ticking away towards the 30 April deadline on which Minister Tessa Jowell had placed such insistence a few months earlier. Accordingly, when she informed the House of Commons that there had been a fresh delay in order to give the FA more time to raise the necessary funding, she unsurprisingly came in for a good deal of flack from all sides of the House. The FA had told her that they were within a "hair's breadth" of reaching a £400 million arrangement with WestLB, which prompted Ms. Jowell to state that it would not be right or reasonable to pull the plug "when the prospects of success look better than ever"⁵²². However, the FA still had to meet the conditions set by the bank before the loan could be formally approved. But here again, all was not as it seemed in relation to the German bid, since barely a few days later the bank in question appeared to suggest that it would require the assistance of other financial institutions. Andreas Seibert, a senior member of the WestLB Board, said that the money was most likely to be raised by a consortium of banks, whereas many sources in the City had believed that WestLB was

prepared to lend the cash from its own reserves⁵²³. Ms. Jowell had to "face the music" in the House of Commons once again two weeks later when she announced a further delay, since negotiations between the FA and the German bank were proving to be more protracted than expected⁵²⁴.

Er, how about settling for a facelift?

This entire affair has certainly plumbed a number of depths in incompetence and inconsistency. However, surely the nadir must have been reached towards the end of May, when a shamefaced FA held out the prospect that the finance for the project would not be found, and that they may have to settle for a "tarted up" old-style Wembley, Twin Towers and all⁵²⁵. It believed that it would cost around £40 million to restore the fabric of the stadium sufficiently to warrant a public health and safety certificate, but it would hold no more than 60,000 seats – making it smaller than Old Trafford.

Such an outcome would naturally be extremely damaging to Tessa Jowell, the Culture Secretary, particularly after the flak she had received for the repeated postponements of the deadline for a decision on the project. It would also invite on her head the fury of virtually every West Midlands MP, who had been led to believe that Birmingham had a chance of hosting the new stadium (see below)⁵²⁶.

Accordingly, Ms. Jowell lost little time in dismissing this speculation. Facing MPs in the House of Commons a few days after the proposal had been made, she asked the rhetorical question whether, given that there was currently moss growing on the walls and grass growing between the seats, there was anyone who seriously considered that this would be the route through which the lottery money would be returned in practice⁵²⁷. (Perhaps someone should have pointed out to the good Minister that the bounds of credibility had already been sufficiently stretched by developments thus far...)

Whatever happened to Birmingham...?

It will be recalled not only that two West Midlands cities, Birmingham and Coventry, put in bids to host the new national stadium, but also that at a certain point the mood amongst Government ministers was swinging towards such an alternative bid as the London project plumbed new depths in embarrassment⁵²⁸. Particularly Birmingham seemed to be in with a reasonable chance of scooping the project, especially as it would have represented an infinitely more economical proposition⁵²⁹.

All this makes it perfectly understandable for those behind the Birmingham bid to feel somewhat annoyed when the Wembley project was given more second chances than the most liberal Recording Angel would

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be prepared to grant. When the 30 April deadline was postponed (see above), an angry Paul Spooner, project director for the Birmingham bid, said:

“Tessa Jowell established five tests and a deadline in her statement to Parliament on December 19. It would appear the Government is reneging on its commitment that it would encourage the FA to make Birmingham the preferred option if those tests were not met by the end of April. I believe many people in the West Midlands will feel badly let down by the government and the FA in not recognising the potential of this area to be the home of major projects such as the national stadium”⁵³⁰

Mr. Spooner’s comments when the deadline was put back a second time were not reported in the Press, perhaps because they were unsuitable for a family newspaper. Another spokesman for the Birmingham bid, Kevin Johnson, pronounced himself “staggered” at this renewed let-off. He was joined by Julie Kirkbride, MP for Bromsgrove⁵³¹ and a member of the relevant Select Committee.

At the time of writing, it looked as though, at long last, a breakthrough may have been reached in the shape of a deal between the FA and the German bank WestLB. If this proves to be yet another false dawn, obviously the pressure for Birmingham to be awarded the stadium could become irresistible. However, whatever the outcome, Britain’s second-largest city was treated extremely shabbily by all concerned (as is conceded in the relevant Select Committee report; see below), which sits ill with a Government allegedly in favour of “the regions” and “decentralisation”.

Those damning report and inquiries

In the meantime, speculation was mounting about the contents of a number of reports relating to the project, particularly as the date approached for the managers of the project to present themselves before the powerful Select Committee on Culture, Media and Sport. Before the meeting, its members made it clear that they were prepared to use all their muscle to compel the publication of three controversial reports into the project. The first is a report by construction consultants Tropus which contained a number of allegations concerning the internal procedures employed by the WNSL. The second was the report drawn up by company doctor David James into the manner in which the project had been managed until September 2000⁵³². The third was a private letter from Mr. James to Sir Rodney Walker, which was understood to contain his personal précis of the report as well as his opinions. The scramble to obtain publication of these documents was regarded as yet another danger to the besieged

project team⁵³³. Particularly the first two were said to be “explosive”⁵³⁴.

The reports in question proved to be every bit as controversial as they were expected to be. As regards the Tropus report, David Hudson, its Chief Executive, who was involved in the project for nearly two years, informed the Select Committee of the manner in which senior managers of the stadium, who were responsible to the then Chairman Ken Bates and former Chief Executive Bob Stubbs, consistently ignored professional advice and omitted to carry out standard management practice. Mr. Hudson also highlighted the manner in which costs were allowed to spiral out of control because, in his view, they were never properly quantified. Costs of the construction contract alone had since risen to £360 million, and the entire project is now expected to cost £715 million⁵³⁵.

Also, despite the enormous amounts of money involved and that, as has already been mentioned earlier, the plan was being bankrolled by National Lottery money to the tune of £120 million, no proper management structures were put into place, according to the report. Construction projects of this size normally have a Project Execution Plan, which sets out details of the deadlines, how they are to be met, and at what cost. Tropus claim that the plan which they prepared for this purpose was ignored.

The most damaging revelation of all was that the Wembley management had initially agreed its £326 million deal with Multiplex on the basis of a three-page letter, which Tropus claim gave precious few details about that which the developers would be expected to deliver. The letter in question was countersigned by Stubbs on 1/9/2000 and approved by the Wembley Board, headed by Bates and containing FA Chief Executive Adam Crozier. The report claims that this agreement locked Wembley into dealing with one construction firm, thereby depriving themselves of the opportunity to obtain value for money since they had not opened the deal for competitive bidding⁵³⁶.

The James report also contained material which cast the entire Wembley team in the least favourable light possible. This document was the fruit of Mr. James’s four-month investigation into the manner in which contracts were awarded to design, build and equip the stadium. Whilst the report concludes that there was no evidence of any criminal activity or impropriety, it emerges that Mr. James could not give his assurance to the then Chairman Sir Rodney Walker that it was safe to proceed with the construction of the stadium. This was thought to be because Mr. James was concerned that the scope of his enquiry was too narrow to guarantee that all was well with the project⁵³⁷.

As a result of all this, it came as no surprise to learn that the National Audit Office planned to open a full-

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scale enquiry into the entire project. More particularly the enquiry would focus on the question whether the £120 million of lottery money referred to above (which is deemed to be “public money”) was used in such a way as to obtain “value for money” for the Government⁵³⁸. It would also investigate the involvement of Sport England and other public sector bodies in the saga⁵³⁹. The outcome of this inquiry was not yet known at the time of writing.

Finally, the Select Committee itself yielded to no-one in the scathing nature of the report which it drew up as a result of its hearings. In a blistering attack on the general handling of the planned stadium, the MPs in question described the officials at the lottery-funding body Sport England as “slack, slovenly and supine”. This body, according to the Committee, had only made extremely vague arrangements for recovering the £120 million invested in the project if matters went wrong. More particularly,

“Sport England’s protection of the £120 million, the largest single Lottery grant ever awarded to a sporting project, entirely fails to meet the standards to be expected of such a public body. We believe that Sport England’s performance has been deficient to the point of dereliction. A new Chairman of Sport England is due to be appointed. It must be the duty of the successful candidate to examine rigorously the lessons of the Wembley project. Sport England must provide Parliament and the public with reassurances that it has the ability and determination to put its house in order”⁵⁴⁰

Sport England immediately announced a review of its handling of the project.

WNSL is also taken to task for its lack of adequate management standards. And both the FA and the Government are condemned for having failed to make it clear to rival bidders for the national stadium in the West Midlands that Wembley had become the only viable option⁵⁴¹ (see also below, p.71).

The Committee’s general conclusion is that Wembley should have been a private commercial concern. Instead, it was mounted on a quasi-public, semi-commercial basis. It should have met the highest standards in accounting and tendering; this it definitely did not⁵⁴².

Athletics definitely at Picketts Lock

As has been recorded frequently in these pages, one of the many areas in which the relevant authorities showed themselves at their hesitant and supine worst has been the question whether the new stadium should also feature athletics facilities. The issue was finally settled at the end of April, when it was decided that a

new indoor athletics centre was to be constructed at Picketts Lock, North London⁵⁴³. This was part of the Government’s injection of £41 million into British athletics which it certainly owed the sport following its decision in October 2001 not to build a new stadium there to host the World Championships⁵⁴⁴. (This subject will be returned to later – see below)

Seemingly unaware of the way in which the tide was turning, Sport England approved proposals to include athletics in the design for the Wembley stadium, as a result of a study commissioned by it⁵⁴⁵. However, there is a suspicion that this decision was motivated more by the prospect that, if athletics was included in the Wembley design, Sport England would not be required to return the £120 million lottery money referred to earlier. If this was indeed the motivation, it shows Sport England up in a very bad light indeed, perhaps inviting the consideration that the Select Committee report referred to above was too kind rather than over-harsh in its comments regarding the organisation.

Picketts Lock will be one of several indoor venues to be built across the country. Work has already commenced on a track in Birmingham, and there are also plans for centres in Gateshead, Bath and Belfast. A further £5 million will fund the current facility at Crystal Palace and a new site in North-West London. The cash injection is also regarded as something of a token of thanks to David Moorcroft, the Chief Executive of UK Athletics, who reacted with due philosophy when proposed schemes at Wembley and Picketts Lock were abandoned by the Government⁵⁴⁶. Mr. Moorcroft hailed the cash award as a “reward for patience”⁵⁴⁷.

Light at the end of the Wembley tunnel?

When the Select Committee report came out, there were not wanting commentators who saw this as the final nail in the Wembley coffin. Surely the entire project was now a “dead duck”, and the stadium would either be built in Birmingham or not at all⁵⁴⁸.

However, all was not lost. On the same day as the said Select Committee report was issued, more cheering news was forthcoming which this time held out the prospect of definitely seeing the matter settled once and for all. Westdeutsche Landesbank, the German bank due to provide £310 million towards the stadium, announced that it had completed its “due diligence”, i.e. the detailed checks normally made by banks before issuing loans. This assessment had prompted certain changes, but relatively minor ones. In principle, final contracts had been drawn up, and at the time of writing, the FA and the bank were due to sign on the dotted line some time in the late summer⁵⁴⁹.

Could it really be all over bar the popping of champagne corks? As they don’t say in Germany, *beobachten Sie diesen Raum* (Watch this space)!

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Silverstone to become “world class”, but not without controversy

It was not so long ago that serious doubts were being expressed over the future of Silverstone as a venue for major Formula One events, as has been recorded in these columns⁵⁵⁰. However, since then matters have been moving considerably – notably in the political arena, with sports minister Richard Caborn throwing his weight behind the campaign to preserve the historic circuit as a Grand Prix venue⁵⁵¹.

Since then matters moved up yet a further gear (so to speak) when Patricia Hewitt, Minister at the Department of Trade and Industry (DTI), announced plans to support the extensive development planned for the circuit⁵⁵². This followed extensive lobbying by Sir Jackie Stewart, the former World Champion and current British Racing Drivers' Club (BRDC) President, who had been campaigning very hard in order to prompt the Government to provide extra funding aimed at transforming the circuit into a world-class motor-racing venue.

In a joint venture between race organisers Octagon Motorsports, the BRDC and Bernie Ecclestone's company Formula One Management (FOM), the sum of £40 million has been invested in facility improvements. However, a further £40 million is required in order to complete these ambitious designs⁵⁵³. Never the soul of diplomacy, Ecclestone shortly afterwards criticised the organisation of the British Grand Prix by Octagon, with particular reference to the inadequacy of the facilities at Silverstone – a clear sign that, in his view, it was Octagon which should provide at least some of the cash. As a result, Octagon Chief Executive Rob Bain resigned. Ecclestone was unrepentant, claiming that the organisation of traffic inside the circuit is not up to standard, and called upon the race organisers to “give something back” to fans of the sport by improving facilities, thus giving them a fair deal⁵⁵⁴.

More controversy was forthcoming a few weeks later, when the National Audit Office (NAO) announced their intention to investigate the decision by the Prime Minister and by Secretary of State Stephen Byers to speed up the construction of the bypass at Silverstone in order to save the Formula One Grand Prix, which Bernie Ecclestone had threatened to remove from Britain. Ecclestone is a former donor of £1 million to the Labour Party. The bypass decision had been taken against the advice of the most senior civil servant in the Department of Transport, Sir Richard Mottram, who had asserted that it did not provide “value for money”. Downing Street, on the other hand, defended the decision on the basis that it had been taken in the “public interest”⁵⁵⁵.

The NAO, which acts as Parliament's financial invigilator, had been alerted by Sir Richard after the

latter had refused to sign the £8 million cheque for the deal unless he was ordered to do so by Mr. Byers, who was Transport Secretary at the time. Such action is rare in Whitehall. This investigation is naturally a major embarrassment to the Government, because of past associations between the Prime Minister and Formula One racing. It will be recalled that, shortly after his access to power, Mr. Blair was compelled to return a £1 million donation from Mr. Ecclestone in order to avoid accusations of sleaze after ministers had lobbied for Formula One to be exempted from the ban on tobacco advertising.

A Whitehall source has stated that, on his understanding, Mr. Blair had personally informed Mr. Ecclestone that the road would be open on time. Both he and Mr. Byers took the decision to allocate extra money to the bypass after they had, in line with the Government policy described above, given a commitment to Formula One that it would build the road in order to improve access to the racing circuit in Northamptonshire by linking it to the motorway network. The construction schedule was adversely affected by the restrictions on movements which followed the outbreak of foot-and-mouth disease two years ago. It therefore fell behind schedule and required a cash injection in order to be ready for this year's meeting. Mr. Byers then decided that the wider national interest would best be served by speeding up the Silverstone project and instructed the Highways Agency to proceed accordingly.

This was naturally not to the taste of some MPs, one of whom, Liberal Democrat Treasury spokesman Edward Davey, called it a “scandal” that taxpayers' money should have been wasted against the explicit advice of a senior Civil Servant – and indeed contrary to Treasury guidelines⁵⁵⁶.

The outcome of the NAO investigation was not yet known at the time of writing.

“New Law on sport” proposed in the Netherlands

In April 2002, several Government Ministers of the Netherlands issued a letter in which they mentioned the possibility of a Law on Sport, which would feature not only the European dimension, but also such topics as doping, financing, accommodations and commercialisation. They also indicated what were the current opportunities of taking action against football vandalism⁵⁵⁷.

French Decree sets out conditions for licensing sporting federations

In May 2002, the French Government issued Decree No 2002-648, which defines the conditions which have to be met for a sporting federation to be licensed by the Minister for Sport. It also sets out in detail the contents

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of the relevant application form. The Federation in question must also adopt articles of association as well as a set of disciplinary rules which comply with the model Articles and Rules for licensed sporting federations. These documents are appended to the Decree. This instrument also sets out the conditions in which this licence may be withdrawn⁵⁵⁸.

Official backing for sport – initiatives, proposals and criticisms (UK)

Every Government – indeed, every authority no matter how small – has experienced them – anguished cries from sporting clubs, federations and individuals who believe their activity to be worthy of unstinting official support, in terms financial and/or regulatory. The current UK administration has been no exception to this phenomenon during the period under review; nor has it been spared the inevitable brickbats which always fly around, the unifying motif of which is that “they” are not doing nearly enough for “us”. This is in spite of several instances of largess which have taken various forms.

Athletics gets £41 million windfall. By far the best news in this regard came in May 2002, when (as has already been mentioned previously – see above, p.68) it was announced that British athletics were to be awarded a lottery windfall of £41 million. Representing as it does the largest investment in the history of the sport, this award came after several months of discussion between Sport England, David Moorcroft, the UK Athletics Chief Executive and the Government. The bulk of the cash will come from Sport England’s National Lottery fund, but £4 million is to be provided by the Department of Culture, Media and Sport. Apart from financing the construction of the new Picketts Lock athletics stadium (see above p.68), the money will also be spent on refurbishing tracks all over Britain, as well as on nationwide development programmes at grassroots and schools level encouraging more people to take part in the sport. Also, for the first time British athletes will be given access to the best medical treatment⁵⁵⁹.

Government adopts free swimming scheme for under-18s. Another item of positive news in this direction came at approximately the same time as news broke of the athletics Lottery windfall, when it was announced that public swimming baths – the first proud instances of local councils’ social credentials but more recently written off as little more than white elephants – could be set for a new golden age as the promoters of a healthier and fitter Britain⁵⁶⁰.

Inspired by the success earned by Glasgow City Council in allowing all under-18s free access to their baths, the Government now wishes to encourage a similar scheme south of the border. As a result of Glasgow’s initiative, the

use of swimming pools has increased by 120 per cent amongst young people, and this percentage has been higher still in some of the most deprived areas of the city. Speaking at a London conference in May 2002, Public Health minister Yvette Cooper invited councils and their local partners to compete for funds aimed at widening community opportunities for physical exercise. At least one of the winning bids from the nine English regions should involve swimming, although other proposals would be welcomed. The £2.5 million programme will involve Sport England as well as the Countryside Agency. Aware that poorer families often consider the cost of transport and admission to leisure centres to be prohibitive, the Minister is seeking to promote schemes which encourage and facilitate exercise without actually “telling people what is good for them”⁵⁶¹.

Criticism of official subsidy policies abounds. The good news inherent in the previous items has not, however, prevented an avalanche of criticism of official policy in this regard.

First of all, the fact that no other sports have been the beneficiaries of the same kind of official munificence as those described in the above two items does not, however, mean that they are in no need of official support – or that their spokespersons will relax in their efforts to secure it. One of the factors which has proved to be a catalyst in this respect has been the ban on tobacco advertising issued by the Government five years ago. Sports such as Rugby League, cricket, snooker, darts, and ice hockey agreed to abide by these regulations, but few have succeeded in finding alternative sponsors, as a result of which they are facing a severe cash crisis. In early April of this year, officials from the sports concerned requested a meeting with the Government. At such a meeting, they will press for a similar system to that in operation in Australia and Ireland to be adopted here. In these countries, the Health Ministries sponsor a number of sports which were unable to find sponsors once bans on tobacco advertising were put into effect⁵⁶².

On this point, one of the spokespersons involved, Maurice Lindsay, who represents the Rugby League board, points out that, whereas Silk Cut used to sponsor its Challenge Cup to the tune of £1.1 million, Kellogg’s, the new sponsors, could only muster £450,000. Lindsay and other claim that, since the time of enacting the tobacco advertising ban, the Government has provided little assistance, and that meetings with the Tobacco Sponsorship Task Force, formed by the Government following the ban in order to help find new sponsors, have been routinely cancelled⁵⁶³.

Former Sports Minister Kate Hoey has also been to the forefront of criticising official policy on this issue. Even though we should perhaps discount something for

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the proverbial rancid fruit, given the circumstances of her departure from office⁵⁶⁴, she is far from alone in the criticisms she has voiced, using her regular column in the daily press (the lucky (?) current recipient being The Daily Telegraph). Thus in late April she expressed her concern about official policy towards those Olympic sports which captured the nation's attention at the time of the Sydney Olympics, when they helped Britain to a record haul of medals. To her chagrin, however, the television coverage did not last much beyond the period immediately following the Games, which means that interest amongst the general public has dwindled. Any reduction in media coverage goes hand in hand with a drop in income which the sports affected receive in the shape of broadcasting fees⁵⁶⁵.

This has repercussions at the Government level. Football has emerged as a major beneficiary of Government funds, because the latter agreed to match the input from the FA and the Premier League – made possible by their sizeable broadcasting revenue – towards the Football Foundation, which encourages the game at the grassroots. Thus we had the anomaly whereby the richest sport in the country received extra support whereas requests by other sports for similar funding were dismissed. The National Lottery cannot by itself provide sufficient funds in support of these sports; they also need Government help⁵⁶⁶.

In the summer, another vociferous critic of Government policy materialised in the imposing shape of Audley Harrison, the Sydney Olympic super-heavyweight gold medalist, when he made a vitriolic attack on sports provision in Britain. The latter he described as “disgusting and outdated”, and he took the Government to task for failing to provide either for existing champions or for those who aspire to reach the top in the sport of their choosing⁵⁶⁷. Harrison, who is a Wembley resident, also criticised the national stadium fiasco and criticised Government Ministers for losing the 2005 World Athletics Championships (see above, p.68).

The boxer's ire had been fed by his return to the Crystal Palace National Sports Centre during the build-up to a fight against Dominic Negus following a spell of training in Las Vegas. He had trained at the South London venue as a member of the England amateur boxing team for the 1998 Commonwealth Games and for the 2000 Olympics. These were his comments on his return:

“Nothing has changed. It is like something out of the dark ages. I'm not criticising the people at Crystal Palace. They are trying, but nothing has been done to the place since I was here 2 ½ years ago. They are talking about pulling it down so they won't spend any money on it. It is a disgrace”⁵⁶⁸

The boxer is no newcomer to political lobbying, having led a party of amateur boxers on a protest march to the Houses of Parliament aimed at securing funding for the Sydney Olympics. Amateur boxing now enjoys funding worth £13 million for the period leading up to the 2004 Games in Athens.

Other aspects of official sports policy (UK)

School sports

For some time now, disquiet has been expressed both by public opinion and in official circles about the decline in competitive sports in the nation's schools. Thus according to the Secondary Heads' Association, inter-schools fixtures fell by 70 per cent in the early 1990s, and the pledge made some time ago by the Prime Minister that two hours of physical training should be provided for every pupil does not seem to have been implemented. This has also been exacerbated by successive governments encouraging schools and local councils to sell off playing fields (see also on this issue below, p.72). This is the probable background to a recent decision by Culture and Sport Secretary Tessa Jowell to start a major campaign, involving the participation of up to 1,000 co-ordinators, aimed at encouraging every school in the country to hold a Sports Day⁵⁶⁹.

However, doubts are growing as to whether the Government's interpretation of what constitutes a Sports Day will have any measurable effect on the sporting prowess of the nation's youth. These were prompted by the contents of the “sports day tool kit” unveiled by Ms. Jowell a few months later, which made no provision for such traditional Sports Day items as sack, egg-and-spoon and three-legged races. Instead, teams will not compete directly but perform tasks in rotation. It also includes problem-solving exercises of the kind pioneered by corporate activity weekends, such as requiring a team to move from point A to point B without touching the ground, using objects such as a plank and a bucket⁵⁷⁰.

Although the new-style Sports Day was criticised by traditionalists as missing out on the vital competitive element which was an inherent part of sport, Sport England have tested the initiative in 100 schools and received 3,000 requests for the tool kit from schools across the country⁵⁷¹.

One particular aspect of school sport which has come in for criticism from certain quarters is swimming. Here again, the ubiquitous Kate Hoey has been far from reticent in her comments⁵⁷². Monitoring the fate of a Private Member's Bill, which enjoyed all-party support, introduced 10 years ago and aimed at making swimming a compulsory element in the national curriculum for all primary school children, she concludes

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that this target is as far from being met as ever. Swimming had been marked out for this special position in the curriculum not only because of its value as a recreational activity, but also because of its critical rôle in reducing the risk of drowning.

The time to be spent on this activity was not specified, but all primary schools were to ensure that by the age of 11 all pupils had been taught to swim unaided, competently and safely for at least 25 metres. They are supposed to have developed confidence in the water, be able to rest, float and adopt support positions, as well as understanding the principles and skills of water safety and survival. However, according to Ms. Hoey, none of these targets seem to have been met. Two years ago, the Central Council of Physical recreation undertook a survey of schools, and noted in its consequent report that many schools kept no record whatsoever of their pupils' swimming achievements, and that only in 25 per cent of schools were all children capable of swimming 25 metres unaided. It also emerged that local authorities were not subsidising the costs of using off-site swimming pools, and that 42 per cent of schools were requesting parental contributions to pay for their children's swimming.

In addition, the education monitoring body Ofsted's report, which was issued a few months later, confirmed a wide disparity in standards, with some schools in the most deprived areas not providing any swimming opportunities. In many cases, pupils who were already able to swim were not taken to the pool and those who did go were stopped as soon as they could achieve 25 metres. This has led both the Amateur Swimming Association and the Culture and Sport Select Committee in Parliament to campaign for a vast improvement in swimming standards in our schools. However, Ms. Hoey insists that this will require a vast increase in funding. At least £2 billion is apparently required to modernise our crumbling public pools – which still leaves Britain with a desperate shortage in swimming baths compared to a city such as Paris. (On the subject of swimming pools, see both above, p.71 and below, p.73)

Playing fields "to be officially protected"

In previous issues, this column has monitored the increasingly vocal protests which have been raised in reaction to the Government's policy on playing fields – more particularly its alleged failure to keep its election manifesto pledge to arrest their sell-off⁵⁷³. This will undoubtedly have been a factor in a new set of guidelines issued by John Prescott, the Deputy Prime Minister, aimed at saving playing fields and sports centres from the predatory designs of property developers. Under this new set of controls, local authorities will be compelled to audit sporting facilities and estimate future demand when considering requests to build on sports sites⁵⁷⁴.

The document concerned, which was published in

the summer just before the Parliamentary recess, contains a "presumption against development". Separate reforms, expected within the next few months, are reportedly being drafted to promote sport locally by empowering councils to insist on playing fields and open spaces as part of "planning gain" deals with developers⁵⁷⁵.

St. George's Day – a festival of sport?

In contrast to the other parts of the UK, England appears to have but little inclination to celebrate its national day, being St. George's Day on 23 April. In an effort to re-evaluate this date on the calendar, the Institute for Public Policy and Research (IPPR), proposes that it should be transformed into an annual, multicultural festival of football in an attempt to challenge the image of England fans as drunken, violent and racist bigots⁵⁷⁶. It also calls upon the Football association (FA) and players' groups to lead the way in changing the image of fans. Among the initiatives proposed are:

- the establishment of a football tourist office to provide fans with cultural information;
- that fans should distribute calling cards when abroad;
- that fans should be encouraged to write to the media about trips abroad;
- that England fans should wear a new slogan on shorts which goes "Love football, love England", in order to soften the image of the flag;
- to organise safe transport for England fans from hotels to stadiums;
- that one-third of all England internationals should be played at grounds around the country.

Should "ultimate fighting" be banned in Britain?

In recent years, a new sport – if that is indeed the appropriate term to use – has been sweeping the United States, i.e. that of "ultimate fighting". Its participants have been described as the modern equivalent of Roman gladiators, whose merciless battle for survival is regarded as the ultimate test for mind and body. The combatants lock horns in an octagonal cage, surrounded by a 5ft fence. Once battle has commenced, no holds are barred as the fighters attempt to punch, kick, slap or wrestle their way to victory.

Almost inevitably, this activity has crossed the Atlantic and was on display for the first time in this country in the unlikely setting of the Royal Albert Hall, during the summer. The event consisted of five fights each lasting for five five-minute rounds, and was

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broadcast on the Sky Box (sic) Office channel. This attracted widespread criticism from doctors' groups and politicians, who maintain that caging fighters and allowing them to use a combination of karate, kung-fu, boxing and wrestling is both brutal and dangerous, and should therefore be prohibited⁵⁷⁷. In fact, until recently the sport was banned in 49 of the United States⁵⁷⁸.

Ultimate fighting was started in 1993, and until two years ago, it was governed by two rules only: no striking to the groin or throat and no eye-gouging. Over the past few years, however, organisers have introduced new rules, and claim that their sport is now as safe as any other. The British Medical association has called for greater regulation, claiming that there is a danger of combatants incurring brain damage and other serious injuries⁵⁷⁹.

London "could host Games in 2012" says Olympic chief

The events described above (p.65) and in previous issues are unlikely to have promoted any confidence in this country's ability to host an international tiddlywinks tournament, let alone the largest and arguably the most prestigious sporting event on the international calendar. Yet that is precisely what the new President of the International Olympic Committee, Jacques Rogge, appeared to be suggesting in late July of this year, judging from the following statement made to BBC Radio 5 Live's Sportsweek programme:

"If Manchester (Commonwealth Games) goes well, if the question mark over a modern Olympic stadium is lifted, then you have all the chances because you have a great reputation in sport and any bid coming from the United Kingdom would be a very strong bid. I think it's definitely going to have an influence on the potential bid for London for 2012"⁵⁸⁰

The damage caused to this country's reputation by the Wembley and Picketts Lock sagas were dismissed by the Olympic chief as temporary. This statement was undoubtedly one of the reasons why, a few days later, the British Olympic Association (BOA) urged London to throw its hat in the ring for the 2012 Games. The BOA has identified Stratford, in East London, as the best possible venue for an Olympic bid. It has development opportunities which could be linked to the Games; however, these may disappear as pressure for space in the capital increases⁵⁸¹. Certainly Europe is likely to be the continent which will stage the 2012 Olympics, Moscow and Budapest already being official candidates. Paris is also thought to be considering making a bid.

However, not everyone considers it to be inevitable that any British bid should be based in London – and they are not necessarily born and bred Mancunians

either. Thus Dick Pound, one of the most senior Olympic figures in the world, was apparently so impressed by what he witnessed during the Commonwealth Games that he insisted that Manchester could stage the 2012 Games. He thus put himself in direct conflict with Sports Minister Richard Caborn, who, whilst praising Manchester for the manner in which it had organised the Commonwealth Games, insisted – with scant regard for the mixed metaphor – that the Olympics were in a "totally different ball park". He also pointed out that, whilst the Commonwealth Games had cost £330 million, the Sydney Olympics involved expenditure of around £2,000 million. This, in the Minister's view made London the only realistic candidate from these isles (although he failed to explain exactly why this should be so)⁵⁸².

Are swimming pools safe (both at home and abroad)?

Swimming pools are supposed to be places where we go in order to improve our health. However, this notion has taken a dive (!) recently by a report by the consumer magazine Which? purporting to show that more than 50 per cent of British baths failed to meet water quality standards. In addition, up to one pool in seven may be sufficiently infested with harmful bacteria to make bathers ill. Some were found to contain bacteria such as *pseudomonas aeruginosa*, which causes skin and ear infections. Others had high levels of chloramines, being chemicals which are capable of setting off asthma attacks as well as irritating eyes and noses.

Moreover, a number of pools contained very low levels of disinfectant, promoting the spread of bacteria and making bathers vulnerable to waterborne infection. The inspection also showed that the problem was not restricted to public pools, those in the private sector being just as deficient⁵⁸³. The report prompted Ralph Riley, Chairman of the Pool Water Treatment Advisory Group, to call for official regulation in order to remedy the problem. Incredibly, there is at present no legislation covering water quality in pools.

Unfortunately, these concerns are not restricted to this country. In Belgium similar findings have also produced something of a crisis in this sector. At the time of writing, many swimming baths in the Flanders region are temporarily closed in order to enable urgent refurbishment work to take place. This frantic activity is the result of a series of checks carried out by inspectors attached to the Ministry of the Environment (Ministerie van Leefmilieu) of the Flemish Regional Government, and which found that almost 50 per cent of swimming baths in the region fail to meet environmental standards which entered into effect five years ago⁵⁸⁴. According to Philip Tanghe, a specialist attached to the relevant Ministry, the standards which had not been complied with concerned mainly those on the storage of

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chemicals, water treatment systems, sanitary facilities as well as the state of the floors and embankments. The water quality rules appear to have been largely complied with.

The closure of so many swimming baths for these reasons has also had other public health implications. Coming as it did during the hottest period in the summer, they prompted many people to seek out alternative venues for a refreshing dip – unfortunately not always in the safest and most desirable places. Thus many bathers in the Antwerp region saw fit to swim in areas such as the river Schelde, near the Kennedy Tunnel, an area which has been placed out of bounds by the public authorities. The police keep a watchful eye for any transgressors, but there are so many potential improvised swimming pools in that area that they simply cannot maintain checks over them all, with the result that people simply wait for the police to move to some other spot and subsequently simply resume their bathing⁵⁸⁵.

White paper on betting published (UK)

In March 2002, the Government published its proposals aimed at updating the betting laws of this country in the shape of the White Paper entitled “A Safe Bet for Success – Modernising Britain’s Gambling Laws”. Before forming the basis for any draft legislation, it will first be considered by the Select Committee on Culture, Media and Sport. The proposals contained therein largely follow the recommendations made last July by Gambling Review Body, under the leadership of Sir Alan Budd, which reported last July. The outcome of the public consultation exercise carried out by the Department with regard to the recommendations had been published together with the policy paper earlier that month. The Department hopes that the changes will be contained in a Bill during the 2003-4 session of Parliament – almost seven years after the Conservative Government first proposed the relaxation of gaming legislation⁵⁸⁶.

The White Paper holds out the prospect that the law will be updated in many areas, including casinos, gaming machines, bookmaking, lotteries and on-line gambling. The proposed reforms include widespread changes to the licensing system, with local authorities taking over the role hitherto played by magistrates in this area, and the setting up of a Gambling Commission which would oversee all gambling as well as issuing enforceable codes of social responsibility aimed at ensuring that criminal activity is minimised and that minors are protected⁵⁸⁷.

Reactions to these proposals were many and varied. Obviously they were welcomed by the gaming industry, but churches, psychiatrists and Gamblers Anonymous expressed the fear that they would lead to a greater incidence of problem betting and more cases of

gambling addiction⁵⁸⁸.

Author Anthony Wollenberg, writing in a leading professional journal⁵⁸⁹, predicts that lawyers stand to derive considerable benefits from these proposals. The expected increase in the number and variety of gambling venues and changes to the licensing and regulatory framework should provide much licensing and advisory work. Planning and property lawyers should find this sector increasingly productive as gambling operators develop new entertainment venues. Litigators may find themselves pursuing gambling debts (which are likely to be made enforceable for the first time in over 150 years), and corporate lawyers are likely to find that operators require finance as they seek to exploit an expanding market.

However, the proposed system still leaves a number of concerns and unanswered questions. Thus it is unclear what these proposals mean for the Independent Betting Arbitration Service (IBAS) (see above, p.54), the body which currently adjudicates in the overwhelming majority of betting disputes. If, as is indicated above, betting debts are to become recoverable at law, the bets themselves will be regarded as contracts, and their interpretation in the event of disputes a matter for lawyers and the courts. (This has in fact already happened in some countries – see, for example, the recent South African Court of Appeal decision on this issue featured in a previous issue⁵⁹⁰.) This will obviously work both ways, and bettors will be able to sue bookmakers who renege on a bet. However, most unpaid debts in the racing industry involve bettors who owe their bookmakers. Introducing gambling debts into the legal sphere raises the possibility that the less scrupulous members of the bookmaking fraternity will extend too much credit to desperate punters, then attempt to seize their house or car if they default. It has therefore been suggested that the new Gambling Commission should make bookmakers aware that they may forfeit their licences if they resort to the courts too readily or frequently⁵⁹¹. However, whether such strictures could be reconciled with the Human Rights Act 1998 is very much open to question.

Initiatives by Sports Minister in various fields (UK)

Our Sports Minister has been a busy man recently, judging by a series of interventions and initiatives in various areas of sport. First of all, there was his intervention in the Geoff Thompson case. Mr. Thompson is a former world karate champion who operates the Manchester-based Youth Charter for Sport. He has recently threatened to take legal action over what he claims to have been interference in his rôle by Sport England. This prompted the Minister for Sport to intervene. He has asked Mr. Thompson to provide him

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with written details of his complaint, and promised to investigate it⁵⁹². The outcome of this investigation was not known at the time of writing.

At the height of the last cricket season, Mr. Caborn gave hope to millions of cricket fans by holding out the prospect of “giving back the Ashes to the people”. He urged the Heads of Sport at the BBC and Channel Four to rethink their decision not to bid for the rights to screen highlights of the forthcoming winter series between Australia and England. Earlier, Channel Four, the principal broadcaster of live Test cricket in this country had admitted that it had turned down these rights on commercial grounds. Mr. Caborn considers the “Ashes” to be part of England’s heritage, and has therefore asked the relevant broadcasters to think again⁵⁹³.

Finally, Mr. Caborn offered some Government support to those footballers unlucky enough to fall by the wayside as a result of the ITV Digital fiasco (see above, p.38 et seq.) by holding out the prospect that they would be offered Government training to become coaches or physical education teachers⁵⁹⁴.

The Sports Dispute Resolution Panel: an interim report

One of the few positive outcomes of the sad Diane Modahl case, extensively documented both in these columns and elsewhere, was the establishment of the Sports Dispute Resolution Panel (SDRP) which took effect as from 1/1/2000. This was hailed in this Journal as a radical breakthrough in the manner in which sports-related disputes could be settled⁵⁹⁵. In May of this year, Sports Minister-turned-columnist Kate Hoey devoted her regular spot in a daily newspaper to providing an interim report on its activities⁵⁹⁶.

Ms. Hoey charts the reasons why the Panel was established in the first place, and explains its functioning. As a body aiming to supply a simple, effective and independent mechanism to resolve sporting disputes fairly and speedily, it provides a UK-wide service with members representing competitors (including the Athletes Commission), governing bodies and sports sponsors. The British Olympic Association, the Central Council for Physical Recreation and the Institute of Professional Sport are among those who sit on the Board, as well as the sports forums for Northern Ireland, Scotland and Wales.

Ms. Hoey is of the opinion that, despite the multiplicity of its members, the SDRP is not a bureaucratic organisation, and that Jon Siddall, its director, is determined to keep matters that way. The Board is chaired by employment lawyer (and leading BASL member) Charles Woodhouse. The members do not themselves become directly involved in the resolution of disputes, but appoint panels of arbitrators and mediators who perform this function. As such, there

are around 200 highly-qualified people, including retired judges and lay members, who give of their time in order to assist sport, with costs varying between no fee at all and a minimum charge. In this way a large number of disputes have hitherto been settled, including issues of discipline, selection, doping, contractual rights, coaching contracts, transfer fees, child protection and alleged emotional abuse. The core funding of £40,000 from the UK Sports Council has increased to £100,000; with this funding comes recognition as the main organisation for providing sporting disputes with resolution throughout the country. Its income is supplemented through service fees and charges made for individual cases. However, the rule is that no-one should be precluded on cost grounds from using the services of the Panel.

Ms. Hoey also hails the organisation as a welcome opportunity to rid sport of the “blame culture”, and is convinced that slowly but surely it is gaining the trust and confidence of the major groupings within sport. Ultimately, it should become the independent mechanism for the doping resolution process to be removed from the various governing bodies. This would prevent the legal battles which have ripped apart so many sports – and which had such a sad ending in the case which prompted the establishment of the Panel in the first place.

Round-up of other cases (all months quoted refer to 2002, unless stated otherwise)

Athens, Greece. In July, the Greek Government announced a reduction in the number of venues planned for the 2004 Olympics in the country’s capital. Construction of the hockey and baseball grounds has been abandoned, and one beach volley court will be built rather than two. The equestrian centre in Markopoulo is also affected. The Minister responsible, Evangelos Venizelos, stated that these cuts would not result in lower quality venues⁵⁹⁷.

London, UK. As was announced in the previous issue of this journal⁵⁹⁸, major changes are taking place at the London headquarters of Sport England, the main body regulating and monitoring sport in this country, as part of a major reorganisation of the manner in which sport is being managed. In July, Chief Executive David Moffett informed staff that over 100 of them were to be made redundant as Sport England concentrates on the grassroots and social aspects of sport, whilst responsibility for the elite level will largely be entrusted to the English Sports Institute (a Sport England subsidiary). The department worst affected by the redundancies was that dealing with lottery grants, whose powers are to be devolved to the nine Regions⁵⁹⁹.

London, UK. In March, the first independent body

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seeking to monitor the treatment of football fans was launched in the shape of the Independent Football Commission. However, this body, which is being supported by the Government, the Football Association and the Premier League, has attracted criticism because it will have no statutory powers conferred on it. It will only be entitled to make recommendations to clubs. It is led by Derek Fraser, professor and Vice-Chancellor of the University of Teesside, and includes seven other members, none of whom appear to have been either football supporters or administrators. The organisation is to investigate such issues as ticketing policy, accessibility to matches, supporter involvement in clubs, replica kits and their cost, and other merchandising. It is to produce reports throughout the year. Fans having complaints will initially be instructed to raise them with the clubs. Thereafter, complaints will be raised either with the Premier League or the Football Association, with the IFC acting as final arbitrator. It will be based at the University of Teesside in Middlesbrough⁶⁰⁰.

Nationality, visas, immigration and related issues

Merlene Ottey cleared to represent Slovenia

In a previous issue⁶⁰¹ attention was drawn to the attempt by Olympic champion sprinter Merlene Ottey, originally from Jamaica, to acquire Slovenian nationality, having lived in the country for several years. Ms. Ottey was in fact granted Slovenian citizenship in May 2002, and was shortly afterwards cleared to represent her adopted country at the forthcoming European Championships⁶⁰².

Unlawful immigration under sporting cover – the problem continues

The problem of athletes, coaches and officials taking part in a sporting festival and subsequently overstaying their welcome in the host country – in many cases in order to remain there on a permanent basis – has been an increasing headache for sports administrators and public authorities alike over the past decade. Thus 14 members of a Pakistani football team disappeared in Japan in 1994, whilst two boxers and a member of the national hockey team of the same country disappeared after the 1996 Atlanta Olympics⁶⁰³. The problem resurfaced at the Sydney Olympics in 2000, when 108 people from 61 countries unlawfully remained in Australia following the Games⁶⁰⁴. Now Britain seems to have been on the receiving end of this trend, judging by a number of developments during the period under review.

In July 2002, officials of the Royal and Ancient Golf Club, St. Andrews, which was hosting this year's Open Championship, pronounced themselves mystified over

the failure to appear of 47 out of 48 Nigerian "golfers" who entered the Open but failed to materialise for the qualifying rounds. They admitted that there was something strange about the large number of entries from Nigeria, not a traditionally strong golfing nation, but were unable to say whether this was linked to anything sinister. Normally, the golfers would have been required to undergo an interview for a six-month visa, but the Home Office declined to state whether they had been issued with visas, or whether they had all flown to Britain. The R&A had attempted to verify the applications with the Nigerian golfing authorities, but communications links with Western Africa were "not the best"⁶⁰⁵. Thus far, nothing further has been heard about these visitors.

The liberties taken with the host country's hospitality after the Atlanta and Sydney Olympics not unnaturally gave rise to some speculation as to whether something similar might occur on the occasion of the Commonwealth Games in Manchester this year. Particularly aware of this problem were the Pakistan sporting authorities, who were embarrassed at the knowledge that, as has been mentioned above, its athletes had in the past "slipped out" at various events throughout the world. For the Commonwealth Games, Pakistan had 64 athletes and 11 officials representing them. These were compelled by the authorities to sign a bond of £10,000, which parents of all the athletes involved would have to pay should they fail to return after the Games. The system was heavily criticised by some sporting officials, who protested that none of the parents would be able to pay this amount. A UK Home Office spokesman later insisted that this was not a move instigated by the UK Government⁶⁰⁶.

That at least some of the fears concerning the Commonwealth Games in this regard were justified seemed to be confirmed towards the end of the sporting festival, when the entire Bangladeshi male athletics team went missing from the Games. This included the country's fastest runner, Maruf Reza. Initially, a swimmer had also disappeared, but later reappeared as suddenly as he had left. Jaja Ahmed, of the Olympic Committee for Bangladesh, pronounced himself extremely sad at this development⁶⁰⁷. At the time of writing, nothing further had been heard of these missing athletes.

All ends well in Kimutai visa scare

One of the attractions of successive Commonwealth Games has been the succession of first-class middle-distance athletes from East Africa. At one point, however, it seemed as though the Manchester Games were going to be deprived of the participation of Japheth Kimutai, the 800 metres gold medal winner at the 1998 Games in Kuala Lumpur. With barely a week

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to go before the official opening, he was informed by the British Consulate in Stuttgart that, because of security checks, they required his passport for three weeks before they would be able to issue him with a visa. However, Mr. Kimuntai, who is based in Germany during the summer, was unable to do this because he needed his passport in order to travel to Grand Prix events throughout Europe⁶⁰⁸.

However, this proved to be a false alarm. Just before the Games commenced Kimuntai's manager, James Templeton, confirmed that the athlete had obtained a visa in the German city of Düsseldorf. He stated that there had merely been a delay in issuing the visa, and that reports of his visa having been refused were "baseless and false"⁶⁰⁹.

Passports ploy plays havoc with overseas player restrictions in domestic cricket (UK)

In order to prevent the kind of situation which has caused problems in the English football Premiership, whereby certain teams strengthen their playing squad by purchasing many foreign players and thus have a deterrent effect on local talent, the county clubs in English domestic cricket are currently restricted to one overseas player. This number will rise to two during the 2003 season. However, subtle ways of overcoming this restriction have been found thanks to the whims and vagaries of nationality law and the free movement of persons rules within the European Union (EU).

As a survey compiled by a columnist for a major Sunday broadsheet shows⁶¹⁰, there are currently 16 cricketers playing in the English game with dual nationality, one of which is that of an EU state and the other that of a cricketing country. Some acquired the EU nationality merely because their parents – or even one of them – were born in an EU country; however, under the free movement of person rules of the Treaty of Rome that places them on the same footing as any British national from the point of view of being entitled to work in this country. Thus Steve Koenig of Middlesex holds passports of both South Africa and Italy, and Derbyshire's Andrew Gait has both a Zimbabwean and a British passport.

Although no foul play is involved in the case of these players, (contrary to the passport scandal that hit football two years ago, as documented in this organ⁶¹¹) there is a feeling that the system is being abused – to the point that in a recent poll held by the Professional Cricketers' Association (PCA) 87 per cent wanted restrictions placed on those who, like the 16 players described above (plus three others who have only one passport of an EU country, such as Baz Zuiderent of Sussex and the Netherlands) are eligible to play county cricket because of their passport, but are not yet qualified to play for England because of the country of

their birth. This could not be enshrined in any legislation because of the strictures of EU law, but could be achieved by stealthy consensus⁶¹².

Other issues

Civil awards for leading sports personalities

In Britain, the Queen's Birthday honours list once again contained a number of awards for the sporting famous. Bobby Robson, the former England player and manager and currently the Newcastle United coach, received a knighthood; Paula Radcliffe, the London Marathon champion who is at the same time one of the most popular figures in athletics, received an MBE as did Jason Leonard, the Harlequins, England and British Lions Rugby Union star. England (and Mr. Leonard's) rugby coach Clive Woodward was also honoured, being awarded the OBE for revolutionising the England way of approaching internationals since taking over from Jack Rowell in 1997 and twice winning the Six Nations Championship for the "Red Rose". MBEs were also bestowed upon the British women's curling team, who were Britain's first Winter Olympics medal winners since 1984. Gordon Neale, Chief Executive of Disability Sport England, was made an OBE, as was the England women's football team coach Hope Powell. Tommy Boyd of Glasgow Celtic received an MBE⁶¹³.

Meanwhile, across the Channel, Liverpool FC manager Gérard Houllier obtained one of the highest civil awards obtainable in France for his achievements in football – both with Liverpool and with the French national team – when he was awarded the *Légion d'Honneur* in April 2002⁶¹⁴.

Pubs cleared by High Court to open early for World Cup (UK)

In a previous issue, it was reported that, in November 2001, the British Government had given a clear signal that pubs across the country should be allowed to open early in order to accommodate World Cup games being played in the morning, allowing for the time difference between East Asia and Western Europe. To this end, magistrates were instructed, through the Magistrates' Association, to adopt a favourable attitude towards applications by pubs to avail themselves of extended licensing hours⁶¹⁵.

However, not all magistrates were willing to adopt this liberal line, judging by a case which went as far as the High Court earlier this year. When Martin Gough, who operates the White Hart pub in Brislington, Bristol, applied to local magistrates for such an extension, he was met with a flat refusal on the grounds that previous High Court rulings did not allow them to grant permission for early morning pub openings. Mr. Gough

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appealed against this decision⁶¹⁶.

At the High Court, Lord Woolf, the Lord Chief Justice, sitting with Mr. Justice Harrison, granted an order of special exemption enabling Mr. Gough to open his pub in the manner requested. They ruled that there was no legal reason why Mr. Gough should not be permitted to do so. The judges agreed that times had changed since the 1970s and 1980s when High Court decisions in effect banned landlords from opening at unusual hours. These included a 1978 case in which Leicester magistrates dismissed a similar application to that made by Mr. Gough on the grounds that fans watching pub television did not constitute "participants" in the match. Updating the law and laying down guidelines for the entire country, they reminded magistrates that the licensing laws allowed the granting of special exemptions for customers to participate in genuine special occasions, as long as they did not amount merely to an excuse for landlords to serve more alcohol. Lord Woolf added:

"If one were to ask anyone today whether the World Cup was a national special event, I apprehend that the reaction would be immediate that it was such an event. The customers are going to the public house, as the justices found here, to take part in a collective enjoyment of the event"⁶¹⁷

Mr. Gough naturally pronounced himself "delighted" at the outcome.

European Governments' support for tobacco advertising ban "may move Grand Prix to Asia"

The implications for British sport of the impending European-wide ban on tobacco advertising have already been discussed elsewhere in this organ (see above, p.70). To this list of casualties there may shortly be added a major showpiece of the Formula One calendar, to wit the British Grand Prix. Max Mosley, who heads the FIA, being the world governing body in motor racing, has threatened European countries with having their Grand Prix events removed if they act before the world-wide ban on tobacco advertising is introduced at the end of the 2006 season⁶¹⁸.

It is certainly a fact that Bahrain has already applied to host a Formula One event on a track which will be ready to host it by the spring of 2004, whereas the United Arab Emirates have recently started work on the Dubai Autodrome and Business Park, which features an FIA-standard asphalt track, five kilometres long, the completion of which is planned for the end of 2003. These two Gulf Arab countries are the favourites to be awarded races by the FIA, and they have been joined by Kuwait, Lebanon and even Iraq in the race to tap the

lucrative market in the Middle East. They will all display a more "flexible" attitude towards tobacco advertising than is the case in Europe⁶¹⁹.

Complaint against *Sunday People* over Lennox Lewis article dismissed by Press watchdog (UK)⁶²⁰

The Press Complaints Commission is an independent body dealing with complaints made by members of the general public concerning the editorial content of newspapers and magazines. All complaints are investigated under the editors' Code of Practice, which is binding on all national and regional newspapers and magazines. The Code, which was drawn up by the Editors themselves – covers the manner in which news is gathered and reported. It also provides special protection to particularly vulnerable groups such as children, hospital patients and those at risk from discrimination. Recently, it was called upon to act in a case involving boxer Lennox Lewis. More particularly when the tabloid *Sunday People* newspaper published an article entitled "Lennox Lewis girl 'beaten up by his minder'" in April 2001, this led to a complaint to the Commission by the lady in question, on the grounds that the newspaper had infringed the relevant provisions in the Code of Practice on accuracy, privacy and harassment.

The article in question had reported that a minder in the employment of Lennox Lewis had been arrested following an incident at a restaurant in London, having apparently discovered – that the complainant was recording their conversation. She had explained that, on two or three occasions in February, she had been approached by a *Sunday People* journalist who had learned of her friendship with Mr. Lewis, even though on the first occasion she had informed him that she was not in any way interested in providing a story. The following week, she received a telephone call from the reporter and one from a second journalist, who also put a note through her letterbox. Both were asked to cease this activity, but the following day she was photographed as she left home. Ms. Collins-Plante called the police, but nevertheless discovered the journalist on her doorstep when she returned home. The next day the newspaper published an article which, according to the complainant, contained quotations of doubtful authenticity and portrayed her, inaccurately and offensively, as a "star-struck young girl".

The *Sunday People*, for its part, maintained that the essence of the report, i.e. that an allegation of assault had been made following an incident in a restaurant, and that a twenty-four year old man had been arrested, interviewed and bailed, had been confirmed by Scotland Yard before it was published. Since both the altercation and the taking of the photograph had occurred in public

5. Public Law

places, the newspaper did not consider that any breach of the complainant's private life had been established. The tabloid also asserted that the journalist had telephoned the complainant for the second time in February after having been asked by her to call back. The next approach did not occur until after the restaurant incident, when Ms. Collins-Plante had once more requested the journalist whether she could think over his offer. No further approaches were made after a policeman telephoned, on the complainant's behalf, to state that she did not wish to co-operate with any further story. It was also contended by the news organ that a freelance journalist, operating on the complainant's behalf, had approached rival tabloid *News of the World*, as well as *The Mail on Sunday* before the alleged assault. There was no evidence that the complainant had concluded a contract with either paper. However, the apparatus used to record the restaurant conversation belonged to a *News of the World* journalist, and it was understood that an agreement had been made to the effect that both Ms. Plante-Collins and the journalist would receive payment for co-operating with an article dealing with the complainant's relationship with Mr. Lewis.

In its adjudication, the Commission pointed out that the clause in the Code relating to harassment is intended to prevent repeated approaches from journalists, particularly after they have been requested to desist. Clearly the Commission was not in a position to make any judgment about the precise number of occasions on which the complainant had been approached, or whether or not she had made it clear to the newspaper in question that she did not wish to be approached in the future. However, the Commission believed that the newspaper was entitled to seek a response by the complainant to the incident described in the article, and did not consider that the telephone calls, plus a note, communicated over a period of six weeks before and after this event could be described as persistent within the meaning of the Code.

The Commission also noted that the newspaper had confirmed the facts of the incident with Scotland Yard before the article was published, and that the photograph of the complainant had been taken in a public place. It did not regard the reporting of the fact of her friendship with Mr. Lewis or an alleged assault in a public restaurant as intrusive within the meaning of Clause 3 (Privacy). Nor did it consider that descriptions of the complainant were significantly in violation of Clause 1 (accuracy).

The Commission therefore dismissed the complaint.

Ring of truth? More revelations from the public records about the Bobby Moore bracelet affair

Readers with long memories will recall the infamous incident which marred the England football team's build-up to the 1970 World Cup, whereby England skipper Bobby Moore was accused of, and arrested for, having stolen an emerald bracelet from a shop in Bogota, Colombia. In a previous issue⁶²¹, this column reported on some of the political manoeuvres which preceded the eventual release of Mr. Moore, as they emerged from the annual release of documents from the Public Record Office (PRO). New revelations from the PRO have served to cloud this affair in even murkier shrouds of mystery than was hitherto the case⁶²².

It may be recalled that some of the wilder sections of the British media had claimed that the affair was a Latin American plot against the captain and his team. However, recently released documents of the Foreign Office which were uncovered at the PRO by the *Guardian* newspaper appear to call into question this rather hysterical attitude. In fact the files in question supply tantalising details which seem to support the suggestion that the true thief was an unidentified third man – possibly another England player – who was with Moore and Bobby Charlton in the hotel jewellery shop when the bracelet went missing. They reveal what Moore and Charlton told the Colombian authorities when they were specifically requested to name the third man who had been with them in the shop. The reply given by Moore, in an unsworn statement given to Bow Street magistrates following a further request from the Colombian authorities months after the incident, was less than categorical:

“There were quite a few members of the English football team in the foyer of the hotel and when Mr. Charlton and I entered the jewellers’ shop it may have been possible that other members of the team were round the door of the shop. As far as I know no other member of the team entered the shop but I had my back to the door the whole time. I don’t know the name of any third party present and cannot confirm anything with regard to a third person”⁶²³

The file concerned also records that the Colombian authorities had measured the size of Moore's wrist to establish whether it could have fitted through the hole in the glass cabinet from which the bracelet was stolen. The wrist was too big.

Sports journalist Jeff Powell has, in his biography of Moore, maintained that, before his death in 1993, Bobby Moore had hinted to him that perhaps a younger player did “something foolish”. In a television interview, Powell has claimed that Mr. Moore had told him the full story, but only on the promise that the journalist would take it with him to his grave.

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Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

London, UK. As the build-up to the 2002 World Cup gathered momentum, British Government Ministers urged employers to be as flexible as possible in their practices in order to enable their employees to watch the tournament. They accepted that those providing essential services could not expect the morning off for England's games, but argued that where feasible employers should set up screens at work. Trade and Industry Minister Patricia Hewitt herself gave a solemn pledge to civil servants that she would not schedule any meetings for her department during England games⁶²⁴.

Hartlepool/Hounslow (UK). In May, Stuart Drummond, who acts as "H'Angus the Monkey", the mascot of local football club Hartlepool FC, was elected Executive Mayor of the town. He had campaigned specifically on the basis of his mascot status⁶²⁵. The following month saw the election of Luke Kirton, a member of the AbeeC party, whose main manifesto commitment was to tackle the planning logjam blighting the club⁶²⁶.

Portugal. The General Election which took place in Portugal in March saw the removal from office of the Socialist Party after six years of power. The Social Democrats emerged victorious following a campaign which had criticised, amongst other things, the lavish spending by the previous administration on the 2004 European Football Championships, to be held in Portugal⁶²⁷.

Berlin, Germany. According to a German Sunday newspaper, former East German ice-skating champion Katarina Witt was so loyal to the Stasi secret police of the former German Democratic Republic that she inquired about becoming one of its agents⁶²⁸.

Seoul, South Korea. In June, an administrative blunder made it impossible for members of the South Korean national football team to vote by proxy in the local elections, which coincided with the World Cup. Korean FA officials had intended to apply for absentee balloting but failed to meet the deadline to do so. Any players wishing to vote would accordingly have to do so in person in their own constituencies – an unlikely prospect given their other commitments⁶²⁹.

Beijing, China. In July, the Beijing city fathers caused panic amongst the Chinese capital's many pigeon fanciers after issuing a ban on keeping such birds as part of a campaign to clean up the city for the 2008 Olympics. Fines amounting to a month's pension for retired workers have been proposed for offenders⁶³⁰.

Manchester, UK. Security for the Commonwealth Games in Manchester this year was increased when a local newspaper discovered intruders were gaining access to drains situated underneath Sportcity, the Games complex⁶³¹.

6. Administrative Law

Planning Law

Appeal against decision to refuse use of Twickenham as concert venue fails (UK)⁶³²

In a previous issue⁶³³, attention was drawn to a High Court decision in which the Rugby Football Union (RFU) had attempted to overturn a decision by the Inspector not to use the stadium at Twickenham, which is also the site of the RFU headquarters, as a venue for outdoor concerts. The High Court dismissed the application, mainly on the basis that the requirement which any such venue had to meet under the relevant Order was that it should be an enclosed building. The RFU appealed against this decision to the Court of Appeal.

The RFU argued that the High Court judge had erred in (a) placing emphasis on the physical characteristics of the venue rather than the purpose of a use, and (b) construing the word "recreation" in Class D2(e) of the Town and Country Planning (Use Classes) Order 1987 to mean only physical recreation. The Court, however, dismissed the appeal. The judge had been correct in upholding the Inspector's decision and his reasoning could not be faulted. The 1987 Order was not consistent in the manner in which it defined use classes, and although some were defined exclusively by reference to the purpose of the use, Class D2b was not. Therefore the fact that an open space was used for concerts did not make it a concert hall, since it lacked the characteristics of a hall.

As for Class D2(e), although the word "recreation" was capable of having a very broad meaning as a matter of general usage, it did not have such a meaning in the context of the use class. The expression "other... recreations" used in Class D2(e) indicated that its scope extended only to recreations of a nature similar to those specifically listed, placing the emphasis on physical activity. The word "recreation" was used to cover such activities as could not be qualified as sport – for example practice or training. The stadium fell within the scope of Class D2(e) because rugby was played there, and not because it was watched there. It was correct to incorporate some physical element, otherwise Class D2(e) would be so broad as to cover Class D2 in its entirety, rendering the remainder otiose.

Temporary use of farmland for motorcycle scrambling allowed. English Court of Appeal decision⁶³⁴

In the case under review, the disputed site was a roughly rectangular piece of land which was part of a farm. In the late 1980s, the planning authorities refused planning applications seeking permission to change its use to a track for sports and leisure use by off-road vehicles. In spite of this, the land was, in reality, actually used for vehicular purposes, and enforcement notices were accordingly served in January 1990. Appeals

against these notices were rejected, and the use in question discontinued in 1992. However, appeals made in 1990 against enforcement notices relating to operational development which had taken place on the site were successful. This development, which consisted of engineering operations, created a number of banks, depressions and jumps which remained on the site in question until the time of the Court of Appeal case, and formed a type of course or track. In February 1995, the appellant applied, under Section 192 of the Town and Country Planning Act 1990, for a lawful development certificate (LDC) specifying "the use of agricultural land for the purpose of vehicular sports and leisure activities for a period not exceeding 28 days in any calendar year". This was refused by the planning authority. Subsequent appeals to the Secretary of State and the High Court were dismissed. In April 1998, the appellants applied for an LDC in respect of the operational development, and this was granted by the planning authority in September of the same year. This certificate referred to "the creation of a circuit or track by mechanical excavation and raising of banks and jumps on formerly level or graded field or meadow".

In the meantime, in June 1998, the appellants applied for an LDC worded in identical terms to that which had been submitted in 1995. This was dismissed by the local planning authority, whereupon the appellants appealed to the Secretary of State. An inquiry was held in August 2000. The Inspector recorded the appellants' argument that, in between the proposed events, the site would revert to agricultural use involving the grazing of animals, with the physical appearance of the land remaining unchanged. She described the issue as being whether the proposed use would have the attributes of a temporary or permanent, though intermittent, use. In reaching her decision on the issue, she referred to the various earth banks, depressions and jumps which had been created in the past, describing them as permanent physical alterations which had materially changed the nature and appearance of the land. She asserted that the appellants did not propose to remove these features between events, and found, as a matter of fact and degree, in the light of the existing nature and appearance of the land, that the re-introduction of the vehicular and leisure use would amount to a permanent, albeit intermittent, use subject to the requirements of the effective enforcement notices, rather than a temporary use. The Inspector stressed that the appeal site had the appearance of a facility created for vehicular sports, and that she considered the proposed use to be a permanent one falling outside Pat 4 Class B of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (the GPDO). She accordingly dismissed the appeal.

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The appellants then applied to the High Court. Here, Scott-Baker J. ruled that the question whether a use was temporary for the purpose of the GPDO was one of fact, to be decided in accordance with the circumstances of the case. When resolving this question, it was necessary to consider the character of the use. In the case under review, the Inspector was entitled to take into account the fact that the layout of the land made it suitable for the use under consideration, and that the works aimed at achieving this layout had been undertaken by the appellants. He therefore dismissed the appeal.

The appellants thereupon appealed to the Court of Appeal. The Court ruled that:

- (a) The carrying out of operations on the land, either in anticipation of the proposed use or accompanying it, may in some cases be relevant on the issue of whether the proposed use was a temporary one within the GPDO, or whether it was instead a permanent change of land use. This would arise if the operations contemplated made it difficult or impossible for the site to revert realistically to its previous normal use (such as agriculture) in between the occasions on which the land was employed for the new use. If the physical changes had that effect, then one would be dealing with a material change of use from the previous use, which had to all intents and purposes ceased, to the new use, even though the latter, in practice, only involved activity on 2 days or fewer per year. It was the aspects of duration and reversion to normal use which was of importance. However, that relevance was the sole relevance which such physical alterations to the land were likely to have to this question. Engineering and other operations were themselves subject to planning control, so that the local planning authority was well capable of controlling physical alterations to the form of the land. If physical changes to the land were allowed to take place and they did not prevent the normal permanent use from continuing for most of the year, there was no reason, in principle, why the rights under Part 4 Class B of the GDPO should not be available for another use which did not take place for more than 28 days in the year. There was nothing in the wording of the GPDO which prevented the deemed permission from being available in such a situation. Class B of Part 4 contained no reference to the character or appearance of the land as a criterion or to its planning merits generally, but only to the maximum duration of the use each year. The planning legislation constituted a statutory wording which Parliament had considered fit to adopt.
- (b) These physical alterations could lead to a change in the appearance and character of the land, as the Inspector had found to be the case with the site

under consideration. However, those physical changes in the case under review had already taken place and had the benefit of an LDC to establish their lawful existence. They were a physical fact. The Inspector and the High Court judge had been wrong in attaching the significance which they gave to the existing physical changes to the site. It was the duration of the proposed use and the reversion between these occasions to the normal use of the land which were the critical factors. If the site in question was employed for the proposed use on no more than 28 days per year, and it reverted after each occasion to agricultural use for the remainder of the year, the deemed permission in Part 4 Class B of the GPDO covered the proposed use. These conditions had been met in this case.

The appeal was therefore allowed.

Objectors to Fulham FC planning application were not violated in their human rights, rules English Court of Appeal

This case is dealt with under Item 14, "Human Rights/Civil Liberties" (see below, p.112).

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

London, UK. The new stadium to which Arsenal FC is planning to move within the foreseeable future has been the subject matter of much controversy, some of it reported in earlier editions of this organ⁶³⁵. However, in late July the High Court endorsed plans for the new ground by upholding the planning permission granted to it by Islington Council⁶³⁶. The full text of the decision was not yet available at the time of writing.

London, UK. In March, top Rugby Union club Wasps, who were still seeking a temporary home, learned that their bid to share Adams Park with Wycombe Wanderers requires planning permission. Initially, they considered approaching Harlequins for this purpose⁶³⁷. However, the club decided to apply for the necessary planning permission, and in late May the local district council gave its qualified support to the proposed ground sharing scheme with Wycombe Wanderers⁶³⁸.

Sydney, Australia. In June, plans were approved to turn parts of the Sydney Olympics site into a residential neighbourhood housing 3,000 people. The stadiums used during the Games will, however, remain⁶³⁹.

Fairlop Waters, Essex, UK. In July, an application to build a new racecourse at Fairlop Waters in Essex was rejected by the Government in spite of a recommendation by a planning inspector that it should

6. Administrative Law

be approved. Following a public enquiry, the Inspector, Brian Sims, had recommended that the scheme should go ahead. However, Deputy Prime Minister John Prescott overruled this decision as a result of sustained opposition from both local residents and Redbridge Borough Council. The decision was a serious blow for Wiggins Group, the firm behind the scheme. They were not expected to appeal⁶⁴⁰.

Liverpool, UK. Liverpool FC are to leave their traditional ground at Anfield for a new stadium in nearby Stanley Park, thus bringing to an end an association of 110 years with the hallowed ground. The decision follows an investigation into the possibility of increasing Anfield's capacity, which concluded that it would be easier to build a new stadium⁶⁴¹.

Judicial Review (other than planning decisions)

Standard of judicial review is the same for allocation of sports channel royalties as for deciding their amount. Canadian court decision⁶⁴²

In the case under review, the Canadian Copyright Board had issued a decision on the determination and allocation of royalties for the retransmission of distant signals by cable services. The collective society which represented four professional sports leagues applied for judicial review of the decision of the Board dealing with the allocation of royalties to its members. The collective society claimed that the Board had committed the following three errors: (a) in ruling that it was appropriate to allocate royalties on the basis of the period for which subscribers watched various types of programmes; (b) by restricting its discretion where it set its face against any evidence of the value of programmes to cable companies other than numbers of viewers, and (c) in its cursory examination of the collective society's evidence submitted through its expert witness.

As regards alleged error (a), the Court ruled that the Board had not departed from its previous determination that the allocation of royalties should be based on the value of programmes to cable companies. The Board had merely made it clear that the number of hours spent by subscribers watching specific types of programme was the most reliable criterion for the purpose of determining the value of programmes to cable services.

As regards alleged error (b), the Board had dismissed, not the evidence presented by the collective society, but its approach towards determining the value of programmes to cable firms. Where it exercises its discretion to set royalties, the Board is operating on its

"home ground", and its decisions are reviewable only on grounds of clear unreasonableness. Decisions by the Board on the allocation of royalties should not be reviewed on the basis of a different standard. The Board had not issued a clearly unreasonable decision where it retained the cumulative viewing criterion for determining the value of sports programmes to cable firms.

As regards alleged error (c), whilst not necessarily addressing every item of evidence in considerable depth, the Board's evidence adequately explained why it had declined to accept the collective society's approach towards the evidence. The Board's conclusions as to fact had been supported by the record.

The Court therefore dismissed the appeal.

Breeding of horses for riding ground not eligible for agricultural subsidy, rules Italian court⁶⁴³

In May 2001, the Italian Supreme Administrative Court (Consiglio di Stato) ruled that the breeding of horses for the purpose of using them in a riding ground cannot be qualified as livestock breeding, for which Italian subsidies awarded by way of incentive are available under Italian legislation. The subsidies in question are intended for the breeding of animals to be used for the production of food.

Other issues

Compensation for riding stables fixed by Lands Tribunal⁶⁴⁴

In a recent decision, the Land Tribunal fixed compensation for the compulsory purchase of riding stables at Gravesend on a relocation basis at £119,438, made up of £23,416 for the residual interest in the lease, £4,100 for tenant's fixtures, and £91,922 for disturbance. Equivalent reinstatement under r(5) of section 5 of the Land Compensation Act did not apply because, although the land in question was intended for the purpose of a riding school and stables, including the provision of the full and working livery facilities that formed part of the business and, but for the compulsory acquisition, would have continued to be so intended – there was a general demand or market for the property in question for that purpose. There was nothing to prevent the proprietors of the riding school operating outside the Gravesend area and there was nothing in the purpose for which the land was intended which required evidence of general demand or market to be restricted to the Gravesend district. The riding school purpose could be reinstated at a location other than that which fell within the current catchment area, since a commercial riding school and stables could be established in virtually any location (subject to it being

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accessible to prospective customers and clients). The riding school business, together with the tail end of the lease under which the claimants occupied the land, would have found a buyer if offered to the market in October 1998. Although the number of transactions referred to by the claimants' witness demonstrated a limited market, it did not prove a lack of general demand, bearing in mind the statement made by that witness that, if the claimants had offered their business to the market, in her professional opinion it would have been sold, and that when the claimants acquired the business in 1989 on the open market, they paid a premium for it.

The Tribunal also held that there was no loss of goodwill in respect of a valuation based on relocation in this instance because the business had relocated more or less locally, and nearly all the claimants' customers have continued at the new facility, and any loss of goodwill that may have occurred would eventually be compensated by the attracting of new customers; the business would, to all intents and purposes, be back to where it was in terms of profitability by May 2002; it make allowance for loss of goodwill in the circumstances of this case would amount to double counting.

The Tribunal determined that, given the circumstances, the sum of £119,438 was reasonable and would adequately compensate the claimants for the actual and anticipated losses incurred in respect of the compulsory acquisition and relocation. It was also a sum which a reasonable businessman would consider expending, on the grounds that this was the relocation of a small and essentially family-run business which had some additional value to the owners over and above a purely commercial investment opportunity.

Golf course construction site held to be a rateable hereditament by valuation tribunal⁶⁴⁵

In October 2001, a valuation tribunal decided that two fields and part of a woodland with offices, store, and a lorry wheel washing facility, and with planning permission for a golf course, were a rateable hereditament in the occupation of the contractors constructing the golf course. The hereditament was used for the deposition of waste material during the construction of the golf course because the work commenced in 1996, and in October 2001 the golf course was a long way from completion and unlikely to be open for several years. The contractors either received payment for the material brought on site or obtained the material from sites where they had been instructed to remove material, thereby saving tipping costs.

7. Property Law

Land Law

[None]

Intellectual Property Law

Athletic association penalised for use of logo. Slovenian court decision⁶⁴⁶

The claimant in the case under review, a graphic designer, had entered into negotiations with the first defendant, an advertising agency, for the designing of a logo and other graphic items for use in graphic representations published by the second defendant – the Athletic Association of Slovenia. Even though no contract was concluded, the claimant communicated his designs to the first defendant. These designs were then used by the athletics association in its various publications. The designer brought joint civil proceedings for infringement of copyright against both defendants, claiming injunctive relief against the further use of his works, the payment of punitive damages to the amount of a customary royalty, increased by 200 per cent – in other words, triple damages – as well as the payment of interest on punitive damages with effect from the date on which the action was brought.

The trial court (Okrožno sodišče) of Ljubljana ruled that the claimant was entitled to injunctive relief against both claimants and that his claim for damages would be allowed in part. It recalled that under the Copyright and Related Rights Act 1995, a graphic design is a work protected by copyright. The use of such a work by both defendants without permission in the claimant's part constituted a violation of the claimant's financial rights. It also held that, on the facts, the first defendant had acted with deliberate intent, whilst the second defendant had acted with gross negligence.

The claimant was entitled to punitive damages to different amounts from the respective defendants, this amount being assessed in accordance with their respective levels of culpability. For his act of deliberate infringement, the first defendant was ordered to pay triple damages; for its act of gross negligence, the athletics association was liable for the payment of double damages. Payment of interest on the punitive damages would be ordered in each instance with effect from the date of the court's decision, and not from the date on which the action was brought. This is because punitive damages possess the characteristics of a financial claim with effect from the date on which they were determined by the court and ordered against the defendants.

The Athletics Association appealed against this decision. However, the Court of Appeals of Ljubljana ruled that the appeal should be dismissed on the same grounds as those stated in the trial court's decision.

Battle for WWF initials settled in favour of World Wildlife Fund. English Court of Appeal decision⁶⁴⁷

The legal tussle between the World Wrestling Federation and the World Wildlife Fund (which has now changed its name to World Wide Fund for Nature) has been well documented both in these columns⁶⁴⁸ and elsewhere. On the last occasion in which this item made this organ, the nature protection organisation had won the day before the High Court, which found that the wrestling federation had infringed its copyright over the initials. However, the wrestling organisation had obtained leave to appeal against this decision to the Court of Appeal – but to no avail, since the latter confirmed the High Court ruling.

The case arose from a long-standing dispute between the two organisations over the use of these initials. Trademark disputes arose and, from 1993, the claimant (i.e. the World Wide Fund) had threatened to take the wrestling federation to court in several countries. The parties then negotiated a settlement agreement which was signed in 1994. The defendants undertook, inter alia, to refrain from making oral, printed, written or visual use of the initials WWF anywhere in the world – except in the US, where more limited restrictions applied. Initially, the wrestling federation acted in compliance with this agreement, but ignored it in 1997 when it set up the website www.wwf.com. In December 2000, the claimant then commenced proceedings for the purpose of enforcing the agreement, and obtained a summary judgment accordingly. The wrestling organisation appealed against this ruling.

The appeal was dismissed. The Court ruled that a settlement agreement under which the parties resolve a genuine dispute as to the use of a trademark was presumed to represent a reasonable division of their trading interests unless the defendant seeking to challenge it was able to demonstrate any justification for releasing him from it on grounds of restraint of trade or for other reasons. It also held that the defendant had failed to establish the threshold requirement for applying the doctrine of restraint of trade (either at the common law or under Article 81 of the EU Treaty on unfair competition). Therefore the claimant was entitled to enforce its rights under the agreement.

Penthouse settles "Kournikova" pictures row out of court (US)

One of the worst-kept secrets in the world of the printed media is that the "adult" magazine *Penthouse* is in dire financial straits, saddled as it is with unpayable debts. However, its publishers seem intent on adding to its woes, judging by the sum which it has had to pay by way of out-of-court settlement to a woman whose topless

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photographs appeared in a recent issue, and of which the magazine claimed that they represented that well-known model (and occasional tennis player) Anna Kournikova.

The woman concerned, Judith Soltesz-Benetton, daughter-in-law of the famous Italian designer, had initially decided to sue the magazine publishers for \$10 million. In mid-May 2002, however, an amicable settlement was reached – just hours before a Manhattan court was to rule that the pictures infringed her privacy and represented the use of her image as advertising without her consent having been obtained⁶⁴⁹.

Ms. Soltesz-Benetton did not reveal how close the amount finally agreed upon was to the sum claimed in court, although it cannot have been very far removed from the latter. Bob Guccione, the magazine publisher, had already made the humblest of apologies to her, blaming the incident on human error. Ms. Kournikova is also suing the magazine over the same incident in California – also for \$10 million⁶⁵⁰. The outcome was not yet known at the time of writing.

Totally passed off – Irvine wins case against Talksport in image misrepresentation case⁶⁵¹

It will not have escaped even the most listless of readers that sporting personalities are becoming increasingly insistent on obtaining legal recognition and protection of their “image rights”, even though the full scope of this concept remains far from clear. Some light, however, has been shed on this enigma by a recent high-profile case which will have set certain benchmarks on this issue.

Eddie Irvine is a major figure on the Formula One circuit, being Jaguar’s senior driver for this discipline. In 1999, the Talksport radio station had issued an advertising brochure containing a picture of Mr. Irvine in full racing outfit, in which a radio bearing the station’s name had been substituted, by digital manipulation, for a mobile telephone held to his ear. Mr. Irvine did not take kindly to this use of his image, and took out proceedings against the broadcaster before the High Court. Here, Ms. Justice Laddie (who is rapidly making a name for himself in the area of sports law – see previous issues of this organ⁶⁵²) ruled that this use of Mr. Irvine’s picture constituted passing-off, in that the photograph was a misrepresentation which gave the mistaken impression that Mr. Irvine was endorsing Talksport. In so doing, he acknowledged that celebrities such as Mr. Irvine have a “property right” in their goodwill which may be enforced against those who make false claims or suggestions of endorsement of their products.

Mr. Laddie first drew a distinction between endorsement cases and merchandising. Endorsement, he ruled, occurs where someone endorses a product or service, tells the relevant public that he/she approves of the public or service, or that he/she is happy to be

associated with it. In effect he/she adds his/her name to as an encouragement to members of the relevant public to buy or use the service or product. He considered it to be common knowledge that for many sporting figures, for example, income earned from endorsing products and services represents a substantial proportion of their income. Large amounts are paid for endorsement because those in business have reason to believe that the lustre of a famous personality, if attached to their goods or services, will enhance the attraction of these goods or services to their target market.

In the judge’s opinion, the exploitation of the celebrity’s goodwill in this manner can be distinguished from mere merchandising, which he described as the exploitation of images, themes or articles which have become famous, such as the recent Star Wars film, by the sale of “spin-off products”. He held that it is not a necessary feature of merchandising that members of the public will think that the products are in any way endorsed by the film makers or the actors in the film. This distinction was essential to the fate of Mr. Irvine’s claim, since the judge had previously dismissed complaints of passing off, through use of merchandise, of famous names on merchandise produce, in such decisions as the Arsenal case⁶⁵³. Here, he had ruled that the public would not believe that the product was in any way endorsed by or connected with the claimant⁶⁵⁴.

The judge found that the underlying principle of the tort of passing off was the maintenance of what is currently regarded as fair trading. The law of passing off responds to changes in the nature of trade and recognises that the commercial environment in which it operates is a constant state of flux. Hence, for example, the law could no longer adopt the narrow approach taken in *McCulloch v. May*⁶⁵⁵ which required the claimant to be engaged in business and in a common field of activity to the defendant; nor was it necessary that the defendant should be offering substitute goods or services in relation to those of the claimant. Instead, he ruled that the objective of a passing-off action is to vindicate the claimant’s exclusive right to goodwill and to prevent unlicensed use of goodwill which may reduce, blur or diminish its exclusive nature.

Applying this “commercial environment” test of misrepresentation, the judge considered that a false endorsement case could succeed where the claimant was able to prove that he has a significant reputation or goodwill and that the defendant’s action gave rise to a “false message” being conveyed to the public that the defendant’s goods were endorsed, recommended or approved by the claimant. He considered that both elements were present in this claim, and that there was an implicit endorsement in the use of the altered photograph of Mr. Irvine on the defendant’s brochure.

Laddie J. also ruled that he should receive £2,000 –

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which he described as “a reasonable endorsement fee”. However, he also ordered that because the claimant had rejected a higher out-of-court settlement of £5,000 the previous year, he should pay both his and the broadcaster’s costs. These can be roughly assessed at £300,000⁶⁵⁶.

The comments were not slow in coming. Writing in the Law Society’s Gazette⁶⁵⁷ author Stuart Lockyear considers this case an important one for various reasons:

- it finally establishes that, in a passing-off case, it is not a necessary requirement for the claimant to share a “common field of activity” with the defendants, nor even – as was the case here – that the claimant should be involved in a trade or business;
- the courts have now taken notice of the fact that celebrities exploit their own image and name by endorsing products, and not only those related to their own field of action. The courts will confer on a celebrity an exclusive right over his/her name and image, and thus protect the “brand” of the celebrity;
- any false endorsement of this type will constitute passing-off where the celebrity has a significant reputation and/or goodwill, and the defendant’s activity wrongly suggests to a sufficiently wide section of the celebrity’s market that the latter has endorsed, recommended or approved the defendant’s product;
- there is a long history of failed attempts by, or on behalf of, celebrities to protect their image rights. Thus in the 1980s Adam Ant failed to establish that his distinctive make-up was protected by copyright⁶⁵⁸. Elvis Presley Enterprises failed to restrain the unofficial merchandising activities of Sid Shaw trading as Elvisly Yours⁶⁵⁹ on the grounds that the public would not necessarily believe that Mr. Shaw’s products were officially licensed by the claimant. In addition, the estate of Diana, Princess of Wales failed in its attempt to register her likeness as a trade mark in an effort to control merchandising enterprises using her image.

On a more comparative note, copyright expert Fraser Reid, of law firm Theodore Goddard, said

“The English courts have finally caught up with the marketplace. In Germany, the courts acknowledge rights to privacy and the US acknowledges personality rights, as does France. There’s never been a reported decision where celebrity endorsements have gone to the High Court. For the individual it won’t change things too much, but it’s a sword for sporting personalities to tackle misuse of their image”⁶⁶⁰

Amanda Michaels⁶⁶¹, however, considers that the value of this decision to celebrities may be of limited value. On the one hand, the judge had indicated that the damage caused to Mr. Irvine may have been small

in direct money terms, but could have produced potentially long-term damaging effects. Nevertheless, the only remedy which he granted in the light of the evidence filed for Mr. Irvine was the award of damages to the amount which he considered to represent a licence fee which would have been negotiated between a willing licensor and licensee. In other words, if a claimant cannot prove direct loss or damage, the financial penalty for the defendant’s wrongdoing will be calculated on the same basis as if the defendant had acted properly by seeking to obtain a licence prior to using the claimant’s image. There is no premium, therefore for flagrancy. Therefore, whilst the decision makes a positive step towards recognising current commercial merchandising activities, celebrities may find that its value is limited⁶⁶².

Tiger Woods sues artist over image rights (US)

In July, golfer Tiger Woods took court action against Alabama-based artist Rick Rush for having exploited his image for unlawful commercial gain. This was a dispute which has its origins in 1998, when Jireh publishing, a small company based in Tuscaloosa, Alabama, and owned by the artist’s brother, Don, published a limited-edition print of a painting depicting Mr. Woods winning the 1997 Masters in Augusta. These prints retailed at \$700, and in addition 5,000 lithographs were on sale at \$15 apiece⁶⁶³.

Readers may recall from an earlier issue the outcome of the resulting court proceedings⁶⁶⁴. Lawyers acting for ETW, being a company founded by the golfing champion for the purpose of controlling the marketing of his image, took the brothers to court, relying upon what is known as “rights of publicity statutes” which make it unlawful for third parties to derive profit from the name, image or photograph of an individual without the latter’s authorisation. In spite of being threatened with bankruptcy, the brothers contested the action, proclaiming theirs as a fight on behalf of all artists who wished to depict public figures at public events. In April 2000, the Federal District Court of Ohio awarded the action against Mr. Woods, stating that the painting in question was an artist’s creation seeking to express a message.

Mr. Woods’s company challenged this decision before the Appeal Court in Cincinnati. At the time of writing, no decision had yet been made in these proceedings, but observers expect this case to go all the way to the US Supreme Court for a definitive ruling. The case has overtones of David v. Goliath about it, and many sporting commentators feel that there are major issues at stake here concerning an artist’s freedom of speech under the First Amendment. However, many are supporting the golfer in his endeavours. These include the National

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Football League's Players' Association, who consider it unacceptable that an artist should be able to sell thousands of copies of the golfer's image, and then hide behind the First Amendment⁶⁶⁵.

Norwegian article on legal protection for sporting events which are suitable for broadcasting⁶⁶⁶

In this paper, the author Tore Lunde examines the legal protection available in Scandinavian law for sporting events, more particularly the rights of the organiser in relation to any broadcasts of the event by television or radio. The author establishes that Scandinavian law is not over-generous in its concern for the sporting organiser and in legal resources which support the organiser in the financial interest he/she has in sporting and similar events. Such legal protection could be based on several legal principles and take the practical form of a system of protection of broadcasting rights.

Rugby Football Union loses "war of the roses" over England shirt (UK)

In the previous issue of this column⁶⁶⁷, attention was drawn to an impending court battle over the allegedly unauthorised use of the red rose emblem featured on the shirts of England's Rugby international players. More particularly the Rugby Football Union (RFU), and its official shirt manufacturer, Nike, were attempting to prevent Cotton Traders (headed by former England players Fran Cotton and Steve Smith) from using the rose emblem on their shirts. They accused Cotton Traders of reneging on an agreement to discontinue the use of the rose on its white Rugby jerseys after Nike took over the official production of the jerseys in 1997. Cotton Traders had produced the shirts between 1991 and 1996. When Nike acquired the contract for £2 million, the shirt was redesigned, but Cotton Traders continued to produce the classic plain white jersey featuring the traditional red rose.

In March 2002, the High Court dismissed the action. Mr. Justice Lloyd held that the Rugby rose was not generally understood to indicate the RFU or the commercial origin of the goods on which it appeared. He accepted the traders' counterclaim that the RFU's European registration of the rose emblem as a trade mark was invalid on the grounds that it was not distinctive of the RFU. The RFU had argued that people who were aware of Cotton Traders' previous link with the RFU, and of Fran Cotton's association with English Rugby, would be misled into believing that there still existed an official connection. To this, Lloyd J. replied:

"I don't see how either of these factors can properly be regarded as making Cotton Traders'

use of this emblem of the nation and its rugby team on replicas of the historical jersey anything other than use in accordance with honest practices in the relevant trade"⁶⁶⁸

Both the RFU and Nike were facing a legal bill of £1 million as a result of this case. At the time of writing, they had been granted leave to appeal.

William Hill faces patent dispute (UK)

The bookmakers William Hill, who recently decided to float on the stock market now face a patent dispute over the technology behind their online casino business. Their online division is the fastest growing betting channel in the Hill group. Julian Menashe, a computer businessman, claims that the Hill website uses a software download on which he holds a European patent. He is looking for a £200,000 licence fee and 1.5 per cent of gross wins. At the time of writing, the bookmakers had rejected an initial settlement offer to this effect⁶⁶⁹.

Advocate-General of EU Court gives opinion in Arsenal v. Reed

This issue is covered under Item 9, "EU Law" (see below, p.96).

Canadian ruling on injunction regarding right to broadcast Portuguese football games

This issue is dealt with under the item entitled "Procedural Law and Evidence" (below, p.102).

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National Competition Law

Justice tempered with ignorance? German Supreme Court rules that football pools operator did not consciously break the law⁶⁷⁰

In the case under review, the defendant had operated, as from 1990, a system of football pools under which punters place money on the outcome of specific team pairings. In justification of this business, he relied upon a licence issued to him by the local council. This licence was based on transitional legislation enacted by the Government of the German Democratic Republic (i.e. that which applied during the period which elapsed between the fall of the Berlin Wall and the re-unification of Germany). At a certain point, however, he started to expand the scope of his operations beyond the confines of the former East Germany and offered his services throughout the German territory. This was not to the liking of other German football pools operators, one of which took the defendant to court on the grounds that his operation constituted unfair competition. The licence he had obtained allegedly failed to apply outside the former East Germany, and therefore fell within the scope of Article 284 of the Criminal Code (Strafgesetzbuch – StGB). That rendered it automatically an act of unfair competition under Article 1 of the Law on Unfair Competition Act (Unlauterer Wettbewerbsgesetz – henceforth referred to as “the Law”) on the grounds that it was immoral (sittwidrig). The claimant, a partner in a football operator of Nordrhein-Westfalen, also alleged that, quite apart from the issue of its territorial applicability, the licence in question was not lawful in its own right, since it also required approval by the then Minister of the Interior of the GDR, which it did not receive. In addition, the licence should not have been awarded under the legislation as it applied in the GDR at the time, since football pools only became lawful after the adoption of the Collections and Lotteries Regulation (*Sammlungs- und Lotterieverordnung*).

At first instance and on appeal, the claimant’s action succeeded. The defendant then applied to the Supreme Court (Bundesgerichtshof – BGH), which awarded the action against the original claimant. On the question of the defendant’s allegedly “immoral” activity, the Court held that any action which infringed statutory provisions beyond the Law was not automatically “immoral” within the meaning of Article 1 of the Act. This depended on the object of the statutory provisions in questions, and the principles which it was attempting to protect. It was true that any infringement of Article 284 StGB was a rule on fundamental values which at the same time has implications for unfair competition legislation. Therefore anyone violating this provision by organising gambling operations without official authorisation was not only committing an offence

against market access legislation, but also, in principle, an immoral trading action within the meaning of Article 1 of the Law.

However, Article 284 StGB was aimed at penalising behaviour which was undesirable because it was socially damaging. One of the objects of this provision is to prevent an excessive amount of incentives for gambling and to guarantee a properly controlled system of gambling through state regulation. This objective was not endangered by the activities of the defendant.

Even if the actions of the defendant did fall within the scope of this provision of the criminal law, they would not qualify as unfair competition. The defendant possessed a licence which was awarded to him in April 1990. Under the circumstances of this case, he was not acting unlawfully where he regarded this licence as an adequate legal basis for his operations. A trader can be expected to acquaint himself with the various legal provisions which govern his activity – and even to obtain proper legal advice where his activity is subject to some doubt as to its lawfulness. However, it would be carrying this duty too far to expect him also to act in accordance with the strictest interpretation and application to individual cases of the relevant legislation, where the appropriate authorities and courts expressly regard his activity as lawful. It would naturally be different if the trader was aware of the unlawfulness of his activity, deliberately chose to ignore any evidence of this unlawfulness or unlawfully influenced the attitude of the administrative authorities. This was not the case here.

The Supreme Court therefore set aside the decision of the Court of Appeal (*Landesgericht*).

OFT action fuels discord between bookies and British racing authorities (UK)

It is sometimes said in racing circles that only the writer Edgar Allan Poe could do full justice to the curse which currently seems to govern relations between the horseracing authorities and the bookmakers in this country. No sooner had peace broken out in the various media rights disagreements described in an earlier section (see above, p.41) than new rifts appeared on the horizon – mainly as a result of the investigations which the Office of Fair Trading (OFT) has of late been conducting into various aspects of the industry.

The first of these rifts concerns the question of the fees charged by the National Joint Pitch Council, the body which administers Britain’s betting rings. It may be recalled from the previous issue⁶⁷¹ that, in December 2001, the OFT found that the system of selling betting pitches at regular auctions, which only the NJPC was allowed to organise, contravened competition law. This was in response to a complaint by David Boden, a former bookmaker who was attempting to set up a rival auction facility for racecourse pitches. Given that the

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Council charged a 12.5 commission on these sales – which sometimes involved six-figure sums – this finding threatened to produce a serious reduction in the Council’s income.

This is why the Council shortly afterwards decided to add £10 to the daily fee which bookmakers pay for the right to take bets at the racecourses themselves. In addition, the Council introduced a new charge of £20 for bookmakers who wished to “opt on”, which allows a bookmaker having a pitch position which is outside the permitted number to work where a colleague higher up the list fails to turn up. This not unnaturally aroused the ire of the bookmaking fraternity, with many of them refusing to pay the surcharge, feeling that they were being made to pay for the shortcomings of the Council’s administration⁶⁷².

This placed them in breach of Rule 4.1, which stipulates that no bookmaker may negotiate bets unless he has paid the pitch administration fee. Accordingly, the refuseniks were all served with notices of breach, warning of the Council’s power to suspend or withdraw their betting permits⁶⁷³. In the meantime, however, the OFT investigation into the Council’s practices continued, and obviously the new system of charges also became a focus of this investigation.

Several months later, the OFT discontinued its investigation following an accommodation with the NJPC. As part of the deal, the Council agreed to reduce the commission it charged for the sale of pitches from 12.5 per cent to 6 per cent. Private sales between bookmakers will also be subject to a commission of 6 per cent, down from the previous level of 15 per cent. In return, the OFT allowed the Council to retain its monopoly on the sale of pitches. This appeared to be in contradiction with its earlier finding, mentioned above, when it declared the monopoly to be in breach of competition law⁶⁷⁴. David Boden, whose complaint set off the investigation in the first place, criticised the settlement as not going far enough, since it allowed the monopoly to remain. He considered it wrong that the NJPC should still be able to operate without any threat of competition⁶⁷⁵.

In the meantime, however, the storm clouds were gathering over another OFT investigation – this time into the hold which the British Horseracing Board had over data and picture rights. This was following a complaint from the bookmakers, prompted by the festering disagreement over these rights which are documented above. The feeling amongst leading commentators was that the bookmakers had neither anticipated nor desired that their complaint would lead to a full-scale investigation of racing practices, the most far-reaching outcome of which could very well be a ruling which destroyed the rhythms of the racing calendar and opened up the sport to private enterprise by various promoters attempting to organise unlicensed racing⁶⁷⁶.

This was exactly the outcome which looked likely

following a leaked letter from the OFT official leading the inquiry, Russ Phillips, which gave a clear signal of a number of radical changes which were about to befall the industry. The letter detailed the areas which the OFT was investigating in order to decide whether or not the rules of the BHB constituted unfair competition. More particularly:

“the OFT will be examining the scope for further competition within racing as part of its remit to ensure that markets are working well for consumers. Specifically, the OFT is investigating potential restrictions on racecourses’ ability to stage racing and earn income from that racing. The OFT is thus considering the extent to which the orders and rules limit courses’ freedom to decide how often they race, the type of racing they provide and the prizes they can offer. The OFT is also considering how courses can charge bookmakers for putting on racing – including pre-race data”⁶⁷⁷

Significantly, the letter concludes by stating that the OFT was anticipating that increased competition would potentially benefit racegoers, punters and race horse owners, and that courses should benefit from a greater degree of freedom.

The BHB has repeatedly insisted that it owns pre-race information such as runners, riders and weights, and, as is described above, has concluded a historic deal with the betting industry based on such data. However, some racecourses have insisted that they are the rightful owners of such data. If their view is endorsed by the OFT, it could transform the BHB into little more than a talking shop whilst the racecourses acquired control⁶⁷⁸.

At the time of writing, the results of the investigation were not yet known.

OFT makes formal accusation on replica shirt price-fixing (UK)

It will be recalled from the previous issue⁶⁷⁹ that concern was mounting about the various practices engaged in by football clubs and sportswear companies in relation to the replica shirts trade. This concern was not restricted to increasingly hard-up fans, but had reached the official level in the shape of the Office of Fair Trading (OFT), which launched an investigation, which included raids on the offices of sportswear firms Umbro and JJB Sports. In mid-May, this resulted in accusation being formally brought in respect of the practice of charging £50 for shirts which only cost £10 to make. These accusations have been made against 11 companies, which included Manchester United, the Football Association, Umbro and JD Sports. They were given nine weeks in which to respond to these charges⁶⁸⁰.

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More particularly the OFT claim that they have evidence that these companies concluded anti-competitive agreements over the sale of replica shirts by refusing to authorise retailers to sell England and Manchester United strips at a discount. Instead, they compelled shops to charge the full price of £39.99⁶⁸¹. The investigation is focused entirely on football kits produced and supplied by Umbro, a Cheshire-based company established in 1924, whose exclusive 10-year contract with Manchester United ended in July 2002⁶⁸².

If the OFT finds the companies concerned guilty, they could face fines amounting to 10 per cent of their annual turnover. Under such a scenario, JJB could be compelled to pay £66 million, whilst Manchester United would lose £10 million⁶⁸³. The verdict was not yet known at the time of writing.

Rotherham RFC case referred to OFT after intervention by MP (UK)

The controversy surrounding the refusal of the English Rugby Union authorities to allow Rotherham RFC access to the Premiership is a saga which is fully documented elsewhere in this publication (see below, p.138). Put briefly, the Division One champions, having won the Division One championship, were informed that neither their ground at Clifton lane, nor Millmoor, home of Rotherham United with whom a ground sharing arrangement had been proposed, met the relevant criteria for promotion.

This case may soon be brought within the realm of the ordinary legal system, since Rotherham have now referred their case to the Office of Fair Trading (OFT). In this, they are being supported by Derek Wyatt, the former Bedford and England player, who is now Labour MP for Sittingbourne. The latter believes that the promotion ruling may be in violation of the 1998 Competition Act, and has formally requested the OFT to investigate the question whether the English Rugby Board are acting as a cartel⁶⁸⁴. He believes that it is very important to obtain a ruling from the OFT because it could also affect football, cricket and other sports.

Stephen Hendry and others fail in bid for compensation arising from alleged breach of competition law. English High Court decision

This case, which has both national and EU competition law dimensions, is dealt with under the item headed "EU Competition Law" (below, p.94)

EU Competition Law

European Commission closes investigation into UEFA rule on multiple ownership of football clubs⁶⁸⁵

In June of this year, the European Commission announced that it had closed an investigation into the UEFA multi-ownership rule under which no firm or individual may directly or indirectly control more than one of the clubs taking part in a UEFA club competition. The investigation in question had been prompted by a formal complaint made by ENIC plc, and an investment company having stakes in six clubs Glasgow Rangers, FC Basel, Vicenza Calcio, Slavia Prague, AEK Athens and Tottenham Hotspur). This complaint has been dismissed.

After careful examination, the Commission arrived at the conclusion that, although the UEFA rule is a decision adopted by an association of enterprises and, therefore, theoretically caught by the prohibition contained in Article 81(1) of the EU Treaty, it can be justified by the need to guarantee the integrity of its competitions. It is the task of sporting organisations to organise and promote their specific sports, particularly as regards pure sporting rules such as the number of players who make up a football team or the size of the goalposts. On a number of occasions, the European Court of Justice has ruled that the economic aspects of sport are subject to EU law, whilst recognising that the special characteristics of this sector must be taken into account when applying the rules of the Treaty. In the case of the UEFA multi-ownership rules, the Commission establishes that the object of this rule was not to distort competition, but to guarantee the integrity of the competitions organised by this ruling body. In any case, the restriction of freedom of action on the part of clubs and investors which this rule entails does not go beyond that which is required to ensure its legitimate purpose, to wit to protect the uncertainty of tournament results in the interests of the general public.

This decision clearly establishes that a rule may fall outside the scope of competition rules despite the possibility that it could produce negative effects on business – as long as it does not go beyond that which is necessary to ensure its legitimate aim, and that it is applied in a non-discriminatory manner.

Commenting on the case, Mario Monti, the Commissioner in charge of competition, stated:

"The main purpose of the UEFA rule is to protect the integrity of the competition, in other words, to avoid situations where the owner of two or more clubs participating in the competition could be tempted to rig matches. Although the rule could theoretically be caught by Article 81 of the EU Treaty, it is intended to ensure that sporting competitions are fair and honest, which is in the interest of the public and football fans in particular."

ENIC had two months in which to appeal against this decision.

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Commission closes investigation into FIFA rules on players' agents⁶⁸⁶

After lengthy discussions with the world governing body of football, FIFA, the European Commission decided in April 2002 to close its investigation into the rules governing access to the profession of players' agent. This outcome became possible once FIFA had decided to review the rules which had been the subject-matter of the complaints. One of these had been that the rule prohibiting players and clubs from using the services of agents not licensed by FIFA constituted unfair competition. The world governing body has since enacted new rules which are acceptable to the Commission. The latter recognises FIFA's right to regulate the profession in order to promote good practice, provided that access remains open and non-discriminatory.

Following a number of complaints, the Commission had initiated a detailed investigation of FIFA's rules on players' agents. This investigation had prompted a statement of objections which was communicated to the world governing body on 19/10/1999⁶⁸⁷. The Commission considered that the organisation's rules constituted restrictive agreements in that they prevented or restricted access to this profession by natural or legal persons having the necessary skills and qualifications, especially where these were required to pay a large and non-interest-bearing deposit. FIFA accordingly decided to review these rules, and in fact adopted new provisions on 10/12/2000, which entered into effect on 1/3/2001 and were most recently amended on 3/4/2002. The conditions embodied in the new rules governing access to the profession were regarded as being objective and transparent, and no longer restricted access to persons capable of paying a CHF 200,000 deposit with FIFA. Liability insurance has been substituted for the deposit.

Henceforth, anyone wishing to become a player's agent will be required to pass a multiple-choice test. Any candidate obtaining the minimum number of marks stipulated will pass. The dates for the test, as well as a large number of the questions, are the same throughout the world. To acquire a licence, the candidate must then contract professional liability insurance in order to cover any claims for compensation arising from actions which are contrary to the principles contained in these rules. The agent is also required to sign a Code of Professional Conduct containing the principles of professional integrity, transparency, honesty and the fair management of interests. There is also the requirement that the agent should keep accounts.

These changes to the rules have prompted the finding on the part of the Commission that the world organisation's aims of extending good practice, raising professional standards and protecting its members from

unqualified or unscrupulous agents prevail over considerations of fair competition. It has accordingly dismissed the complaints. However, should it emerge at some later date that these objectives are capable of being reached without the FIFA rules – for example because the EU Member States have regulated the profession or because players' agents have been able to introduce a system of self-regulation whilst ensuring a high level of professionalism and integrity – the Commission could subject these rules to a review.

Commission approves UEFA's new policy on selling media rights to the Champions' League⁶⁸⁸

It may be recalled from an earlier issue⁶⁸⁹ that, in July 2001, the Commission decided to open proceedings against the European football governing body UEFA regarding its policy on selling television rights to its Champions' League fixtures. In June 2002, the European Commission announced that it intended to adopt a favourable position towards the new draft rules relating to the sale of broadcasting and other media rights to these matches.

The Commission had objected to the previous rules, which had been notified to it for clearance, on the grounds that, where a group of people join forces for the purpose of selling a given product, this is restrictive of competition. The rules were found to distort competition between broadcasters, to encourage media concentration, and to stifle the development of Internet sport services as well as the new generation of mobile telephones by restricting access to key contents, which is not in the broad interest of football fans and the consumer generally. The new UEFA rules, however, will, according to the Commission, bring the Champions' League within the reach, not only of Internet content providers and UMTS operators, but also of a larger number of television and radio companies. Instead of selling the rights as a package to one broadcaster only per country, UEFA will sell the rights in several bundles for shorter periods; in addition, individual football clubs will also be able to utilize some of the rights for the benefit of their fan base.

In 1999, UEFA had notified its Regulations concerning the Joint Selling of the Commercial Rights to the UEFA Champions' League to the Commission, requesting clearance under EU competition law. Under these Regulations, UEFA sold all the television rights to the final stages of the tournament on behalf of the clubs participating in the League. These rights were sold as a package on an exclusive basis, for a maximum period of four years, to a single broadcaster in every member state, generally a free-to-air television company which would normally sublicense some rights to a pay-TV operator. One of the drawbacks of this system was that some of

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these rights, including live footage, went unexploited. In fact, the clubs, and possibly other operators such as regional television channels or minor pay-per-view companies, would be happy to use these rights.

The Commission takes the view that joint selling on an exclusive basis – be it in sport or any other sector – is restrictive of competition because it has the effect of reducing output and restricting price competition. This view is, moreover, shared by a number of national competition authorities. Accordingly, joint selling of football television rights could only be allowed where this was beneficial to the consumer, and where certain safeguards are adopted as laid down in Article 81(3) of the EU Treaty, which allows the Commission to exempt restrictive agreements where these contribute towards improving the production or distribution of goods or towards promoting technical or economic progress, whilst allowing consumers a fair share in the resulting benefits.

One particular effect of joint selling is that only the larger media groups are able to afford the acquisition and utilization of the bundle of rights. These groups are typically dominant existing broadcasters. The system also gives rise to unsatisfactory levels of demand from such broadcasters as are unable to obtain the rights concerned, and delays the use of new technologies because of a reluctance of the parties to embrace new ways of presenting sound and pictures of football.

Taking all the above objections into account, the Commission sent a statement of objections to UEFA in relation to its notified rules on 19/7/2001, formally giving it notice that its joint selling arrangement, in its present form, could not justify an exemption from EU competition rules.

The new selling arrangement which UEFA proposes to adopt following these objections can be summarised as follows:

- UEFA will continue to sell the rights to the live broadcasting of the main Champions' league games on Tuesdays and Wednesdays. For example, at the start of the Champions' League season (i.e. the final stage which commences after the qualifying stages with 32 teams) UEFA will be able to sell the "golden game" (for example, Bayern v. Real Madrid) to a television company in Germany and Spain. If UEFA has failed to sell some of the other games played on that Tuesday (normally a total of eight at the beginning of the season) to another broadcaster, the clubs will be given the opportunity to sell their matches on an individual basis. This means that Arsenal and Manchester United, playing on the same day, could themselves sell the rights in Germany and Spain should UEFA have been unable to sell the rights.
- Unlike the old system, the new rules will ensure that all media rights will be placed on the market,

including those rights which have been unutilised thus far, such as internet and UTMS rights. This represents a welcome move for telecom operators currently introducing the third generation of mobile telephones.

- After Thursday midnights, individual clubs will have the right to utilize deferred television rights in order to provide their fans with improved services.
- The settlement entails that UEFA has split all the media rights into 14 smaller bundles. Some of these are utilized by UEFA only and some are jointly utilised by both UEFA and the individual clubs.
- UEFA is to award the media rights contracts for a period not exceeding three years, using a public tender procedure giving all broadcasters an opportunity to bid for the rights.

The Commission has given preliminary approval to the modified arrangements. Before bestowing its final approval, however, the Commission is seeking to give third parties the opportunity to comment. For this purpose, a Notice describing the new arrangements was published in the EU Official Journal a few weeks afterwards. Third parties are invited to forward their comments on these arrangements to the Commission. Depending on the outcome of this consultation exercise, the Commission's departments will propose the adoption of a formal exemption decision pursuant to Article 81(3) of the Treaty.

This case is yet another example of the way in which EU law is attempting to take account of the specific nature of sport when assessing the lawfulness of certain activities.

EU statement on the relationship between its competition law and sport⁶⁹⁰

General statements on the applicability of EU competition law to sport have hitherto tended to be the preserve of speeches by leading personalities in this field – e.g. by Competition Commissioner Mario Monti⁶⁹¹ and top Commission administrator Jean-François Pons⁶⁹². In June 2002, the EU published a general statement on the subject which provides a systematic summary of the position to date⁶⁹³.

It starts out by pointing out the declaration on the specific nature of sport adopted by the European Council in Nice which stressed the need to take account, in relation to every aspect of EU action, of the social, educational and cultural roles of sport, which render it a special case. It then points out that both European Commissioners responsible for this area, to wit, Ms. Reding and Mr. Monti, have engaged in

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constructive discussions with sporting bodies over the past two years in order to put these principles into practice. This has resulted in important changes aimed at bringing their rules into line with their legal obligations (such as the ones discussed in the previous two sections). The statement then proceeds to detail some practical examples of the application of EU competition law, including the aforementioned UEFA broadcasting rules, those governing Formula One racing⁶⁹⁴, the rules on transfers in football (Sport and the Law Journal issues *passim!*), grants to French football clubs⁶⁹⁵ and the Mouscron case⁶⁹⁶ (in which the Commission dismissed a complaint against the UEFA home and away rule, on the grounds that this is a sporting rule which is a necessary part of the organisation of sporting competitions, and therefore as such falls outside the scope of competition law).

Hendry and others in bid for compensation arising from alleged breach of competition law. English High Court decision⁶⁹⁷

Are the peasants revolting in the world of snooker? Certainly it looked at one stage as though it may go the way of boxing, with rival controlling bodies vying with each other to produce the ultimate champion. The case which Stephen Hendry and several colleagues brought and lost against the world controlling body in snooker, however, may have placed an obstacle in any such path.

The World Professional Billiards and Snooker Association (WPBSA) is the world regulatory body for professional snooker, of which virtually every professional snooker player is a member. The majority on its board must be made up of current or former professional players. It has both regulatory and disciplinary functions, and organises and promotes professional tournaments, as well concluding agreements both with broadcasters for the televised screening of matches and with sponsors. The first two claimants in the case were professional snooker players who are managed by TSN, which acted as the third claimant in the case. All players being managed by TSN own a few shares in the company. In the early days of the TSN, when it was active in the utilisation of snooker through the Internet, it announced that it intended to organise a tour of professional tournaments which would rival that of the WPBSA. TSN later announced that it had decided to refrain from running this tour; however, by this time the action under review had already been initiated.

In this action, the claimants argued that three rules introduced recently by the WPBSA were unlawful and void; they also challenged certain practices operated by the world governing body, relying on restraint of trade, UK competition law and EU competition law.

First, the High Court had to establish whether the

practices and rules indicted were caught by EU competition law. This requires the activity in question to form part of a relevant market and the players involved to be “undertakings” within the meaning of EU competition law. The Court held that there clearly is a market for organising and promoting snooker tournaments. This involves a number of various economic activities. One is to secure the participation of snooker players. Another is to endeavour to secure a contract for the televising of all or part of the tournament. Thirdly, it involves securing sponsorship or other advertising. Fourthly – a minor activity – it involves selling tickets to the public. There is also a market for players to sell personal advertising rights, but this is secondary to the main activity of all players, which is to compete. Players are dependent on tournament organisers, and the reverse is also true; however, unlike the organisers, snooker players have no transferable skills.

There are two different aspects to this market; one is the acquisition of the raw ingredients or the raw materials; the other is the selling of the product. As between snooker players and tournament organisers, there is clearly no substitutable market as far as the players are concerned. As between broadcasters and promoters, and sponsors and promoters, on the other hand, there are close substitutes in the shape of other sports. Therefore the relevant market for the purposes of competition law is that which exists as between snooker players and promoters. Whilst the WPBSA is a players’ association, represents the players and is accountable to them rather than to outside shareholders, by organising and promoting tournaments it secures the participation of players and sells broadcasting and sponsorship rights for profit, albeit profit which it puts back into the sport. It is thus an undertaking within the meaning of competition law.

When it comes to the question whether the Association was barring access to this market, the Court ruled that the fact of there being one single body which governs the organisation of snooker throughout the world is not itself a barrier to entering that market. Whether or not there exists a barrier depends on the manner in which the regulatory power has been exercised. The fact that a body has a sizeable share in the relevant market gives rise to the presumption that it has market power and a dominant position in that market. The question whether or not an undertaking has market power with respect to a particular identified market or is in a dominant position in that market is to be answered by looking at the entire context.

There was, however, one sense in which the WPBSA breached both national and EU competition law. A rule imposed by a body which has a dominant position in the relevant market, to the effect that snooker players may not enter tournaments organised

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by anyone else without securing written permission of that body beforehand, is in breach of the Competition Act 1998. It was not the object of the rule but its effect which was important, and the effect of that rule was to restrict the sources to which players may turn in order to earn their living, and to do so to a considerable extent in the United Kingdom. Because of the countries involved in which the competitions are organised, the rule also has a significant effect on trade between the Member States and therefore also contravenes Articles 81 and 82 of the EC Treaty. The provision in question also represents a restraint of trade, and is more than is reasonably required for the protection of the legitimate interests held by the governing organisation.

As to the WPBSA rule restricting to two the number of logos which a player may wear whilst competing in its tournaments has neither an object nor an effect which is restrictive of competition and is no more than is reasonably required in the circumstances. It is thus an entirely reasonable rule to impose and is not an abuse of a dominant position. The same applied to the rule requiring players to make themselves available for promotional interviews. As regards the latter rule, the WPBSA did not have a dominant position in the relevant market anyway, and the rule was not in restraint of trade. Shortening the time limit within which players had to commit themselves to taking part in the tours during the next season did not represent an abuse of the Association's dominant position either, as it was merely acting in a way which is normal in the context of competition between commercial operators. Therefore it was not appropriate to award damages in favour of the claimants as there was no evidence of any loss.

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Sports Commissioner strengthens links with top professional sports organisations

At a recent meeting in Brussels, Ms. Viviane Reding, the European Commissioner responsible for sport, and Jean-Marie Leblanc, Director General of the cycling Tour de France, agreed to increase the levels of co-operation between the Commission and the Tour's organisers. They also took the opportunity to take stock of measures adopted by the Commission and the Tour in order to counter the doping problem. Ms. Reding then personally followed the first stage of the Tour on 7 July⁶⁹⁸.

Earlier that year, she had invited representatives of the G14 group – which is an association of the top footballing clubs in Europe. The purpose of this meeting was to provide a voice for these clubs in negotiating with, and acting as a partner to, UEFA and the Commission in what is a very diversified and truly European market.

The talks centred on the commercialisation of sport, the general way in which clubs are financed in Europe, as well as more specific issues such as football television rights, particularly the lucrative Champions' League, of which the G14 clubs are the mainstay. Other points of discussion were the possibilities of broadening the field of co-operation between G14 and the Commission, as well as the responsibilities of the larger clubs towards the many thousands of smaller clubs, and the role and position of young people in sport.

ECJ hearing of Arsenal v. Reed commences

Arsenal FC made a decidedly early start in Europe this year when the EU leg of its case against Matthew Reed kicked off in the European Court of Justice in early May. It will be recalled from a previous issue⁶⁹⁹ that, in April 2001, the North London football club had brought an action against street trader Mathew Reed, who had used the name and logos of the club on various garments which he sold in the vicinity of Arsenal's Highbury ground. Mr. Justice Laddie had dismissed the allegation by the claimants that the trader was "passing off" his goods as the genuine article, but had qualified this ruling by stating that Mr. Reed's activity could conceivably be regarded as an infringement of the club's rights under EU law.

It is in the light of this finding that the High Court referred to the EU judiciary a request for a preliminary ruling on the question whether or not non-trade mark use can constitute an infringement of registered trade mark rights⁷⁰⁰. The hearing commenced in mid-May of this year, but the outcome was not yet known at the time of writing.

Newcastle United involved in EU dispute with Bacardi on freedom of services (UK)⁷⁰¹

Newcastle United may be associated more with brown ale than with Bacardi, but finds itself currently enmeshed in litigation on this subject before the European judiciary.

Under an agreement concluded in 1994 between, on the one hand, the English Football Association (FA) and a number of football clubs, including Newcastle United, and, on the other hand, Dorna Marketing (UK) Ltd. Dorna was responsible for selling and displaying advertising around the touchline of each of the clubs' pitches for each home fixture played by the clubs' first teams. In this capacity, Dorna sold advertising time to drinks manufacturers Bacardi-Martini and Cellier des Dauphins on its revolving electronic display system during a game between Newcastle and Metz, to be played in December 1996 in the third round of the UEFA Cup. That game was broadcast live in the UK and in France.

Shortly before the match commenced, the Newcastle authorities became aware that Dorna had sold advertising space to Bacardi-Martini and Cellier du Dauphin with the object of displaying advertisements for alcoholic drinks in the course of the game. Accordingly, Newcastle instructed Dorna that, as the game was to be broadcast by a French television channel, the French regulations restricting the advertising of alcoholic beverages (under the Loi Evin) would apply, and that Dorna should therefore remove the claimants' advertisements from its hoardings in order to comply with these regulations. Since the advertisements concerned could not be removed from the rotating hoardings before the match started, the display system was programmed in such a way that these advertisements only appeared for one to two second intervals during the game, which was broadcast live on the French channel Canal Plus.

In July 1998, Bacardi-Martini and Cellier du Dauphin initiated proceedings against both Dorna and Newcastle in the High Court (QBD) seeking damages and injunctive relief. The claims against Dorna were subsequently withdrawn. The High Court referred a number of preliminary questions to the ECJ, seeking to establish whether the Loi Evin infringed EU rules on the freedom to provide services.

The hearing commenced in mid-May. The outcome was not yet known at the time of writing.

Advocate-General issues opinion in Slovakian handball player case⁷⁰²

In the case under review, Maros Kolpak, a Slovak citizen, had, since March 1997, been playing as a goalkeeper for TSV Ostringen, a German second division club. He is normally resident in Germany and has a valid residence permit. The Deutsche

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Handballbund eV, which is the governing body for handball in Germany and organises the Federal German Handball League, issued Mr. Kolpak with a licence which was marked "A" on account of his status as a foreign national. Under the rules of the governing body, teams playing in championship and cup matches in the Federal and regional leagues may only field a maximum of two players having licences containing such a mark.

Mr. Kolpak at a certain point applied for a licence which made no reference to his foreign citizenship, taking the view that, because of the prohibition of discrimination enshrined in the EU/Slovakia Agreement, he was entitled to play without any restriction. This was refused, and the dispute landed before the Oberlandesgericht Hamm (Court of Appeal of Hamm) which decided to refer the issue to the European Court of Justice. More particularly it sought clarification from the ECJ on the question whether the requirement stated in the EU/Slovakia Agreement that Slovakian workers lawfully employed in an EU member state should enjoy the same treatment as the nationals of that country (prohibition of discrimination), prohibits any rule applied by a sporting federation by which clubs may only use a restricted number of players from states outside the European Economic Area in specific matches.

In July 2002, Advocate-General Stix-Hackl issued her opinion on the case. The Advocate-Generals' Opinions are not binding on the Court; their rôle is to propose to the Court, acting with complete independence, a legal solution to the cases assigned to them.

In the first place, the Advocate-General, referring to the most recent case law of the Court on this subject, in the shape of Case C-162/00 (Pokrzeptowicz-Meyer, decision made on 29/1/2002, not yet published), noted that, because of the clarity and unconditional terms of the prohibition of discrimination against Slovak workers, the rule in question, i.e. Article 38(1) of the Agreement, is directly applicable⁷⁰³ and Slovak citizens may rely on it. She also referred to the established case law of the ECJ, under which the parallel provision of the EC Treaty (freedom of movement of workers) applies not only to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner, such as the rules of a sports association.

This interpretation also applies to Article 38 of the EU/Slovakia Agreement, because that article has the same object and purpose as the corresponding provision in the EC Treaty. Mr. Kolpak is covered by the Agreement because he is a lawful resident of Germany on the basis of his residence permit, and is a worker.

Finally, the Advocate-General examines whether or not the restriction, stipulated in the rules of the sporting federation, on the number of players from states outside the European Economic Area constitutes a

barrier to the free movement of such workers. She concludes that it is precisely the participation in championship and cup games of the Federal and regional leagues which is an essential object of a professional athlete's employment, and that, since there is no provision for a restrictive rule of that type for nationals of EEA contracting parties and EC citizens, this amounts to discrimination against Slovak nationals.

Referring to the Bosman decision, the Advocate-General expressed the view that this rule could not be justified on sporting grounds either.

The decision of the Court itself will be issued at some later date, and will obviously be covered by this column.

European Commission organises Sports Forum

On 7-8 November 2002, the European Commission is organising a Sports Forum, which will take place at the Royal Academy of Fine Arts, Copenhagen (Denmark). The main focus of the gathering will be the deliberations of the three working groups: (a) Taking account of sport in Community policies and actions; (b) Voluntary work in sport, and (c) European Year of Education through Sport. There will also be a plenary session on the essence of Nice and Community law.

EU issues call for proposals on preparatory measures for a Community sports policy

Earlier this year, the EU issued a call for proposals as regards preparatory measures for a Community policy in the field of sport (doc. DG EAC No. 33/02). The aim of this call is to integrate sport better into various EU policies – once more, bearing in mind the declaration on sport by the Nice European Council. The proposals are to concentrate on two areas:

- (a) combating doping in sport. More particularly, proposals are invited for projects investigating the protection of young athletes and amateur athletes against doping; planning and evaluating programmes aimed at preventing doping; the causes of the spread of doping, from a sporting and social point of view, and criteria for measuring the effectiveness of combating doping at regular intervals (benchmarking). They should dovetail with other EU initiatives, particularly those in the areas of research and health
- (b) utilising the potential inherent in sporting activities for the benefit of youth. Here, the emphasis is on (i) co-operation projects between youth organisers, sports organisations and public authorities to create sporting activities which meet the needs for informal education and to ensure the exchange of best practice; (ii) projects to encourage – for example via voluntary work – improved training for activities

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benefiting and aimed at young people and aimed at those who are active in sporting activities, in order to improve their knowledge and ability to implement youth projects at European level, and (iii) projects for identifying priority themes in youth work which sporting activities are capable of promoting, such as democracy, participation, tolerance, mutual understanding, dialogue between the generations, and sustainable social and environmental development.

Council of Ministers declares 2004 “Year of Education through Sport”

In late May 2002, the Council of Ministers of the EU agreed to make 2004 the European Year of Education through Sport. This seeks to implement Community and national actions in order to encourage co-operation between educational establishments and sports organisations, to provide for better integration of sport, and to transmit its values in education. For this purpose, the sum of €11.5 million has been set aside.

“Derby Two” banning orders are consistent with EU law, rules Court of Appeal (UK)

This matter has been dealt with under Item 2, “Criminal Law” (see above, p.25).

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Bankruptcy (actual or threatened) of Sporting Clubs and Bodies

Bankruptcy threat to League clubs following collapse of ITV Digital (UK)

The sorry saga relating to the rise and fall of ITV Digital is fully documented elsewhere in this organ (see above, p.38). One of the more dramatic potential consequences of this affair is the threat of bankruptcy which currently hangs over various Nationwide League clubs as a direct or indirect result of this fiasco. Even though some of the more hair-raising predictions in this respect have yet to be realised, the picture is sufficiently grim for some clubs to raise serious doubts about the future.

The Football League itself has made commendable efforts to soften the blow for some of the worst-hit clubs. Thus in early May it announced that it would relax its strict rules on bankruptcy for the start of the following season. Hitherto, clubs which fell into the hands of administrators were set time limits by the League for them to emerge from administration. However, as a result of the ITV Digital crisis, no such targets were set for the beginning of the 2002-3 season⁷⁰⁴. This nevertheless left a number of clubs in considerable financial difficulties. David Buchler, Vice-Chairman of Premiership club Tottenham Hotspur and chairman of insolvency specialists Kroll Buchler Phillips who were advising the Football League, warned Football League clubs not to spend money accrued from season ticket sales. He advised that if these clubs sanctioned expenditure from season ticket revenues and then collapsed, they would risk prosecution under legislation which prohibits trading whilst insolvent. Instead, he stated, the money in question should be placed in a trust account fund drawn on a weekly or monthly basis, and not spent on long-term projects such as transfers or improving stadiums⁷⁰⁵.

The first club to experience the threat of extinction was Bradford City, in whose shares trading was suspended in early May – as a result of not only the ITV crisis, but also the decision by Middlesbrough not to buy their star Italian player Benito Carbone. It was then placed in administration, with Mike Moore, of administrators Kroll, Buchler Phillips, warning that in view of the limited cash available many players' contracts would need to be terminated⁷⁰⁶. Although the Football League reiterated that it would not prevent any club placed in administration from starting the new season, Gordon Taylor, Chief Executive of the Professional Footballers' Association (PFA) warned that Bradford were going down a dangerous road, adding that to go into administration and write off one's debts "totally destroys your credibility"⁷⁰⁷.

A few weeks later, the beleaguered Yorkshire club decided to slash its playing staff by half, which would result in 19 players having to leave the club – including

Carbone (whose weekly wage bill was £40,000). Gary Walsh, David Wetherall, Danny Cadamarteri, Gunnar Halle and Gareth Whalley also were amongst the casualties. This action was condemned by the PFA as "disgraceful"⁷⁰⁸. Even these draconian measures left a major question mark over the club's future, particularly when its creditors discovered that they could expect only a basic 9.4 p in the pound under the administrators' proposal, the Company Voluntary Agreement – and that even that puny amount could be hard to extract. The leading creditor was a football insurance company, which was owed nearly £9 million and was being asked to accept as little as £850,000. This prompted the PFA to make an offer to the club of a loan worth £2 million in order to tide it over⁷⁰⁹. The club were then set a deadline of 8 August in order to devise a rescue package – or be removed from the League⁷¹⁰.

The club were saved from extinction by a deal brokered by their administrators on 1 August, and which at the same time cut its debts of £36 million by 90 per cent. The deal was accepted by the creditors, who accepted the offer of 10 p in the pound⁷¹¹. At its meeting in London on 6 August, the League Board of Directors approved the return of Bradford City's share in the League, subject to finalising the club's agreements with the PFA and between Gordon Gibb and Julian Rhodes, its new prospective owners⁷¹².

Other clubs also faced difficulties as a result of this affair. In mid-June, Notts County, the oldest Football League club, went into administration in the face of mounting debts⁷¹³. Lincoln City were also faced with the prospect of going into administration⁷¹⁴. And a few days before the new League season started, First Division club Gillingham put every member of its playing staff up for sale once the full implications of the new agreement with Sky (see above, p.39) became clear⁷¹⁵.

Other football clubs facing bankruptcy

Bury FC (UK). Although Bury FC is also a Nationwide League club, its financial troubles dated from long before the ITV Digital collapse (as was noted in our previous issue⁷¹⁶), and therefore its parlous position could not be ascribed to this event. However, its short-term future at least was guaranteed when a mystery benefactor pledged to invest £1.3 million into the club. This news came two weeks after the club had been placed in administration after creditors demanded payment on a £1 million mortgage. Previously, fans had raised £140,000 in order to help their club⁷¹⁷.

Leicester City (UK). This too is a Football League club, but one which was relegated from the Premiership and therefore was not in principle affected by the ITV Digital crisis. However, it had been facing financial difficulties for some time, particularly as a result of its acquisition

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of a new ground, which cost £28 million to build. Matters were not helped by relegation, even though the blow was softened by the “parachute payment” which is supposed to ease the financial impact of relegation. At the time of writing, it faced the choice between selling top players and facing the real possibility of going into administration⁷¹⁸.

Airdrieonians FC (UK). Airdrieonians, one of the Scottish League’s oldest clubs, were placed in full liquidation in early May 2002, and therefore ceased to exist. The debt-ridden club had been put up for sale, but no bid was forthcoming by the relevant deadline⁷¹⁹.

Napoli (Italy). These are hard times indeed for the Neapolitan club, former UEFA Cup winners and twice Italian champions. In mid-March, the club was placed into administration. Its accounts had been under investigation for several months beforehand⁷²⁰.

Financial difficulties hit the world of Welsh Rugby Union

The cold winds of financial hardship have also been blowing in the boardrooms of the game played with the oval ball. This has been particularly the case in that archetypal Rugby-playing country Wales. The Welsh Rugby Union is in dire financial trouble, with debts of £75 million and the recent discovery that it does not own all the land on which the Millennium Stadium, Cardiff, was built. Radical proposals to streamline the management of the game in the Principality were put to a meeting of the WRU clubs in late May, which included replacing the Union’s 27-strong General Committee with an eight-man executive board underpinned by an elected general council which would meet quarterly. These proposals were drawn up by a working party chaired by WRU President Sir Tasker Watkins. These proposals, however, were unacceptable to the General Committee, which meant that the status quo prevailed⁷²¹. Exactly how long the game in Wales can proceed in this way remains to be seen.

York Wasps rugby league club wound up (UK)

In March 2002, York, one of the oldest teams in Rugby League, finally was wound up after experiencing one financial crisis too many. It had been trading with debts of £30,000, and had no prospects of surmounting this problem. The club had been in decline ever since it sold its traditional home close to the city centre, popularly known as Clarence Street, in 1989 to move to the Ryedale Stadium at Monks Cross. For much of the previous two decades it had been one of the “yo-yo” clubs, alternating between the first and second divisions. The move to the new stadium alienated many supporters, the financial consequences of which led to

a deterioration in results. There was talk of a rescue package, but this failed to materialise in time for the deadline set by the Rugby Football League⁷²².

Sports-related businesses in financial trouble

The sports internet business claimed its most sizeable victim in late May when Sports.com, a firm backed by leading sporting agent Mark McCormack, financier George Soros and golfer Tiger Woods, was placed into administration. Accountants Baker Tilly were appointed as administrators to Europe’s largest sports site by the High Court hours before the start of the Football World Cup. Advertising, content sales and online betting revenue from the tournament had been well below expectation. Bruce Mackay, a partner at the administrators, stated that, in his view, cuts in advertising budgets across Europe, associated with high operational costs, were the root cause of the cashflow problems faced by businesses of this kind⁷²³.

Financial problems have also been lapping at the edges of golf-club operator Clubhaus. In May, Rupert Horner, its financial director, resigned from its Board at an extraordinary meeting as the group staved off bankruptcy by means of an emergency restructuring plan. Mr. Horner’s departure came as a threatened shareholders’ revolt led by former Today owner Eddie Shah failed to materialise.

During the early summer, Non-League Media, the football newspaper group which has Newcastle manager Sir Bobby Robson amongst its directors, applied to go into administration. The company, which publishes magazines such as She Kicks, had experienced a disastrous two years as a public company, and was compelled to seek protection from its creditors seven months after an accounting black hole saw its former Chairman’s assets frozen⁷²⁴.

In August 2002, it was announced that James Gilbert UK Ltd – the oldest brand name in Rugby Union – was plunged into receivership with debts of almost £12 million. This jeopardised the company’s £1 million sponsorship deal with the England Rugby team and their bid to supply balls for next year’s Rugby World Cup. At the time of writing, the firm had been put up for sale by Price Waterhouse Cooper, the receivers drafted in to take charge of the company. It was also considering a major takeover bid from leading sports equipment supplier Mitre, and negotiations were also taking place with Adidas.

That the German Kirch sporting media empire was in dire difficulties is something which was already in evidence from the previous issue of this organ⁷²⁵. The contractual implications of its collapse have already been discussed under a previous item (see above, p.43). In April 2002, KirchMedia filed for insolvency. This was shortly followed by the demise of KirchPayTV, with its

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schedule of sport and films, which filed for bankruptcy a few weeks later. The latter was losing £1.25 million per day as it struggled to build a market share against free-to-air channels. It was compelled to file for bankruptcy after failing to raise more funds from existing shareholders, including BSkyB, or from new investors⁷²⁶.

Leading motor racing company placed in receivership

In late March, Adrian Reynard, founder of British American Racing, announced that Reynard Motorsport had been placed into receivership. Previous efforts to recapitalise the company had failed to reach expected levels, and without further financial investment the company were left without any alternative. Staff losses were expected to be over 100 people⁷²⁷.

Other issues

Forest leave Stock Exchange

There was a time, around 20 years ago, when only one football team was capable of challenging the mighty Liverpool juggernaut, i.e. Nottingham Forest, when it won the League Championship, and the European Cup twice, in close succession. However, its star has waned considerably since those days, and in April 2002 they suffered the indignity of being the first football club to leave the Stock Exchange after deciding that they could see no other way of securing their long-term future. The club have abandoned their share listing in order to force through a £5 million rescue deal proposed by major shareholder Nigel Doughty⁷²⁸.

French Decree imposes articles of associations as condition for licensing sports clubs⁷²⁹

In April 2002, the French Government issued a decree, made pursuant to the general Law on Sport of 16/7/1984, fixing certain conditions for the licensing of sports clubs. Article 2 of the Decree stipulates that the articles of association of such clubs must contain the following provisions:

- (a) those which guarantee the democratic operation of the club, such as the opportunity for every member to take part in the General Meeting, the appointment of the Board of Directors (Conseil d'administration) by the General Meeting by secret ballot, a minimum number of General Meetings and meetings of the Board per year, and certain conditions relating to the convening of the General Meeting and meetings of the Board;
- (b) those which guarantee the transparency of the organisation, such as a complete accounting system,

the adoption of the annual budget by the Board before the financial year begins, the submission of the accounts to the General Meeting no later than six months after the end of the financial year, and the prior authorisation by the Board of any contract between the club and one of its directors or his/her relatives;

- (c) those which guarantee equal access to men and women of its senior positions.

These articles must also contain provisions guaranteeing the rights of the defence in the event of disciplinary measures, and stipulate a prohibition of any form of discrimination in the club's organisation and day-to-day operation.

Other items

Football. In late June 2002, accountants Deloitte and Touche concluded their latest scrutiny of football club accounts by maintaining that football finances remain in good health. Surprisingly, the demise of ITV Digital (see above, p.38) merits only a few paragraphs in the report, in spite of the fact that the doomed media company terminated their contract with the Football League on the advice of Deloitte & Touche⁷³⁰.

Rugby League. In March 2002, St. Helens announced that they were launching a share issue in order to wipe out a debt of more than £1 million⁷³¹.

11. Procedural Law and Evidence

Battle of injunctions in Canadian dispute over Portuguese football broadcasting rights⁷³²

In the case under review, the claimant was a party to a contract with a broadcaster under which the former had acquired exclusive broadcasting rights to broadcast Portuguese football matches in commercial establishments in Canada. It brought proceedings against the defendants for infringement of copyright and for having violated the terms of the Radiocommunication Act 1985. To this end, it made an application for an interlocutory injunction.

Some of the defendants – the named defendants – appeared and were represented at the hearing. The available evidence indicated that, before the contract had been concluded, the named defendants had entered into an arrangement with a wholly owned subsidiary of the broadcaster whereby the defendants were authorised to receive the football matches in question. The claimant maintained that the defendants had falsely claimed to have US addresses, and had omitted to mention that they were commercial undertakings. Accordingly, counsel for the named defendants requested that the hearing of the application be adjourned pending cross-examination. Thereupon the claimant requested an interim injunction against the named defendants as well as an interlocutory injunction against such defendants as failed to appear.

The Federal Court ruled that the application for an interim injunction against the named defendants be dismissed, and that the application for an interlocutory injunction against the defendants who failed to appear should be awarded.

The reasons for its decision were as follows. In order to obtain either an interim or an interlocutory injunction, the claimant must demonstrate that it has raised a serious issue to be tried, that it would incur irreparable loss if the order were not to be awarded, and that the balance of convenience favoured the granting of the order.

If the claimant could be compensated by means of damages for any loss it may incur, there is no justification to issue an interim injunction. As regards the question of irreparable harm arising from the named defendant's activities, the time limit for the next hearing was very brief. Since the claimant's evidence failed to demonstrate that it would incur a loss of reputation or that its business would be lost before the hearing date occurred, it had failed to establish that it would incur irreparable harm as a result of the named defendants' activities.

However, the position was different with regard to those defendants who failed to appear or to advance

any evidence that they had any right to receive the services to which the claimant maintained that it had exclusive rights. In relation to these defendants, the claimant had met the conditions for the awarding of an interlocutory injunction. There was a serious substantive issue to be tried, i.e. did the claimant enjoy the sole right to provide the services? Irreparable harm had occurred in that the claimant's business could cease if the customers failed to purchase the services from the claimant. Finally, the balance of convenience favoured the claimant, as the latter was entitled to provide the services under its agreement with the broadcaster.

English Court of Appeal held to lack jurisdiction to grant permission to appeal in basketball federation employment dispute⁷³³

In this case, arbitration proceedings were initiated under an agreement between the US and international basketball associations to resolve professional basketball players' employment dispute. The applicant participated in the proceedings but disputed the arbitrator's jurisdiction. Ruling that he had substantive jurisdiction, the arbitrator made an award. The applicant thereupon addressed the Commercial Court seeking, inter alia, to quash the award under Section 67 of the Arbitration Act 1996, on the basis that the arbitrator lacked jurisdiction. The judge dismissed the application and at the same time refused leave to appeal. Lord Justice Rix, however, granted permission to appeal. The other parties applied for the setting aside of this grant of permission.

The Court of Appeal awarded the application and set aside the permission to appeal. It ruled that the Court, in exceptional circumstances, had powers to set aside the grant of permission under Rule 52.9 of the Civil Procedure Rules 1998. Only the judge who heard the application to challenge the arbitrator's substantive jurisdiction under Section 67 of the Arbitration Act 1996 was able to grant permission to appeal against the court's decision. Sections 67, 68 and 69 demonstrated a consistent legislative policy that no appeal should be made against the decision of a court without the permission of that court. Therefore the Court of Appeal had no jurisdiction to grant permission to appeal.

11. Procedural Law and Evidence

Court of law has no jurisdiction to assess whether or not doping-based disqualification of horse. Swedish court decision⁷³⁴

In the case under review, Blaze of Glory, a horse belonging to the claimant had won a race, but was then disqualified following a doping test. This had shown the horse to have consumed Naproxen, an anti-infection drug which is on the list of prohibited substances applied by STC, the Swedish horseracing authority. This led to the forfeiture of the winner's prize (SEK 90,000) and of the "breeder's bonus" (uppfödarpremie) of SEK 9,000. The trainer, H.A., was thereupon issued with a three-month ban and fined SEK 25,000 in accordance with the strict rules on trainer liability stipulated by STC.

This prompted the owners of the horse, AB Superbus, to initiate court proceedings against STC for the recovery of the winner's prize and the breeder's bonus. The claimant argued that the horseracing body has unlawfully withheld the prize money; the defendant claimed this matter could not be substantively tried by the court, since the ordinary courts have no jurisdiction to assess this kind of issue since it is a matter which is internal to the organisation in question. It was a general principle that the courts did not intervene in disputes arising from the organisation's internal regulations, and there was no reason in the instant case to depart from this rule. Even if the court were to award itself jurisdiction, STC contended that the decision on Blaze of Glory was taken in accordance with the established custom and practice of the organisation. The sport must have its own way of determining which measures are the most appropriate to deal with such situations. All such decisions as have been taken by disciplinary boards and similar organisations may not be tried by the ordinary courts.

Superbus on the other hand argued that this was not a matter which was exclusively internal to the organisation and that, even if it were, the circumstances of the case are such that the court may try the case. It explained that the trainer had transported Blaze of Glory in a box which had previously belonged to a colt treated with the substance, that, aware of the fact that the substance was prohibited, he had the box thoroughly cleaned before placing Blaze of Glory in it, and that he was completely taken by surprise by the outcome of the doping test. This is why he requested that the amount of the substance be measured, which had shown that only a minuscule quantity had entered the horse's bloodstream. STC had misinterpreted its own rules, given that they prohibit administration of, and/or treatment with, the prohibited substance as well as other measures capable of having a positive or negative influence on the race. The quantity in question had not been administered in the true sense of the term, but had entered the horse's system by accident. In addition,

such a small quantity was incapable of materially affecting the result of the race.

The court of first instance (Tingsrätten) had dismissed the action. The matter then went before the Court of Appeal (Hovrätten) which set aside the first decision. The matter finally landed before the Supreme Court (Högsta rätten). The latter in turn, by a 3-2 majority, set aside the Court of Appeal's decision, thus reinstating that of the first instance court. The arguments advanced by the claimant as regards the interpretation of the terms "administered", "treated" and "influence on the race" were dismissed with the finding that those who take part in a race have by that very fact subjected themselves not only to the rules of the race itself, but also to the regulatory system which applies for the purpose of implementing these rules. Therefore the participant is bound in a contract-like manner by the verdict which is given by the race officials (tävlingsfunktionärerna). The fact that from time to time unintentionally incorrect verdicts can occur in these circumstances must be regarded as one of the conditions for participation in the race. This is why such incorrect verdicts do not constitute an adequate ground for regarding the affected participant, contrary to the assessment of the race officials, as being entitled to the relevant prize. This is all the more the case because the verdict in question was not one which must be made in the heat of the race, but was issued subsequent to it.

Judges Gregow and Lennander, however, had a dissenting opinion recorded.

12. International Private Law

Netherlands law is held to apply in dispute over liability for skilift accident.

Netherlands Supreme Court decision⁷³⁵

In the course of 1989, there occurred an accident on a ski piste in Austria, when Chantal, a ten-year-old girl, fell from a skilift, dragging with her several other people who were using the lift and some of whom thus sustained personal injury. One of these passengers, Jannetje Cool, was compensated by the relevant insurance company ABP, which then brought a court action against Chantal and her parents, claiming that they were jointly liable for the injury suffered by Cool. The matter landed before the Netherlands Supreme Court (Hoge Raad).

The central question which the Court had to decide was whether the claim was governed by Austrian or Netherlands law. (This issue was all the more important because during the intervening period, the action was already time-barred under Austrian law.) The Court ruled that, under its established case law, this is a case which constitutes an exception to the *lex loci delicti* rule (under which it is the law of the place where the tortious act occurred which applies), on the grounds that both Chantal and Cool had their normal residence (*woonplaats*) in the Netherlands, and the legal consequences of the tortious act (*onrechtmatige daad*) also took place entirely in the Netherlands.

The Court also had to consider the question whether 1971 Treaty of The Hague on road traffic accidents applied – in which case Austrian law would be applicable. The Court answered this question in the negative, because, in its opinion, this case did not meet the conditions required for the Treaty to be applicable. The Treaty in question applied where the accident concerned was actually a road traffic accident. Under Article 1 of the Treaty, this means that the accident in question must have been one in which one or more motor vehicles were involved, and which was related to traffic on the public highway, i.e. on areas which are accessible to the general public, or solely to a limited number of people who are entitled to use them. From the explanatory memorandum to the Treaty it appears that these terms need to be interpreted broadly. Even if the Court were to accept the argument, put forward by the defendants, that the route used by the skilift meets the “public highway” test, this still leaves the question whether the skilift was a vehicle which was “involved” in the accident. From the Explanatory Memorandum to the Treaty, it also appears that scope of the term “involved” should not be restricted to the circumstance that the vehicle actively caused the accident, but should also include cases where passive vehicles caused or even suffered damage. The facts as established by the Court showed that the skilift neither caused the accident nor incurred any damage. The scheme of the

Treaty does not lend itself either to applying its provisions to the instant case, since it is very much intended as a Treaty dealing with road traffic accidents.

Under the private international law of the Netherlands, obligations arising from tortious acts are, unless a definitive choice of law has been made by the parties, governed by the law of the state on whose territory the tortious act occurred. The Supreme Court has in the past accepted that there is one exception to this rule, i.e. where the author of the act and its victim are both officially resident in a different state from that where the tortious act occurred, and the legal consequences of this act take place entirely in that other state. There is also statutory legislation to that effect. The circumstances justifying such an exception clearly applied in this case. The fact that there were other, real or potential, victims involved in this tortious act does not in any way detract from the applicability of this exception.

13. Fiscal Law

Income from image rights agreements not deemed to be emoluments from employment. British Special (Tax) Commissioners decision⁷³⁶

This case concerns essentially a Premier (Football) League club ("Sports"), two players of international repute ("Evelyn" and "Jocelyn"), their agents (Y and Z) and various companies owned by or managed for the benefit of "Evelyn" and "Jocelyn". When the two players were employed by "Sports", there were separate contracts: one between the players and "Sports", under which they would play for the club (i.e. a standard player's agreement), the other between the companies holding the image rights to the players and the club, which gave the club the right to utilize the players' images for a specific period. These were referred to as "the promotional agreements".

The Inspector of Taxes' view was that the payments under the promotional agreements should be taxable under Schedule E as emoluments from employment (Section 19 of ICTA 1988); in addition, "Sports", as the employer, should have deducted income tax – and presumably also National Insurance contributions – under the Pay As You Earn (PAYE) system from the payments made under the promotional agreements. The Inland Revenue had other arguments in reserve should the principal one fail. The first was that the promotional payments were benefits-in-kind under section 154 of ICTA 1988, and the other (which applied exclusively to "Evelyn") was that the payments had been made under a retirement benefit scheme (Section 595 of ICTA 1988). The Special Commissioners were not swayed by any of these arguments.

According to commentator Martin Edhouse⁷³⁷, the reason for this decision appears to have been that the Special Commissioners acknowledged that, since both players had high profile international reputations, they were able to receive large payments for promotional and marketing activities; evidence was produced to the effect that this was common practice in Premiership clubs. Therefore the promotional agreements between the club and the players' representatives were genuine commercial agreements which had truly independent value, which the parties could and would enforce. Thus the payments made under the agreements were genuine and not attributable to the players' duties of employment under their players' contracts. Once the promotional agreements were held to be valid, the Inland Revenue's other arguments were almost doomed to fail. There could be no requirement to deduct PAYE duties if the payments were not related to employment. Benefits in kind were incapable of including anything provided in return for good consideration under a separate commercial contract. Also, if commercially valid payments under a

promotional contract were for the provision of specific marketing rights they could not be made with a view to the provision of retirement benefits.

According to the same author, it is interesting to note that the Special Commissioners were willing to accept, on the basis of the substantial evidence offered, that the promotional contracts were real, separate, commercial agreements capable of having considerable financial value. The Commissioners also indicated that they could not "pierce the corporate veil" because the payments to the companies were genuine. Since the nature of the rights involved, i.e. image rights, may seem to preclude any connection with the provision of personal services, it may also be that this kind of arrangement is also immune to any attack under IR35. Therefore, if the totality of a person's relationship with an employer can validly and legally be separated into agreements between different legal entities, and one set of "agreements" (between the employer and, say, a company) does not amount to the provision of personal services, does this mean that IR35 will be ineffective against that part of the arrangement (provided that it can be shown to be genuine, of course)? This would truly be a feather in the Inland Revenue's cap.

The author also noted that the Commissioners noted that it was agreed by both parties that "in England, there is no property in a person's image". It would therefore seem that such rights may be transferable without significant Capital Gains Tax consequences, since under the relevant legislation the concept of an "asset", which forms the basis for CGT, includes "all forms of property" (Section 21 of TCGA 1992).

The present author would add that the significance of this decision could be qualified slightly by the fact that the Commissioners seemed to attach considerable importance to the fact that the players were of "international repute". Does this mean that the image rights of lesser mortals could be related more closely to their employment as players, since in their case it could be argued that their image is substantially identified with that of the club? Perhaps some future decision will enlighten us.

Sporting personalities under the scrutiny of the tax authorities

Boris Becker

The three times Wimbledon champion's trials and tribulation with the fiscal authorities of his native Germany have been extensively documented both in this organ⁷³⁸ and elsewhere. Matters took a dramatic turn in mid-July 2002 when German prosecutors confirmed that they had "sufficient reason to suspect tax offences", following a lengthy investigation which has uncovered alleged discrepancies in the former

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player's personal accounts⁷³⁹.

It seemed for a while that there was a distinct possibility that the former star could soon be facing a prison sentence. However, intense negotiations between his lawyers and the state prosecutor (Staatsanwalt) produced a deal a few weeks later, under which Mr. Becker will pay the sum of €6.5 million, inclusive of interest, and be placed on probation for two years. The fiscal authorities of Munich stated that they stood by their allegations that, during his playing career, Becker had declared Monte Carlo as his principal place of residence, whilst actually spending most of his time in Munich, making him liable for German taxation. The full amount owed by him has never been publicly revealed⁷⁴⁰.

Cesare Maldini

In June 2002, it was revealed that the contract under which Cesare Maldini, the former Italian international, is employed as manager of the Paraguayan football team was being investigated for possible tax evasion. Government officials have requested a copy of Mr. Maldini's six-month agreement (which was terminated with Paraguay's exit from the World Cup in the second round) as well as documents relating to expenses and bonuses⁷⁴¹.

David Beckham

Whether or not the tax authorities have been inspired by the "Evelyn and Jocelyn" case reported above is impossible to tell, but the fact remains that David Beckham is facing a possible investigation over fears that he may be about to exploit a fiscal loophole. The tax authorities are particularly interested in that part of the player's contract (see above, p.105) which relates to media rights⁷⁴².

Officials are concerned about the growing potential for players to use their network of companies in order to minimise tax and National Insurance payments. Tax experts estimate that between them they could save £15 million per annum on salaries estimated at £300 million by exploiting a loophole already being extensively used by footballers throughout Europe. Officials are particularly worried that establishing a separate income from his regular employer, to be paid to one of his companies, will set a precedent allowing a part of his income to be treated differently for tax and NIC purposes⁷⁴³. Judging by the ruling in the "Evelyn and Jocelyn" case stated above, these fears appear to be entirely justified.

Ins and outs of UK fiscal policy towards sport

It will be recalled from the previous issue⁷⁴⁴ that various commentators were becoming increasingly critical of the present Government's fiscal policy towards sport. This chorus of disapproval intensified as it became clear that the Chancellor of the Exchequer, Gordon Brown, had failed to live up to various pledges he had given in the past about reducing the tax burden for sports clubs.

This pressure on the Government continued in March 2002 when officials from the country's leading sports warned that as many as 40,000 voluntary sports clubs could go out of business within the next few years if they failed to obtain exemption from Value Added Tax (VAT) and local rates. Some also had to pay duty on bars and gaming machines which they operate in clubhouses, as well as tax on tickets sold for certain fundraising events. Such money should be used for the development of sport and young athletes, the same officials argued. They were unhappy with the Government's alternative, which was to propose that the clubs should apply for charitable status in order to obtain tax exemptions, because of the cost and administration involved. As part of this campaign, a delegation of representatives from the worlds of football, rugby, cricket and tennis met Financial Secretary to the Treasury Paul Boateng⁷⁴⁵.

The outcome of the 2002 Budget for sports clubs appeared to be a compromise between these various positions. Clubs would be offered an incentive of 80 per cent mandatory relief on rates if they became charities. This incentive would obviously make the effort involved in registering for charitable status well worthwhile. The requirements for obtaining this status were also simplified: to qualify as charities, would have to allow their facilities genuinely to be open to anyone who wishes to use them. In addition, the quango Sport England would as from May 2002 establish a helpline to assist clubs with making the appropriate applications. And even for those clubs which failed to meet these criteria, the Treasury introduced a number of other reliefs, which include tax exemption on fundraising income to a maximum of £15,000, and inheritance tax relief on gifts. This news was universally greeted with acclaim from all concerned in the sporting world, particularly as Dr. Brown had added that these tax reliefs would be matched with an extra £20 million for the improvement of facilities at non-profit-making clubs, many of which were facing considerable financial difficulties⁷⁴⁶.

Some of this euphoria, however, evaporated a few weeks later when it was learned that the country's sports clubs and governing bodies were being investigated by Customs and Excise officials over unpaid VAT bills, and that they may therefore be required to pay

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millions of pounds into the Treasury's coffers – once again raising the spectre that many of them could be bankrupted as a result. This took many clubs by surprise since they had not been made aware that they were liable to pay VAT on certain lottery grants which they receive. The Chancellor of the Exchequer already takes 12p in the pound from lottery ticket sales, but VAT must also be paid on capital building projects which are funded by lottery grants. This left sports clubs and governing bodies, which have used lottery money to build clubhouses, centres of excellence and other major projects, facing sizeable VAT bills. This led to calls for the Government to introduce some kind of exemption which would at least reduce the size of these bills⁷⁴⁷.

The sporting world was even more dismayed to learn that some sporting bodies and clubs were already falling victim to some of the shortcomings in the Government's fiscal policy in relation to sport. Thus the English Hockey Association (EHA) was pushed close to bankruptcy as a result of Customs and Excise demands for backdated VAT payments on its lottery-funded programmes. Fortunately, the hockey clubs affiliated to the EHA agreed to bail out their governing body, which was faced with a £100,000 debt, by paying £60-75 per team⁷⁴⁸.

Another case to shake the sporting world out of any complacency that may have remained occurred in late July, when Banbury Cricket Club, which has been in existence for 50 years, was facing extinction after being informed by the Charity Commissioners that it would need to change radically in order to retain its charitable status. The Commissioners had launched an inquiry after a member of the public questioned the charitable status of the Banbury Recreation Ground, the trust which owns the playing ground on which the club plays its cricket. The Commissioners felt that the club fell short of the requirement that the facility should be available to community groups – one of the conditions stipulated by the Chancellor for the obtention of tax relief, as is reported above⁷⁴⁹.

In order to retain its charitable status, the club would have to stop planning weekly matches, let the grass grow at one end, and place picnic tables on the boundary. Otherwise the Commissioners would impose an administrative manager to wind up the trust and sell all its assets. This decision was criticised by the England and Wales Cricket Board, and even led to questions being asked in the House of Lords. Former Sports Minister Kate Hoey urged the Government to look into this matter with some urgency⁷⁵⁰.

Southampton FC involved in landmark VAT ruling (UK)⁷⁵¹

In the case under review, Southampton Leisure Holdings issued shares to the shareholders of English Premiership club Southampton FC in consideration of the transfer to it by the club's shareholders of their shares in the club. Having acquired those shares, Southampton Leisure Holdings introduced management charges to the club. It recovered the input tax incurred on the various professional services provided to it in connection with the deal, on the basis that the services provided were used partly in making exempt supplies (the issue of shares) and partly in making taxable supplies (the management charges which it made). As a fully taxable business, it argued that it was able to recover the VAT incurred in full. This was because a proportion of the input tax incurred was attributable to taxable supplies under the provisions of Regulation 101(2)(d) of the VAT Regulations.

Customs took the view, as they normally tend to when shares are being issued, that the professional services were used exclusively in making exempt supplies and thus that, under the provisions of Regulation 101(2)(c), no part of the input tax on the services supplied to the appellant company was attributable to taxable supplies. The professional services provided to the appellant company on which VAT was incurred were fairly typical of the costs normally encountered in a corporate financial transaction. They included legal services, financial and commercial due diligence exercises carried out by reporting accountants, the services of a nominated adviser or sponsor to co-ordinate the transaction, the printing costs of the offer document, and the services of a public relations firm.

The Southampton Leisure company appealed against this ruling to the VAT Tribunal, which considered the following three questions:

- (a) Was there a direct and immediate link between the professional services supplied to the appellant company and the taxable supplies which it would ultimately make? Citing case law of the European Court of Justice (ECJ)⁷⁵², the appellant company argued that the professional costs incurred and the acquisition of shares in Southampton Football Club were both preparatory acts to undertaking an economic activity, and were therefore a cost component of the subsequent taxable supplies it would make. In addition, there was a direct and immediate link between the supplies relating to the acquisition of the shares and the subsequent taxable supplies which that company would make.

The Tribunal dismissed these arguments, concluding that a recent decision by the ECJ⁷⁵³ made it clear that,

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although the management of a subsidiary was an economic activity, there was no direct and immediate link between the services purchased by a holding company in connection with its acquisition of a subsidiary company and any subsequent taxable transaction. It accordingly concluded that there was no direct and immediate link between the professional services supplied to the appellant company and the taxable supplies of management services made to Southampton Football Club.

(b) as a matter of law, did the professional services supplied to the appellant have a direct and immediate link to its business as a whole (general “overhead” costs) or was the link solely to the exempt supply of its own shares? Here, Customs argued that another ECJ decision⁷⁵⁴ was authority for the view that supplies made by merchant bankers, solicitors and accountants in connection with the issuing of shares were directly attributable to an exempt supply and were not part of the general overheads of the business as a whole. The exempt supply of shares was a “chain-breaking” event, which had the effect of a direct link between the professional services incurred and the exempt supply of shares made by the appellant company. Moreover, where services were supplied and used for an exempt transaction, the recipient of the services was not entitled to deduct input tax, even where the ultimate purpose of the transaction was the carrying out of a taxable transaction. It was not therefore possible to “look through” the exempt supply of shares and examine the ultimate aim pursued by a taxable person.

The tribunal accepted that, as had been the case with the BLP Group decision, if there had only been an issue of shares by the appellant company, the professional services would indeed have related solely to the exempt supply of shares which was made. However, the key point, following the principle decided in *Cibo*, was that, as the professional services were used partly for the exempt issue of shares and partly for the acquisition of shares in Southampton Football Club, an input tax incurred should be considered as being residual (general overhead) VAT incurred in connection with the appellant’s business as a whole. This would have the effect of allowing it to recover a significant proportion of the VAT in question.

(c) if the services were found to have a direct and immediate link to an exempt supply, did all the services relate to the issue of the appellant’s shares? In answering this question, the Tribunal referred to the High Court decision in *RAP Group v.*

Commissioners of Customs and Excise⁷⁵⁵. This case also centred around a company incurring the services of professional advisers in respect of a share-for-share transfer prior to making taxable supplies of management charges. The tribunal decided that, following the decision in the *RAP Group* case, the question was whether the professional costs incurred were used partly for an exempt transaction and partly for the general purpose of the business. The *Cibo* decision had already made it clear that if there was no direct and immediate link to exempt supplies, there was a link to the business as a whole.

Having followed the analysis of individual costs in the *RAP Group* decision, the Tribunal concluded that all the services incurred by the company which related both to the issue of shares and to the acquisition of shares could be treated as general overhead VAT of the business, and therefore were fully recoverable. Costs which related exclusively to the exempt issue of shares, such as the printing of the offer document and public relations advice, were held to be directly attributable to the exempt issue of shares and therefore the VAT on these costs was irrecoverable.

The author Peter Williams⁷⁵⁶ comments that this decision is important because it correctly distinguishes the circumstances in the transaction from the decision in the *BLP Group* case. Customs’ policy of constantly quoting *BLP Group* in the face of any costs relating to an issue or sale of share is, in his opinion, based on a fundamental misunderstanding of that decision.

Promotor Eliades suspended in tax dispute

Panos Eliades, the former promoter of heavyweight boxing champion Lennox Lewis, is no newcomer to either this column or to the world of controversy. He was once again at the centre of a dispute in late April 2002, when he had his promoter’s licence suspended by the British Boxing Board of Control because of irregularities concerning the purse paid to South African Frans Botha when he fought for Lewis’s title in July 2000. More particularly, Botha complained that Eliades had deducted \$69,000 from his \$300,000 earnings which should have been paid to the Inland Revenue. This was not done, and Botha, who resides in the US, was taxed a second time by the American fiscal authorities. Under a reciprocal agreement between the British and US tax authorities, Botha would have been entitled to a refund of the \$69,000, but two years later is still owed this sum⁷⁵⁷.

Eliades for his part argued that he was unable to pay the sum because his assets are frozen as a result of a court ruling in the US in a separate action initiated by Lewis over money which the latter claims he is owed⁷⁵⁸.

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He reacted by announcing that he would instruct his lawyers to sue the Board for compensation, claiming that Botha's tax problem was between the Inland Revenue and himself.

It is perhaps significant in this connection that another case which was referred to the Board concerned American boxer Keith Holmes, who claims to have had some \$96,000 deducted from his purse for a defence against Briton Robert McCracken in a fight promoted by none other than Mr. Eliades in April 2000. Holmes claims that this money was supposed to cover his tax liability with the Inland Revenue, but was never paid...⁷⁵⁹ .

The outcome of the dispute was not yet known at the time of writing.

14. Human Rights/Civil Liberties

Racism in Sport

Azam/Andrew affair draws to a close (UK)

In our previous issue, we reported on the disquieting case involving accusations of racism which followed a bad-tempered Rugby Union game between Gloucester and Newcastle at Kingholm⁷⁶⁰. The players involved were Gloucester hooker and French international Olivier Azam and Newcastle's Tongan flanker Epi Taione. The accusations had originally been made by former England international Rob Andrew, now Director of Rugby at Newcastle.

Following months of accusations, counter-accusations, threats of legal action and banning Rob Andrew from the Kingholm premises, the matter finally went before a Rugby Union panel in early April. The three-man panel, chaired independently by Michael Beloff QC, who was assisted by former England international Budge Rogers and retired police inspector Gordon Skelton, announced that, following its investigation of the incident, it cleared Azam, his club and his supporters. Mr. Beloff insisted that there had been unanimity on this matter, not only amongst the members of the panel, but also amongst those who assisted the panel in its enquiry. He added that in the panel's view, Mr. Taione was the only player or official who claims to have heard the racially abusive words, which Azam had always denied pronouncing. One Gloucester spectator had been guilty of uttering one or two phrases of racial abuse and had been immediately ejected from the ground⁷⁶¹.

However, following a protest by Tom Walkinshaw, the Gloucester owner, the RFU issued a correction to this statement in relation to the Gloucester spectator, stating that in fact the ejection did not happen. There had been an incident involving the spectator, but he was spoken to by stewards and details of the incident were recorded in a notebook⁷⁶².

However, the legal implications of the affair did not end there. A few days after the verdict, Mr. Azam issued a statement which called upon Rob Andrew to apologise or face legal action for slander. He remained concerned that his reputation had suffered as a result of the whole affair, which he described as his "worst experience in rugby"⁷⁶³. His club Gloucester associated itself with Azam's call for an apology (although they indicated that they would not fund any legal action taken by the latter), stating that Andrew would "not be welcome" at Kingholm for as long as he failed to say sorry⁷⁶⁴. Finally, Andrew relented and issued an appropriate apology a few weeks later⁷⁶⁵.

Leeds United threaten racists with life ban... then apologise after racist jibe made by "comedian" at club function (UK)

In late March 2002, Premiership club Leeds United warned those of their supporters attending the match against Tottenham at White Hart Lane that they would face life bans from Elland Road if they were caught chanting racial abuse. This message was communicated to them in a leaflet containing an anti-racist message from the club Chairman, coach and captain. This followed complaints from Leicester City Chairman John Elsom after Leeds's previous away game, where some Leeds fans were reported to Kick It Out, football's anti-racism group for having chanted anti-Turkish and anti-Pakistani slogans⁷⁶⁶.

Although no-one doubts the seriousness of intent shown by Leeds United to rid their club from any suggestion of racism, it has to be said that their judgment and sensitivity are often open to question. In the wake of the Bowyer/Woodgate affair (Journals *passim!*) it was not perhaps the best idea the club leadership had to invite someone like "comedian" Stan Boardman, not known for belonging to the politically-correct school of after-dinner speaking, to officiate at a club function... given in honour of a black player. But that is precisely what happened in early May.

Mr. Boardman chose to deliver himself of a string of racist "jokes", one of which, incredibly, trivialised the Bowyer/Woodgate affair⁷⁶⁷. The club later wrote to Mr. Boardman informing him that his comments had caused deep offence, that he would be no longer welcome to perform at Elland Road, and that they were even reviewing the £4,000 fee which had been agreed beforehand. The club also announced that the Chairman, Peter Ridsdale, would be writing to the dinner guests and sponsors apologising for any offence⁷⁶⁸.

Rather enigmatically, the Leeds United spokesperson who announced these measures added that the club had not been aware that Mr. Boardman's material contained anything racist other than that directed at "the Germans".... Presumably no-one told him not to mention the bore.

Race issue continues to make waves in South African sport

It was never going to be easy for all aspects of South African society to come to terms with the turbulent past, and it was almost inevitable that this should manifest itself also on the sporting field, as has already been reported in previous issues of this organ⁷⁶⁹. Recently, it has been the Rugby Union national team which has been the focus for such tensions. In May 2002, Percy Montgomery, who with 261 points is the second-highest Springbok scorer of all time, announced that he was ending his involvement in international

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rugby in order to seek his fortune in the British game. He made this announcement just after Rudolf Straueli, the new South African coach, refused to award him a national contract, and cited the policy of “fast-tracking players of colour” into the national team as the cause. He is one of eight Springboks who have joined British clubs, thus discontinuing their international careers⁷⁷⁰.

This led the Sports Minister, Ngconde Balfour to launch a volley of bitter criticism at the player, accusing him of “inherent racism”. He added that players such as Montgomery were free to play where they wished, but should stop hiding behind excuses, adding that it was inherently racist to lay the blame for his departure on “the transformation” and that for a long time Montgomery had kept in the national side, not on merit but at the behest of coaches who “had their own agenda”. Rudolf Straueli also joined the attack on Montgomery⁷⁷¹.

However, a few months later there occurred a dramatic turnaround in South African selection policy for senior cricket teams, when the United Cricket Board abolished the system of race quotas following a three-day meeting involving 150 of the game’s most prominent exponents. It had been planned that, as from the current season, senior provincial teams would need to include a mandatory four players of colour and, whilst no such rules applied to the national team, the Board had insisted that the selectors should not choose all-white sides. Instead, all these teams will be selected purely on merit. Nevertheless, some guidelines aimed at including more players from the various ethnic groups that make up the country remain. Thus Provincial B and lower level teams should contain at least 50 per cent of players of colour⁷⁷².

“Racism still rife” amongst football spectators and players, claims university report (UK)

In spite of the commendable efforts made by so many people at so many levels of the game, racism continues to be rampant amongst its spectators and fans, and even amongst its players, if a recent report emanating from Bath University is to be believed. The research project in question, which is the first of its kind, shows that after 20 years of laudable initiatives in this regard, black players continue to face abuse. Dr. Robyn Jones, the senior lecturer who carried out the study, even went so far as to conclude that things had not really moved along an enormous amount⁷⁷³.

The researchers involved considered the experiences of players at the top of the semi-professional leagues immediately below the Football League, and in-depth interviews were conducted with 15 players in order to discover their personal experiences of racism. These leagues were chosen because this was where the bulk

of football is played, and because the researchers wished to look beneath the elite level because no-one had hitherto studied the phenomenon of racism in these lower reaches of soccer. Dr Jones added that, although the extent and intensity of crowd racial abuse varied considerably, making monkey noises when the interviewees were playing the ball was common. Two players also recalled occasions when fruit was hurled at them during a match.

According to the report, some of the respondents also reported that it was not uncommon for them to receive verbal abuse from opponents. Concern was also expressed about the shortage of black managers and coaches⁷⁷⁴.

All Blacks coach accused of racist selection policy

As the South African Rugby Union team arrived in Wellington for their key Tri-Nations clash with New Zealand in mid-July, they found themselves involved in a race row, but this time one which involved the other team. Their coach, Rudolf Straueli – who as we saw earlier is a man familiar with the endless debate in his country over the racial element in selection policy (see above) – had to defend his All Black (sic) counterpart John Mitchell against charges of racial bias⁷⁷⁵.

These accusations had been made by former New Zealand international Chris Laidlaw in a newspaper column, in which he accused Mitchell of excluding players of Maori and Polynesian descent in favour of white players. More particularly Mr. Laidlaw cited the omission of players such as Roger Randle, Bruce Reihana, Jerry Collins and Pita Alatini as evidence of this bias. Mr. Straueli, however, staunchly defended his opposite number, whom he knew very well not only as an opposing player at the international level, but also when the two were involved in English Rugby. Mitchell himself defended his record by pointing out that 11 out of 26 of the All Black playing squad were “non-European”⁷⁷⁶.

Article in racism amongst sports spectators in Australian law review⁷⁷⁷

The article under review analyses a range of questions relating to the use of racist abuse by spectators at sporting events, focusing particularly on Australian Rules football. It explores some possible options for the combating and removal of racist abuse, whilst remaining mindful of the relationships between racism in football and that which exists more generally in the community. The author argues that the positive anti-racism strategies and images which have marked the approach by the Australian Football League to on-field racist abuse need to be subjected to careful scrutiny. It is also important to note that, if the community is serious about combating the traditions of racism which have characterised

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Australian sport, there are major questions which need to be asked about the athletes' experiences of racism and racist abuse, not just in the top competitions, but also at all levels of sporting activity.

Other issues

Cardiff, UK. Rhodri Morgan, the Welsh First Minister, was accused of a "diluted sense of racism" after suggesting, in early July 2002, that he welcomed England's disappointments in the football World Cup and at Wimbledon this year. Mr. Morgan stated that he himself had been upset by comments made by certain England players about the Welsh cricket team which had defeated England in a limited overs game⁷⁷⁸.

Coventry, UK. Just before the World Cup competition kicked off, students at hall of residence at Warwick University were instructed to remove flags of St. George from their windows on the grounds that they were "racist" and "likely to incite violence"⁷⁷⁹.

Human Rights Issues

Article on Casey Martin decision in US journal⁷⁸⁰

In a previous issue⁷⁸¹, this column reported on what was considered the final stage (at least in the courts) of the Casey Martin saga. It will be recalled that Mr. Martin, a golfer, had originally brought a successful action against the Professional Golfers' Association (PGA) as a result of which he won the right to compensate for a chronic and painful circulatory disease by driving a cart along the golf course during PGA tournaments. This decision was then challenged by the PGA before the Supreme Court, which confirmed the original ruling.

In an article which appeared recently in a sister paper, the author John T. Wolohan examines the extent to which this decision can be truly qualified as a "landmark ruling". He examines the potential effect of the Martin decision on other professional and amateur sports. He starts by giving a brief review of the facts of the case, then proceeds to analyse both the majority and the dissenting opinions (whilst only two members of the Supreme Court dissented from the majority decision, the dissenting opinion is examined because of the number of issues which it raises in the author's opinion). Finally, without making any comments as to whether the Supreme Court decision was correct or not, the paper concludes by outlining some areas in which this decision will potentially produce the greatest impact.

Fulham FC planning procedure did not breach human rights, rules Court of Appeal (UK)⁷⁸²

In the case under review, the claimant, in seeking

judicial review of the relevant Minister's refusal to call in a revised planning application for the redevelopment of Fulham FC's football ground at Craven Cottage, South London, claimed that objectors had been deprived of the opportunity of an oral hearing, in breach of Article 6 of the European Convention on Human Rights (ECHR). The Court dismissed the appeal, ruling that the susceptibility to judicial review of the local authority decision to grant planning permission satisfied the rights which they derived from Article 6 ECHR.

Other matters

Switzerland. In the midst of the football World Cup, world governing body FIFA were faced with allegations that the official tournament footballs were manufactured using sweat-shops in India and Pakistan. This was strongly denied by FIFA, which in addition accused pressure groups of failing to acknowledge its work in combating child labour⁷⁸³.

San Francisco, US. In May 2002, a 17st fitness instructor who had been informed by an exercise company that she was too fat to hold classes had the ban overturned after having sued under human rights legislation. San Francisco is one of four cities in the US which have implemented a law banning discrimination based on height, weight or body type⁷⁸⁴.

Manchester, UK. During the 2002 Commonwealth Games, members of the Free Tibet Campaign targeted Jacques Rogge, President of the International Olympic Committee, about the IOC decision to hold the 2008 Olympics in Beijing, on account of allegations of human rights violations in Tibet under Chinese rule⁷⁸⁵.

Gender Issues

Time up for men-only golf clubs (UK)?

One of the last bastions of male chauvinism in this country appears to be the golf club. Whereas virtually every other sport – even cricket – now opens its portals to both genders, it remains not uncommon for many golf clubs all over the country to bar women from their premises. However, some recent moves have been made which are aimed at discontinuing this state of affairs.

The first official move came in mid-March 2002, and from a rather unlikely source. Barbara Gorna, wife of Tory MP Robert Walter, was refused mineral water at a golf club. This prompted her husband to introduce a Private Member's Bill to Parliament banning private clubs from relegating women to second-class membership, restricting them from parts of the club, and denying them the right to vote or stand for office⁷⁸⁶. However, it would not ban men-only clubs. To date, the

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Bill has not yet become law.

The issue returned to public attention during the run-up to the British Open, which was held at Muirfield this year. One of the Sunday newspapers sent a female reporter to the club to investigate the situation⁷⁸⁷. She found sexist attitudes still well entrenched at the men-only club, in spite of the fact that almost half of the 150,000 golf fans about to pay £45 each to watch the Open were women. This led her to question the wisdom of the Royal and Ancient Golf Club of St. Andrews, the game's governing body in this country, to stage the British open in such a male preserve. Someone who echoed these sentiments shortly afterwards was Sports Minister Richard Caborn, who not only regretted the choice of venue, but also heaped criticism on the Royal and Ancient (also an all-male fraternity) for not doing enough to include women⁷⁸⁸.

This naturally raised the hackles at St. Andrews. Secretary Peter Dawson expressed his perplexity at the Minister's remarks, observing (not without justice) that Mr. Caborn could first have contacted the authority before sounding off to the Press. On the claim by the Minister that such a men-only policy was harming Britain's chances of breeding world-class players, Mr. Dawson attacked the record of Mr. Caborn's own government in relation to golf, stating:

"The Government have not helped to fund golf in any shape or form whatsoever. Junior golf gets help from us through the Golf Foundation. We raise what we can by rattling tins and collecting funds. If the minister is interested in grassroots, he should think about some funding from the government"⁷⁸⁹

Accusations of sexism fly around at this year's Wimbledon (UK)

In view of the prominence of the world's leading female tennis players, one might draw the conclusion that this sport seems to have made greater advances in the cause of gender equality than the sport mentioned on the previous item. Nevertheless, the major tournaments of the world are not immune from accusations in this regard, as this year's Wimbledon championships demonstrated.

In late April the news broke that Wimbledon was about to deliver a somewhat insulting snub to women's tennis when it intensified the disparity between their prize money and the men's at this year's championships. The flat five per cent increase awarded meant that the women's singles winner would receive £486,000, whilst the men's champion would be £525,000 richer after the tournament. The All England Club remained unmoved by an angry reaction from the Women's Tennis Association (WTA), and chairman Tim

Phillips admitted that he did not envisage parity for women "for the foreseeable future"⁷⁹⁰.

The tournament was barely a few days old when a fresh accusation of this kind was made – although the butt of the criticism made was the BBC rather than the tournament organisers. Former champion Martina Navratilova accused an interviewer of sexism when he asked Anna Kournikova, shortly after she had lost a match in the early rounds, not only about the game she lost, but also "how had her day been". Ms. Kournikova herself was so incensed by the manner of the interview that she threatened to walk out. Ms. Navratilova added that someone like Pete Sampras would never have been interviewed in that manner, and called for complete equality in such matters⁷⁹¹.

Football is "the most popular sport for women" according to FA investigation (UK)

According to a recent and exhaustive investigation carried out by the English Football Association (FA), football has now become the most popular sport amongst women in contemporary Britain. This conclusion was drawn after three months of extensive letter-writing and telephoning to hundreds of regional leagues and county FAs – not to mention the governing bodies of rival sports. The FA's figures showed that 61,667 women played football competitively, which represented an substantial increase on the 11,000 players registered at the time when the FA took over the running of the women's game in 1993⁷⁹².

Other Issues

Grand National faces up to "biggest protest" by animal welfare campaigners

In the previous issue⁷⁹³, it was reported that the Jockey Club had offered to meet Animal Aid, the animal welfare rights campaigning group, in order to discuss policies for the welfare of horses. It is not reported whether this offer was taken up. What is known, however, is that Animal Aid organised the biggest demonstration yet against the Grand National at Aintree, which they claim is an exercise in animal cruelty. They planned 40 demonstrations at betting shops throughout the country on the day of the race⁷⁹⁴.

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Is there such a thing as a “fundamental right to football”? German work published

One of the more interesting works on sports law to reach the bookshelves recently has been a German volume by Jens Petersen entitled *Fußball im Rundfunk- und Medienrecht* (the place of football in broadcasting and media law). The work discusses the legal issues involved in the so-called “basic provision” (Grundversorgung) of football in the context of the general need for information on the part of the citizen. Immediate and generally accessible recordings of information about football events has led to an intense debate because of developments in the private media. The author puts forward a number of possible solutions which could both meet the public interest of citizens and the economic interests of private business. He does so in a comparative manner, by focusing on the situation in which the media find themselves in other European countries.

Blackburn footballer loses fight for secrecy (UK)

Not only the previous issue⁷⁹⁵, but virtually the entire media in their full diversity, have been engaged – some would say excessively – by the case of the married Premier League footballer who attempted to prevent a Sunday newspaper from disclosing his name after revealing that, although married, he had been involved in affairs with at least two other women. Shortly before the last issue went to press, it was learned that he had failed to convince the Court of Appeal that his name should be kept secret. He then made an 11th-hour appeal to Lord Woolf, the Lord Chief Justice, to obtain that his name should not be revealed until he had time to request the House of Lords to consider whether confidentiality laws apply to extramarital affairs. However, Lord Woolf ruled that the player had run out of time and that the story was bound to emerge regardless of the order which had made. He added:

“One of the main reasons why the Court was prepared to grant a stay was because (sic) the case put forward in the Court of Appeal that it was one where the claimant was anxious to protect his wife and child from the damaging consequences of the publicity. But the claimant, it appears, has himself said something to his wife, as to what has happened”⁷⁹⁶

The message coming through His Lordship’s tortured grammar was the utter inevitability of the player’s name ultimately falling into the public domain. In what proved to be something of an anti-climax, the footballer in question turned out to be Blackburn Rovers player Garry Flitcroft, who had previously failed to make the national

headlines either as a player or as an adulterer. The present writer cannot help entertaining a feeling of unease at the verdict. It is all very well for Lord Wakeham, Chairman of the (self-regulating) Press Complaints Commission, to emphasise continuously the freedom of the press. He may, however, be in danger of confusing the notions of “freedom” and “licence”, and this landmark ruling may encourage newspapers to make increasing use of allegations, however, far-fetched, which identify personalities, since these have a much better market value.

Controversy also surrounded the manner in which the footballer had been funded in his legal campaign. The same newspaper which accused him of adultery claimed that his legal expenses were being covered by the Professional Footballers’ Association (PFA) to the tune of £100,000⁷⁹⁷. PFA Chief Executive Gordon Taylor made no comment on this allegation, but merely stated that his union would continue to support the player⁷⁹⁸ – to what end it was difficult to determine now that the player’s identity had become known.

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General, scientific and technological developments

EPO use increases amid growing unease about testing methods

The size of the task facing those actively involved in fighting the use of drugs in sport was revealed at the conclusion of the Winter Olympics in Salt Lake City, when an official disclosed that as many as 100 drugs tests showed traces of the banned performance-enhancing drug erythropoietin (EPO). To make matters worse, almost all the suspects avoided penalties because the test used was insufficiently sophisticated to prove beyond doubt that the substance had been used. This was the first occasion on which all athletes in endurance events had been tested for EPO. They underwent a combined blood/urine test which in many cases suggested that they had used the drug but had ceased to do so several days prior to being due to compete⁷⁹⁹.

One International Olympic Committee (IOC) official explained that legally, the results of these tests would have failed to stand up because EPO disappears from the body very quickly, and that the Committee was very happy to have made an example of those who were actually caught. Officials are unsure as to which athletes actually revealed traces of the drug because, unless a sample tests positive, it cannot be linked to the athletes who gave the sample. In other words, one competitor taking part in several events could have produced more than sample showing traces of EPO. Around 1,000 tests were conducted at the Games⁸⁰⁰.

In fact, opinion on the appropriateness of the current system is far from unanimous. Professor Arne Ljungqvist, the Chairman of the Medical Commission of the World Anti-doping Agency (WADA) is currently locked in fundamental disagreement with Hein Verbruggen, President of the International Cycling Union (UCI) as well as a member of the WADA Board on this issue. The latter claims that urine sampling is sufficient, whereas Ljungqvist cleaves to the scientific view that both blood and urine samples are necessary in order to detect the substance. Verbruggen also asserts that it is difficult to take blood samples from riders in events such as the Tour de France, which was marked by a major doping scandal four years ago. Differences between Mr. Verbruggen and the scientists came to a head when the former accused the latter of placing obstacles in the path of the efforts undertaken by the UCI to have the urine-only EPO testing method accepted, adding that this had cost them all credibility. This outraged both Ljungqvist and fellow-scientist Bengt

Saltin⁸⁰¹. (More about the Verbruggen/UCI dispute can be found under the item headed "Doping issues and measures – international bodies", below p.117).

Matters have been complicated even further by the new type of EPO which is indistinguishable from the hormone naturally produced by the human body, and to which attention was already drawn in the previous issue⁸⁰². There is concern that this new substances may not be detected even by the combined blood/urine test. At the time of writing, WADA Chairman Dick Pound was about to appoint a team of experts having the task of identifying the best EPO test⁸⁰³.

In spite of all the above, the UCI chose to make the astonishing claim, with the Tour de France in full flow, that it had "won the battle against EPO", on the basis of a sharp reduction in the numbers of cyclists caught as a result of testing. It admittedly qualified this statement by making reference to the next generation of drugs, but was confident that the efforts made by the scientific community would lead to a sharp reduction in the number of cyclists doping themselves⁸⁰⁴. This may, however, have more to do with the contention between the UCI and WADA, referred to above, than with any realistic assessment of the problem.

Are high-altitude tents ethically acceptable?

When David Beckham broke his famous metatarsal bone shortly before the football World Cup was due to kick off, part of the measures taken in order to assist his recovery was to have him spend some time sleeping in an altitude tent. However, innocuous this contraption may sound, it is an "artificial aid" the use of which has given rise to official objections. The tent replicates a high-altitude atmosphere low in oxygen which causes the body to produce more red blood cells as well as erythropoietin (EPO). In fact athletes were banned from taking altitude tents to the Olympic Village in Sydney for the 2000 Games⁸⁰⁵.

It is understood that the World Anti-doping Agency (WADA) is currently studying this issue very carefully.

The latest wheeze – controversy surrounds the "asthmatics loophole"

In a previous issue⁸⁰⁶, attention was drawn to the controversy which surrounds the issue of the medication which asthmatic athletes take and which may contain prohibited substances. Particularly the drug Salbutamol continues to give rise to controversy. Although concern was expressed at the sharp rise in the numbers of athletes claiming to be asthmatics at the 2000 Olympics, the measures taken since then by

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the sporting authorities still appear to be inadequate. The IOC introduced new rules to counter this trend, which was that athletes using inhalers must submit clinical proof of their complaint and undergo tests before an independent medical panel⁸⁰⁷. However, this rule appeared also to be open to all manner of exception and qualification.

Thus during the Commonwealth Games in Manchester this year, runner Kim Collins tested positive for this drug after winning the 100 metres event. He was, however, exonerated later on informing officials that he was in fact an asthmatic but his national organisation had omitted to pass on the necessary documentation. (See also below, p.123) This focused attention on the very tenuous nature of the “asthma loophole”, and the reaction by the relevant officials did nothing to alleviate either the uncertainty or the unease. This is what IOC President Jacques Rogge had to say:

“We have allowed for some drugs for asthmatic patients. As long as they declare it, as long as they have a medical check-up to show they are genuinely asthmatic, they can use Salbutamol, which is a very good drug. And that is perfectly legal. The problem is that too many athletes pretend that they have asthma, but that’s what’s happening in life (...) We can be on top of the problem, but we cannot eliminate it”⁸⁰⁸

In the present author’s opinion, this is all very well, but Dr. Rogge failed conspicuously to condemn the Collins case, which had proved to be the very opposite of the strictness with which he claimed that the standards were being applied. Also, apart from mouthing the usual platitudes about “a close alliance (between WADA) and the pharmaceutical industry” and to stress the need for more scientific research, he omitted singularly to state what he and his organisation would be doing to close this manifestly absurd loophole.

(See also the case of Spanish cyclist Gonzalez de Galdeano, below p.118)

Recent studies show widespread use of illegal drugs⁸⁰⁹

According to a recent study carried out in Belgium, Germany, Italy and Portugal, six per cent of those frequenting health and fitness clubs admitted to the regular use of performance-enhancing substances. This followed a study carried out by the French Government in April 2001 which purported to show that between three and five per cent of children and adolescents engaging in amateur sport took drugs.

More worryingly on the home front, an IOC study into food supplements worldwide revealed that British athletes were the third most likely nationality to incur

positive dope tests through taking contaminated supplements. More particularly it showed that 18.9 per cent of British products tested contained enough “rogue substances” to trigger a positive drugs test (as compared to 18.8 per cent for the US). The evidence of this two-year study, which was conducted at the Cologne laboratory of the IOC, appears to shed some light on the question why there has been such a spate of positive tests for the banned steroid nandrolone from British athletes in recent years⁸¹⁰. (It will be recalled that the ban imposed on one of these athletes, Mark Richardson, was reduced by the International Association of Athletics Federations (IAAF) after he provided evidence that he had unwittingly taken supplements which had been contaminated⁸¹¹. The worst-affected country in this regard was found to be the Netherlands, with 25.8 per cent of products tested offering evidence of contamination, with Austria coming a close second with 22.7 per cent⁸¹²).

Finally, evidence that the use of banned substances by top athletes is on the rise came from a paper given by Dr. Don Catlin, Director of the IOC testing laboratory at the Salt Lake City games, during a conference of the British Medical Association in London, held at the end of April. Dr. Catlin announced that he knew of at least four new “clandestine steroids” being unlawfully sold for use by athletes. He added that many anabolic steroids which are in use remain undetectable to testing officials in a covert game between what he described as “mom and pop operations” (i.e. highly qualified rogue chemists who farm steroids and smuggle them across the world) and IOC testing officials⁸¹³.

UK swimming coach warns of “doping war” to come

The relatively small number of athletes who failed dope tests on the occasion of the Manchester Commonwealth Games (see below, p.124) have caused the latter to be known as the “clean Games”. Any complacency this may have induced amongst sporting administrators was but short-lived, when a swimming coach sent shockwaves through his sport by declaring that the latter was engaged in an “en masse pharmaceutical war” which would plunge it “back to the days of the GDR and China”. The coach in question was Bill Sweetenham, the Australian at the helm of the British swimming team.

It is reported by a leading British Sunday newspaper⁸¹⁴ that, as he looked through the results of the European swimming championships taking place in Berlin at the same time as the Games, one Australian coach ticked off a series of names with the words “cheat, cheat, cheat”. This caused Mr. Sweetenham to communicate the strong feelings amongst the coaching fraternity that there were certain nations which gave the impression of having returned to a state of

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pharmaceutical warfare. More particularly he expressed the fear that such nations were heading for territory such as genetics therapy, thus transferring the entire issue to another medical area altogether. However, he declined to name specific countries or people.

Whether prompted by this prediction or not, Ian Thorpe, who carried off a record-equalling six gold medals at the Commonwealth Games, called for a straightforward life ban for anyone using any performance-enhancing drugs⁸¹⁵.

Doping issues and measures – international bodies

WADA proposes anti-doping code

At a meeting of its Board in early June 2002, the World Anti-doping Agency (WADA) finalised the first draft of the World Anti-doping Code and prepared it for immediate circulation to the various international sports federations as well as the world's governments. The basis of the Code is that universal adoption of the Code is the key to harmonizing anti-doping procedures and penalties across the world. It is planned to have the Code adopted at a world conference in February 2003 and implemented prior to the 2004 Olympics⁸¹⁶.

The main thrust of the proposed code is that anyone found guilty of failing a dope test will be banned for two years on a first offence and for life on a second conviction. The use of performance-enhancing drugs will be the basis of any violation; other unlawful or banned drugs such as marijuana or heroin (which are not regarded as performance-enhancing) would come under a separate designation, with appropriate penalties being set by individual sporting bodies. This distinction focuses the agency's testing and penalties system on steroids and other drugs used to gain an unfair advantage over competitors⁸¹⁷.

FIFA and WADA in doping rules dispute

The plan unveiled by the World Anti-doping Agency (WADA) aimed at harmonising the fight against doping, discussed in the previous section, has led to a disagreement with the world governing body FIFA and cast fresh doubt on the inclusion of football in the Olympics.

The strict new rules provide that anyone failing a test should be banned for two years on a first offence, and for life on offending for the second time. It is envisaged that the code will apply to all Olympic sports, and that any sports governing body which refuses to endorse the proposal will be barred from participation in the Games. FIFA President Sepp Blatter has, however, signalled that his organisation will not be prepared to do this, as it is feared that many courts would rule that a

two-year ban constitutes a restraint of trade and therefore unlawful. Relations between FIFA and WADA have been under considerable strain anyway, as is demonstrated by the fact that the former refused to allow the latter to scrutinise the testing undertaken in the course of the recent World Cup⁸¹⁸.

As there is still some time to go before the new Code is formally adopted and implemented, there remains some scope for this position to change, although in view of the determination shown by WADA it looks as though the flexibility will need to emanate from FIFA's side.

EU Sports Ministers and sporting federations meet in Brussels to discuss anti-doping measures⁸¹⁹

At a meeting held in mid-March 2002, the Sports Ministers of the European Union and representatives of the Olympic Movement as well as the main sports federations met to examine ways of improving their co-operation on the campaign against doping and of achieving positive results before the next Olympics of 2004 and 2006. Sports Commissioner Viviane Reding was one of the personalities chairing the various sessions. The aspects addressed were: the case for regulatory and legislative alignment, strengthening education and prevention, improvement of the athletes' environment, and ensuring the effectiveness of WADA.

WADA headquarters open in Montreal⁸²⁰

In April 2002, the structure of the World Anti-Doping Agency (WADA) assumed a more permanent shape with the opening of its new headquarters in Montreal, Canada, and the inauguration of its European regional office in Lausanne, Switzerland. Later that month, the Agency invited cities to submit tenders for the purpose of hosting its two other agencies, serving Africa and Asia/Australasia, to complete its structure. WADA's Foundation Board selected Montreal as the site of its permanent headquarters from among four cities apart from Montreal, i.e. Lausanne, Bonn, Stockholm and Vienna.

World swimming body introduces blood testing

In early April 2002, FINA, the world governing body for swimming, voted to introduce blood testing two months later as part of its campaign to step up the fight against doping. FINA had already decided to conduct tests for the synthetic hormone erythropoietin (EPO) at the world short-course championships, which began in Moscow at the time when the decision was being taken. However, the vote referred to above enshrines the procedure in the federation's rules on doping control⁸²¹.

UCI chief resigns from WADA

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In August, Hein Verbruggen, the outspoken President of UCI, the world governing body in cycling, resigned from the Board of the World Anti-doping Agency (WADA) in protest at the leadership of its President, Dick Pound. He criticised the organisation and its Canadian chief for what he described as “irresponsible” statements regarding cyclists, and added that any future association between it and UCI was uncertain. Verbruggen explained that he was furious about the manner in which the Agency had handled the case of Igor Gonzalez de Galdeano, who tested positive whilst leading the Tour de France but was not penalised because he suffers from asthma and was in possession of a prescription⁸²².

Doping issues and measures – individual countries

UK Sport “should have drug testing powers removed” claims report

According to a highly critical report, the responsibility for carrying out dope tests should be removed from government agency UK Sport and transferred to an independent body. The report in question was commissioned by the Chief Executive of UK Sport, Richard Caldicott, but never made public. However, a leading Sunday newspaper claims to have knowledge of the contents of this document⁸²³, and of the fact that it accuses the agency of labouring under an irreconcilable conflict of interests over drug-testing. The fact that such a damning conclusion has not been published has caused some concern amongst British sporting bodies, which for some time now have been demanding that drug-testing should be removed from UK Sport. The report has been compiled by Dr. Roger Jackson, a leading sports consultant enjoying a world-wide reputation, and was not even disclosed to some members of the UK Sport Council, most of whom do not know that the report actually exists. Equal ignorance about the report and its contents was confirmed by the Department for Culture, Media and Sport, who said that they were not aware of it at a time when Richard Caborn, the Sports Minister, was being asked by influential sports leaders to reconsider national anti-doping policy.

The report itself was compiled by Dr. Jackson last year after he had spent several months employed as a sports consultant for UK Sports prior to returning to his native Canada. He is in fact Vice-Chairman of the Canadian Centre for Ethics in Sport, as well as being a former President of the Canadian Olympic Committee. He makes a trenchant criticism of the agency’s dual rôle as a drug-testing agency and as a distributor of lottery funds, arguing that this inevitably leads to a conflict of interests, since a positive doping test could directly

influence the funding levels enjoyed by the sport in question. He recommends that the UK’s anti-doping programme be transferred to an independent, government-funded agency, as is the case not only in Canada but also in many other countries, such as Norway, Australia and the United States⁸²⁴.

Doping issues – Football

Hormone abuse “has spread to Premiership” claims FIFA expert (UK)

Although punctuated by the odd isolated case, English football has hitherto been remarkably free from the malign influence of dope cheating. This is unlike the Continental game, which – as has been documented in these pages – has suffered scandal after scandal (cases such as Fernando Couto, Jaap Stam, Edgar Davids and Frank de Boer come immediately to mind). Such complacency we may soon be compelled to abandon if the statements made recently by a medical expert employed by world governing body FIFA is to be believed. In a hard-hitting interview conducted by a leading UK Sunday newspaper⁸²⁵, Dr. Michel D’Hooghe, Chairman of FIFA’s Medical Commission, maintained that there are now players in the English Premiership who are amongst those using unlawful substances in order to enhance their performance, acquire more stamina and recover more quickly from injury. More particularly they make regular use of EPO, growth hormones and anabolic steroids. Although he omitted to name the players involved, he added that they were likely to play for the most successful clubs.

The problem is exacerbated, according to Dr. Hooghe, by the fact that, although some players take EPO to enhance stamina, it is undetectable by football’s current drug tests. In addition, some high-profile footballers have adopted the practice of paying unscrupulous doctors in order to acquire and administer to them banned substances. He blamed the current trend on the greater number of matches which top footballers are currently expected to play as well as the increased commercialism of the modern game. He described as “crazy” playing schedules requiring footballers to compete in some 80 games per season. Commenting on Dr. D’Hooghe’s findings, Gordon Taylor, Chief Executive of the Professional Footballers’ Association, added another fear, to wit that some clubs may be doping their players without them being aware of it. An unnamed member of the medical staff of a leading Premiership club confirmed the medical official’s claims⁸²⁶.

To emphasise that Dr. D’Hooghe’s comments are not just the product of an over-zealous official’s suspicious mind, a few weeks later one of the most experienced drugs testers in the world – and an English one at that –

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claimed that English football was not doing enough to tackle the increasing threat posed by the use of performance-enhancing substances. Greg Moon, a former doping tester for UK Sport (which carries out tests on behalf of the Football Association) even went so far as to assert that, far from being entitled to assume any airs of superiority over European clubs, the English game had procedures which fell below the standards applied on the Continent⁸²⁷. He stated his belief that the design of the FA dope-testing programme made this an unlikely contingency, and that it was too convenient for all concerned that the majority of those being caught were youth-team players. Whereas in various European countries such as Italy (see above), some of the leading footballers have been caught and heavily penalised, there had been not one high-profile case in England where a footballer has produced a positive test for a banned substance.

One of the reasons for this is that, although in absolute terms football is the most tested sport in Britain, it is spread very thinly over not only the professional leagues, but also schools and women's football, covering something in the region of 5,000 players. (In Italy, by contrast two players from each side in the top two divisions are tested after every match.) In many cases, the testers are not even looking for performance-enhancing drugs, since nearly half the tests carried out are analysed only for "recreational" substances such as ecstasy and cannabis⁸²⁸.

The moral of the story may be that the sooner the WADA Code, referred to above (p.117), finds universal application, the better for all concerned.

Portuguese star fails third dope test

In mid-July 2002, Daniel Kenedy, who was removed from the Portuguese World Cup squad following a positive drugs test, failed a third dope test. Carlos Pereira, his club chairman at Maritimo, admitted that the player had tested positive for diuretics, which can be used not only to lose weights, but also to mask other banned drugs⁸²⁹.

Doping issues – Cycling

Doping scandals continue to mar the Giro d'Italia....

It would have been a pleasure for the present author to have been able to leave this section blank, which would have meant that the drugs scandal which almost caused last year's race to be abandoned was an aberration rather than the norm⁸³⁰. However, developments during this year's race, whilst less dramatic than those which occurred in 2001, have done nothing to restore the image or the integrity of one of the oldest events on the professional cycling calendar.

Even a few months before the race started, it was announced that as many as 35 riders could be banned from this year's race, as a result of an investigation based on raids by police during last year's Giro, and on another raid carried out on six riders prior to the fourth stage of the Tirreno-Adriatico event. The latter investigation had led the Saeco team to suspend one of its riders, Fabio Sacchi, before that stage, an illegal hormone having allegedly been discovered on his person⁸³¹.

This year's race was only a few stages old when the last man in the race, Nicola Chesini, was arrested by police investigating a massive seizure of drugs at the home of Antonio Varriale, his team-mate in the Panaria squad, which they believed may be linked to a drugs ring supplying both professional and amateur cyclists⁸³². Then race organisers announced that Stefano Garzelli, captain of the Mapei team, had tested positive for the diuretic and masking agent Probenecid following the stage he had won a few days earlier. The rider concerned, who won the 2000 race, denied any wrongdoing but announced that he was ready to abandon the sport if follow-up analyses confirmed the original result⁸³³. Unfortunately, this proved to be the case, so Garzelli was disqualified⁸³⁴. Two other positive tests were announced that day: one for Roberto Sgambelluri and the Russian Faat Zakirov. The substance in question was said to be Nesp, a variant of EPO⁸³⁵.

What was particularly surprising about this turn of events was the fact that the rider's team, Mapei-Quickstep, had earned itself the admiration of the race authorities (if not of the other teams) with its hard-line stance opposing the use of any banned substances. This caused some sources to speculate whether the team might have been the victims of a conspiracy. In this regard, Mapei's team management pointed to a number of coincidences which could indicate that their cyclists' food or drink had been contaminated with the banned drug, which is no longer widely available but can be used to mask steroids. Apparently the team managers received a telephone call from anti-drugs police in Padua inquiring about positive tests amongst team riders only four hours after Garzelli had submitted the sample. Team

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manager Alvaro Crespi also maintains that the team found themselves compelled continually to stop during the relevant stage to urinate, and that a masseur was taken to hospital with severe kidney pains⁸³⁶.

Those advancing the conspiracy theory also point out that Mapei had not endeared itself to the cycling community because of its outspoken views on doping, referred to above, since it shows other cyclists up in a bad light. Their sponsor, Giorgio Squinzi, had also attacked the sporting authorities for their dilatoriness in dealing with the problem. The 1999 race had been punctuated by heated arguments between Mapei's riders and their rivals over the team's attitude. After the race, the Mapei company announced that it would end its sponsorship of the team⁸³⁷.

Meanwhile, as a result of the Varriale inquiry referred to earlier, an obscure Italian rider called Domenico Romano had failed to register for the next day's stage and simply disappeared. Following the eventful weekend described above, Romano finally called at a police station in Brescia (Lombardy) and gave himself up. Later, his lawyer admitted on Italian television that his client had taken drugs, adding enigmatically that, however, these substances "did not belong to him".

The Giro continued under a cloud the next day when it was disclosed that the previous year's winner, Gilberto Simoni, had provided a sample which showed traces of cocaine. The rider claimed that this had been caused by an anaesthetic administered to him during a visit to the dentist earlier that day. However, he had failed to enter the use of the banned product in his health booklet, which all professional cyclists are required to keep⁸³⁸. He was therefore removed from the race. A separate test, taken later, was also found to have traces of cocaine in it, which led Simoni to be suspended by his team, Saeco⁸³⁹. This led to an investigation by the Italian Cycling Federation disciplinary commission, which later cleared him of any doping offences. Apparently the second positive test was caused by cough sweets manufactured in Peru which were found to contain faint traces of cocaine⁸⁴⁰.

In the meantime, the consequences of the previous Giro's scandals continued to rumble. However, for one rider at least these had a happy outcome, when Marco Pantani won his appeal against an eight-month ban imposed on him in June 2002⁸⁴¹. As a result of a hearing held in Padova, the Federal Appeal Commission of the Italian Cycling Federation set aside the sentence issued by the Federation's disciplinary committee on 17/6/2002⁸⁴². Pantani had been banned for the possession of an insulin syringe as a result of that famous raid by the police during last year's race⁸⁴³. As a result of the appeal, Pantani's suspension was lifted⁸⁴⁴.

... as well as the Tour de France

The "Queen of Cycling Races" was also aware that it

had a good deal to do in order to restore its good name, particularly after the doping scandals which had affected it in 2000. Well before this year's race commenced, its organisers announced new measures aimed at countering the use of illegal drugs. Riders would henceforth face random drugs tests during the four-week period preceding the start of the race in July. Results would be available well before the start of the three-week race, and any riders failing tests would be banned from taking part⁸⁴⁵. These tests failed to produce a positive sample, which boosted hopes that the race would be free from any major scandal this year.

Any such hopes were dashed just a few days before the race started. First, it was announced that Olympic road champion Jan Ullrich (Germany) had tested positive for amphetamines during an out-of-competition test carried out on behalf of his Deutsche Telekom team. As he was neither competing nor training at the time of the test, speculation abounded as to how the drug came to enter his system. Earlier, Frenchman Laurent Paumier had withdrawn from the race because of a positive test for corticosteroids, and his fellow-countryman Laurent Roux had tested positive for amphetamines⁸⁴⁶.

The Tour started and settled down without any further doping mishaps. However, it was not to last. The day after the Tour finished in Paris, it was announced that Lithuanian rider Raimondas Rumšas, who surprisingly finished third overall, had become the subject-matter of an investigation opened by French police over that weekend, thus raising the spectre of a fresh doping scandal. The inquiry started when the rider's wife, Edita, was stopped by customs police near Chamonix and found to be in possession of substances suspected of being doping agents. Later that day, police raided the hotel where Rumšas's team had rooms booked by the race organisers. Rumšas was provisionally suspended by his Lampre-Daikin team⁸⁴⁷.

Daniel Baal, assistant director of the Tour, commented that if Rumšas were found guilty of, or confessed to, having taken illegal drugs, he would be deprived of his third place. Baal also confirmed that one of the Lithuanian's blood tests, taken on the rest day (22 July), had raised sufficient suspicion for him to be compelled to take a urine test checking for the presence of EPO. However, that test had turned out to be negative⁸⁴⁸. The affair confirmed a number of suspicions that recently, riders had started to involve their family rather than trainers and soigneurs as "doping couriers".

The rider was shortly afterwards expected to present himself to the police in Lyon in order to account for the massive quantity of drugs found in the vehicle driven by his wife, who was still in police custody. However, Rumšas suddenly seemed to have disappeared from the face of the earth. At the time of writing, no further news of his whereabouts had been learned. The French

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press in the meantime dismissed his claim that the drugs were intended for his mother-in-law in Lithuania, and were convinced that they were intended for a group of cyclists⁸⁴⁹.

The reader is advised to watch this space for further developments.

CAS upholds Vandenbroucke appeal

In late June 2002, the appeal brought by Belgian cyclist Frank Vandenbroucke against a six-month suspension and fine after performance-enhancing drugs were found at his home was upheld by the Court of Arbitration for Sport⁸⁵⁰.

Doping issues – Racing

Doping scandal in racing continues to fester

It will be recalled from the last issue⁸⁵¹ that concern had been mounting among commentators and administrators about the prospect that the sport might shortly be rocked by a major doping scandal. These fears were somewhat allayed by the "February raids", in which officials from the Jockey Club descended on five stables and took over 400 samples, all of which turned out to be negative. One month later, one of these stables, that operated by Mark Pitman, was raided again, but this time on the occasion of a routine check⁸⁵². Once again, the tests carried out proved to be negative.

However, the world of racing once more braced itself for the possibility of a scandal in late April 2002, when two major on-line betting companies, Betfair and Betdaq, were interviewed by Jockey Club Security, after officials confirmed that an odds-on favourite, Ashgar, who finished third in a novice hurdle at Plumpton on Easter Saturday, had returned a positive dope test. The gelding in question had tested positive to acetylpromazine (ACP), known in racing circles as a "stopping" drug. It is a fast-acting tranquilizer which leaves a horse's system almost as rapidly. However, ACP is also widely used in racing to quieten difficult horses, for example when their coats need to be clipped⁸⁵³, a factor which has the same potential to confuse and blur the issue as asthmatic medication has for "human doping" (see above, p.115). It is the same substance which set off the race-fixing and doping investigations in 1998-99 and prompted a court case which eventually failed because of lack of evidence⁸⁵⁴.

The Jockey Club later claimed that, whereas that investigation had been backed up by evidence of irregular betting patterns, no such evidence was available on this occasion. However, many commentators poured scorn on this claim. There were known to be sophisticated systems whereby certain professional gamblers made very large numbers of

small bets, thus enabling them to avoid drawing attention to "monster gambles"; any organised ring of dopers could easily do the same, it was claimed⁸⁵⁵.

The issue of doping also featured prominently in the revelations which were made with the lifting of reporting restrictions on a drug-smuggling and money-laundering trial held last year (see under the item headed "Criminal Law", above p.23). Meanwhile, the scandal shows no signs of abating. Towards the end of July, there occurred the strange case of the chaser Hachty Boy, who tested positive – once again for ACP⁸⁵⁶. The Jockey Club has not ruled out the possibility that the substance may have entered the horse by accident because of its dual use described above, particularly as, far from paralysing the horse, the latter went on to win by 11 lengths. However, the initial conclusion of the investigators was that the horse may have been the victim of a bungled attempt at nobbling the horse, ending with the latter kicking out and causing the doper to flee before a sufficient dose had been administered⁸⁵⁷. No final verdict had been reached at the time of writing. And, as a delicious irony, the very next day two-year-old filly Razotti tested positive for clenbuterol, a prohibited substance which is, however, commonly used to treat respiratory problems. The owner? None other than Peter Savill, Chairman of the British Horseracing Board....⁸⁵⁸

Court of law has no jurisdiction to assess whether or not doping-based disqualification of horse. Swedish court decision

This issue was dealt with earlier, under the item headed "Procedural law and Evidence" (see above, p.103).

Doping issues – Winter Sports

The Alain Baxter affair – continued

Shortly before the previous issue went to press, it was learned that Alain Baxter, who became this country's first winner of a skiing Olympic medal at Salt Lake City by obtaining a bronze in the slalom event, had tested positive for the banned substance methamphetamine⁸⁵⁹. He appeared before the inquiry and disciplinary commissions of the IOC on 15 March, not expecting a great deal of mercy, since exoneration would have been an unprecedented move on the commissions' part⁸⁶⁰. His slender hopes of redemption hinged on the commissions accepting that he used a nasal decongestant without knowing that the US version contained methamphetamine and that he did not gain an advantage through its use⁸⁶¹. The manufacturers of the inhaler, Proctor and Gamble, forwarded a statement to the disciplinary body confirming that the substance was non-performance enhancing⁸⁶².

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The commissions issued their decision a few days later, which was that the Scottish skier should be stripped of his bronze medal. At the same time, it was learned that the International Skiing Federation had provisionally banned him until such time as they would meet in June to take a definitive decision⁸⁶³. Baxter immediately announced that he would fight to establish his innocence. He must have realised the Sisyphean nature of his task, since, whatever argument Baxter may have advanced in mitigation, he was guilty of breaking Chapter II, Article 2.2 of the Olympic Anti-doping Code, which is governed by the principle of strict liability. This meant that the question whether or not the product was performance-enhancing cannot be an issue of substance⁸⁶⁴.

A few days after the IOC announced its decision, the British Olympic Association (BOA) made a formal request to the IOC that new tests be carried out on Baxter's urine sample. More particularly it asked for a split test, which they believed would prove that the skier did not take any performance-enhancing substance. There are two types of the drug in question, to wit the performance-enhancing dextromethamphetamine (also known as "speed") and levomethamphetamine, which is merely a decongestant and which the BOA argued was contained in Baxter's sample⁸⁶⁵. This plea was later reinforced by Professor Arnold Beckett, who until 1992 was a long-standing member of the IOC Medical Commission⁸⁶⁶. However, this request was not acceded to.

Mr. Baxter's fate therefore appeared to lie exclusively in the hands of the Court of Arbitration for Sport (CAS), to whom he made a formal appeal in mid-April⁸⁶⁷. He did so on the prompting of Michael Beloff QC, a leading member of the CAS, who would represent him at the hearing⁸⁶⁸. The BOA had indicated that they would provide moral, rather than financial, support, for a case which was likely to cost around £50,000. The British Ski Federation accordingly launched an appeal fund – particularly since Baxter could no longer use his suspended Lottery money for this purpose⁸⁶⁹.

As was mentioned above, the International Ski Federation (FIS) met in June and issued a surprisingly lenient three-month ban, which, however, meant that he would have to miss the opening World Cup event of the season⁸⁷⁰. Shortly afterwards it was learned that the hearing before the CAS would take place in September 2002⁸⁷¹. The verdict was not known at the time of writing.

Other Winter Olympics cases

Shortly after the Games, the IOC opened an investigation into the discovery of blood transfusion equipment left behind by members of the Austrian cross country skiing team. The medical equipment and empty blood packs were found by a housekeeper

cleaning their house which they had rented. Under the Olympic Movement Anti-doping Code, blood doping is a prohibited method. It is defined as being the administration of blood, red blood cells and related blood products to an athlete, which may be preceded by the withdrawal of blood from the athlete who continues to train in this blood-depleted state.

In late May 2002, the Executive Board of the IOC, meeting in Kuala Lumpur, penalised two Austrian cross-country skiers, their coach and their chiropractor for these doping offences. The Board also issued a strongly-worded warning to the team doctor, Peter Baumgart, as well as the Austrian Olympic Committee, for allowing this to happen⁸⁷².

The athletes in question, Marc Mayer and Achim Walcher, were disqualified from the events in which they competed. Neither athlete was in contention for any medal in any event. The IOC also requested the FIS to alter the results of the events in question and to consider whether it should take such further action as fell within its jurisdiction. The coach and chiropractor, Walter Mayer and Volker Müller, were declared ineligible for participation in any Olympic Games, up to and including the 2010 Olympic Winter Games⁸⁷³.

Earlier, Norway had announced that it would take the IOC to the CAS in order to have the cross-country skiers Johann Muehlepp, Larissa Lazutina and Olga Danilova stripped of the medals which they won before testing positive for doping during the Games. If the Court awards this action, Norwegians Thomas Alsgaard, Frode Estil and Odd-Bjorn Hjeltnes would qualify for medals⁸⁷⁴. It will be recalled from the previous issue that the skiers in question had only been stripped of the medals won for the event for which the test was organised⁸⁷⁵. Many people were unhappy about this, particularly since Article 25 of the IOC Charter states that any athlete guilty of cheating at the Games should forfeit all medals won⁸⁷⁶.

Doping issues – Athletics

The Janine Whitlock affair (UK)

The England athletics team looked forward to the Manchester Commonwealth Games in the expectation of a record haul of medals. However, their prospects and morale were given a severe blow when, on the eve of the Games, UK Athletics was compelled to admit that two British record-holders had tested positive for banned anabolic steroids. The two athletes in question were pole vaulter Janine Whitlock and discus thrower Periss Wilkins⁸⁷⁷. The latter was later banned for two years⁸⁷⁸.

The case of Janine Whitlock was particularly perplexing. She had established herself as a favourite during the Commonwealth Trials held a month earlier when she jumped 4.41 metres, being the 36th British

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record of her career. It was a performance which earned her the reward of a Rover car; to do so, however, she had to pass a drugs test. This proved to be positive for methandienone, a drug marketed as Dianabol and which is easily detected by the current spectrometers used in laboratories world-wide⁸⁷⁹. The news came as such a shock to the athlete that UK Athletics immediately offered her counselling by one of its psychologists⁸⁸⁰.

Two days later, the pole vaulter bowed to the inevitable and withdrew from England's squad for the Games. She stated that she would co-operate fully with UK Athletics and world governing body IAAF to find an explanation for the presence of the drug. She gave a strong indication that her defence was likely to include an allegation of sabotage⁸⁸¹. She was later suspended from competition by UK Athletics whilst her case was being investigated by a disciplinary committee⁸⁸².

No further details of this case were available at the time of writing.

Collins fails test but keeps medal – to widespread criticism

Even the "friendly Games" held this year in Manchester were not entirely free from doping cases. One of the most controversial of these turned out to be the case of Kim Collins, to which reference has already been made earlier (see above, p.116). On 1 August, the Commonwealth Games Federation announced that Kim Collins, the sprinter from St. Kitts and Nevis, had been reprimanded after testing positive for the steroid Salbutamol. He eluded any penalties because he was able to prove that he had used the substance as part of his asthma treatment. However, in breach of Games rules, he had failed to declare this use for medication prior to the competition. This meant that he was allowed to retain the medal he had won in spectacular fashion in the 100 metres event⁸⁸³.

Even though it could not overturn the decision, WADA nevertheless announced that it would investigate the matter, with President Dick Pound expressing his barely-veiled annoyance at the decision. Naturally, this decision was widely criticised, coming as it did after solemn assurances had been given about the strictness with which sporting authorities everywhere intended to apply the rules. British Olympic Association officials were dismayed at the decision⁸⁸⁴. Pointing out how this disregard for the procedural aspects can not only set a dangerous precedent, but also lead to unfairness and inconsistency, Paul Hayward, writing in *The Daily Telegraph*⁸⁸⁵, conceded that

"forgetfulness and naivety were, evidently, his (Collins's) only misdemeanours. But one wonders how that will play with, say, Andrea Raducan, the

brilliant Romanian gymnast who was stripped of her medal at the Sydney Olympics after taking Neurofen for a cold. Again, there was no suggestion that Raducan was trying to cheat, but her failure to mention the Neurofen dose before the event cost her an Olympic title"

The same author also points out that, before the authorities' attitudes had stiffened, sport was becoming submerged in a welter of litigation and deliberate obfuscation by athletes and their lawyers. Judging by the Collins verdict, these days may return sooner than we expected.

Myerscough ban lifted – but was this the right decision? (UK)

Another doping case which has stirred up considerable controversy is that of Carl Myerscough, a successful young athlete who incurred a ban for using a steroid when he was 19 and studying at Millfield public school. That ban came to an end in March 2002, but the Commonwealth Games Council of England (CGCE) had imposed a life ban, which meant that he could not be included in the team for the Manchester Games. In April, both UK Athletics and the Amateur Athletics Association of England announced that they would support Myerscough's bid to overturn this life ban⁸⁸⁶.

In June, the ban was lifted by the Sports Disputes Resolution Panel, which decided that there were mitigating circumstances in his case. The CGCE had agreed beforehand that it would accept any verdict by the Panel⁸⁸⁷. Earlier, Myerscough had claimed that he had been the victim of sabotage when he was banned, alleging that the positive urine sample was not his and that a jealous rival had switched the samples⁸⁸⁸. Whatever may be the justice of his case, the readiness of two official sports bodies to support him must have given rise to some disquiet in certain quarters.

London Marathon "cleanest" ever? (UK)

As was anticipated in an earlier issue of this organ⁸⁸⁹, the London Marathon this year became the first major event to conduct independent compulsory blood tests on all top athletes – 22 in number. The race had long been suspected of having paid handsome appearance fees to athletes who had used EPO to enhance their performance⁸⁹⁰. In the event, all these tests, plus the random urine tests, turned out to be negative⁸⁹¹.

US athletics continues to defy Olympic doping rules

In the previous issue⁸⁹², attention was drawn to the continued refusal by USA Track and Field, the governing body for US athletics, to comply with Olympic doping rules. More particularly there had been calls for the US

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to be expelled from world athletics because of its failure to identify those who had tested positive for prohibited substances – notably in connection with the 2000 Olympics. This threat seemed a real possibility when, in late April 2002, the US Olympic Committee agreed to take away USA Track and Field's membership if remaining problems with its application of anti-doping rules and other administrative procedures were not remedied by 31 August⁸⁹³.

The allegation that an American gold medallist at Sydney 2000 had tested positive for a banned anabolic steroid the previous year was repeated at a WADA meeting in Montreal, and increased pressure on the US governing body to name the athlete concerned so that he could be dealt with under disciplinary proceedings. Details of this case had emerged during an inquiry undertaken the previous year by Canadian lawyer Richard McLaren on behalf of USA Track and Field (USATF). It is claimed that McLaren found evidence that the athlete in question tested positive for nandrolone in July 1999 but was allowed to continue competing until being banned eight months later for two years. However, the athlete was cleared at an appeal in July 2000 and allowed to compete in the US trials, and subsequently in the Olympic Games. USATF claim that the rules which applied at the time prohibited disclosure of the athlete's identity⁸⁹⁴.

The issue had not yet been resolved at the time of writing.

Other cases

London, UK. In May, Paul Edwards, a British shot putter serving a life ban for doping, and who has consistently maintained his innocence, had his case debated in the House of Commons. Andrew Hunter, the athlete's MP, had supported his stance. Edwards was sent home from the 1994 Commonwealth games after testing positive for a cocktail of banned substances⁸⁹⁵.

Manchester, UK. During this year's Commonwealth Games, Canadian triathlete Kelly Guest was sent home after testing positive for the banned drug nandrolone⁸⁹⁶.

Vienna, Austria. In May 2002, it was revealed that Slovakian shot putter Makulas Konopka had tested positive for the banned product Stanzolol at the European indoor Championships held between 1 and 3 March in Vienna. The athlete was banned for two years, and stripped of his bronze medal, which was awarded to Russian shot putter Pavel Chumachenko⁸⁹⁷.

Doping issues – Rugby Union

Ben Tune in drug test cover-up?

Just before the Test between Australian and South

Africa held in Brisbane in late July 2002, the visiting side demanded that all 44 players involved be tested for unlawful drugs following accusations that the Australian Rugby Union (ARU) was involved in a doping cover-up. More particularly it was disclosed that the ARU had ignored a failed dope test unofficially given to Wallaby wing Ben Tune in March 2001 when he was playing for the Queensland Reds⁸⁹⁸.

The ARU admitted that it had been informed at the time by the Queensland Rugby Union, and that the player had been stood down for four Super 12 matches until such time as traces of the substance probenecid – which is often administered with antibiotics in treating infections but can also be used as a masking agent for steroids – had cleared his system. The ARU allege that the drug was innocently prescribed in order to speed the player's recovery from a knee injury. Once it was realised what he had been administered, Tune was privately tested and returned only after his system had cleared⁸⁹⁹.

The International Rugby Board has requested an explanation from the ARU⁹⁰⁰. No details of the outcome of this case were available at the time of writing.

Other cases

London, UK. In mid-April 2002, the Rugby Football Union suspended Plymouth Albion three-quarter Russell Thompson for two years after having found him guilty of taking a banned drug, 19-norandrostenedione⁹⁰¹.

Manchester, UK. During the 2002 Commonwealth Games, Fred Asselin, a member of the Canadian Rugby Sevens team, was suspended by his own officials having tested positive for an anabolic steroid⁹⁰².

Doping issues – Weight Lifting

Doping cases mar Commonwealth Games events

Weightlifting is also a sport which took some of the shine off the Manchester Commonwealth Games because of a number of doping cases. In fact, the Nigerian team never made it to Manchester because its federation had been banned for one year, and four of its lifters for two years, after having tested positive for the steroid noradtestosterone. It was therefore not allowed to compete in the Games⁹⁰³. Then two days before the start of the event, Scotland's weightlifting manager Jim Ferguson stepped down because of an investigation into allegations that he helped competitors buy performance-enhancing substances. This followed a report in *The Mail on Sunday* which had also alleged that the team's weightlifting coach John McNiven had failed a dope test in the past⁹⁰⁴.

As the Games drew to a close, it was the Indian

15. Drugs legislation and related issues

team which became the focus of unwanted attention. First Krishnan Madasamy was stripped of the three silver medals which he had won in the men's under-62kg division after testing positive for 19-norandrosterone, a metabolite of nandrolone. He was the first-ever weightlifter to be disqualified from the Games for a doping offence⁹⁰⁵. Then, as the closing ceremony was in full swing, medical officials were holding emergency meetings about another positive test in the sport. It turned out that the offender was Sathesha Rai, who had won two gold medals and a silver in the 77kg category⁹⁰⁶. Although no further details had emerged by the time of writing, it was understood that other positive tests could still be in the pipeline.

Doping issues – Other Sports

Pistol shooting. In June 2002, Philip Adams, an Australian farmer who has won 17 pistol shooting medals in successive Commonwealth Games, tested positive for a banned diuretic which he had taken as part of his medication for high blood pressure. He escaped a ban on grounds of extenuating circumstances, and was allowed to compete in the Commonwealth Games in Manchester⁹⁰⁷.

Lawn tennis. The International Tennis Federation (ITF) attacked a French anti-doping agency in July 2002 after the latter announced that two players had tested positive for illegal drugs during the French Open the previous month. The players in question were not named, and the ITF, which had organised the event, immediately hit out at the Conseil de prévention et de lutte contre le dopage for releasing the information in what they described as "premature fashion"⁹⁰⁸.

Earlier, Tatum O'Neal, former spouse of Wimbledon winner John McEnroe, accused her ex-husband of having taken steroids to boost his career⁹⁰⁹.

Baseball. According to a prestigious US sports magazine, the sport of baseball is rapidly becoming submerged in a sea of drugs, with the ever-intensifying trend on the part of its players to rely on steroids and other drugs to enhance performance. Steroids are now so rampant in the sport, claims the report, that the game has become a pharmacological sideshow. The drugs in question range from human growth hormone to ephedrine-laced dietary supplements. There is still an absence of official dope testing in the sport because of opposition on the part of the players' union⁹¹⁰.

Rugby League. In Australia, a player who jumped a fence in order to escape a post-match dope test was suspended by his club in late July 2002, and was facing

a two-year suspension at the time of writing. The player, Scott McDougall, eventually supplied a urine sample at his Sydney home, but could still face suspension⁹¹¹.

Equestrianism. In July 2002, British rider Gary Parsonage won an appeal against a lifetime Olympic ban after his horse Just So II tested positive for the banned sedative acepromazine. The Appeal Panel of the British Olympic Associations allowed the appeal on the grounds that the offence was a minor one. He had been banned for three months but ruled ineligible for the Games⁹¹².

Table tennis. In June 2002, Barney Reed, the No. 3 of US table tennis, was suspended for two years after testing positive for norandrosterone at the North American Championships held the previous July⁹¹³.

16. Family Law

[None]

17. Issues specific to individual sports

Football

The “Battle of Bramall Lane” and its aftermath (UK)

Sheffield United and West Bromwich Albion are two footballing sides which have certainly known better times, but have not been noticeable thus far for their lack of discipline on the field. Yet another illusion was brutally shattered in mid-March 2002 when both teams were involved in one of the most eccentric of games ever witnessed in this country. Sheffield United, the home side in a crucial Nationwide League first division tie, had three men sent off. In accordance with the relevant rules, the referee, Eddie Wolstenholme, called the match off eight minutes from time after two more United players (Michael Browne and Rob Ullathorne) left the field with injuries⁹¹⁴. This raised the possibility of the match having to be replayed, an outcome which was hotly challenged by WBA manager Gary Megson. Describing the match as the most disgraceful exhibition he had ever witnessed, accusing his opponents of deliberately reducing their team in order to force a replay, particularly in view of the fact that Albion were leading 3-0 at the time when the game was abandoned. He claimed that he heard the United management issue specific instructions to their players to that effect. He added that if his side was compelled to engage in a replay by the authorities, his players would “come here, kick off and then walk off the pitch”. These allegations were denied by United manager Neil Warnock⁹¹⁵.

This extraordinary turn of events naturally did not elude the attention of the game’s disciplinary authorities. Mr. Warnock attempted a damage limitation exercise by urging that WBA be awarded the three match points, and by threatening severe disciplinary action against Patrick Suffo and Georges Santos, two of the dismissed players – even though he did not make this threat against dismissed

goalkeeper Simon Tracey because he had “only” been guilty, in one of those splendid euphemisms which mark the modern game, of the “technical offence” of handling outside his penalty area. However, he undid some of the goodwill generated by this flurry of activity by calling Mr. Megson “one of the biggest moaners in the game”⁹¹⁶. This charm offensive clearly impressed the referee, who announced that he would not be mentioning either manager in his report. This meant that Warnock was almost certain to escape punishment by the Football Association. Mr. Wolstenholme also discounted suggestions that United player Michael Brown, who was one of the “injured” players involved, walked off the field without permission⁹¹⁷.

Inevitably, the FA ruled that the 3-0 result should stand and WBA be awarded the three match points⁹¹⁸. However, two weeks later it announced that no independent evidence was available to indicate that there was a deliberate attempt by any United player or official to force the abandonment of the game⁹¹⁹. That left Warnock and his club facing charges of improper conduct and failing to control its players respectively, but all this produced was fines of £300 for the former and £10,000 for the latter⁹²⁰. Patrick Suffo incurred a £3,000 fine and a three-match suspension for violent conduct⁹²¹.

Proposals made (and rejected) to change structure of British football

Contract or expand the Football League?

The collapse of ITV Digital, described in full detail above, may have failed to produce the apocalyptic consequences for the game which were initially predicted. Yet it is universally recognised that matters may certainly take such a dramatic course if some far-reaching changes are not made to the game as it operates in this country at present – both North and

17. Issues specific to individual sports

South of the border. As Alex Fynn argues in *The Observer*⁹²², the crisis in the game has in fact been building up for a number of years and clubs have consistently ignored the warning signs. He identified two fundamental weaknesses in the current game: excessive reliance on the money emanating from television coverage, and a tendency to allow expenditure – particularly player’s earnings – to outstrip revenue.

The ITV Digital affair could therefore be welcomed as a catalyst for change rather than heralding the game’s collapse – provided that those in charge draw appropriate lessons. He firmly believes that, far from contracting, the Football League should actually expand from 72 clubs to 100 and from three divisions to five, exploiting its main strength, which is its popularity. This could be structured into two national and three regional divisions, thus ensuring that the smaller clubs maximise their income (more local games) and minimising their expenditure (less travel)⁹²³.

“Old Firm” bid to enter English football – and are rejected

One of the elements which many see as a possible source of salvation for the game is an injection of new blood from outside. The best way of achieving this would be to invite the “old firm” of Scottish football, Celtic and Rangers – and maybe also others – to join the ranks of the various English competitions. In fact, tentative steps aimed at achieving this goal had already been taken earlier this year, as can be seen from the previous issue⁹²⁴, but without success. A renewed attempt in this direction was made in early April, when it was learned that Celtic and Rangers had been approached by three chairmen of Nationwide League clubs about the possibility of them joining a reconstituted First Division in England. The determination of the First Division clubs to force through change was evident from some of the preparations already made, which included the hiring of a firm of consultants for the purpose of considering the branding and marketing of the new First Division⁹²⁵, thus relaunching the notion of the Phoenix league which had been floated some time earlier⁹²⁶. Certainly this type of league was seen as a very attractive prospect for BSkyB, which, as has been described above (p.39), replaced ITV Digital as the League’s chief television medium⁹²⁷.

At first it seemed that on this occasion, the Football League might be more receptive to the proposal of the “Old Firm” moving South, since it shortly afterwards indicated it was willing to meet the Glasgow clubs in order to discuss the future⁹²⁸. These talks took place during the second week of May, and ended with league executives putting forward the proposal that Celtic and Rangers should join the new First Division in time for the 2002-3 season. This would then need to be accepted by (a) the Football association, (b) the League

member clubs, as well as (c) the Premiership clubs (it was believed that the latter could place obstacles in the path of a Scottish team gaining promotion to it)⁹²⁹.

In the event, the proposal fell at the first hurdle when the FA ruled out the move, on the basis that such a move would be contrary to its policy and “against the spirit of fair competition”⁹³⁰. This was in spite of a tearful plea by Geoffrey Richmond, Chairman of beleaguered Nationwide League club Bradford City (see above, p.99) to allow the move, on the basis that it was probably the only way of keeping clubs such as his alive⁹³¹. In the meantime, the proposed move had already caused shockwaves within the Scottish Premier League. Clearly fearful of committing themselves to any media deal from which it would be both difficult and costly to extricate themselves in the event of a move South, they vetoed the creation of a Scottish Premier League (SPL) television channel in early April.

This prompted an angry reaction from the remaining 10 clubs, who promptly commenced talks about setting up a breakaway league⁹³². They met at Hampden Park a week later, and subsequently announced that they would resign from the League and leave by 2004. The rejection of the Glasgow clubs’ move South by the FA failed to remove the opposition by the former to the SPL Channel, and they rejected it anew at a stormy meeting of the SPL in Edinburgh in late July. Thereupon the other 10 clubs renewed their vow to quit the SPL⁹³³. This threatened to precipitate the greatest crisis the Scottish game had ever known, and the issue was still unresolved at the time of writing.

Calls to change Premiership to combat player fatigue

One of the reasons advanced by commentators – and England’s manager – for the national team’s failure to progress beyond the quarter finals of the World Cup was that by the time the tournament kicked off, the English players had become fatigued through playing too many club games. Already during the tournament, Adam Crozier, the FA Chief Executive, announced that he would start to put out feelers amongst players and managers as to what the answer could be to this problem⁹³⁴. A few weeks later, Arsenal Chairman David Dein was less circumspect and openly argued for a winter break in the season, which would last three weeks and start immediately after the New Year’s Day fixtures. This would enable players to go on holiday, and even give the fans a welcome break from the intensity of the season, in which three-match weeks are not uncommon⁹³⁵.

This would naturally lead to a fundamental rescheduling of all soccer programmes, which is why early adoption of such a scheme remains unlikely.

Refereeing in crisis following World Cup rows

17. Issues specific to individual sports

Referees vow to stamp out “divers and fakers”

Although football refereeing as an institution emerged much the poorer as a result of the 2002 World Cup, for reasons made clear below, the initial signs were that it would be the match officials rather than the players who would be stamping their authority on the tournament. The tone was set by an injunction to all referees in charge of the tournament to enforce a strict clampdown on diving and feigning injury, as world governing body FIFA strove to rid the game of one of its most common types of cheating. FIFA General Secretary Michael Zen-Ruffinen announced that there would be a seminar in Seoul for the benefit of referees aimed especially at drawing attention to this problem⁹³⁶.

Unfortunately, this policy got off to a bad start. With the tournament barely a few days old, just such an incident occurred during the Brazil v. Turkey match. Brazil had gone ahead through a controversial late penalty, when Rivaldo, dallying over a corner kick, was struck on the leg by a ball kicked in frustration by Turkey’s Hakan Unsal. The Brazilian star collapsed to the ground clutching his face, but the referee, a Korean official badly out of his depth and let down by his assistants, sent off the Turkish defender instead⁹³⁷. It was to be the start of a very bad month for refereeing at the top level.

Italy and Spain cry foul

One of the major shocks of the tournament – apart from the good behaviour of England’s fans – was the game in which South Korea beat Italy 2-1 and thus ensured that the Azzurri caught an early aeroplane home. Certainly some doubtful decisions were made against Italy, since the sending-off of Francesco Totti seemed to have no basis in reality, and the “golden goal” which Italy had disallowed did not appear to have any blemish to it. However, the entire Italian nation seemed to unite in condemning not only Mr. Byron Moreno, the match official in question, but the FIFA as well of being “thieves” (“shame on you gentlemen of FIFA and your dirty games” was one of the kinder messages issued by top sports newspaper *Gazzetta dello Sport*). The invective against FIFA appeared to be indicative of a feeling that the governing body and its President, Sepp Blatter, were determined to ensure that South Korea remained in the competition⁹³⁸.

A few days later it was Spain’s turn to cry foul, having been beaten by South Korea after having had two seemingly legitimate goals disallowed. Both the Spanish players and media also heaped damnation upon the referee, Egyptian Gamal Ghandour, claiming once again that “unseen hands” were at work to favour the home side. Even the Prime Minister, José Maria Aznar, expressed his concern at having lost thanks to bad luck

“and other things”⁹³⁹. It was also felt in Spanish circles that there was a general bias against European sides during the tournament⁹⁴⁰. More balanced commentators, however, seemed to be agreed that, whilst the refereeing of both the Italy and Spain matches was abysmal, there was little evidence of downright bias⁹⁴¹.

Reactions by FIFA personalities and others

The initial reaction by FIFA president Sepp Blatter was, surprisingly, to attack the standard of refereeing during the tournament, calling it “a disaster” and the “only negative aspect of the Cup”. He pledged himself to offer concrete proposals aimed at improving the situation at the next meeting of FIFA’s Executive. The suggestions he put forward included fast-tracking former professional footballers into top-level refereeing positions, and selecting fewer referees from smaller countries.

This attack on the match officials directly contradicted other FIFA officials, who had praised the standard of refereeing, with Director of Communications Keith Cooper claiming that errors had been “kept to a minimum”⁹⁴². The impression that the right hand was somewhat ignorant of the workings of its left counterpart was reinforced when Edgardo Codesal, the spokesman for the governing body’s refereeing committee, insisted that referees in general “had done a good job”. He also said that FIFA was planning to restrict replays of controversial incidents during matches. The feeling was that Blatter’s comments had been made mainly to soothe hurt feelings amongst those on the receiving end of refereeing errors, whereas the other officials were representing the true FIFA position⁹⁴³. UEFA also made a suggestion, which was to use two referees per game, Chief Executive Gerhard Aigner explaining that at present, referees are not close enough to the action⁹⁴⁴.

Most commentators in the media were quite scathing of the standard of refereeing in the controversial matches cited above. However, others, such as Kevin Mitchell in *The Observer*⁹⁴⁵ pointed out that the heavy pressures which currently rest on match officials and accordingly can lead to mistakes are caused not only by players’ histrionics, but also by the official bodies’ sometimes pusillanimous response to these antics. Thus Rivaldo’s shameless play-acting referred to above was met only with the slap on the wrist of a \$7,000 fine. Even worse perhaps, in the present writer’s opinion, was the cynical way in which he chose to defend his deception, which he justified as “using his experience”⁹⁴⁶. The penalty handed out to Portuguese player Joao Pinto for punching the referee after being sent off was a mere three months’ suspension and a £21,000 fine rather than the life ban he so richly deserved⁹⁴⁷.

Coaches must take their share of the blame as well.

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When Michael Ballack committed a foul on the edge of his own area during the semi-final against South Korea, he was given a yellow card and ruled him out for the final. Rudi Völler, the German manager, described his action as “heroic” in committing a “tactical foul which was utterly necessary”⁹⁴⁸. This statement must surely stand as a monument to the cynicism which has not become such an integral part of the “beautiful game” as to be probably irreversible.

Boston United admit financial irregularities, but are allowed to remain in League (UK)

When Boston United were promoted from the Nationwide Conference to the ranks of the Nationwide League, many football enthusiasts were looking forward to welcoming a complete newcomer in the League fold. However, at a certain point it looked as though this pleasure might be short-lived, since in late June the club found itself on the wrong end of 16 charges brought by the Football Association (FA). These charges followed a month-long inquiry into alleged irregularities at the club. Manager Steve Evans faced eight charges, the most serious concerning an alleged payment of £8,000 to a player in an effort to mislead an FA inquiry⁹⁴⁹.

In the event, Boston, who had admitted six of the charges, were fined £100,000 and had four points deducted from their tally the following season, but were allowed to retain their League status. This was not to the liking of all those in responsible positions of the game’s authority. Thus Graham Bean, the FA’s compliance officer responsible for ensuring certain ethical standards in the game, was said to be incensed at the decision, particularly as he appeared to have been sidelined during the entire process⁹⁵⁰.

Champions’ League games to be reduced – to the fury of leading clubs

The leading clubs of Europe seemed to be on a collision course with the European governing body UEFA after they learned that the latter plans to reduce the number of fixtures in the tournament by abolishing the second round. This stage will be replaced by an extra two-leg knockout round, although 16 clubs will still progress from the 32-strong first group phase. In a statement, the G14 group of leading European sides stated that they were in favour of retaining the current structure⁹⁵¹.

Robson wins tussle with West Ham for illegal approach for Bernard (UK)

The past few seasons in the English Premiership have been marked by regular accusations against clubs regarding their alleged “tapping” (i.e. making an illegal approach to) certain players in order to entice them away from their employer. Most recently it has been Newcastle who, through their ebullient manager Sir Bobby Robson, accused West Ham United of having made an unlawful approach for Newcastle’s French defender Olivier Bernard. The Newcastle Chairman, Freddie Shepherd, seemed less alarmed about this allegation, which suggested that he might have been contemplating accepting a fee for the player. However, Bernard was in the event offered a new contract by Newcastle⁹⁵².

Three months later, an arbitrator appointed by the Premier League to adjudicate in his dispute awarded the case to Newcastle⁹⁵³.

“Dons” allowed to move to Milton Keynes (UK)

It will be recalled from a previous issue⁹⁵⁴ that Nationwide League club Wimbledon had failed in its bid to relocate its premises to Milton Keynes, having had its application dismissed by the Football League. The club thereupon appealed to the Football Association, which appointed an independent commission to review the case. This commission gave Wimbledon the authorisation they sought. This decision is final, with no scope for any appeal, and was celebrated by the club’s Chairman, Charles Koppel⁹⁵⁵.

However, there were many others who failed to share this delight – and these were not only Wimbledon traditionalist supporters. The FA and Football League expressed concern at the possible implications of this decision. Football League rules only allow moves within the conurbation from which the clubs take their name or with which they are associated, but the Commission ruled that exceptional circumstances justified the move. There was also concern that this might herald a trend towards the American system of franchising clubs⁹⁵⁶.

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

- In August, Leicester City midfielder Dennis Wise had his contract terminated by his club following an incident during the club’s pre-season tour of Finland which involved team-mate Callum Davidson, during which Wise was said to have punched the latter⁹⁵⁷.
- In April, Fulham striker Barry Hayles was suspended for three matches by the FA following an incident with West Ham defender Hayden Foxe during a match the previous year⁹⁵⁸.
- It may be recalled from a previous issue⁹⁵⁹ that the

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“Predator” football boots worn by David Beckham had been banned in a Kent Sunday league. Renewed concern at the safety of this apparel resurfaced in March when the Professional Football Association, the players’ union, demanded an inquiry after Burnley striker Andy Payton needed 35 stitches in a leg wound which he sustained following a clash with an opponent wearing these boots⁹⁶⁰.

- In March, Larus Sigurdsson, West Bromwich Albion’s Icelandic central defender, was banned for two games after having been booked for the tenth time at Sheffield United⁹⁶¹.
- In April, Everton’s Scotland international Duncan Ferguson was fined £35,000 for a punch which floored Bolton’s Ferdi Bobic⁹⁶².
- During the same month, Blackburn Rovers coach Graeme Souness was fined £10,000 and incurred a one-match touchline ban for having used offensive and insulting behaviour towards a referee during an FA Cup tie with Middlesbrough⁹⁶³.
- Later that same month, Leicester City fined Robbie Savage two weeks’ wages for using the referee’s toilet without permission before a match with Aston Villa⁹⁶⁴.
- In May, Nationwide League club Cardiff City were fined for the crowd disturbances⁹⁶⁵ which took place during their FA Cup tie with Leeds United in January⁹⁶⁶.
- The chances of a successful Scottish/Irish bid to stage the 2008 European Championships appeared slim when the Gaelic Athletic Association in Ireland refused to alter a rule barring football from its stadiums⁹⁶⁷.
- English referees have been instructed to take a stronger stand against abusive managers as from the current season. They will be sent to the stands if they ignore warnings from the fourth match official⁹⁶⁸.
- In May, Northern Ireland manager Sammy McIlroy and his assistant Jim Harvey were banned for one match and fined £4,000 after having been ordered from the dug-out during the match against Malta in La Valletta last October⁹⁶⁹.
- In August, Arsenal FC were fined £50,000 by the Football Association after being found guilty of misconduct in the light of their poor disciplinary record during the last season⁹⁷⁰.
- As from this season, the Nationwide Conference will organise playoffs between the second and fifth-

placed teams for a place in the Nationwide League Third Division⁹⁷¹.

Rugby Union

The Rotherham RFC saga

When, towards the end of the 2001-2 season, Harlequins sunk to the bottom of the Zurich Premier league and Rotherham topped the First Division, it looked as though Northern grit would replace the Southern toffs in English Rugby’s top flight. Except that they didn’t, thanks to rules and rulings which many consider to owe more to the old school tie than to the appropriate club jersey.

Under the criteria set by England Rugby, the governing body for professional Rugby Union in this country, all Premiership clubs must have a ground with a minimum capacity of 4,800, of which at least 2,000 must be seated under cover. Rotherham have their premises at the Clifton Lane ground, which they share with a local cricket team. Average attendances are under 1,000, with most supporters standing round the pitch whilst the rest sit in a 300-strong stand. Rotherham hope to build a new 10,000 stadium but maintain that they are unable to do so because the cricket club refuses to move.

The club therefore requested the Rugby authorities whether they could share the ground of Rotherham United football club. However, a new rule was then introduced whereby any Rugby club sharing grounds must have primacy of tenancy in order to ensure that matches are played on a Saturday. This was seen by critics as a tactic to prevent Harlequins from dropping down to the lower division⁹⁷².

Whether or not Rotherham met all the relevant criteria under the ground-sharing scheme was left to a team of auditors appointed for the purpose, who were to report to England Rugby in April. A group of MPs had also lobbied on Rotherham’s behalf (see above, p.91). At first, Rotherham’s prospects seemed good, particularly since England Rugby could not arrive at an immediate decision, which indicated at least that their application was being taken seriously⁹⁷³. However, when the decision was postponed a second time, suspicions began to form that the prevarication merely sought to establish who would be relegated from the Premiership before taking an appropriate decision⁹⁷⁴.

On 9 May, England Rugby finally announced that Rotherham would not be allowed access to the ranks of the Premiership because it failed to meet appropriate entry requirements as to its stadium and resources⁹⁷⁵. This gave rise to a storm of protest throughout the Rugby-playing community. In a forensic examination of the reasons for this decision, respected commentator Stephen Jones poured scorn on the decision⁹⁷⁶.

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Particularly the report submitted by PMP, the company hired by England Rugby to assess the Rotherham case, is dismissed by him in the following words:

“the account was an endless succession of veiled accusations and nit-picking that Rotherham had promised to meet certain standards and then failed, often by a matter of a few days; had messed up their own administration, ignored reminders. On Friday Rotherham issued a convincing rebuttal, in any case”

Elsewhere, the condemnation has been virtually universal. From a purely legal point of view, of course, there remains the unfair competition litigation which at the time of writing was still hanging over the case (see above, p.91). This column will obviously follow this saga with keen interest.

Next World Cup allocated to Australia... on its own

That the organisation of the next World Cup in 2003 was far from straightforward is a proposition which was already in evidence in the previous issue of this organ⁹⁷⁷, with the originally planned joint hosts threatening legal action over the proposal that Australia should host the event on its own.

In April 2002, Australia's proposal to drop New Zealand as co-hosts and to stage the World Cup alone cleared its first major hurdle, when it was approved unanimously by the Board of Rugby World Cup Limited (RWCL)⁹⁷⁸. However, this decision had still to be ratified by the International Rugby Board (IRB), meeting in Dublin. The latter then announced that it would postpone a decision for 24 hours, leading to speculation that New Zealand could yet be readmitted as joint hosts, particularly in view of the intensive lobbying in which the New Zealand delegation had been engaging the previous few days⁹⁷⁹. It then transpired that the New Zealand Rugby Union Board had threatened the IRB with a High Court injunction to prevent the IRB Council from taking a decision, on the grounds that it was a *fait accompli*. However, the New Zealanders backed down once they realised that they would have become involved in protracted and ultimately fruitless legal proceedings.

Finally, on 18 April, the status of Australia as exclusive World Cup hosts was confirmed by the IRB, which at the same time castigated the New Zealanders for their “wholly inappropriate behaviour” during the entire saga. The NZRFU Chairman Murray McCaw responded by accusing the IRB of making a decision based purely on money. Former All Black Zinzan Brooke added to this by calling upon New Zealand rugby to withdraw from the Cup in protest⁹⁸⁰. In the wake of this fiasco, Murray McCaw, David Rutherford and John

Spicer resigned from the NZRFU Board⁹⁸¹.

WRU plan to slim down top division fails (UK)

One of the sadder aspects of modern Rugby has been to witness the decline of the Welsh national team, from perpetual candidates for the Grand Slam to perpetual candidates for the Wooden Spoon. Clearly only drastic action could restore the Principality to its former glory on the Rugby field, and it was accordingly proposed that the top-division sides should be reduced from nine to six. The WRU could have taken this decision itself; instead, it was accused of total lack of leadership by putting the issue to the vote of all its 239 club members in April 2002, which meant that the proposals was almost certain to founder⁹⁸².

And so it proved, by a massive majority of 325 votes to 98⁹⁸³. This was in spite of the crushing defeat by England by a margin of 40 points only a few days earlier, which seemed to emphasise the need for change. Those proposing the plan pointed out that resources were being spread too thinly, and that this could lead to the current sponsors withdrawing their support altogether, thus causing the top sides in Welsh Rugby to become semi-professional⁹⁸⁴. It seems certain that the plan will resurface and may find acceptance – particularly after a few more defeats such as the one they suffered at the hands of the “old enemy”.

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

- In March, the Rugby Football Union (England) decreed that henceforth anyone throwing a punch at an opponent faced an automatic three-week ban as part of a “zero tolerance” crackdown on thuggish behaviour in the wake of the Martin Johnson case, described in an earlier issue⁹⁸⁵ of this organ⁹⁸⁶.
- In April, Samoan captain Semo Sititi made rugby history by staying on the pitch in spite of being shown the red card. This happened when an ugly brawl developed during a Singapore Sevens match between Samoa and New Zealand, as a result of which three red cards were shown – two to New Zealand and one to Samoa. However, none of the match officials checked that the Samoan player dismissed actually left the field⁹⁸⁷.
- In June, French side Agen, who had mounted a double appeal against their suspension as a result of a match-fixing scandal, lost these appeals when the Board of the European Rugby Cup decided that the one-year ban imposed earlier would remain in place⁹⁸⁸.

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Rugby League

“Saints” threaten legal action over “skeleton team” fine (UK)

In mid-April 2002, St. Helens refused to co-operate with the Rugby Football League (RFL) over the under-strength team which they had fielded for a match at Bradford. The League had given Saints 48 hours to provide an explanation for the selection which included only five of the likely contenders for Challenge Cup final scheduled for the following week, as well as the decision to play with 12 men for the final 25 minutes. This followed claims by their opponents that Saints had brought the game into disrepute by these practices⁹⁸⁹. The Rugby Football League’s Operational Board then announced that it had established an independent advisory panel to consider this charge⁹⁹⁰. As a result, St. Helens were fined £25,000. The Saints had claimed that 12 men were unfit before the game, but the team miraculously succeeded in being at full strength for the Challenge Cup Final. A statement from the RFL said that the club had failed to utilise substitutes within the spirit of the game and had breached bylaws by engaging in conduct prejudicial to the interests of the game⁹⁹¹. St. Helens were later said to be considering legal action against this decision⁹⁹².

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

- In April, Rob Jackson, the London Broncos three-quarter, was banned for six matches after having been found guilty of biting the arm of Richard Fletcher, of Hull, during the Bronco’s defeat at Hull⁹⁹³.
- In May, Jason Ryles, the Australian test prop who plays for St. George-Illawarra Dragons, incurred a five-match ban – his fourth suspension this year⁹⁹⁴.
- In June, Wakefield complained to the RFL about Warrington, accusing them of making an illegal approach to their player Nathan Wood⁹⁹⁵.
- In July, Castleford prop Dean Sampson was suspended for six games and fined £400 after being found guilty of striking an opponent during a match with Wigan. His team-mate Michael Smith incurred a one-match ban and a fine of £250 for the same offence⁹⁹⁶.
- In May, clubs were reminded by the game’s authorities that advertising boards must be at least two metres away from the pitch. This came in the wake of a number of injuries caused by players colliding with hoardings⁹⁹⁷.

* In May, Super League coaches renewed their calls for

video referees, following a series of controversial decisions in a game between Widnes and Hull⁹⁹⁸.

- * In July, Swinton were given authorisation by the Rugby Football League to play at Salford City’s football ground at Moor Lane for the remainder of the season⁹⁹⁹.

Racing

McCoy and other first banned, then vindicated on “void” race (UK)

Tony McCoy commenced the new jump season in a disappointing fashion when he was suspended for ten days for taking the wrong course in the opening race at Plumpton in April 2002. Seven other jockeys were banned for the same offence. Stewards ruled that the riders had steered their horses to the wrong side of a running rail in the back straight. Applying the rules of racing, they accordingly declared the race void¹⁰⁰⁰. Tom Scudamore, one of the jockeys banned, complained that there had been inadequate instructions from the clerk of the course, and that the plan of the course did not have a rail on it¹⁰⁰¹. The banned jockeys appealed against this verdict¹⁰⁰². The appeal, before the Jockey Club disciplinary committee, was successful. The Committee found that the jockeys, having jumped the first hurdle, were confronted with a dolling-off rail which could be passed on either side. Plumpton’s clerk of the course explained that he had placed some running rail there to keep horses on the inside and to protect the outside of the hurdles course. The Committee found that the plan shown in the weighing room failed to refer to the dolling-off rail, and that the jockeys who rode to that plan were entitled to pass the rail on either side¹⁰⁰³.

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

- In April, Mick Kinane was banned for seven days after having been found guilty of irresponsible riding of a major nature in the Boadicea Stakes¹⁰⁰⁴. He appealed to the Jockey Club disciplinary committee, which upheld the ban¹⁰⁰⁵.
- In June, Johnny Murtagh received a four-day ban for excessive use of the whip during the Ascot Gold Cup¹⁰⁰⁶.
- The Jockey Club is considering the introduction of a new rule which would mean that jockeys would have to ride horses out to the line, regardless of whether they are 10 lengths clear or 10 lengths last. This is a measure aimed at avoiding a situation which occurred at Pontefract when Tony Culhane eased his mount to such an extent that it was caught near the line. The

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rule is already in force in Hong Kong and Australia¹⁰⁰⁷.

- In April, Martin Pipe and Barry Geraghty were exonerated in a Jockey Club Disciplinary Committee appeal from stopping Magnus in the Coral Eurobet Cup Hurdle at Cheltenham. Pipe had been fined £2,000 and Geraghty suspended for 12 days, whereas the horse was banned for 40 days. Pipe produced veterinary evidence that the horse had bled¹⁰⁰⁸.
- Redcar course was fined £3,500 in April for the late abandonment of a meeting last May following a two-day Jockey Club enquiry. It had been alleged that the track was unfit for racing. Redcar now face legal claims for costs incurred by owners, trainers and jockeys who had travelled to the North East¹⁰⁰⁹.
- In April, Tony McCoy was judged to have used his whip in the incorrect place on Copeland at Chepstow, and was stood down for two days¹⁰¹⁰.
- In spite of the warrant issued for his arrest in Hong Kong, where he is thought to be facing charges of bribery (see above, p.21) jockey John Egan was allowed to continue riding by the Jockey Club. It had been widely expected that he would have his licence removed at a special meeting of the Club's licensing committee in July; however, following the hearing, held in the presence of Egan's lawyer, it was announced that the Club would not be exercising this power¹⁰¹¹.
- Also in July, the Appeal Board of the Jockey Club dismissed the appeal brought by Mick Easterby against a fine which he had incurred earlier under Rule 155(ii), which is that which penalises a failure to gain the best possible placing, in April¹⁰¹².

Cricket

Various "chucking" disputes continue

From the last two issues of this organ¹⁰¹³, it is apparent that the cricket world is once again being afflicted by accusations of "chucking" levelled (hurled even?) at various bowlers. This seems to be a new growth area in the sport, judging by the continued aggravation being experienced in this area by the game's authorities.

Ruchira Perera

Until mid-May 2002, Sri Lankan fast bowler Ruchira Perera seemed destined to be nothing more than an orthodox seamer who, whilst serving his country well, would hardly be instilling fear amongst the top batsmen at the international level. Then came the first Test

Match between the tourists and England, and with it the penetrating eyes of the media, which included Dermot Reeve, formerly of Warwickshire and England. Commentating on Channel Four, he turned to colleague Michael Atherton and opined:

"I'm sorry, Michael, but that's a throw. I am going to put my head on the block."¹⁰¹⁴

This set off a welter of video replays, punditry, accusations and counter-accusations. It was unfortunate that the target of all this attention should have been Sri Lankan, because it reopened wounds dating back to 1998 when David Lloyd, the England coach at the time, made derogatory remarks about what he described as the "unconventional" bowling action engaged in by spinner Muttiah Muralitharan. The visitors' manager, Chandra Schaffter, accused the English media of pleading the proverbial rancid fruit in the light of the bowler's success in the match up to that point¹⁰¹⁵. Certainly it seemed rather strange that, as long as Perera was sending down some very undistinguished stuff, no criticism was forthcoming, whereas a flurry of wickets seem also to have brought a spate of innuendo.

The umpires did not immediately indict Perera's action, but once the match was over, and having studied video evidence of his action, Srin Venkateraghavan and Daryl Harper reported Perera to the match referee, former Indian star batsman Gundappa Viswanath, who in turn informed the International Cricket Council (ICC) and the Sri Lankan team management of the decision¹⁰¹⁶. Curiously, this did not prevent the bowler from taking part in the second Test. Under ICC rules, if a bowler is reported for the first time, he obtains six weeks' grace during which he may continue to compete in international cricket, on condition that he works with a person appointed by his national Cricket Board in order to rectify the problem – in Perera's case, a bent elbow. If he is reported on two further occasions within the next 12 months, the ICC may ban the player and arrange consultation with one of their own experts.

This was all very well, but, as Derek Pringle wrote in *The Daily Telegraph*¹⁰¹⁷, given that the umpires were sufficiently disturbed to call for video evidence and report Perera, it is strange that he was not no-balled on one occasion during the match, and even stranger that the same umpires allowed him to play in the second Test. To add fuel to the fire, England batsman Mark Butcher weighed in with accusations of "chucking" against the seamer just days before the second Test started, using a weekly column in a local Surrey newspaper. He wrote:

"Having faced him for some time, I can say that he

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definitely straightens his arm. It's not so bad when the ball is pitched up but when he bowls short, he just runs up and throws it at you. I can't believe someone gets away with it"¹⁰¹⁸

However, Mr. Butcher distanced himself from these observations the very next day, claiming that he had been a little "silly" in a conversation with the person who ghost-writes the column for him¹⁰¹⁹. However, Butcher was summoned to a hearing by the England and Wales Cricket Board in order to explain his remarks¹⁰²⁰.

In view of the protracted timetable outlined above, this issue had not yet been resolved at the time of writing. This column will monitor its future course with keen interest.

James Kirtley

The Sussex and England bowler's action has been subject to scrutiny by the authorities for some time now¹⁰²¹. It seemed for a while that, following the remedial work with Bob Cottam to which he has been subjected in accordance with ICC rules, all was well, since his action has been cleared by the authorities as a result. However, the Perera imbroglio referred to earlier brought his action into focus once again, particularly since Kirtley was selected for the one-day triangular series which followed the Sri Lankan Tests, and took two Sri Lankan wickets in the process. Writing in *The Guardian*¹⁰²², former Middlesex and England seamer considered that, although Kirtley's action had manifestly improved, he did at times appear to bowl with two actions during the match. Although this may be due to his hyper-extensive arm, the Sri Lankan players could have been forgiven for wondering why one bowler who displays two types of action is reported to the authorities, whereas the other plays with impunity.

ICC makes major rule changes as power struggle for control of world cricket continues

The various disputes which have afflicted the world of cricket during the past twelve months, some of which have been documented in these pages¹⁰²³, seem to reflect more than the odd disagreement on individual cases, and appear to be indicative of a wider power struggle for control of the game at the international level. The forum where this struggle was to be decided was widely perceived to be a key meeting of the International Cricket Council (ICC) Executive Board in mid-March 2002. Jagmohan Dalmiya, the flamboyant Chairman of the Indian Cricket Board who had featured prominently during the Sehwag affair the previous winter, had vowed to use this meeting to condemn what he considered to be anti-Asian bias within the ICC, present India as the natural centre of the cricketing world, and urge that

control be withdrawn from administrators and returned to delegates (most obviously himself)¹⁰²⁴.

During the meeting, Dalmiya seems to have scored some victories without having succeeded in establishing himself as the new epicentre of the international game. The ICC President Malcolm Gray survived a coup engineered by the Indian, but was compelled to make at least some compromises to those wishing to reduce his power. At issue was the question of who controls the Executive Board: delegates drawn largely from every Test-playing country, or a central administration headed by former lawyers Gray and Malcolm Speed (ICC Chief Executive). The latter believed that decisive leadership from the centre was the only way in which to prevent the sport from descending into chaos¹⁰²⁵.

However, Gray's position seemed to be in danger when Dalmiya successfully challenged the composition of the three-man refereeing commission established in order to investigate India's rebellion concerning the penalties to be administered to five of their players by Mike Denness, the match referee during India's tour of South Africa the previous winter¹⁰²⁶. Dalmiya maintained that six test nations were ready to overthrow Speed if he persisted in claiming the right to govern. After intensive lobbying, Dalmiya got his way by forcing a ruling that a reformed three-man referees' commission would be drawn from the Executive Board. Malcolm Gray was reported to be disquieted by this decision, fearing a precedent under which the Executive Board could now assume the right of veto over every decision, as well as slowing down the ICC decision-making process and undermining the game's ability to operate without fear or favouritism¹⁰²⁷.

In a further effort to reduce the scope for achieving consistency free from any cultural bias, the ICC also decided a tough new system of disciplinary rules, laying down 25 basic playing offences which will be penalised under four levels of a new disciplinary code. Minor transgressions (level one) may result in a reprimand or loss of half the match fee, whereas level four offences (anticipating the sadly inevitable day when a player threatens an umpire) will entail a minimum punishment of a ban for five Tests and a maximum life ban. Suspended sentences have been discarded. The valid complaint levelled by Asian Test countries that "western sledging" has been largely tolerated whilst "excessive Asian appealing" has been obsessively penalised appears to have been fairly resolved, since both types of behaviour will henceforth constitute Level Two offences.

In addition, match referees will no longer be the remote, all-knowing figures of the past. In future, they will adjudicate on charges but not actually lay them, since the latter is the preserve of on-field or television umpires. There will also be a right to appeal, although

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this will be confined to the most serious Level Three and Four punishments. These will be handled with commendable despatch, since for international fixtures a member of the Code of Conduct Commission will be required to reach a verdict within seven days. During tournaments such as the World Cup, however, the decision will need to be made before the next match¹⁰²⁸.

MacLaurin jumps before being pushed – but is the English game right in letting him go? (UK)

Whilst the struggle for power at the international level was proceeding in the manner described above, domestic cricket in this country was also witnessing a challenge to the existing order. Five years after assuming the reins of power at the England and Wales Cricket Board (ECB), Lord MacLaurin seemed in an unassailable position, having presided over a massive transformation, both in quantitative and qualitative terms, in the manner in which the domestic game is managed. However, in April 2002 Mike Soper, Chairman of Surrey CCC, announced that he would challenge MacLaurin for the Chairmanship of the ECB¹⁰²⁹.

On the occasion of previous elections during his tenure, MacLaurin had made it known that he would not stand again if challenged¹⁰³⁰. However, it took a long time before he definitely let it be known that he was calling it a day, waiting until a few weeks before elections for the post were due to be held to announce that, because of business pressures, he was not allowing his name to go forward again for the post¹⁰³¹. This gave rise to speculation that he resigned before being defeated at the polls, given that dissatisfaction with his forceful style of management had grown in some quarters. In order to avoid giving the impression that he was leaving under a cloud, MacLaurin invited his successor to work with him for a year in order to ensure a smooth transition of power¹⁰³².

Most commentators sounded a note of regret at his leaving. Mike Selvey¹⁰³³ pointed out that MacLaurin had succeeded in turning the ECB from a rather primitive organisation operating from two rooms at the top of the Lords pavilion into an organisation having its own multi-storey building and employing 84 staff ranging from Chief Executive to IT support analyst. However, the county clubs have proved something of a stumbling block to his reforming zeal; more particularly they were unwilling to countenance the complete governance of the game by a properly constituted Board of Directors having a mandate to deal with all matters referred to it by the counties. Mark Nicholas, writing in *The Daily Telegraph*¹⁰³⁴, also regretted his departure, opining that it would only be the minority of “insecure counties” who would be glad to see him go.

At the time of writing, Lord MacLaurin’s successor

had not yet been elected.

First-class counties agree to changes aimed at increasing appeal

In order to counter the impression that the County game in England was in terminal decline, the first-class county clubs, meeting in April as the First-class Forum (FCF), agreed to a number of changes aimed at increasing spectator appeal. One of the most innovative features will be a new 20-over league to replace the current Benson & Hedges tournament, stimulated by the prediction, made by marketing consultants, that this would attract the highest audiences in the domestic game¹⁰³⁵. The usual one-day regulations will apply, with fielding restrictions in place for six overs and bowlers limited to four overs each. Matches will be played between 5.30 and 8.15 pm, whereas some floodlit games will start at 7.30 and finish at 10.15 pm¹⁰³⁶. The FCF also agreed to support the proposal that counties be allowed to field two overseas players, rather than the one currently allowed¹⁰³⁷.

However, the counties remain committed to promoting the excellence of the England team, even though this may mean depriving them of some of their best players for most of the season. They proved this by voting to allow the ECB to award central contracts to the best 20 players rather than the 12 permitted at present. These contracts will cover both tests and international one-day fixtures¹⁰³⁸.

ICC expands use of video technology in match decision-making... and provides training for top umpires

For some time now, the age-old rule that the umpire is always right in his decision-making has been undermined by the introduction of video replays for contentious run-outs. However, the International Cricket Council’s Playing Committee went a good deal further at its meeting held in mid-March in Cape Town, where it sanctioned an enormous expansion in the use of this technology to cover all umpiring decisions, including disputed lbw decisions. These controversial plans were introduced at the ICC Champions Trophy in Sri Lanka in September 2002, and could, if successful, be introduced in time for the next World Cup in 2003¹⁰³⁹.

English cricket seemed to adopt a “wait and see” position in relation to this experiment, judging by the reaction of ECB Cricket Operations manager Alan Fordham. He vowed to wait until all the positive and negative aspects of the new technology had been thoroughly explored before recommending that the domestic game should follow suit¹⁰⁴⁰.

A few weeks earlier, the same city had been host to a training course for top umpires. They were taken through a host of lessons, including fitness tests and – a sad

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reflection of the times we live in – legal training sessions, anticipating the day when players will almost inevitably attempt to challenge their decisions in the courts¹⁰⁴¹.

ECB introduces bans for bad behaviour

Because of the recent and rapid deterioration in the on-field behaviour of top players, the game's authorities have been compelled to introduce disciplinary measures unthinkable even a generation ago. In April, the England and Wales Cricket Board (ECB) announced yet another set of measures aimed at dealing with this phenomenon. Henceforth, any registered County player who totals a fixed number of "demerit points" in the course of any twelve-month period will face suspension. The ECB will also retain the power to enforce stricter penalties according to the circumstances. Fixed penalties will be issued by umpires who report a player to the ECB. However, the new system will stop short of issuing football-style red and yellow cards¹⁰⁴².

Round-up of other items (all months quoted refer to 2002, unless stated otherwise)

- In June, Steve Kirby, the Yorkshire and England fast bowler, became the first player to be issued with a three-point penalty under the new disciplinary code for county cricket after hurling the ball at Leicestershire's Darren Maddy¹⁰⁴³.
- In late July, Hampshire CCC were docked eight points on the basis that their pitch was inadequate¹⁰⁴⁴.
- During the second Test against Sri Lanka in June, England captain Nasser Hussain was reprimanded by umpire Steve Bucknor for verbally abusing tail ender Dilhara Fernando¹⁰⁴⁵.
- During the same month, Middlesex batsman Paul Weekes incurred three penalty points by the ECB for showing dissent at an umpire's decision, after having been given out, caught at the wicket, during a match with Gloucester at Bristol¹⁰⁴⁶.
- The following month, another Middlesex player was in disciplinary trouble when David Alleyne received three penalty points for showing serious dissent at an umpire's decision during a Second XI Trophy match with Warwickshire¹⁰⁴⁷.

Motor Racing

FIA say "carry on fixing" after Austrian Grand Prix farce

Formula One racing does not offer the most exciting of contests these days, since Michael Schumacher's domination of this discipline is about as complete as Ian

Thorpe's is in swimming. The German seems determined to increase this domination to as yet unseen levels of tedium, judging by the turn of events at the Austrian Grand Prix in May 2002, when Rubens Barrichello was ordered by his team Ferrari to surrender his unassailable lead just yards from the finish, and cited Schumacher's quest for a fifth title as the reason. This earned the team widespread condemnation, which was exacerbated by Schumacher's farcical exercise in tokenism by pushing Barrichello to the top position on the rostrum afterwards¹⁰⁴⁸. Unrepentantly, the team vowed to continue this policy at future races¹⁰⁴⁹.

For these antics, the Ferrari team were summoned to a disciplinary session of the Motorsport Council of the FIA, the governing body for the sport. This took place in late June, and it ended with the team incurring a fine of \$1 million for having engaged in "ill-mannered and inconsiderate behaviour" on the podium. The Motorsport Council did, however, fail to deduct any points from the team. The actual fixing of the race itself went unpunished by the Council¹⁰⁵⁰. Although the team's behaviour had not been technically in breach of the rules, it is difficult to imagine that there was no general provision on race conduct which could not have been relied upon in order to penalise such behaviour.

FIA approves new engine restrictions

In March 2002, FIA, the governing body in motor racing, decided to restrict teams to one engine per car for Grand Prix weekends, and warned drivers that they would henceforth be penalised for dangerous on-track actions. Under the new regulations, which will be introduced in 2004, teams which change engines in the course of the weekend will be punished by forfeiting ten places on the grid. The governing body also decided that it would have the final decision regarding an engine change. This was to avoid the rebuilding of engines at the circuit, while the use of a spare car will count as an additional permitted engine.

The decision to introduce the rules in 2004 is aimed at enabling engine suppliers, who have invested cash into the development of power units specifically in order to qualify, to develop reliable engines¹⁰⁵¹.

Boxing

BBBC doctor resigns over McCullough licence

In July 2002, George O'Neill, the doctor acting for the British Boxing Board of Control (BBBC) resigned over the decision to issue Wayne McCullough with a licence to box in Britain. The Belfast doctor was followed by three of his colleagues connected to the Northern Ireland Area Council for the Board. Two years ago, a

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cyst was discovered near McCullough's brain just before he was scheduled to fight in Belfast, which resulted in the Board refusing him permission to box. However, the Board later reneged on their decision, opting on this occasion to allow McCullough back into a British ring, on 17/8/2002 in Cardiff¹⁰⁵².

Frank Warren, McCullough's promotor, expressed his disappointment at Dr. O'Neill's decision. He claimed that neurological specialists had assured the Board that McCullough was at no greater risk than any other boxer. Warren pointed out that, whilst Dr. O'Neill is a general practitioner, those advising the Board were specialists in their field¹⁰⁵³.

Other Sports

Showjumping. In March 2002, Olympic showjumper Nick Skelton was issued with an official warning for misconduct after having forced his way into the hotel room of two equestrian stars and drunkenly berating them over their riding skills. The British Show Jumping Association (BSJA) issued the caution after hearing how Skelton had targeted James Davenport and his brother Richard after they competed in the European Championships for young riders in Spain the previous year¹⁰⁵⁴.

Cycling. During the Tour of Italy this year, Francesco Casagrande, the race favourite, was disqualified from the race following a confrontation with Columbian John Freddy Garcia. The latter was taken to hospital suffering from facial injuries after clashing shoulders with Casagrande during a mountain sprint early in the 15th stage, as a result of which Garcia landed on his face and required stitches to his forehead and mouth¹⁰⁵⁵.

Sailing. In March 2002, Cowes, the scene of the prestigious annual race, announced plans to introduce laser speed guns and road-style electronic displays urging yachtsmen to slow down in an attempt to improve safety. Cowes Harbour Commission hoped to have the flashing warning signs in place within weeks. They would be the first in any part of the world. Captain Stuart McIntosh, the harbourmaster, commented that these measures were not to be interpreted as a punishment for yachtsmen exceeding the six-knot limit, but merely as a measure intended to educate them. However, a fine which could reach £2,000 is available for repeated offences¹⁰⁵⁶.

Hockey. In April 2002, Old Loughtonians had two points deducted by the English Hockey League (EHL) for playing an unregistered contestant, Ollie Davies, in two matches the previous month¹⁰⁵⁷.

Ice skating. The French judge and the federation official at the centre of the Olympic figure skating scandal in Salt Lake City in February¹⁰⁵⁸ were issued with the harshest punishment in the history of the sport when they were each banned for three years and barred from officiating at the next Winter Games¹⁰⁵⁹. (See also above, p.23)

Bowling. During the 2002 Commonwealth Games in Manchester, John Davies, a disabled New Zealand lawn bowler was sent home in disgrace after having sexually harassed a woman volunteer¹⁰⁶⁰.

Footnotes

- 1 Anwaltsblatt 7/2000, p.409.
- 2 [2002] 1 Sport and the Law Journal p.35.
- 3 The Independent of 6/6/2002, p.18.
- 4 The Sunday Telegraph of 17/3/2002, p.S10.
- 5 Bender.S., "Balancing Act" in Gazette of 4/7/2002, p.28-30.
- 6 Gazette of 4/7/2002, p.8.
- 7 Gazette of 28/3/2002, p.8.
- 8 Gazette of 21/3/2002, p.13.
- 9 Gazette of 21/3/2002, p.9.
- 10 Gazette of 21/3/2002, p.5.
- 11 The Lawyer of 22/7/2002, p.16.
- 12 Gazette of 13/6/2002, p.26 et seq.
- 13 Nederlands Juristenblad of 31/5/2002, p.1091; see also www.mundivoccat.com website.
- 14 See Neue Juristische Wochenschrift, No.23/2000, p.XX.
- 15 See Neue Juristische Wochenschrift No.25/2002, p.XXII.
- 16 See Neue Juristische Wochenschrift No.31/2002, p.XVIII.
- 17 See e.g.[2000] 1 Sport and the Law Journal p.45.
- 18 2nd edn.(1998).
- 19 The Guardian of 20/6/2002, p.14.
- 20 Ibid.
- 21 Ibid.
- 22 The Guardian of 2/7/2002, p.7.
- 23 The Independent of 2/7/2002, p.28.
- 24 The Independent of 26/3/2002, p.15.
- 25 The Guardian of 26/3/2002, p.15.
- 26 Ibid.
- 27 The Daily Telegraph of 21/3/2002, p.S8.
- 28 Ibid.
- 29 Daily Mail of 9/7/2002, p.15.
- 30 The Daily Telegraph of 28/3/2002, p.S6.
- 31 The Sunday Telegraph of 28/7/2002, p.S5.
- 32 The Daily Telegraph of 15/3/2002, p.S5.
- 33 The Guardian of 15/3/2002, p.34.
- 34 [2002] 1 Sport and the Law Journal p.16 et seq.
- 35 The Guardian of 16/3/2002, p.S10.
- 36 The Guardian of 13/4/2002, p.S11.
- 37 [2002] 1 Sport and the Law Journal p.18.
- 38 The Daily Telegraph of 18/3/2002, p.S3.
- 39 [2002] 1 Sport and the Law Journal p.17.
- 40 The Guardian of 23/3/2002, p.S10.
- 41 Daily Mail of 5/4/2002, p.93.
- 42 Daily Mail of 12/4/2002, p.81.
- 43 The Sunday Telegraph of 14/4/2002, p.S3.
- 44 Daily Mail of 18/4/2002, p.83.
- 45 Daily Mail of 17/4/2002, p.83.
- 46 The Sunday Telegraph of 21/4/2002, p.S1.
- 47 The Guardian of 20/4/2002, p.S4.
- 48 Daily Mail of 23/4/2002, p.77.
- 49 The Daily Telegraph of 24/4/2002, p.S2.
- 50 Daily Mail of 22/4/2002, p.79.
- 51 The Guardian of 22/4/2002, p.S3.
- 52 The Guardian of 24/4/2002, p.26.
- 53 The Guardian of 26/4/2002, p.30.
- 54 Daily Mail of 1/5/2002, p.76.
- 55 The Guardian of 4/5/2002, p.S7.
- 56 The Guardian of 6/5/2002, p.S7.
- 57 The Observer of 5/5/2002, p.S10.
- 58 Daily Mail of 8/5/2002, p.75.
- 59 The Guardian of 9/5/2002, p.26.
- 60 The Daily Telegraph of 13/5/2002, p.S3.
- 61 The Daily Telegraph of 22/5/2002, p.S2.
- 62 Daily Mail of 25/5/2002, p.91.
- 63 The Observer of 26/5/2002, p.S7.
- 64 The Daily Telegraph of 29/5/2002, p.S2.
- 65 The Guardian of 30/5/2002, p.34.
- 66 The Sunday Telegraph of 2/6/2002, p.S4.
- 67 The Guardian of 22/6/2002, p.S17.
- 68 The Daily Telegraph of 21/6/2002, p.S3.
- 69 The Guardian of 10/7/2002, p.27.
- 70 The Daily Telegraph of 15/3/2002, p.S7.
- 71 [2002] 1 Sport and the Law Journal p.62-64.
- 72 [2002] 1 Sport and the Law Journal p.43.
- 73 [2001] 2 Sport and the Law Journal p.63.
- 74 Daily Mail of 24/4/2002, p.76.
- 75 Daily Mail of 7/5/2002, p.69.
- 76 Ibid.
- 77 Daily Mail of 25/5/2002, p.91.
- 78 [2002] 1 Sport and the Law Journal p.1.
- 79 Daily Mail of 4/4/2002, p.91.
- 80 Ibid.
- 81 Daily Mail of 19/4/2002, p.92.
- 82 Ibid.
- 83 [2002] 1 Sport and the Law Journal p.18.
- 84 Daily Mail of 7/6/2002, p.87.
- 85 Ibid.
- 86 [2001] 1 Sport and the Law Journal p.13.
- 87 Daily Mail of 6/4/2002, p.91.
- 88 Ibid.
- 89 The Sunday Telegraph of 23/6/2002, p.S9.
- 90 The Daily Telegraph of 28/6/2002, p.S6.
- 91 The Sunday Telegraph of 23/6/2002, p.S9.
- 92 The Daily Telegraph of 21/3/2002, p.S8.
- 93 The Sunday Telegraph of 23/6/2002, loc.cit.
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The harder the cap, the softer the law?

Salary Caps as a response to the economic downturn.
By Stephen Hornsby

1. Professional sport in the current economic climate

According to a report published in September 2002, the English Football League's salutary experience of selling its broadcasting rights to only one interested pay-TV bidder after the collapse of ITV Digital will soon be replicated by three of Europe's top five soccer leagues including the English Premier League¹. Indeed, only a few months ago, rugby union's Six Nations Committee had to go back and accept a bid from the sole bidder for the broadcasting rights that it had earlier described as being "silly". Clearly these examples do not bode well for the major soccer leagues which are at the pinnacle of European professional sport.

This dependence on one broadcaster is not unprecedented. Before broadcasting was de-regulated and Sky and others came on the scene, football was faced with either a monopoly state broadcaster or two terrestrial broadcasters who did not compete very vigorously. The interests of licence payers or shareholders meant that rights fees were depressed as a result. However, during most of that period, clubs were helped by the fact that transfer revenues were at a high level and player remuneration was comparatively low. Post Bosman (and September 11), this situation has changed utterly.

No industry can deal with a decline in its revenue and an increase in its costs without undergoing fundamental structural change. Help is nowhere in sight: state aid is ruled out and what is more, populist but anti-competitive listings legislation which keeps down sports' rights fees makes matters worse. Competition authorities, having now been forced to accept that without collective selling there may be no event², are turning their attention to the exclusive character of the broadcasting deals: their insistence on "windows" of rights or extensive sub-licensing will only depress rights fees still further³.

It is against this background that more and more discussion is taking place on issues of cost control, and in particular the need to cap salaries. Much of the public debate has been characterised by failure to distinguish between the practical difficulties in enforcing a salary cap and their legality. This is not surprising: unless and

until there is authoritative guidance in Europe on the legality of salary caps, it is difficult to draw clear distinctions between what is practical and what is a legal difficulty.

The object of this article is to put the legal case in favour of one form of salary cap if that were to be the method chosen by the sport to seek to deal with the current crisis. It is argued that the "hard" form of salary cap, in which total team revenue is capped, is likely to survive legal scrutiny in the present economic circumstances. Despite the huge practical difficulties of implementation, this form of salary cap should therefore not be ruled out as a means of resolving current problems on legal grounds.

It is important that a positive analysis of a "hard" salary cap is possible because the alternatives to salary caps (such as revenue sharing, club consolidation and franchising, individual salary cuts, redundancies and liquidations and common ownership of competing clubs) may create even greater legal and practical problems. Whether any salary cap can be made to work effectively without more radical changes to the European model of sport is an interesting question touched on briefly at the end of the article.

2. Types of salary cap and the relevant law

Salary caps come in a variety of different forms but can be broadly divided into "hard" caps and "soft" caps. "Hard" caps forbid teams from spending more than a fixed sum on their players; "soft" caps on the other hand are more flexible and allow clubs to spend a proportion of their individual revenues (but no more) on player's salary. Under a "soft" cap, the richer the club, the more it can spend on players.

The traditional rationale for salary caps is that in their absence, the survival of the competition or its balance will be at risk because the same well-endowed teams always win. Whilst it is possible to make a distinction between these rationales, unbalanced competitions are often unstable: this instability can lead to an economic crisis which leads the governing body to intervene. In the opinion of Max Mosley, Formula One is probably at this point in its development. In announcing his intention to introduce draconian measures designed to

bring Ferrari's dominance to an end, he said that such measures were contrary to Formula One's traditions but "you can keep your traditions but no-one cares because they are not watching".⁴

"Hard" caps, by not allowing the wealthy to buy success, favour competitive balance. On the other hand, "soft" caps reward efficiency (or the wealthy) who are able to spend more than their poorer rivals at

"Hard" caps forbid teams from spending more than a fixed sum on their players; "soft" caps on the other hand are more flexible and allow clubs to spend a proportion of their individual revenues (but no more) on player's salary.

the potential cost of competitive balance. When broadcasting and other commercial revenues are in decline, "soft" caps may therefore prove self defeating and provoke consolidation.

EU competition law has potential applications to both sorts of caps provided that trade in players' services between Member States is affected. Even if such international trade is not affected, domestic competition law (such as the UK Competition Act 1998) will apply. If salary caps were to be

accompanied by restrictions on player movement within Europe with a view to achieving competitive balance (as happens in the US "draft" systems), then the free movement of persons provisions could apply as well. In practice, this situation is unlikely to arise while leagues continue to be organised on a national territorial basis so they are not considered further here.⁵

EC competition law requires appreciable restrictions of competition to be identified in a relevant market or markets. If this threshold test is satisfied, then agreements can benefit from exemption under Article 81(3) if the outcome is judged to be beneficial in accordance with detailed criteria. The burden of demonstrating the benefits of restrictive agreements falls upon the parties

but the effect on third parties (and their views) are taken into account before reaching an exemption decision. We shall see that as a result of recent case law, the distinction between Article 81(1) and Article 81(3) is eroding, even if it has not collapsed entirely.

In common law jurisdictions, the restraint of trade doctrine also applies. The restraint of trade doctrine focuses on restrictions on individuals' freedom. It is not necessary to define a relevant market to bring the doctrine into play. Thereafter however, the party seeking to uphold the restrictions may satisfy the Court that they are reasonable by reference to wider policy considerations. We consider the restraint of trade doctrine below.

3. The application of competition law to salary caps

In examining the competition law implications of "hard" and "soft" salary caps, it is necessary to go through a number of stages:

- Are there restrictions on clubs' freedom, and if so, how appreciable are they?
- What is the effect of these restrictions in a number of identified markets in the light of the objectives of these restrictions?
- Can these restrictions be justified?

Both "hard" and "soft" caps are horizontal agreements between competitors which restrict the amount of money that they spend on a key input, or raw material. Both amount to joint purchasing agreements which normally fall within Article 81(1) and require justification under Article 81(3).

Although the "hard" cap is very restrictive in character, with no clubs being allowed to exceed the ceiling on expenditure, it is now clear that competition law is not so formalistic that the degree of restrictiveness determines that Article 81(1) applies without further analysis. Similarly, the fact that a "soft" cap is in formal terms less restrictive than a "hard" cap because it gives each club the ability to "cut their coat according to their cloth" does not necessarily mean that it escapes Article 81(1). In both cases, what counts is the effect of the formal restriction on clubs' freedom

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taking into account all the relevant economic circumstances. Only if it appears that Article 81(1) is applicable is it necessary to go on to consider under Article 81(3) whether the agreement creating the cap can be justified.

This further and wider analysis has to take into account particular features of the relevant market. Conclusions that are valid in one market are not necessarily valid in others if that market has particular characteristics which point to a different conclusion. This can be illustrated by an example: assume for a moment that purchasers of scrap (which is the key ingredient for raw steel) were considering a cap on the amount of money they would spend on this product in the face of declining demand and they sought advice on whether a “hard” or “soft” cap would be more likely to survive regulatory scrutiny. In these circumstances, it would be normal to advise that both “hard” and “soft” caps would fall within Article 81(1).

It is now clear however that in different situations, restrictions of freedom in an “upstream” market can be justified by reference to the objectives which such restrictions are designed to achieve in a “downstream” market.

Moreover, in this market it is difficult to envisage how an exemption could be granted under Article 81(3) even if there were to be a massive contraction in the number of steel firms as a result. One of the reasons would be that common purchasing agreements for such a key input would not only restrict competition in the scrap market but would lead to coordination and upward pressure on the price of the finished product. Anti competitive effects by this analogy would be manifest “upstream” (the raw material market) and

“downstream” in the finished steel market. Even in a time of economic crisis, this would not be justified as consumers of steel would bear the cost of steel industry over-capacity. It is now clear however that in different situations, restrictions of freedom in an “upstream” market can be justified by reference to the objectives which such restrictions are designed to achieve in a “downstream” market. This kind of analysis is well illustrated in the EC Commission’s recently published rejection of ENIC’s complaint against the UEFA rule prohibiting one company from owning more than one football club.⁶ The relevant passages are worth quoting in full:

“30. However, the simple fact that the UEFA rule may not have as its object a restriction of competition is not sufficient to consider that it falls outside of the scope of application of Article 81(1) of the Treaty. It is also necessary to assess whether the effect of the rule is restrictive and if so, whether this effect is inherent in the pursuit of the object of the rule which is to ensure the very existence of credible pan European football competitions. The rule may limit the freedom to act of clubs or their owners.

31. As the Court of Justice recently stated in the Wouters case⁷, “not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article[81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives. (...) a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article [81(1)] of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.”

32. Thus the question to answer in the present case is whether the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions. Taking into account the particular context in which the rule is applied, the limitation on the freedom to act that it entails is justified and cannot be considered as a restriction of competition. Without the UEFA rule, the proper functioning of the market where the

clubs develop their economic activities would be under threat, since the public's perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability. If UEFA competitions were not credible and consumers did not have the perception that the games played represent honest sporting competition between the participants, the competitions would be devalued with the inevitable consequence over time of lower consumer confidence, interest and marketability. Without a solid sporting foundation, clubs would be less capable of extracting value from ancillary activities and investment in clubs would lose value."

In asking the question whether restrictions that prevent the setting up of a multi-disciplinary partnership were justified, the European Court in *Wouters* went beyond the "upstream" restrictions in the organisation of the professional market (in essence the restriction on lawyers and accountants setting up in partnership together) and examined the interests of ultimate consumers of those services in the "downstream"

market for the acquisition of professional services.

On the other hand, in a sport market without a large number of clubs, there can be no sporting competition and nothing is produced at all – let alone at a competitive price.

The application of *Wouters'* judgment in the sporting field in ENIC is of the greatest significance. This is not the first time that Community institutions have acknowledged the specific nature of sport in seeking to analyse a number of its characteristics under Community law. In his opinion in *Bosman*, at paragraph 270 the Advocate-General said that "certain restrictions

may be necessary to ensure the proper functioning of the sector"⁸. However the application of *Wouters* in ENIC so as to allow UEFA's prohibition of common ownership of clubs puts a great deal more flesh on this bone and is far more instructive than the generalities of the Helsinki Report on Sport⁹. In the light of ENIC, it is possible to pose the question of whether salary caps are inherent in ensuring the "very existence of credible pan European competitions". Would the absence of restrictions on the clubs' freedom to act have the effect of "rendering, in the long term, any competition impossible"? If the answer to these questions is affirmative, then the key analysis is taking

place within Article 81(1) instead of Article 81(3). Restrictions of freedom are in effect being analysed as not restrictive of competition: therefore they fall outside the rules of competition altogether.

The ENIC principles applied to "hard" salary caps

In seeking to answer the question of whether a "hard" cap falls outside the rules of competition, it is necessary to identify the relevant sporting markets in which such a cap may have an impact. It is also necessary to put to one side the degree of restrictiveness of the cap and bear in mind the limitations of examples drawn from the manufacturing industry, such as steel.

In particular, one must consider the "counterfactual", ie. what might reasonably be expected to happen in the absence of the restrictions. In a market with one steel producer only, something is still produced and the price may well be competitive because the existence of substitutes (eg. aluminium) or because ease of entry into the steel market prevents the steel monopolist from exploiting his position. On the other hand, in a sport market without a large number of clubs, there can be no sporting competition and nothing is produced at all – let alone at a competitive price.

The markets concerned by common arrangements in relation to player employment are as follows:

- (i) The market for players services (the employment market);
- (ii) The market for the rights to players services (ie. the transfer market);
- (iii) The market for the sport in question;
- (iv) The market for sports entertainment generally.

In *Bosman* the Court had to analyse restrictions in the second of these markets (the transfer markets) on the football market. The Court found that any benefits on the "downstream" football market advanced by UEFA did not outweigh its restrictive effect on the "upstream" transfer market. In relation to a salary cap, the assessment under competition law means going further "upstream" and involves balancing restrictions on the employment market against the benefit to be derived in the market for the relevant sport.¹⁰

To analyse the question of the impact of employment restrictions on the relevant sports market, it is instructive to return to the example of the steel industry. If all firms responded to severe over-capacity by coordinating the prices at which they purchased scrap through a joint buying agency or by agreeing to spend only a certain proportion of their total turnover on the raw material, we saw that there would be a fear that they would be able to coordinate an increase in prices without dealing with the over-capacity in the steel market itself. Under the "counterfactual", the

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outcome would be worse for consumers of steel (such as car manufacturers): consolidation would be deferred and the consumer (who very probably could not be exploited by even one steel producer) would “pay” for the industry’s overcapacity with higher prices.

The application of ENIC principles to “hard” caps sports markets is fundamentally different from steel markets: the very existence of a sport which provides a benefit to consumers in the sports entertainment market (the final “downstream” market) may depend upon and therefore justify restrictions in the raw material (“upstream” employment market). It is therefore necessary to look beyond the short term interests of those whose salaries are being restricted and the richer clubs whose interests are curtailed under a “hard” cap, and look at the interests of the sport and of final consumers in the sports entertainment market. It is then necessary to consider what would happen in those markets under the “counterfactual” (ie. no salary cap).

However, even when times are good, experience shows that such a “soft” cap does not achieve competitive balance. In times of economic crisis competitive imbalance can only be accentuated under a “soft” cap.

ENIC was concerned with the credibility of competitions. Without the restriction, the Commission took the view that in the long term a credible sporting competition would not be possible because the public would not believe what they saw. Restrictions on clubs’ freedom designed to bring about a credible competition were in the interests of consumers and therefore held not to be restrictions on competition. A fortiori restrictions, without which a product may not exist at all, should fall to be

analysed in the same way. Provided therefore that the factual case for a “hard” cap can be made out, ie. it can be demonstrated that but for the cap there will probably be no competition and therefore nothing produced in “downstream” markets, there is no a priori legal reason why the severe restriction on the clubs’ liberty under a “hard” cap should amount to a restriction of competition falling within the competition rules.

Justification of a “hard” cap under Article 81(3) is unnecessary under this analysis. Unlike the situation in the steel market, the ultimate consumers are not being required to pay higher prices in the sport as a result of the restrictions. Without the restrictions, it is likely there will be nothing to see (or broadcast), ie. no league

competition. Even those whose short-term interests appear prejudiced by a “hard” cap (star players and rich clubs) may not be prejudiced at all for without a sufficient number of clubs to generate a league that has sporting interest, they may need to find other paid employment or investment opportunities.

The ENIC principles applied to “soft” caps

If the degree of formal restriction is less important than the “downstream” impact of restrictions in an “upstream” market, how should the “soft” cap be analysed? Paradoxically it is impossible to avoid the conclusion that the softer the cap the harder the law should be. Clearly, in overall terms a “soft” cap is less restrictive since more efficient clubs can spend more money on players’ salaries as they increase their overall revenues. Moreover, the players may have a real incentive to improve their position by moving from a weaker to a richer club.

However, even when times are good, experience shows that such a “soft” cap does not achieve competitive balance¹¹. In times of economic crisis competitive imbalance can only be accentuated under a “soft” cap. Faced with declining overall revenues, a small club under a “soft” cap is pinned to spending no more than a certain percentage of its shrinking revenues on players’ salary. This may be nothing short of a death sentence for such a club.

It is instructive to bear in mind that rugby leagues’ response to its financial problems was a “soft” cap but that has now been replaced by a “hard” cap since continuation with the “soft” cap was destroying the league. In the light of the practical difficulties of a “hard” cap, it is tempting to advocate a more tolerant approach to a “soft” cap. However, the consistent application of the ENIC principles indicates that “soft” caps in times of economic crisis not only fall within Article 81(1) but are unlikely to satisfy the rigours of an Article 81(3) exercise. The reason for this is that with a “soft” cap there will be a decline in the number of clubs rather than a matching of supply and demand (the proper objective). As the objective can be obtained in a less restrictive way, a “soft” cap ought not to be permitted under competition law.

4. Restraint of trade: out of line or consistent with competition law?

There is no doubt that restraint of trade can be pleaded on an alternative basis in an attack on a salary cap. In the light of what we have said above on the potential legal acceptability of a “hard” salary cap under competition law, restraint of trade may prove a more promising line of attack for those opposed to it. Under this doctrine it is not necessary to define a market: the claimant (who can be clubs as well as players)¹² simply

has to identify a restriction¹³. If he succeeds, it is then for the defendant to convince the Court that the restriction is reasonable both in the overall interests of the parties and, more generally, in the interests of the public¹⁴. Once a restriction on individual freedom is made out, it is difficult to establish that the restriction is "reasonable". Courts in common law jurisdictions have been sceptical about appeals to wider considerations which have included market analysis¹⁵.

Although there is not yet any UK case law on the application of any type of salary cap in sport, there is ample Antipodean authority¹⁶. The leading case is *Adamson v. NSW Rugby League*¹⁷. However, what was striking about the system challenged in *Adamson* was that it was a "draft" system in which players could be effectively compelled to work for a given team. In the words of Wilcox J who emphatically rejected the justifications of the system advanced by its organisers:

"How in a free society can anyone justify a regime which requires a player to submit intensely personal decisions to the determination of others."¹⁸

The Australian experience and the fact that New Zealand competition law is specifically stated to be without prejudice to the application of the restraint of trade doctrine may have had some influence across the Tasman sea. In New Zealand, the rugby union governing body's restrictive transfer system provided specifically that "No player can be compelled to transfer and no player can be prevented from transferring by his Union." It was this liberal feature of the New Zealand system that enabled it to be exempted under New Zealand competition law. The quite modest restrictions in the "upstream" market for the acquisition of player services were outweighed by the advantages in the "downstream" markets having regard to the "counterfactual": ie. in the absence of the restriction, it was considered likely that all the best players would go to a few teams, thus destroying the competition. One writer has expressed the view that it is precisely the absence of compulsion to work for a given employer that would also have enabled the New Zealand system to survive attack under the restraint of trade doctrine¹⁹.

If one considers the facts in *Eastham v. Newcastle*²⁰ (and the *Bosman* case which was decided under free movement provisions which are structurally similar), what the Courts are objecting to is the element of compulsion. The retain and transfer system meant that George Eastham was tied to Newcastle: he had to work for them. Similarly, Jean Marc Bosman could not leave his club until some monies changed hands, despite being out of contract.

These situations can be clearly contrasted to what happens to players under a "hard" salary cap. A player

re-negotiating a contract with his existing club who wants more than the club can pay under a "hard" cap must move on to obtain greater financial rewards, but he is not compelled to work for a given new club. He may even decide to stay where he is. So also with the player who is out of contract: faced with different offers from clubs, he can accept the best financial offer. Alternatively, if his chances of regular selection and prominence in the team is greater with a club who can pay less, he will choose this club if these matters are more important to him.

The key point is that under the "hard" cap, the "intensely personal" decision about whom a player wishes to work for is his and his alone.

The key point is that under the "hard" cap, the "intensely personal" decision about whom a player wishes to work for is his and his alone. There is therefore a fundamental difference between the "hard" cap and the "draft" and retain and transfer systems struck down in *Adamson*, *Eastham* and *Bosman*. Indeed, in an economic crisis it is not going too

far to say that it is the restriction itself that provides freedom to choose as the "counterfactual" for a sport in an economic crisis is that there are fewer potential employers (and opposition teams). There is therefore a compelling argument that restraint of trade and competition law outcomes should be the same for "hard" caps and that challenges by clubs and players should be rejected. On the other hand, but consistent with this analysis, "soft" caps should fail to pass muster under the restraint of trade doctrine just as they fail to pass the competition law test.

5. Collective agreements: do they make any difference?

So far we have seen that there are good legal grounds for the belief that a "hard" cap ought to fall outside the rules of competition altogether in a time of economic crisis and that it is not necessary to proceed to an analysis under Article 81(3). For essentially the same reasons, a "hard" cap is a reasonable restraint of clubs' and players' trade. We have also seen that despite its less restrictive nature from a formal perspective, a "soft" cap, even if it is a practical solution, does not address problems raised by an economic crisis. It leads to enforced closure of weaker clubs and therefore falls within Article 81(1) and would not satisfy the requirements of Article 81(3). Does the presence or absence of a collective agreement involving players' representatives change this legal analysis?

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Opponents of salary caps, who can either be leading players (or their agents) or richer clubs who would suffer from a “hard” cap will say that it does. They will point to US law where the existence of collective agreements in itself exempts salary caps from the application of the Sherman Act. In the US, the absence of a properly negotiated collective agreement is generally fatal to the legal enforceability of a salary cap, whatever its form. Under US law, the fact that the players union subsequently accepts a salary cap agreed between clubs or franchises generally means that anti-trust immunity is lost. It follows that players’

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representatives have to be involved from the outset²¹.

If this reasoning were to be applied in Europe, the involvement of the players union from the outset would of course make it much more difficult to organise a “hard” salary cap if this is considered the only practical and legal solution to the economic situation of sport. However, even in US law, it is not clear that in a very difficult economic climate, a wage cap needs to be negotiated collectively to be legally valid. In the recent case of *Brown v. Pro Football*²², the Supreme Court on an 8-1 majority authorised the unilateral imposition of employment terms by employers after there was a failure to reach a

collective bargaining agreement with the players. The Supreme Court took the view that to make such an agreement vulnerable to anti-trust liability threatened to introduce instability and uncertainty.

Nevertheless, the presence of collective agreements can be important. In a case unlikely to be well known to sports lawyers, concerned as it is with insurance arrangements in Holland (the Albany case²³), the European Court of Justice has already held that the existence of a collective agreement generally determines that it should be exempt from Article 81(1)²⁴. But this is not a blanket exemption. As Advocate General Jacobs made clear in an exhaustive Opinion in which he refers with approval to *Brown v.*

Pro Football, each case must still be looked at on its merits in the light of prevailing circumstances (see paragraph 187). It follows that the presence of a collective agreement does not in itself absolve the “hard” cap or the “soft” cap. What counts is whether the agreement infringes Article 81(1) rather than its collective character. Clearly, if a “hard” cap is agreed collectively, so much the better; but the absence of such agreement is not fatal to it any more than the presence of a collective agreement exempts a “soft” cap where, as we have seen, there are good grounds for it being prohibited under Article 81(1).

6. Is the European model of sport now obsolescent?

We saw at the outset that it was necessary to separate the legal and practical problems faced by salary caps in a time of economic crisis. Even if the application of the ENIC principles and the restraint of trade doctrine permit the form of salary “cap” that could most effectively address professional sports’ current problems, this does not mean that a “hard” salary cap is the most practical solution. Now that there are greater disparities in wealth between the divisions, relegation can mean commercial extinction; clubs in the top divisions have every incentive to cheat in order to maintain their position. Aspirant clubs also have every incentive to cheat in order to improve their position.

The question of whether a “hard” cap, although legal, may be impractical because of promotion and relegation, gives rise to a much greater question – namely whether the European model of sport with its unitary and pyramid structure can survive. Even before the collapse of the broadcasting market it was looking pretty battered. The abolition of restrictions on nationality as a result of *Bosman* has led to a reduction in the playing performance of clubs in smaller countries as players follow the money to the larger leagues. This has given rise to pressure for an Atlantic league from such countries – so far resisted by UEFA.

Whether alternative parallel leagues involving clubs with a similar cost base are necessary or inevitable is debateable: what is clear however is that competition law cannot be used to stop them provided that clubs continue to contract the players and are prepared to withstand the consequences of governing body disapproval²⁵.

No competition authority however has yet pronounced on whether annual promotion and relegation is mandated by competition law. It has been argued that provided no steps are taken to prevent alternative leagues from being organised, then competition law is flexible enough to exempt “closed leagues” without annual promotion and relegation²⁶. Unless and until this proves correct (and the European

model is radically modified), “hard” salary caps may enjoy legal victory but face practical defeat. This could lead to the whole sector being re-structured (even more radically) by the forces of the free market. This would be unfortunate, for to judge by ENIC, EC law (and the restraint of trade doctrine) are sufficiently flexible to allow “hard” salary caps in the current climate.

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- 1 *The European Soccer Report – the TV Rights Slump and the Commercial Prospects for Europe’s top five Soccer leagues. September 2002. Sportcal Global Communications. The English Premier League is reported as having already started preparing for negotiations for a new contract – with three years of the existing contract still to run.*
- 2 *Despite the fact that the major Italian clubs are allowed to sell rights to their home games individually, they were forced to subsidise the minor clubs in order to allow the competition to continue*
- 3 *Under the terms of its recent settlement with the EC Commission, UEFA whilst being allowed to continue to sell the most important rights collectively can no longer attempt to gain exclusivity by selling the rights to the Champions League to a single broadcaster in each country. From now on, UEFA must break rights into several packages to be sold to a variety of broadcasters across several “windows”. The European Court of First Instance judgment of 10 October (M6 v. Commission T-185/00, T-216/00, T-299/00 and 300/00) manifests a similar hostility to exclusive broadcasting arrangements.*
- 4 *See The Times – 7 October 2002.*
- 5 *In any event, whatever the position under EU law (and this would probably be hostile), “draft” systems are likely to fall foul of the restraint of trade doctrine for reasons set out below. See text accompanying footnote 23.*
- 6 *Case Comp/37 806: ENIC/UEFA 22 July 2002.*
- 7 *Case C-309/99: Wouters, judgment of 19 February 2002 not yet published points 97 and 110.*
- 8 *Case C-415/93: Union Royale de Belge de Societes de Football (ASBL) v. Jean-Marc Bosman (C415/93) ECRI-4921.*
- 9 *Com (1999) 644 December 1, 1999.*
- 10 *There is no doubt that the transfer market would be affected by employment restrictions: transactions may be less frequent and for lower sums but the impact may not be very significant. Even if it is significant, the key question again is what is the “counterfactual”? If the answer to this is that the existence of a relevant sport would be put into a question, then any restrictive impact on the transfer market is easily outweighed by the fact that but for the restriction in the employment market, the transfer market would be imperilled by a reduction in the number of clubs. This would lead to a reduction in the number of transfer arrangements. For a case involving restrictions on the number of transfers see New Zealand Rugby Football Union incorporated – New Zealand Commerce Commission authorisation decision 281, 17 December 1996 – subsequently upheld on appeal.*
- 11 *See J Quirk and R D Fort: “Pay Dirt: The Business of Professional Team Sports” Princeton University Press (19912) pp242-258. According to a survey conducted by the authors on the five major league sports in the US between 1901 and 1990, none had achieved competitive balance despite player “drafts” and salary caps.*
- 12 *The doctrine was specifically extended to allow clubs to challenge the rules of their governing body. See Newport Association Football Club v. Football Association of Wales Limited [1995] 2 All ER 87.*
- 13 *Restrictions are widely defined. Thus Lord MacNaughton said in Nordenfelt v. Maxim Guns and Ammunition Co Ltd [1894] AC 535 at p565 that “All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore that is the general rule.”*
- 14 *See Raymond Farrell “Salary Caps and Restraint of Trade”. S & L J 1997 5 (1) for an analysis of relevant cases.*
- 15 *See Kerr v. Morris [1987] Ch 90 where reasonableness as between the parties and public interest were dealt with as separate issues.*
- 16 *For an excellent analysis see W Pengilly “Restraint of Trade & Anti-Trust: A Pigskin Review Post Super League” Canterbury Law Review [Vol 6 1997] pp610-670.*
- 17 *Adamson v. NSW Rugby League Limited (1991) ATPR 41-141 (Full Federal Court of Australia).*
- 18 *N17 Full Federal Court at p53, 035.*
- 19 *Pengelly op. cit at page 655.*
- 20 *Eastham v. Newcastle United FC Limited [1964] Ch 413.*
- 21 *Mackey v. National Football League. 1976 Trade Cases 61, 119.*
- 22 *Brown v. Pro Football 116 S Ct 2116 (1996).*
- 23 *Albany International BV v. Stichting Bedrijfspensioenfonds Textiel Industrie Case C-67/96: judgment of the European Court of Justice 21 September 1999. In Case C-33/89 Kowalska [1990] ECR I-2591 the Court decided that the principle of equal pay could not be overridden by even a genuine process of collective bargaining. Insofar as any “draft” in sport affected rights of free movement it is submitted that it would be struck down both under EC law and at common law – in contrast to the position in US law where a right to choose one’s employer can be bargained away collectively.*
- 24 *See paragraph 60 of the judgment.*
- 25 *These are likely to involve non-selection for national representative teams.*
- 26 *See Stephen Hornsby – “Closed Leagues” a Prime Candidate for the “Sporting Exception” in European Competition Law [2001] ISLR. The issue was not even mentioned by the Commission in its Preliminary Guidelines on the Application of the Competition Rules to Sport (Unpublished Commission Memorandum 15 February 1999).*

PGA Tour, Inc. -v- Martin: The Decision and Its Implications

By Roy L. Reardon and Joseph M. McLaughlin

Early last year, *PGA Tour, Inc. v. Martin*¹ brought the Supreme Court to the rarely visited intersection of federal law and the rules of professional sport. The Court concluded that PGA Tour golf competitions “fit comfortably within the coverage” of Title III of the American with Disabilities Act’s (“ADA”),² “and Martin within its protection.” The decision constituted the Court’s first pronouncement on Title III of the ADA, and gave the Court the opportunity to resolve several issues of national importance concerning the scope of the ADA’s application in places of public accommodation, the relationship between the statute’s employment and public accommodation provisions, and what constitutes a “reasonable accommodation” for a person’s disability under the ADA. This article provides a brief overview of the case and the Supreme Court’s holding, and offers some thoughts about the broader implications of the ruling.

Background

Casey Martin is a 29 year old professional golfer who suffers from a congenital, degenerative circulatory condition called Klippel-Trenaunay-Weber Syndrome. The condition, first diagnosed when Casey was three years old, is manifested in a massive, permanent malformation of his right leg that dramatically limits his ability to walk. Although blood can circulate into his lower right leg, blockage at knee level prevents recirculation, resulting in severe pain and atrophy of the lower leg. In addition to chronic severe pain, Casey has lost significant bone stock and tissue, so that he is at risk of fracturing his tibia simply by walking. The condition has progressively deteriorated and Casey’s right leg is at risk of amputation above the knee. The PGA conceded at all stages of the case that Casey has a disability within the meaning of the ADA.

Despite his disability, Casey excelled at golf, earning a scholarship to Stanford University where he was an NCAA academic all-American. While at Stanford, Casey’s condition deteriorated until he could no longer walk the course, and he applied for and received permission to use a golf cart in competitions. Upon graduation, Casey sought a career in professional golf.

An understanding of the basic structure of the

professional golf world and the rules governing its competitions is necessary to analyze the Court’s application of the ADA to the game. The professional golfer aspires to entrance into one of the three separate tours for professional golfers sponsored by the PGA: the PGA Tour, the Buy.com Tour (f/k/a the Nike Tour) and the Senior Tour (for qualifying golfers 50 years or older). The principal way a player becomes a member of the PGA or Buy.com Tour is by demonstrating his ability in a three-stage tournament known as the Qualifying School (“Q School”). Any member of the public can play in the Q School if he pays a \$3,000 entry fee and submits two letters of recommendation from PGA Tour members. Competition in the first two stages winnows the field to 168 players, each of whom is guaranteed a place on either the PGA or Buy.com Tour.

The rules governing PGA and Nike Tour competition come from three sources: (1) the “Rules of Golf,” as promulgated by the United States Golf Association (“USGA”) and the Royal and Ancient Golf Club of St. Andrews, Scotland; (2) “Conditions of Competition and Local Rules,” which golfers call the “Hard Card;” and (3) “Notices to Competitors,” which relate to the particular golf course involved in a tournament. The Rules of Golf are the recognized fundamental rules of the game, and make it clear that the essence of the game is shot-making:

Rule 1. The Game. 1-1. General. The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

The Rules do not require players to walk. Rule 33-1 of the Rules of Golf authorizes the committee overseeing a tournament to set forth certain “optional conditions” enumerated in Appendix I to the Rules, i.e., a Hard Card. The PGA promulgates a Hard Card annually containing the optional conditions applying to a year’s competitions. The PGA’s requirement that “Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee” is among the “optional conditions” relating to “transportation.” (emphasis added).

Casey used a cart without objection in the first two stages of the 1997 Q School and qualified to enter the third stage. He requested permission from the PGA to use a cart in the final stage of Q School. In support of the request, he sent medical records to the PGA establishing his disability, including a videotape showing the nature and extent of his condition. Without making any objective

Casey used a cart without objection in the first two stages of the 1997 Q School and qualified to enter the third stage. He requested permission from the PGA to use a cart in the final stage of Q School.

determination that allowing Casey to use a cart would give him a competitive advantage, the PGA's Commissioner rejected the request and returned the medical records without reviewing them.

The Lawsuit

Casey then commenced a lawsuit in Oregon federal district court seeking preliminary and permanent injunctive relief under Title I (prohibiting discrimination in employment) and Title III (prohibiting discrimination at places of public accommodation) of the ADA requiring the PGA to permit him to use

a cart in the third stage of Q School and in subsequent PGA events. The District Court granted the preliminary injunction, and Mr. Martin played well enough to earn a spot on the 1998 Nike Tour.

The District Court then granted summary judgment against the PGA on two issues. The District Court held on the basis of an undisputed factual record that (1) the PGA is not exempt from the ADA as a private club because it is a commercial enterprise, and (2) the PGA owns, operates and leases places of public accommodation, subjecting it to Title III of the ADA.

The District Court thereafter conducted a six-day bench trial in which it received medical and lay testimony principally relating to whether Mr. Martin's use of a cart to enable him to participate in PGA competition would fundamentally alter the nature of

PGA competition. The District Court then issued its Findings of Fact and Conclusions of Law containing detailed factual findings supporting the conclusion that there is "compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making, "and that under the individual inquiry mandated under the ADA," the PGA had failed to meet its burden that permitting Mr. Martin to use a cart would fundamentally alter PGA competitions.

The Ninth Circuit Court of Appeals affirmed the District Court's rulings. See *PGA Tour, Inc. v. Martin*, 204 F.3d 994 (2000). The court held that Title III applies to the PGA when it sponsors golf tournaments, and that the factual record developed in the District Court supported the conclusion that "[t]he central competition in shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability. That is precisely the purpose of the ADA." *Id.* at 1000.

One day after the Ninth Circuit ruled, the Seventh Circuit reached a contrary conclusion in a case brought against the USGA by a disabled golfer who sought permission to use a cart in the U.S. Open. See *Olinger v. United States Golf Association*, 205 F.3d 1001 (7th Cir. 2000). Referencing physical ordeals endured during competition by famous golf champions of the past, the Seventh Circuit held that "the nature of the competition would be fundamentally altered if the walking rule were eliminated because it would remove stamina . . . from the set of qualities designed to be tested in this competition." *Id.* at 1006.

Relying principally on the divergent results reached by the Ninth and Seventh Circuits, the PGA filed a petition for a writ of certiorari in the Martin action. The petition sought review of the Ninth Circuit's rulings that Title III of the ADA applied to competitions sponsored by the PGA, and that allowing Casey to use a cart was a reasonable accommodation that would not fundamentally alter the nature of PGA competitions. The Supreme Court granted the petition without specifying whether review had been granted as to one or both of the issues raised by the PGA. In addition to the briefs submitted by the parties,

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the Court received amicus curiae submissions on behalf of Casey Martin from the Department of Justice, Senators Dole, Harkin and Kennedy, and numerous disability rights organizations; and on behalf of the PGA from the USGA, the ATP Tour and the LPGA, and the Equal Employment Advisory Council.

The Supreme Court's Decision

In a seven-to-two decision, the Supreme Court on May 29, 2001 affirmed the Ninth Circuit's ruling in all respects. Writing for the majority, Justice Stevens observed that the case presented two distinct issues: "first, whether the Act protects access to professional golf tournaments by a qualified entrant with a disability; and second, whether a disabled contestant may be denied the use of a golf cart because it would 'fundamentally alter the nature' of the tournaments, § 12182(b)(2)(A)(ii), to allow him to ride when all other contestants must walk." *Martin*, 121 S.Ct. at 1884.

Addressing the coverage issue first, the Court commenced its analysis by noting that Congress enacted the ADA as a direct and "sweeping" response to widespread historic discrimination against disabled persons. *Id.* at 1889. Title III of the ADA broadly provides that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).³ Noting that Congress expressly defined "public accommodation" to include, inter alia, "a golf course," 42 U.S.C. § 12181(7)(L), the Court concluded that "Title III of the ADA, by its plain terms, prohibits [the PGA] from denying Martin equal access to its tours on the basis of his disability." *Martin*, 121 S.Ct. at 1890.

The PGA argued, however, that the protections of Title III only extend to "clients and customers" seeking to obtain "goods and services" at places of public accommodation. The PGA contended that under its interpretation of Title III, Casey as a competitor is not a client or customer of the PGA, but more akin to a performer, making his claim employment-related. Thus, under the PGA's formulation, Casey could assert a claim only under Title I's employment provisions, but such a claim would fail "because he is an independent contractor (as the District Court found) rather than an employee." *Id.* at 1891.

Title III's general rule broadly prohibiting discrimination against "individuals" does not contain the

phrase "clients or customers." Section 12182(b)(1)(A)(iv), the only section of Title III in which the phrase "clients or customers" is found, provides that "[f]or purposes of clauses (i) through (iii) of this subparagraph, the term 'individual' or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." Clauses (i) through (iii) of the subparagraph prohibit public accommodations from discrimination on the basis of disability through contractual arrangements with other entities. Interpreting these provisions, the Court concluded that "[t]hose clauses make clear on the one hand that their prohibitions cannot be avoided by means of contract, while clause (iv) makes clear on the other hand that contractual relationships will not expand a public accommodation's obligations under the subparagraph beyond its own clients or customers." *Martin*, 121 S.Ct. at 1891.

To determine whether permitting Casey to ride in a cart would fundamentally alter the nature of competition, the Court consulted the Rules of Golf, medical and lay testimony developed in the District Court.

While expressing skepticism at the PGA's attempt to engraft the "client and customer" limitation contained in a subparagraph of Title III onto "Title III's general rule prohibiting discrimination against disabled individuals, *id.* (emphasis added), the Court declined to resolve the interpretation question and instead concluded that the PGA's argument "falters even on its own terms." *Id.* Even if the PGA were correct that Title III protects only "clients or customers" at public accommodations, the

Court reasoned, Casey remains covered by Title III. Golf competitions sponsored by the PGA "simultaneously offer at least two 'privileges' to the public – that of watching the golf competition and that of competing in it. Although the latter is more difficult and more expensive to obtain than the former, it is nonetheless a privilege that [the PGA] makes available to members of the general public." *Id.* at 1892. The Court buttressed its conclusion by reference to decisions under Title II of the Civil Rights Act of 1964, which recognized a broad class of individuals covered by anti-discrimination protections at places of public accommodation.

Having concluded that the PGA must conduct its competitions in accordance with Title III of the ADA, the

Court turned to the question of whether barring Casey from using a cart during competition constituted discrimination. Title III of the ADA broadly defines discrimination as the failure of a “public accommodation” to make a “reasonable modification” of its “policies, practices, or procedures” when necessary to make its “goods, services, facilities, privileges, advantages, or accommodations” available to individuals with disabilities, unless such modification would “fundamentally alter the nature” of its “goods, services, facilities, privileges, advantages or accommodations.” 42 U.S.C. § 12182(b)(2)(A)(ii). Because the PGA conceded that “a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments,” the result turned on “whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA Tour, the Nike Tour and the third stage of the Q-School, is a modification that would ‘fundamentally alter the nature’ of those events.” Martin, 121 S.Ct. at 1893.

To determine whether permitting Casey to ride in a cart would fundamentally alter the nature of competition, the Court consulted the Rules of Golf, medical and lay testimony developed in the District Court regarding the effect and enforcement of the PGA’s walking requirement, and evidence regarding the nature and extent of Casey’s disability.

Rule 1 of the Rules of Golf defines the game as “playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.” As the Court noted, “nothing in the Rules of Golf . . . either forbids the use of carts, or penalizes a player for using a cart.” Id. at 1894. Thus, “[t]he walking rule that is contained in [the PGA’s] hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.” Id. at 1894-95.

The Court also found persuasive that the PGA permits the use of carts “in the Senior PGA Tour, the open qualifying events for [the PGA’s] tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well. Moreover, [the PGA] allows the use of carts during certain tournament rounds in both the PGA Tour and the Nike Tour,” and provides no handicap or penalty for players who use carts. Id. at 1895 and n.4⁴.

The PGA’s assertion that walking — and the fatigue induced thereby — are “fundamental” to golf was also contradicted by detailed factual findings in the District Court, which were supported by medical testimony and lay testimony from those involved in the game’s highest levels:

The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in the

walking a golf course (about five miles) to be approximately 500 calories—“nutritionally...less than a Big Mac.” 994 F.Supp., at 1250. What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

Moreover, when given the option of using a cart, the majority of golfers in petitioner’s tournaments have chosen to walk, often to relieve stress or for other strategic reasons. As NIKE TOUR member Eric Johnson testified, walking allows him to keep in rhythm, stay warmer when it’s chilly, and develop a better sense of the elements and the course than riding a cart.

Id. at 1896.

The Court also ruled that the PGA had fatally undermined its position by refusing to consider any evidence concerning the nature and extent of Casey’s disability. In order to comply with the ADA’s requirement that reasonable modifications of policies, practices and procedures be made to grant disabled individuals access to public accommodations, the Court held that “an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances...” Id. The PGA had argued that it was entitled to make the “fundamental alteration” determination without reference to the relevant individual’s circumstances. But the Court rejected the PGA’s argument that all substantive (i.e., potentially outcome-determinative) rules in high-level athletic competitions are sacrosanct, noting that acceptance of such a position would essentially exempt high-level sports organizations from Title III, which “carves out no exemption for elite athletics.” Id. at 1897.

Evaluating the evidence adduced at trial regarding the severity of Casey’s condition, the Court ruled it had “no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of [the PGA’s] tournaments.” Even crediting the PGA’s assertion that the purpose of the walking requirement is to inject fatigue into the competition, the Court concluded that “[t]he purpose of the walking rule is not compromised in the slightest by allowing Martin to use a cart.” The Court noted the District Court’s “uncontested finding” that Casey “easily endures greater fatigue even with a cart

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than his able-bodied competitors do by walking.” *Id.*

Justice Scalia, in a pointed dissent joined by Justice Thomas, criticized the majority’s reasoning and conclusions concerning the two issues presented. On the coverage question, Justice Scalia asserted that Title III protects only clients and customers of public accommodations, and that interpreting Title III’s coverage to reach individuals competing in sports events has worked mischief on the interplay between Title III and Title I’s employment provisions. Noting that “Congress expressly excluded employers of fewer than 15 employees from Title I,” Justice Scalia deemed it “an entirely unreasonable interpretation of the statute to say that these exemptions so carefully crafted in Title I are entirely eliminated by Title III (for the many businesses that are places of public accommodation) because employees and independent contractors ‘enjoy’ the employment and contracting that such places provide.” *Id.* at 1899 (Scalia, J., dissenting).

Justice Scalia also assailed the majority’s application of the “fundamental alteration” inquiry to the rules of professional sport. The game of golf offered by the PGA, in Justice Scalia’s view, is the sum of its arbitrary rules, and no court should “pronounce one or another of them to be ‘nonessential’ if the rulemaker (here the PGA Tour) deems it to be essential.” *Id.* at 1903.

Implications of the Decision

The Supreme Court’s decision interprets Title III of the ADA in accordance with the plain language of the statute and its legislative history. In enacting the ADA, Congress recognized that unequal treatment of people with disabilities cannot be overcome unless both intentional and unintentional barriers to full participation in all aspects of life are eradicated. Casey Martin is seriously disabled as a result of a debilitating circulatory condition. At the same time, Casey is a highly talented golfer, able to match skills with the best in the game. The PGA had tried to deny Casey access to the game of golf at its highest levels because he cannot walk the course. As to Casey Martin, the Supreme Court’s decision simply enforced on an undisputed record unambiguous language in Title III of the ADA establishing that golf courses owned and operated by the PGA are places of public accommodation. Taking into account Casey’s individual circumstances, the Court held that the ADA requires the PGA to accommodate Casey’s disability because it failed to prove that use of a cart would fundamentally alter the nature of its competitions by giving Casey (as opposed to a hypothetical able-bodied golfer) a competitive advantage.

The Martin dissent expressed concern that “future cases of this sort” will proliferate, providing a “rich source of lucrative litigation.” *Id.* at 1904 (Scalia, J., dissenting). It is respectfully submitted that the

dissent’s concerns are overstated. As an initial matter, damages are not recoverable in actions under Title III of the ADA. While the original bill introduced in Congress did include a provision for damages, Congress deleted the damages provision to assuage the concerns of small businesses in exchange for a broader definition of public accommodations. The statute limits the available remedy to injunctive relief, including a mandatory injunction to make a public accommodation “readily accessible,” or to provide an “auxiliary aid or service, modification of a policy, or provision of alternative methods.” 42 U.S.C. § 12188(a)(2).⁵ The inability to recover damages will go far in preventing litigation under Title III from becoming a for-profit venture.

Moreover, as the majority pointed out, the experience in the wake of Casey’s suit against the PGA has not reflected anything approaching a litigation boom. See Martin, 121 S.Ct. at 1897 n.53 (“in the three years since he requested the use of the cart, no one else has sued the PGA, and only two golfers . . . have sued the USGA for a waiver of the walking rule”). The concern that accommodating Mr. Martin will ripple into other sports is also exaggerated. Requiring reasonable accommodations for people with permanent disabilities does not force sports organizations to change the nature of the game to allow people who lack the core skills needed to compete. Someone who cannot run is not qualified to participate in a foot-race. But if a player qualifies by demonstrating exceptional ability in the sport’s essential skills, his permanent disability unrelated to the sport should not exclude him from using that ability.⁶

As a practical matter, Casey will likely prove to be a nearly unique case; it is difficult to conceive many individuals having the talent to compete at the highest levels of a sport yet having a permanent disability within the meaning of the ADA. As Justice Stevens wrote, surely “Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow then access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.” *Id.* at 1898.

The implications of the decision outside of professional sports must await further decisions. As noted above, the majority declined to decide whether Title III applies to all “individuals,” or covers only “clients or customers” of public accommodations. Rather, it concluded that even under the narrow interpretation sponsored by the PGA, Casey is a client or customer of the PGA when he seeks access to the “privilege” of playing in PGA events. While the dissent argued that the majority’s interpretation of Title III will

engulf Title I by making “everyone who seeks a job” at a public accommodation a “customer” seeking the “privilege of employment,” the majority expressly disavowed this result. *Id.* at 1892 n.33 (“Unlike those who successfully apply for a job at a place of public accommodation, or those who successfully bid for a contract, the golfers who qualify for [the PGA’s] tour play at their own pleasure . . . and although they commit to playing in at least 15 tournaments, they are not bound by any obligations typically associated with employment.”).

It bears emphasis that Martin did not present or decide whether an employee can obtain protection under Title III because the Ninth Circuit did not disturb the District Court’s conclusion that Casey is not employed by the PGA. It is improbable, however, that Title III would be interpreted to provide protections expressly excluded by Title I; such an interpretation would directly contradict unambiguous statutory language and legislative history. See 42 U.S.C. § 12111(5)(A) (Title I inapplicable to employers of fewer than 15 employees); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 35, 99 (1990) (“employment practices are governed by Title I of this legislation,” not Title III).

The majority opinion does make clear that Title III claims of covered persons will turn on the inquiry mandated by the text of Title III: whether the non-employee claimant has been denied access to the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. § 12182(a). By paying a \$3,000 entry fee and submitting two letters of recommendation, Casey became a “client or customer” of the PGA seeking to avail himself of the “privileges” afforded by the PGA, i.e., the opportunity to compete. In subsequent cases, a compelling basis remains to contend that Congress extended the protections of Title III to all “individuals” at “places” of “public accommodation,” without limiting their purpose for being there or the uses being made of the facility. Martin expressed skepticism at the textual basis for the “client or customer” limitation, but declined to reject it outright. Thus, for the time being, parties will need to litigate the plaintiff’s status under the alternative formulations of (a) “individual” and (b) “client or customer.”

The full extent of Title III protection for a variety of individuals with disabilities who need an accommodation to access public accommodations must await future cases. For example, an “auditorium,” a “museum” and a “private school” are places of public accommodation, see 42 U.S.C. § 12181(7)(D), (H), (J), and should not cease to be for individuals with disabilities who need an accommodation to access the facilities to audition or perform. Martin supports a powerful argument that such individuals are covered. Under a narrower view,

however, while members of the public attending an opera or symphony are protected, individuals such as blind tenor Andrea Bocelli and violinist Itzhak Perlman (who has a crippling disability) — both of whom excel in their professions — might be discriminated against on the basis of disability at auditions or performances because they need accommodations to access the performance area. Similarly, a narrow interpretation of the “client or customer” standard might withhold anti-discrimination protection from an individual with a disability who wants to try out or perform at a theater or recital, or seeks to earn compensation at a talent show or lecture, even though Title III unambiguously applies to all places of “exhibition or entertainment.” See 42 U.S.C. § 12181(7)(C).

Nothing in the language of Title III or its legislative history suggests that public accommodations should be able to discriminate against such people simply because they seek to use the accommodation’s services to receive compensation. The text and purpose of Title III should mandate the conclusion that Congress extended the protections of Title III to all “individuals” at “places” of “public accommodation,” without limiting their purpose for being there or the uses being made of the facility.

The authors are partners at Simpson Thacher & Bartlett, and represented Casey Martin before the Ninth Circuit Court of Appeals and the United States Supreme Court.

1 121 S.Ct. 1879 (2001).

2 42 U.S.C. § 12101 *et seq.*

3 The other subchapters of the ADA are Title I (employment), Title II (public services), Title IV (telecommunications), and Title V (miscellaneous provisions).

4 As the Court observed, “[I]n consideration of the [\$3,000] entry fee, any golfer with the requisite letters of recommendation acquires the opportunity to qualify for and compete in [PGA] tours. Additionally, any golfer who succeeds in the open qualifying rounds for a tournament may play in the event.” *Id.*

5 The prevailing party in an action under Title III may recover reasonable attorneys’ fees and costs. 42 U.S.C. § 12205.

6 The ADA does not protect individuals with temporary ailments. The ADA does not cover the average person ill from the flu or incapacitated by short term surgery. See 29 C.F.R. ch. 14, pt. 1630, § 1630.2(j) (defining “substantially limits”); 29 C.F.R. ch. 14, pt. 1630, App., § 1630.2(j) (interpreting § 1630.2(j)).

Reasonable care -v- Reckless disregard. Revisited

By **Alistair Duff**

Henderson Boyd Jackson Solicitors

Readers may recollect the original article which appeared in Volume 7, Issue One, 1999, pages 44-54 of the Journal. It would appear an appropriate time to look at the position now and also to remind readers of the conclusion in the original article, namely "However, in reality, there is unlikely to be much practical difference between reckless disregard and negligence in all the circumstances...."

The writer is going to look at two written articles one of which deals with an actual case and four actual case reports he has come across, but the list is not exhaustive. The writer is dealing with them in the order he thinks they were published and it will become apparent that following the Appeal Court case of Caldwell -v- Maguire & Fitzgerald, 27 June 2001, the matter appears to have been put beyond doubt.

Firstly, in terms of an article by Tim Kevan, which appeared in the Journal of Personal Injury Litigation under reference J.P.I.L. 2001, 2, 138-148 headed "Sport Injury Cases, Footballers, Referees and Schools" in one section of the article he specifically considers negligence and looks at the what should be familiar cases of Condon -v- Basi, Elliot -v- Saunders & Liverpool FC, McCord -v- Swansea City Football Club and Watson -v- Bradford City!! In his conclusion he states that "As the above makes clear, the law in this area is still developing and only time will tell how it will do so in the future. It remains uncertain whether a different standard of care should be applied to professionals compared to amateurs. Further, the actual test remains open to debate. Is it, for example, 'significant risk of serious injury' or is it 'reckless disregard' or some other formulation? Perhaps, ultimately, it comes down to a question of fact in the particular case: should this player be found to be liable for the injuries he has caused? Did he act unreasonably in all the circumstances?"

Secondly, in terms of an article by Steven Harvey appearing in Volume 9, Issue One, 2001 of our Journal, headed "Amateur Football and the Law" he considers the case he was involved in namely Cubbin -v- Minis. In this actual case, which was tried on 6 October 2000, the judge found in favour of the claimant awarding the amateur footballer damages of £18,000 for the injuries and financial loss suffered following a broken leg

sustained in a tackle during a Wirral Sunday League game in December 1996. In terms of the article it appears that the judge was very much swayed by the judgment in the case of Watson -v- Gray. He said that the final test would be whether a reasonable amateur player would recognise the significant risk in causing serious injury through his actions and he also appeared to say that a player involved in a football match or any other sporting match owed a duty to take reasonable care. In the sporting context there were however

He said that the final test would be whether a reasonable amateur player would recognise the significant risk in causing serious injury through his actions.

particular circumstances and consequently the test of negligence is slightly modified and he also drew a distinction between amateur and professional football further modifying the test he applied in the case.

The writer has previously commented, the judgment of Watson -v- Gray does not refer to any authorities and the judge accepted that in order for Gordon Watson to succeed in his claim "that it must be proved

on the balance of probabilities that a reasonable professional player would have known that there was a significant risk that what Kevin Gray did would result in a serious injury to Gordon Watson" and the judge, at the end of the day, having considered all the evidence, towards the end of his judgment stated "I accept the plaintiff's submissions except insofar as the challenge is described as badly mistimed. I am in no doubt that such a forceful, high challenge, particularly when carried out when there is a good chance that the ball had been moved on, was one that a reasonable professional player would have known carried with it a significant risk of serious injury. The first plaintiff therefore succeeds in this claim for negligence against the first and second defendants."

This appears to be a different sort of test based upon

whether the plaintiff suffered serious injury or not and this seems rather odd because one could envisage the situation where there is a clearly negligent act - ie an assault on a player by another off the ball but there is no more than minor injury. Does this mean the player cannot recover?

Further reverting to Cubbin the comments about a distinction between amateur and profession football again seems rather odd and, as previously mentioned, such comments were raised in Condon -v- Basi, but Mr Justice Drake in Elliot -v- Saunders, albeit obiter, states

"I fully accept that the standard of care to be considered is objective, but depends on the circumstances of each case. Lord Donaldson's added comment that a higher degree of care is required of a player in a First Division match than that of a player in a local league was not necessarily the decision of the court and was therefore obiter. I'd respectfully doubt whether it can be accepted without some reservation."

The writer would refer to Nettleship -v- Weston, 1972 QB 691, where in the Court of Appeal Lord Denning and Lord Justice Megaw held in a case involving a learner driver that the duty of care owed by the learner driver to the passenger/instructor was the same objective and impersonal standard as that owed by every driver, including the learner to passengers, the public and property on and off the highway in the criminal and civil law. Lord Denning, at one point stated "It is no answer for him to say I was a learner driver under instruction. I was doing my best and could not help it. The Civil Law permits no such excuse. It requires of him the same standard of care as of any other driver."

Further, in Jones -v- Manchester Corp, 1952 2 AER 125, a patient died from an excessive dose of anaesthetic which had been administered by a doctor who had been qualified for 5 months. Again in the Court of Appeal Lord Denning said "Errors due to inexperience or lack of supervision are no defence as against the injured person".

The writer respectfully submits that this applies to

amateurs and professionals involved in sport as well.

Thirdly, we turn to the Court of Appeal judgment given on 27 June 2001 in Caldwell -v- Maguire and Caldwell -v- Fitzgerald, reported in 2002 PIQR, P6, which would appear put matters beyond doubt as all the relevant authorities were cited, which has been one of the problems in the past – namely lack of the citation of all relevant authorities.

The case was to do with a professional jockey who was seriously injured whilst riding in a two mile novice hurdle race at Hexham on 30 September 1994. Holland J dismissed his claim for personal injuries against the two respondents who were also professional jockeys and were riding in the same race. The Appeal was heard before The Lord Chief Justice, Lord Justice Judge and Lord Justice Tuckey. Lord Tuckey stated "The appellant's complaint was that the judge set the standard of care too low; that he effectively required proof of deliberate or reckless disregard for safety. If he had applied the correct standard, in any event, he would or should have found that the respondents were negligent." Further on he stated "Following the race there was a stewards inquiry at which the respondents were found guilty of careless riding in that they had not left enough room for Byrne to come round the inside rail. They were each suspended for three days."..... "Two distinguished experts, John Francome and Carl Llewellyn, gave evidence at the trial. They agreed with the finding of the stewards because they thought the respondents should not have taken the inside line unless and until they were one length clear of Royal Citizen. Both should have looked to their left to ensure that Royal Citizen was no longer in contention. As to the law, the judge said that the primary guidance for him must come from the Court of Appeal."

He considered the five relevant cases, namely Condon -v- Basi, 1985 1WLR 866, Wooldridge -v- Sumner, 1963 2QB 43, Wilks -v- Cheltenham Homeguard Motor Cycle and Light Car Club, 1971 1WLR 668, Harrison -v- Vincent, 1982 RTR 8 and finally Smoldon -v- Whitworth 1997 ELR 249.

Lord Tuckey stated:

"From these cases he extracted five propositions

Reasonable care -v- Reckless disregard. Revisited

..... and Lord Brennan QC for the appellant accepts the first three of the judge's propositions of law, but says the last two are unduly restrictive and not supported by the Court of Appeal authorities, which the judge considered."

Proposition [4] was in the following terms "[4] Given the nature of such prevailing circumstances the threshold for liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse in skill (and thus care) respectively when subject to the stresses of a race. Such are no more than incidents inherent in the nature of the sport" and "[5] In practice it may therefore be difficult to prove any such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden. The judge in the first instance then expressed his conclusions as follows: Each defendant is guilty of lapses of care in the riding of their respective mounts away from the second last hurdle so as to contribute to the premature curtailment of the inside lane otherwise being followed by Royal Citizen and thus so as to contribute to the claimant's accident..." Further on Lord Tuckey states "Holland J, was referred to a number of other Australian authorities, as we have. It is not necessary to refer to those cases. The relevant principles to be applied to a case of this kind emerge clearly from the decision of this court in Condon and Smoldon, which are binding on us." (The writer notes that Curtis J, the judge of the first instance in Smoldon -v- Whitworth specifically said "I decline to be drawn into the argument about whether I am bound by the decision in that case or it is of persuasive authority. Either way, in my judgment the case contains a compelling, modern and easily understood statement of the law.") Lord Justice Tuckey later on commenting on the judge in the first instance's position stated "In his fourth and fifth propositions, the judge made it clear he was referring to the practicalities of the evidential burden and not to legal principle. All he was saying was that, in practice, given the circumstances which he has identified, the threshold of liability is high. Lord Bingham CJ said the same of the referee in Smoldon..... The judge did not say that a claimant has to establish recklessness. That approach was specifically rejected by this court in Smoldon. As in Smoldon, there will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast moving contest. Something more serious is required."

The writer specifically notes that Lord Bingham CJ specifically said "The level of care which is required is

that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast moving and vigorous context. The threshold of liability is a high one. It will not be easily crossed."

Lord Justice Tuckey then turned to the appellant's second ground of appeal which was namely "He submits that the judge should, in any event, have found the respondents liable..... The Jockey Club's findings that the respondents were guilty of careless riding supports and establish the view that this was a case of negligence in which the respondents should have been held liable."

Lord Justice Tuckey later on states "The Jockey Club's

Lord Bingham CJ specifically said "The level of care which is required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance.

rules and its findings are of course relevant matters to be taken into account but, as the authorities make clear, the finding that the respondents were guilty of careless riding is not determinative of negligence. As the judge said, there is a difference between response by the regulatory authority and response by the courts in the shape of a finding of legal liability."

Lord Justice Judge stated at one point in his judgment "I would, however, emphasise two

particular points. First, it is clear from the authorities that a finding that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability in negligence....." " Second, in the context of sporting contests it is also right to emphasise the distinction to be drawn between conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race....." "The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance."

This judgment appears to put the matter beyond doubt, but as stated in the previous article, in reality there is unlikely to be much difference between 'reckless disregard' and 'negligence' in all the circumstances. If the latter is applied and taking into account the playing culture, different styles of play and the heat of the moment as relevant circumstances,

then sports participants are likely to receive just as effective protection using 'negligence' in all the circumstances as the test, as they would under the doctrine of 'reckless disregard'.

The next case to look at is *Leebody -v- Ministry of Defence* 2001 CLY 4544. This case was a county court case dated 9 July 2001 in which Leebody brought an action against the MOD in respect of personal injuries suffered while playing in a football tournament organised by the Royal Navy. He sustained a serious injury to his leg following an allegedly negligent tackle by a member of the opposing team. The referee took no action and it was left to the senior officer present to forfeit the game. Judgment was granted for Leebody on the basis that the offending player went to tackle him from behind with both legs and that the tackle was

Although the judge was satisfied that this was a late and no doubt clumsy tackle in coaching terms, the claimant could not establish that it went any further.

deliberately aimed at the man and not the ball, which was two to three yards ahead of Leebody. The tackle was illegal, outside the rules of Association Football and dangerous in all the circumstances. *Condon -v- Basi* was followed. It doesn't appear that any other cases were cited.

The next case is *Pitcher -v- Huddersfield Town Football Club Ltd*, (unreported, July 17, 2001

QBD). This was a claim for damages for personal injury suffered by Darren Pitcher, the claimant, as a result of a late tackle by Paul Reid in the course of a Nationwide Division One match played on 31 August 1996 between Crystal Palace and Huddersfield Town. The claim was brought in negligence. The allegation was that in the course of his employment, Paul Reid chased the claimant, who was running with the ball towards the Huddersfield goal. Paul Reid was behind the claimant and to his right. After the claimant has passed the ball, he lunged at the claimant with his left leg and struck the claimant on the outside of the right knee with his left foot, as a result of which the claimant sustained injury to his right knee. It was agreed that the time difference between the challenge and when the ball was played was fractional, namely, about 0.2 of a second. Professional sportsmen, it was argued, must react to events in a matter of split seconds; they have the training and the skill at this level to do so.

Although the judge was satisfied that this was a late and no doubt clumsy tackle in coaching terms, the claimant could not establish that it went any further. It was a foul but the judge was not satisfied it was more.

It was held to be an error of judgment in the context of a fast moving game where Paul Reid had to react to events in a matter of split seconds. Whatever their training and their skill the judge concluded that First Division footballers are far from infallible. This was held to be the kind of tackle which, although against the rules of the game, occurs up and down the country every Saturday of the football season in Division One matches. The claimant did not succeed in crossing what the judge called "the high threshold" that lay in his path to take this case from a simple late tackle, albeit one with tragic consequences, to one actionable in negligence. His claim failed. (There doesn't appear there was any authority cited, but the 'high threshold' comment, as you remember, is equivalent to what Lord Bingham said in the *Smoldon* Appeal case.)

Lastly, in the case of *Gaynor -v- Blackpool Football Club* 2002 7 CL 432, 8 November 2001, the judge in the county court of Oldham, dealt with a case where an aspiring professional footballer sought to recover damages when he sustained a serious leg injury during an Under 19s association football match between the youth teams of two professional football clubs. Gaynor alleged that he was kicked high on his leg by C, one of Blackpool's players, after the referee had blown his whistle for an earlier infringement and after the ball had rolled out of play. C, who was shown a red card by the referee following the incident, contended that he had challenged Gaynor for a 50/50 ball close to the touchline while the ball was still in play. C further submitted that he had not heard the whistle being blown and that Gaynor had injured himself when he lunged at the ball, kicking C high on the knee.

The judge gave judgment for Gaynor holding that Gaynor's version of events was to be preferred. C's tackle on Gaynor was extremely late, continuing after the whistle and after the ball was out of play. It was unnecessary and carried a high risk of injury. It was executed in such a way that C kicked Gaynor hard enough to break his leg even though Gaynor was wearing shin pads. *Caldwell -v- Maguire* was applied.

In conclusion, it would appear that in any sporting case now, *Caldwell -v- Maguire* should be cited and will be binding on parties in England. To the writer's knowledge, the matter is still to be tested in the Scottish Courts.

"The best laid plans..."

By Alistair Duff

Henderson Boyd Jackson Solicitors

On Sunday 2 June 2002 at 2.15 am I stepped off the plane in daylight in Anchorage, Alaska about to take part in my sixth climbing trip of the last 15 years.

There have been five previous visits to the Himalayas but none with as small a group as the four of us. (I had been in Tibet with two of them less than 2 years previously) We had grants from the British Mountaineering Council and the Mount Everest Foundation to attempt various first ascents of peaks on the Donjek Glacier in the Yukon (Canada).

Two of our party had departed a week earlier than I to hopefully set up base camp but as it transpired, by the time we arrived, they were on the Eclipse Glacier at about 10,000 feet, some 3 miles west of the Donjek, bad weather having forced the glacier pilot to land them there.

We were meant to play catch-up with them, but having reached our US glacier pilot's wilderness lodge, which was 100 miles from the nearest roadhead on the Tuesday, the first thing on Wednesday morning he told us the weather was too bad over Mount Logan and he would review hourly.

Shortly afterwards he dropped the bombshell and said he couldn't in fact fly into Canada, having received an e-mail from the Royal Canadian Mounted Police and the Civil Aviation Authorities closing his Canadian operation down. He assured us he had been flying into Canada for 20 years without problem and had the requisite permits and licences. He stated he would be consulting his lawyers and congressmen as climbers lives were being put at risk and perhaps we could help by contacting the British media as certainly at that stage, apart from our friends, there was a British climber on Mount Logan. I immediately thought about an action for breach of contract and possibly punitive damages as certainly our climbing holiday was being totally disrupted but we decided we must talk to the others and we had to consider who the contact was with – our pilot as an individual or the company – as there was a lack of documentation, solely a verbal contract and cash up front!

Our two friends were thus stuck on the Eclipse Glacier without apparent means of flying out and we

were despatched to rescue them. We were lent a truck and drove the 500 miles to Kluanie Lake in the Yukon and arrived at a small airstrip on the Friday night next to the North American Arctic Institute. (We were only 90 miles as the crow flies across the ice cap from our wilderness lodge)

Our friends apparently were on the Eclipse with American scientists who were drilling ice cores and, in return for heavy labour, they would be flown out !

We successfully climbed 6 peaks between 7,000 and 8,500 feet; explored glaciers and enjoyed a spell of good weather on the largest icefield outside Greenland and the Antarctic.

We spent 4 days waiting for the weather to break in the company of the Canadian Glacier pilots who in effect had caused our pilot to be banned. We heard their version of events and saw various documents and were pigs in the middle of a trade dispute which had been precipitated by our pilot taking delivery of a new twin otter plane worth \$1.2m in April which gave him a definite competitive

edge.

Their position was our pilot had no requisite licence to fly into Canada and had, over the years, misled customs authorities who had let him fly in and out of Canada but there were now ongoing criminal and civil actions against him.

I was asked about the UK law re the seizing of planes and trucks as they stated their law was weak and they couldn't seize our borrowed \$35,000 truck resplendent in our glacier pilot's company logo (Ultima Thule).

On the Sunday, one of my friends was helicoptered out during a window in the weather and thereafter the last member was taken out by plane on the Tuesday and we immediately drove back to the USA. I was asked about potential court action against our pilot on the grounds of breach of contract as we had, in

essence, each paid \$1,000 to be delivered and picked up from a specific glacier, namely the Donjek and he had spectacularly failed ! However, I put proceedings on hold and said we had more important things to do – namely climb!

We came up with an alternative plan and we were dropped off on the Goat Creek Glazier in the Granite range, which had never been visited before, 11 days after our arrival.

During our 3 week stay, to my knowledge, 3 climbers in these ranges, were killed due to avalanches, crevasses, the fickle weather and the like.

We successfully climbed 6 peaks between 7,000 and 8,500 feet; explored glaciers and enjoyed a spell of good weather on the largest icefield outside Greenland and the Antarctic.

2 peaks are now named Mount Macbeth and Haggis Peak and, apart from the usual dangers such as avalanches, crevasses etc, our hairiest moment

was a visit from a grizzly bear who had obviously lost his bearings!

On our return to our wilderness lodge, we decided to take no further action. On talking to an American lawyer/climber who had come off Mount St Elias, I learnt that there was no punitive damages for breach of contract.

The stranding of climbers though in these mountains, the Wrangle/St Elias Range which straddle the US/Canadian border, raises serious issues. We met 3 climbers at the lodge who had come off Mount Logan, the highest mountain in Canada and were made to ski an extra 6 miles to the arbitrary border in the middle of the glacier so our US pilot could pick them up!

One of our glacier pilot's friends was seriously injured in Canada and whilst he could have rescued him immediately, the Canadians could not and there was a delay of 48 hours which, fortunately, did not prove fatal.

During our 3 week stay, to my knowledge, 3 climbers in these ranges, were killed due to avalanches,

crevasses, the fickle weather and the like.

The weather coming off the gulf of Alaska is some of the worst in the world, but we had enjoyed our climbing and, as per the name of our glacier pilot's company, "Ultima Thule" we have visited "land remote beyond reckoning".

Sports Governing Bodies and Fair Procedures – recent Irish developments

By Dr Neville Cox

Lecturer in Law, Trinity College Dublin

Introduction

The question of the extent to which sports governing bodies are bound to act in accordance with fair procedures in their dealings with individuals and clubs is one that has received significant consideration, both academic and judicial¹. In the Republic of Ireland, the question gains particular focus by reason of the existence of a written constitution, containing a broad if unenumerated right to fair procedures² and a right to work and earn a livelihood³. Moreover, all employment contracts are deemed to contain an implied term, guaranteeing the exercise of fair procedures in the operation of such contacts, whether or not they involve public bodies⁴. As such, a body of case law has emerged within both Ireland and the UK indicating how the general principle of the right to fair procedures is to be fleshed out in the practicalities of the governance of sport.

The question came to the fore in Ireland in two high profile cases in 2001 and 2002. In the first, champion jockey Michael Kinane challenged a ban imposed on him which, if carried into effect would have meant that he would have missed out on riding the Aidan O'Brien trained horse 'Galileo' in the King George VI and Queen Elizabeth Diamond Stakes at Ascot. In the second, the application of what was on the face of it a rigid rule governing the registration of soccer players was addressed, as Shelbourne FC – a leading Irish soccer club – challenged the decision of an appointed arbitrator to restore nine league points that had been deducted from St Patrick's Athletic – another leading Irish soccer team – for playing an unregistered player in three league matches.

What does the requirement of 'fair procedures' entail for a sports governing body?

Before assessing these two cases, it is necessary to consider as a more general question the manner in which decisions of sports governing bodies may be regulated under Irish law. As far as an Irish athlete wishing to take legal action against a governing body is concerned, there are a number of potential avenues open for him, all of which are interrelated. First, should

his constitutional rights be breached, then this will itself amount to an independent cause of action against the relevant body⁵. Moreover, in England since October 2000 and in Ireland in the near future, statutory incorporation of the European Convention on Human Rights provides a new ground for judicial analysis of a sports governing body's decision⁶, (although given that the Human Rights Act only applies to public bodies it may be that the courts will be reluctant to afford this status to sporting bodies, as has proved the case in the past when applicants have sought leave to bring judicial review proceedings against such bodies)⁷. Secondly, should the dispute pertain to an unfair or unreasonable exclusion from or refusal of admission to any competition, (generally though not exclusively within the context of professional sport), then the athlete might proceed via the common law doctrine of unreasonable restraint of trade⁸.

For present purposes, and in light of the nature of the two cases we will be discussing, however, the most relevant method of challenging a governing body's decision is on a fair procedures basis. This being said, it should again be noted that the courts both in Ireland and in England are highly reluctant to strike down decisions of sporting bodies, for want of fair procedures, essentially on the basis that governing bodies are the experts in this area⁹, and as Lord Denning pointed out in *Enderby Town Football Club v. Football Association*¹⁰, 'justice can often be done better by a good layman than a bad lawyer'.¹¹ Thus in Ireland in *Moloney v. Bolger*¹², the court held that the jurisdiction to review internal decisions of sporting authorities for want of fair procedures would only be exercised

'...in the context of a consensual and contractually constituted sports organizations...in an extremely limited number of clear and very serious cases, for example where the court could clearly determine that the decision was wholly irrational'.¹³

Balanced against this is the fact that there is a risk that those in charge of sporting bodies may have different agendas to the courts, where priority is given to protecting the image of sport rather than to ensuring

justice for participants. This is of obvious concern in professional sport where a person's livelihood might be on the line when a decision is made. As McCutcheon notes¹⁴,

'Where serious disciplinary matters are involved, the fundamental dictates of justice demand scrupulous adherence to the highest standard of procedural and substantive fairness.'

Generally at Irish Law, as at English law, the basic requirements of fair procedures can be broadly categorised within the twin maxims, *audi alterem partem* and *nemo iudex in causa sua*.¹⁵ The manner in which these principles are to receive specific application in Ireland is explained in the case *In re Haughey*¹⁶ where the court accepted that some basic elements of this requirement included:

- the right to be furnished with a copy of any evidence which reflected on the good name of the applicant
- the right to cross examine – and indeed generally to have legal representation
- the right to give rebutting evidence
- the right to address (if necessary by counsel) the relevant body in his defence.

Thus in the context of sport, McCutcheon¹⁷ suggests that athletes facing disciplinary action should be entitled to such things as independent legal representation, an impartial hearing by a person independent of the issue itself, prior notice of the charge and disclosure of its material particulars, clearly defined evidentiary rules, possibly a reasoned decision and a right of appeal.¹⁸ Furthermore, it is clear that the rigidity with which the doctrine of fair procedures is to be applied will depend on the magnitude of what is at stake for the person facing, for example disciplinary measures from a sports governing body.¹⁹ Thus in *Quirke v. BLE*,²⁰ the Irish High Court – in finding for an athlete who had been suspended for a doping related offence on the grounds of insufficiently fair procedures – was influenced both by the fact that his suspension was a punishment rather than merely an interim measure pending determination of the overall issue, and also that given that the period

of suspension covered the Olympic games, the consequences thereof were enormous. In the circumstances the court concluded, there was a requirement that the track and field athletics governing body act judicially²¹. As a concomitant of this, it would seem inevitable that as sport becomes increasingly professionalised, and hence as more and more is at stake, the standard of procedures in place will have to be strengthened.²²

Really in order to comply with fair procedures it can be argued that there are three important (if very general) factors to appear on a governing body's checklist namely:

- ensure that the rules are fair
- ensure that the rules and procedures are followed minutely
- ensure that any disciplinary hearing is conducted fairly²³.

The Requirement of 'Fair Rules'

Even if internal rules are in place it may well be that they themselves fall foul of fair procedures. Most obviously, this arises in the context of strict liability rules in relation to doping.²⁴ Thus where an athlete tests positive for a banned substance that is innocently ingested (in the sense of deriving from use of a nasal inhaler or ingestion of a dietary supplement) it seems intuitively unfair that he or she should have his or her career suspended and possibly ended as a result²⁵. As is well known, domestic tribunals as well as the Court of Arbitration for Sport in Lausanne and the former International Amateur Athletics Federation arbitration panel have upheld the legitimacy of such procedures²⁶ (and indeed as Beloff notes, because such tribunals are inevitably more inquisitorial than adversarial the impact of burdens and standards of proof may be more illusory than real).²⁷ Such clauses do, however, cause concern and might well fall foul of an Irish constitutional right to fair procedures, as also might clauses that provide for mandatory penalties²⁸ and clauses in which an athlete expressly waives his or her right to fair procedures.²⁹ Finally as McCutcheon³⁰ notes, disciplinary rules of such bodies that contain open ended terms such as the offence of 'bringing the game into disrepute', (or indeed

Sports Governing Bodies and Fair Procedures – recent Irish developments

the provision within the IOC/WADA anti-doping code that allows not just listed substances to be banned, but also ‘related substances’,) are of questionable validity³¹.

Follow Rules Minutely

This is of particular concern in the two cases that will be dealt with below. Thus it is a legal requirement that as a matter of due process, the relevant rules should be adhered to absolutely and any failure to do so, will ground an action whether in judicial review or for breach of contract³². Moreover, all such rules should be construed as narrowly as possible.³³

Application of this principle is seen most vividly in Dundalk Interim Co. Ltd T/A Dundalk Football Club v. Eircom League and Kilkenny City Football Club³⁴ the importance of which for the Shelbourne case below, cannot be overstated. The case involved a soccer match

The delivery and impact of sports education becomes a highly significant factor in women’s engagement with sport. The provision of equal opportunities for all young people to experience similar choices in education is vital

between Kilkenny City and Limerick FC in the first division of the Eircom National soccer league, which Kilkenny won. As a result, Kilkenny finished in third place in the first division of the Eircom league (thereby qualifying for play-offs to the premier division) with Dundalk a further point adrift in fourth place, and out of the qualifying positions. Kilkenny had, however, played an individual called Fran Carter on that day, who, it was argued was not properly registered to play with Kilkenny, in that his manager and not he had

signed his (Carter’s) name on the registration form. After an enquiry into this by officers of the Eircom league it was decided that there had been a breach of rule 16a of the Eircom League rules, s. ii of which provides that a player is properly registered when he has signed a registration form, and s. vi of which provides that ‘any club playing an unregistered player or players in any match under the jurisdiction of the league...will forfeit three points per match in which a non-registered player plays’ (emphasis added). Accordingly Kilkenny were docked three points, thereby elevating Dundalk into the play off positions.

When Kilkenny City issued a summons, however, to challenge the decision, it was decided to refer the matter to arbitration. The arbitrator concluded that the Kilkenny/Limerick match should be replayed. Kilkenny

won the replay and hence suffered no loss for the alleged misdemeanor. Dundalk Football Club then issued High Court proceedings challenging the decision of the FAI (the governing body under whose auspices the Eircom league is run) to send the matter to arbitration. In the High Court, Finnegan J held that the rules of the FAI provided for a mandatory penalty to be applied in such cases and that it had no jurisdiction to act outside of the rules or to transfer the matter to arbitration.³⁵ In explicit terms the judge ruled that³⁶

‘The penalty for a breach of Rule 16 in terms of the forfeiture of three points is mandatory and there is no discretion in the management committee or the honorary officers in relation to the same. The rules contain no provision for the reference of disputes to arbitration. Again there is no provision for matches to be replayed in the event of a breach of Rule 16 as an alternative to the forfeiture of three points. In these circumstances if the honorary officers were correct in finding that Kilkenny played a non-registered player then it was mandatory that Kilkenny should forfeit three points; the reference to arbitration and the carrying out of the direction of the arbitrator to replay the match are outside the rules and are nullities. The rules of the league represent a contract between the league, and one club playing in it cannot adversely affect the rights under the rules of another club.

In the event Finnegan J essentially decided in favour of Kilkenny City, concluding that the player in question was properly registered at the time of the decision on the grounds that, at common law, it is possible for one’s agent to sign one’s name and for that signature to have legal validity³⁷. For our purposes, however, the decision is an important statement of the fact that in order to operate fairly, governing bodies should follow rules minutely. As we shall see the impact of this decision appears to have gone unnoticed in the Shelbourne case barely two years later.

Ensure that Disciplinary Hearings are Conducted Fairly

In practice, this may be the most significant of the requirements and it is, at least in part, the basis of the High Court decision in the Kinane case. In England, in *Russell v. Duke of Norfolk*³⁸ Lord Denning concluded that because of the essentially monopolistic rights which the Jockey club had in this area (and indeed irrespective of the fact that the relationship between the parties was based on private contract), common justice required that if someone was to lose his livelihood, there would have to be a proper hearing in

advance of this and that the procedure of the hearing would have to be clearly explained to all parties. Again, what such hearing would entail would depend on the facts of the case, including the severity of the consequences of any decision made,³⁹ although undoubtedly any disciplinary panel would have to be properly constituted in accordance with the rules of the federation.⁴⁰ It is also obviously vital that there should be no taint of bias within such hearing.⁴¹

In terms of the requirements for a valid hearing, it is clear as a basic matter of law that one is entitled to be given notice of the issue at stake and the nature of the alleged misdemeanor for which one is being disciplined.⁴² Moreover, according to the court in *Quirke v. BLE*, the athlete must be informed of the gravity of the decision that has been taken, so that he or she has ample opportunity to prepare a defence for him or herself.⁴³ In this light it may also be necessary – depending on the severity of the case and the possibility of appeal – that the applicant be given reasons for the relevant decision.⁴⁴ Finally, if the breach of the disciplinary rules of a federation also generates proceedings at criminal law, it may be inappropriate for an internal tribunal to investigate matters before the criminal proceedings are finished, on the grounds that presentation of one's defence to the sports panel might violate the privilege against self-incrimination at the criminal trial⁴⁵.

It is not clear whether at Irish law an applicant has a right to an oral hearing.⁴⁶ This would seem to depend on the gravity of the case, whether the issue involves any disputed issues of fact, and whether the rules of the governing body provide for an appeal. It seems clear that whether or not such oral hearing is permitted, the applicant is entitled as a matter of natural justice, to make representations outlining his side of the story,⁴⁷ and that the relevant body must consider such representations.⁴⁸ Depending on the gravity of the issue, rules of natural justice may also require that the applicant be entitled to legal representation,⁴⁹ and to cross examine witnesses.⁵⁰ Thus in *Jones & Ebbw Vale RFC v. Welsh Rugby Union*,⁵¹ (admittedly in the context of an application for an interim injunction where the court was merely looking for prima facie evidence of possible unfairness) the English High Court per Ebsworth J found that a decision of a disciplinary panel to suspend a particular rugby player, bore the hallmarks of being in breach of fair procedures because the relevant player (who had a stammer) was not entitled to legal representation, to be present at the hearing and (thereby) to cross examine witnesses⁵². Beyond such hearing (and again depending on the facts of the case) the application of fair procedures may require that there be provision for an appeal,⁵³ and if so that the appeal board should be independent from the body that made

the original decision.⁵⁴

Finally, the merits of the decision itself – including the question of whether the penalty was disproportionate to the offence⁵⁵ – may be the subject for analysis. From the logic of the Irish High Court in *Bolger v. Osborne*, it may be argued that a challenge on the merits of the decision (rather than the decision making procedure) will only be sustained where the decision maker had no evidence before him to justify his or her decision⁵⁶. Thus the court will not strike down a decision on its merits simply because it feels that it is bad, or that it would have made a different decision on the evidence as presented. The decision must be 'irrational' in this sense⁵⁷. The Irish experience in other areas of public law (for instance planning law) where courts recognize the superiority of the practical knowledge of a body charged with the governance of an area, indicates that the burden of proving such irrationality is a very heavy one indeed.⁵⁸ Nonetheless it may well be that in respect of disciplinary issues, because so much is at stake, a decision may be challenged on its merits in cases where there are significant discrepancies in the evidence supporting it – as for example in doping cases where there are major problems with the chain of custody of the impugned sample.⁵⁹

As McArdle points out⁶⁰ it is probably not all that difficult for sports bodies to ensure that their rules remain immune from legal challenge. Provided that their rules and procedures are fair (and indeed it would seem that this is an area in which it would be wise to seek competent legal advice), and that the basic rights and entitlements of all parties are respected, then the ongoing deference shown by the courts to sporting organisations in the administration of their rules, should mean that it is not overly difficult for a lawyer to advise a sports body successfully, as to how to ensure that its rules comply with the law of the land. Equally this is not always the case, and the two cases below are illustrative of ongoing Irish problems in this area.

The case of Michael Kinane

*Kinane v. Turf Club*⁶¹ concerned the champion jockey Michael Kinane who had been suspended for two days for careless riding of the Aidan O'Brien trained horse 'Sophisticat' at Leopardstown. As has been noted, if implemented this ban would have meant Kinane would have been unable to compete in the highly prestigious King George VI and Queen Elizabeth Diamond Stakes horserace at Ascot⁶². As such he appealed the decision of the Leopardstown Stewards before the Appeals and Referrals Committee of the Turf Club (Ireland's horseracing governing body)⁶³. Significantly the latter has been put on a statutory footing since 1994⁶⁴. It was agreed between all parties that, in the event of the committee upholding the decision of the stewards, it

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would hear representations from counsel for Mr. Kinane in respect of the penalty to be imposed.

In the event, after evidence, including video evidence was given in respect of the race, the committee adjourned for deliberation. Having done so, it called both parties in and announced that both the Stewards' decision and the two-day ban imposed would stand. Counsel for Mr. Kinane, Ercus Stewart SC was not given the opportunity to make representations in respect of the penalty to be imposed as had been agreed. He objected to this, and after taking legal advice the committee allowed him to make submissions on the penalty imposed. Mr. Stewart argued that it would be impossible at this point for the committee to come to a different conclusion, and sought an adjournment without a decision to allow a newly constituted committee to hear the appeal. The three-man committee again deliberated in private and returned to inform the plaintiff that they had made their decision and were sticking to it⁶⁵. The plaintiff then commenced proceedings in the High Court, seeking both a declaration that the decision of the appeal committee was null and void and in breach of principles of natural and constitutional justice, and more importantly for present purposes, an interim injunction restraining the implementation of this decision,⁶⁶.

The High Court per McCracken J granted an interim injunction sought and suspended the enforcement of the ban that had been imposed until a hearing of the matter on August 15, 2001 (which period covered the date of the Ascot race meeting on 27 and 28 July)⁶⁷. Under Irish and indeed English law, the test for granting or refusal of an application for an interim or interlocutory injunction is to assess whether the applicant has made out a stateable case for full hearing, and if so to assess as a matter of judicial discretion whether the balance of convenience in the matter favours the applicant or the respondent (who may or may not be on notice of the proceedings)⁶⁸. The court concluded that the applicant had made out a stateable case that the committee's decision would be struck down at full hearing for want of fair procedures and natural and constitutional justice, in that having agreed a procedure with Mick Kinane, the committee failed to adhere to that procedure. (Indeed a stateable case was also undoubtedly made out by reason of the failure of the appeals body to allow the applicant to be heard on what was the pivotal issue in the case – that of penalty). Having shown the existence of a stateable case, there was little or no doubt that the application of any balance of convenience test would favour the applicant who frankly stood to lose a good deal more if the ban was maintained than did the Turf club if it were lifted. The ban was therefore temporarily lifted, and Mr. Kinane competed in and won the King George VI and Queen Elizabeth Diamond Stakes on

another Aidan O'Brien trained horse, Galileo⁶⁹. The turf club subsequently agreed to a permanent injunction being granted against the decision, to a declaration that the decision of the committee was null and void and to pay damages to the plaintiff and the costs of the proceedings⁷⁰.

Finally on 27 August, a newly convened appeals and referrals committee upheld the finding of the stewards and a two-day ban was finally imposed on Mick Kinane, with such ban not covering the date of any major race meeting⁷¹.

The decision is an interesting one, not least because from an outsider's point of view, it may well appear that the situation was manipulated by his legal team to allow a champion jockey to compete in a major event. Whether or not this is true, however, it is submitted that the High Court made entirely the right decision. A great deal was on the line for the applicant in this case; therefore the standards of propriety expected of the governing body were rightly very high. Here, both by failing to allow the applicant to address the panel on the sole point of real significance in the case and especially by failing to follow agreed procedures, the panel simply did not vindicate the interests of the applicant and the decision was therefore inconsistent with requirements of fair procedures. Clearly Mr. Kinane's legal team saw its chance and took it, but in the circumstances it was entirely entitled to do so.

The case of Shelbourne FC.

Of rather more concern is the decision of the High Court in *Accolade Limited (Trading as Shelbourne FC) v. FAI*.⁷² The background to this case is as follows. In the 2001-2002 soccer season, the two top teams in the Premier Division of the Eircom league were Shelbourne FC and St Patrick's Athletic FC. The eventual winners of the league would also qualify for the preliminary rounds of the most prestigious club soccer competition in the world – the UEFA European Champion's League – and hence such team could potentially (albeit improbably) proceed to the point in that august competition where matches were televised, thereby earning millions of euro in broadcasting revenue⁷³. Indeed it is estimated that simply by qualifying for the preliminary rounds of the Champions League, a team could stand to earn in the region of €300,000. In other words the stakes for these two cash-strapped semi-professional clubs could not have been higher.

One of St Patrick's Athletics' players – Paul Marney – had been a product of an internal club youth programme and had played with and had been registered with the club during the 2000-2001 season. (To this extent there is a slight factual difference with the situation of Fran Carter in the Dundalk FC case above, in that there another club, Galway United had

claimed that Mr. Carter was in fact registered with it). The problem arose in 2001 when Mr. Marney was contracted to play as a semi-professional player for St Patrick's. It will be remembered from the Dundalk FC case that under Rule 16 of the Eircom League Rule Book, in the event of a player being improperly registered a club will be fined and will also be deducted three points for each match in which the said unregistered player is fielded. Moreover in this context the terms of Rule 33 not of the Eircom League Rule book but rather of the FAI rule-book (and within the High Court proceedings there was some uncertainty as to how these two sets of rules were to be correlated) come into play. This rule provides that

Non-amateurs shall be registered on a professional registration form and agreement, to be supplied by the secretary of the association. The form after all particulars have been filled in, must be signed by the non-amateur and his signature attested and the form shall be returned by registered post (italics added) to the registrations department/national league of Ireland'.

In September 2001, it transpired that Paul Marney had not been registered properly as a St Patrick's Athletic player⁷⁴. There were two explanations of what had happened. According to the first – which was not accepted by the High Court, being based on hearsay evidence – St Patrick's Athletic simply omitted to send in the registration form on time⁷⁵. According to the other, which was accepted by the High Court, St Patrick's sent an appropriately signed and witnessed registration form by ordinary as distinct from registered post to the FAI in respect of Mr. Marney, but that form was lost in the post⁷⁶. In any event, Mr. Marney played in three games for St Patrick's Athletic as an unregistered player, of which it won two and drew one against Galway United, Derry City FC and Shelbourne FC. Following the game against Derry City it was brought to the attention of the FAI (and thence to that of the St Patrick's Athletic staff) that Paul Marney was an unregistered player. After a hearing into the matter, Eircom league officers found a breach of Rule 16 (a) of the Eircom league rules and decided to impose a one thousand pound fine and to warn St Patrick's Athletic about its future administration, refusing to apply the full rigours of the penalty provided for in Rule 16 on the basis that the non-registration in question was inadvertent⁷⁷. On appeal by Shelbourne FC, the FAI appeal board decided it had no option but to apply strictly the provisions of Rule 16(vi) and to deduct nine points from St Patrick's for playing an unregistered player for three matches⁷⁸.

St Patrick's Athletic in turn hinted at legal action and

requested that the FAI's board of management consider the decision. Accordingly on October 8, 2001 a vote was taken by representatives of 19 of the 21 Eircom League teams (one team was unrepresented and representatives of St Patrick's Athletic were ineligible to vote) which by a 10-9 majority carried a motion expressing sympathy for the difficulty in which St Patrick's Athletic found itself and agreeing 'in the spirit of football' to transfer the matter to arbitration and to be bound by any decision of the arbitrator. In subsequent correspondence it was clear that the FAI viewed only the Eircom league and St Patrick's and not Shelbourne FC to be parties to the arbitration, despite the claim of Shelbourne that it should also be involved.

Eventually, and after challenges to the legitimacy of the appointment of Liam Reidy SC (also chairman of Kilkenny City FC) as arbitrator, the arbitration (in which Shelbourne FC refused to participate) proceeded and the decision on the arbitration was handed down on 7 January 2002. In it the arbitrator decided to restore to St Patrick's the nine points deducted, and instead to impose a twelve hundred pound fine⁷⁹. He was influenced in this, by the anecdotal evidence before him of widespread violation (admitted by the FAI) of registration rules, such that '...if all the provisions of Rule 16 and Rule 33 were to be interpreted strictly...there are many ineligible players...participating in the league'. Moreover, he saw the present violation as a particularly innocuous one. Of most significance, however, is the fact that he did not accept that the imposition of the nine point deduction was a mandatory step under the words of rule 16. Instead in his view⁸⁰,

'The rules of the Eircom league are not a penal code. They must be interpreted in the context of a sporting organisation with the aims and objects to which that organisation aspires. It is my view that reposed in the league itself is the entitlement and duty to do justice in any given situation.'

There are many instances in which a penalty such as has been imposed would be warranted where there has been a deliberate attempt to breach the provisions of rule 16. We are not dealing with such an instance here. There cannot be a more innocuous or technical breach of the provisions of Rule 16 than in this instance. The question therefore, is whether the league has discretion to impose a penalty other than in accordance with Rule 16 (a)(vi).

As I have stated I believe that there are exceptional circumstances in which there is reposed in the league through its officers the entitlement and duty to impose a discretionary penalty. I believe that that was what was done by the league officers

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when this matter came before them in the instance and I believe they were right’.

Various aspects of the decision of the arbitrator were subsequently challenged in High Court proceedings⁸¹, although it seems that the exclusive concern of the court was the validity of the decision of the arbitrator rather than the more questionable validity of the decision to refer the matter to arbitration. In as much as the focus was on the actual arbitration decision, O’Sullivan J of the Irish High Court had no difficulty in concluding that ‘there is...no question of a fundamental error on the face, or indeed otherwise, of this arbitration award’. After all, Shelbourne FC while not a party to the arbitration, had been invited by the arbitrator to make submissions on the case yet had declined to do so. Moreover, Irish case law is absolutely clear on the point that an arbitrator’s decision will only be interfered with in the rarest of circumstances, particularly when challenged by a party to the arbitration process⁸².

This part of the judgment then is unexceptionable. The validity of the arbitrator’s decision was not, however, the crucial point at issue. Rather it was the validity of the original decision to refer the matter to arbitration in the first place – a point that, somewhat remarkably, the High Court judge does not appear to have addressed. The point is that there was no authority within the Eircom League or FAI rulebook for referring the matter to arbitration. It is true that Rule 28 of the FAI rulebook contains a general arbitration clause, in line with the requirements of FIFA and consistent with many sports governing bodies. This clause applies, however, ‘...in the event of any differences or disputes under these rules’. In the instant case, however, there was no dispute in the proper meaning of the term. Parties were agreed that the player was not properly registered and most importantly, the penalty prescribed under the terms of Rule 16 could not have been clearer. As such, there was simply no justification for the activation of the Rule 28 (FAI) procedure.

Counsel for the plaintiff had made this point in the following terms;

‘The relevant rule (Rule 16 (Eircom League) provided for an automatic and mandatory forfeiture of nine points. There was no discretion to abate these. The decision and appeals proceedings were not amenable to subsequent arbitration, nor can the defendant dilute the clear meaning of rule 16 (b)(6) of the Eircom League’s rules by itself or by conferring unlimited jurisdiction on an arbitrator’.

This was of course the conclusion reached in *Dundalk v. FAI*. Yet it seems that counsel for the plaintiff did not refer to the precedent created by the *Dundalk v. FAI*

case. On the other hand, counsel for the defence referred to the case, but sought to distinguish it on the grounds that whereas the former case involved a decision to refer the matter to arbitration without any consultation with the other parties who were affected (that is to say the other clubs in the Eircom league), here the decision to refer to arbitration was taken by an admittedly very narrow majority at a meeting at which all but one of the Eircom league clubs were represented. Thus ‘...in the terms of the resolution of 8 October 2001, the very thing that was referred to arbitration was that the league and the participating members were sympathetic to the plight of St Patrick’s Athletic...’.

It is submitted however, that this is simply not sufficient as a ground for distinction. Had the decision been taken at that meeting to amend Rule 16 and had all the relevant parties been present and the appropriate procedure complied with then this would have been fine. In as much as the rules of the governing body amount to contractual terms with the various member clubs of the governing body, then this would have amounted to no more than the amendment of such terms via a procedure provided for under the terms of the original contract. But that is not what happened. Rather an ad hoc decision was taken without the consent of eleven of the twenty-one clubs in the league, to ignore a mandatory rule, because of the ‘spirit of football’. In other words, an express term of the contract was varied or its application waived, at the behest of less than half the parties to that contract, and more importantly without the consent of all parties. Under typical contract law principles, those parties who wished to vary or waive such terms might possibly create a collateral contract for themselves, but this could not bind the other parties who did not agree to such variation or waiver, and who are entitled as far as their dealings were concerned to be governed by the original terms of the contract.

The arbitrator, however, had accepted the validity of the approach taken by the clubs at the meeting of October 8, concluding that ‘...reposed in the League itself is the entitlement and duty to do justice in any given situation.’ With respect this is simply an inaccurate conclusion. As Finnegan J recognised in *Dundalk v. FAI*, the rules are drafted in such a precise fashion that no such discretion could possibly exist. Nor should the fact that the rule was habitually breached be a reason now for an arbitrator to decide that, ‘in the spirit of football’ it should be deemed to be something discretionary, or indeed that it should be for the members of the league to rob it of its mandatory structure because of what might be an underlying ineptitude in its application by the relevant bodies. The point is that the decision to refer the matter to arbitration, and thereby to undercut the overall impact of the rule, constituted a clear breach of a basic

requirement of fair procedures attaching to sports governing bodies, namely that whatever rules and procedures including disciplinary and quasi disciplinary procedures are in place, they should be followed with the utmost rigidity⁸³. Otherwise such rules could be applied unequally and unfairly and at the whim of the governing body. Now it may be argued that such rigid requirements of fair procedures may perhaps be relaxed in a case of this nature, involving what is at best a semi-professional sport, in other words where, apart from pride and glory, not a great deal at stake. Again, however, this argument should be resisted both because of the danger in denigrating concepts like pride and glory in a sporting arena, but mainly because, as we have seen in financial terms a great deal is at stake with the winners of this domestic league (who would at the time in all probability have been either Shelbourne or St Patrick's Athletic) qualifying to compete in the European Champions league, with the potential of untold riches before them.

These crucial arguments were not dealt with in the High Court decision in the case. On this basis, it is submitted that the decision in the Shelbourne case is an unfortunate one, in that the High Court appears expressly to have sanctioned an act by a sports governing body that violated its own express rules and that was, accordingly a prima facie breach of fair procedures. In practical terms, the decision upheld the conclusion of the arbitrator that St Patrick's Athletic should not be docked any points for playing an unregistered player⁸⁴. Accordingly, as of February 2002 St Patrick's Athletic remained at the top of the Premier Division of the National League.

The extent of the problems which this episode created became evident, however, in March 2002, when it emerged that St Patrick's Athletic had in fact fielded another unregistered player – Charles Mbabazi Livingstone – for the first five games of the season⁸⁵. In a rigid application of Rule 16, (and apparently without a hearing at which officials from St Patrick's Athletic were represented) the Eircom League docked St Patrick's Athletic fifteen points⁸⁶. This time, however, when St Patrick's Athletic appealed this decision, the appeal was rejected, despite the fact that St Patrick's Athletic officials pointed out that many clubs within the league also had unregistered players playing for them, and that having inspected various documents at Eircom league headquarters, 28 of the 40 registrations forms considered did not comply with the organisation's rules.⁸⁷ Roy Dooney, the Eircom League commissioner admitted that the registration rules were regularly flouted, but argued that the other breaches to which St Patrick's Athletic referred were largely technical and minor in nature⁸⁸.

Two major points of controversy arise from this latest aspect of the registration saga, and both are illustrative

of the procedural dangers inherent in not ensuring a clear and precise application of rules. First, when the Mbabazi Livingstone news broke, Roy Dooney confirmed that he had been aware since the previous September that there was a problem with this player's registration yet had done nothing about it⁸⁹, despite the fact that, during the Marney dispute, the reason why most club representatives felt that St Patrick's Athletic should be dealt with in lenient fashion was because their breach of the rules was accidental in nature and hence that they were merely the victims of ill fortune⁹⁰. Dooney claimed that in not announcing the difficulties with Livingstone's registration at the time he had acted for what, in his view was the good of the league. His point was that when he discovered the registration problem St Patrick's Athletic had already been deducted nine points and hence he felt that they had been sufficiently punished, and when the points had been restored he felt that the matter was dead and should be allowed to rest. Thus he explained⁹¹,

'...my thinking here was that the rules of the league are chaotic, the registration system is chaotic and while we are trying to address those problems my guiding spirit in the application of the rules was to ensure both fair play and common sense was used.'

From the point of view of the fair treatment of Shelbourne FC in the context of the Marney arbitration the implications of this admission are obvious. The commissioner of the National Soccer League withheld essential information on the basis of a unilateral determination of what would be in the best interests of the league. The reason why such information was essential is obvious; had it been in the public domain at the time of the Shelbourne case, then it is arguable that the representatives of the teams competing in the Eircom league, the arbitrator and the High Court would have been less amenable to the argument that the inappropriate registration of Paul Marney was a once-off accident for which St Patrick's Athletic should not have been excessively penalised (indeed this appears to have been the logic behind the decision of the FAI appeal board that in this case, St Patrick's Athletic should have the prescribed points deducted).

Even more importantly, from a St Patrick's Athletic point of view, it was clear that it was not the only club in breach of registration rules. Indeed Roy Dooney admitted 'There are other forms that I am aware of that are not correctly filled in. It's not hugely widespread but there would be other clubs who would probably be facing points deduction'.⁹² Moreover, in both the arbitration report of Liam Reidy and also the decision of the High Court, it is clear that great significance was attached to

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the fact that minor breaches of the registration rules were widespread and, if Rule 16 were to be applied rigidly, then the final league table would be farcical in nature, with (possibly) the winning team finishing on a minus number of points! Responding to the news of the fifteen-point deduction, therefore, St Patrick's Athletic officials accepted the legitimacy of the decision on the proviso that all other breaches of registration rules would be similarly punished⁹³. In the event, the Eircom league (arguably following the 'precedent' in the Marney arbitration to the effect that minor and innocuous breaches of registration rules did not merit the sanction proscribed in the rule book) concluded that the other cases to which St Patrick's Athletic referred did not merit the same punishment as it had incurred⁹⁴.

There are two problems with this conclusion. First, as a matter of fact the problems with the registration of Mbabazi Livingstone were themselves technical and minor. At the date when he should have been registered, the FAI had a copy of his contract with St Patrick's Athletic in their offices (it was discussing his registration with FIFA) and in as much as registration is essentially a procedure for ensuring that players are properly linked to clubs, they had clear proof of such link and hence the absence of a specific registration form was something of a technicality. Moreover, such registration forms can cover two years of a player's contract, and it seems that the player's contract in this case was supposed to run until the end of the 2001-2002 season, but owing to a typographical error it referred to the end of the 2000-2001 season.⁹⁵

Secondly and more importantly, it cannot be disputed that St Patrick's Athletic were being treated unequally as against the other clubs in the league whose players were not properly registered, (and indeed (albeit rather paradoxically) as against themselves in respect of the Marney affair), in as much as they were the only team to be deducted points for improper registration of players despite the fact that by everyone's admission such improper registration was endemic. Now it might be argued that because of either (a) the perceived seriousness of the impropriety in this case or (b) as seems more likely, the cumulative effect of the two controversies, St Patrick's Athletic crossed a threshold of liability that other clubs did not cross. The difficulty with this is that there is simply no provision in the rulebook allowing either of these factors to be deemed relevant for the purposes of such adjudication. Accordingly the procedure whereby it was decided that the Mbabazi Livingstone case should be the only one in which the registration rules were applied properly is utterly lacking in transparency, and the decision itself was entirely unfair and arbitrary.

The point is, of course that the Eircom League should have stuck in precise fashion to the rules that it

had created for itself, and should have required adherence to such rules rather than worrying about the pragmatic consequences of the fact that they were so regularly flouted⁹⁶. The Marney/Mbabazi Livingstone saga is graphically illustrative of the reason why the requirement that governing bodies do adhere rigidly to the standards laid down in rule books is such an indispensable element of the guarantee of fair procedures; the alternative leaves open the possibility of at best an approach which is unequal and arbitrary and at worst a facility for favouritism and bias⁹⁷.

Conclusion

At the time of writing, the Eircom League is in the process of amending its rulebook. Nonetheless, the nagging feeling remains that the FAI – which would be lambasted later in the year both for its handling of the incident that led to Ireland and Manchester United soccer captain Roy Keane being sent home from the World Cup 2002, and also for its decision to sell the exclusive TV broadcasting rights to Ireland's home soccer games to the Sky TV network thereby denying the vast majority of Irish soccer fans the chance to watch such matches live in their homes without paying a not insignificant subscription to the Sky TV Network⁹⁹ – through its officers acted on the basis of what was at best a very short term evaluation of what justice demanded. The issue was repeatedly referred to as one where sensible people were seeking 'a footballing solution to a footballing problem'¹⁰⁰. Somewhat regrettably, that is not good enough any more. The transformation of sport (even semi-professional sport like League of Ireland soccer) into business, whereby the rules of governing bodies amount to a contract between such bodies and persons bound thereby, means that what is now needed is footballing solutions that are also legally valid. This is not a case of lawyers taking over sport. Rather it is a case of lawyers requiring that workers, even in the sporting context, are treated fairly and are not having basic rights violated.

The connection in this regard between the Kinane and the Shelbourne cases is obvious. In both cases procedures were agreed in advance between relevant parties. In Kinane such procedures were simply not followed, and in the Eircom League saga such procedures were followed in one case, but not in another. From the point of view both of contract law and, in Ireland of constitutional law this is not good enough. Events in the summer of 2002 put the fairness and efficacy of Irish sports governing bodies' activities firmly under the spotlight. It is to be hoped that lessons will have been learned.

Dr Neville Cox is a Lecturer in Law, Trinity College Dublin. I am grateful to staff at the Eircom League, Alex Schuster, Brendan Dillon and Eoin O'Dell for their assistance. Any errors remain

my own.

- 1 See *inter alia*, Beloff, 'Pitch, Pool, Rink...Court? Judicial review in the Sporting World', (1989) *Public Law*, 95, Pannick, 'judicial review of Sporting Bodies' [1997] *JR* 150, Parpworth, 'Sports governing bodies and the Principles of Natural Justice; An Australian Perspective', 4 (2) *Sport and The Law Journal*, (1997) 5, Weiler and Roberts *Sports and the Law*, 2nd ed (St Paul Minn; West, 1998) at Chapter 1, McCutcheon, 'Judicial review of Sporting Bodies; Recent Irish Experiences', 3 (2) *Sport and the Law Journal*, (1995) 20 and by the same author, 'Sports Discipline, Natural Justice and Strict Liability', (1999) *Anglo-American Law Review*, 37 and 'The Rule of Law in Sport', 9(3) *Sports Law Administration and Practice*, (July, 2002) p.1.
- 2 McDonald v Bord Na GConn, [1965] *IR* 217, Glover v. BLN, [1973] *IR* 388. Generally see Kelly, *The Irish Constitution*, 3rd ed (Butterworths, 1996) pp. 349-359.
- 3 *Ibid* at pp. 761ff
- 4 Glover v. BLN, [1973] *IR* 388, Gunn v. NCAD, [1990] 1 *IR* 168, Mooney v. An Post, [1998] 4 *IR* 288.
- 5 See McCutcheon 'The Role of the Courts in Sports Disputes' unpublished paper presented at an Irish Centre for European Law Conference on Sports Law in Dublin, April 23, 2002.
- 6 See *inter alia*, Lloyd, 'Sports Disciplinary Proceedings and the Human Rights Act', (8)2 *Sport and the Law Journal*, 61, Bitel, 'Human Rights Act', 8 (3) *Sport and The Law Journal*, (2000) 72 and Boyes, 'Regulating Sport after the Human Rights Act 1998', (2001) 151 *New Law Journal*, 444
- 7 See McArdle, 'Judicial review, Public Authorities and Disciplinary Powers of Sports Authorities', (1999) *Cambrian Law Review*, 30 at 35-39
- 8 See Stewart, 'Restraint of Trade in Sport', 6 (3) *Sport and the Law Journal*, 41 [hereafter Stewart] and Steele, 'The Doctrine of Restraint of Trade – How has it contributed to the development of Sports Law', 5 (3) *Sport and the Law Journal*, (1997) p. 5. Also Farrell, 'Salary Caps and Restraint of Trade', 5 (1) *Sport and The Law Journal* (1997) p. 5.
- 9 See for example Williams v. Reason, [1988] 1 *WLR* 96.
- 10 [1971] Ch 591, [1971] 1 *All ER* 215.
- 11 As McCutcheon points out, Lord Denning qualified this comment by saying that it applied, 'Where no points of law are likely to arise'. See McCutcheon, 'Sports Discipline and the Rule of Law' at p. 115 in Greenfield and Osborn ed. *Law and Sport in Contemporary Society*, (Frank Cass & Co., London & Portland, 2000) [hereafter Greenfield & Osborn]. Generally see Woodhouse 1 *Sport and the Law Journal*, (1993) 1 at pp. 2-3, and Beloff, Kerr and Demetriou, *Sports Law*, (Hart Publishing, Oxford & Portland, 1999) [hereafter Beloff] p. 222ff
- 12 High Court unreported per Herbert J, 6/9/2000
- 13 This was also the logic behind the decisions of the UK courts in Gasser v. Stinson, (Unreported, June 15, 1988), Wilander & Tobin v. ITF, [1997] 2 *Lloyd's Rep* 293). For analysis see Moore, *Sports Law and Litigation*, (CLT Professional Publishing, 1997) p. 137.
- 14 Greenfield & Osborn at 116
- 15 See Hogan and Morgan, *Administrative Law in Ireland*, 3rd ed (Round Hall, Dublin, 1998) especially Chapter 10.
- 16 [1971] *IR* 217
- 17 See Greenfield & Osborn pp. 120-121
- 18 Beloff at 195, see also Grayson *Sport and the Law*, 3rd ed. (Butterworths, 2000) [hereafter Grayson] at 386 and ff.
- 19 Flanagan v. UCD [1988] *IR* 724, Roche v. de Waller, High Court Unreported, 31 January 1992. See Griffith Jones, *Law and the Business of Sport*, (Butterworths, 1997) p. 65
- 20 [1988] *IR* 83.
- 21 See McCutcheon, 'Judicial Review of Sporting Bodies: Recent Irish Experiences', 3 (2) *Sport and the Law Journal*, (1995) p. 20 at 23. This was essentially the logic of the court in Quirke v. BLE, where the court was concerned that the relevant suspension was a punishment in itself rather than an interim measure pending a hearing.
- 22 This was the conclusion of Ebsworth J in Jones v. Welsh Rugby Football Union, Unreported, 27 February 1997, Times, January 6, 1998 (CA affirming). For comment see Rose and Albertini, 'Jones v. The Welsh Rugby Union, New Law for the New Era', 5 (1) *Sport and the Law Journal*, (1997) at 20.
- 23 For a comprehensive fleshing out of these requirements see Wearmouth, 'No Winners on the Greasy Pole? Ethical and Legal Frameworks of Evaluating Disciplinary Processes in Sport', 3 (3) *Sport and the Law Journal*, (1995) pp. 33ff [hereafter Wearmouth].
- 24 See McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability', 1999 *Anglo-American Law Review*, 37.
- 25 Beloff argues, however, (at pp. 182-184) that because it is still incumbent on the governing body to prove the presence of the impugned substance in the body the onus has not been reversed in a manner that violates rules of fair procedures. Essentially the evidential and not the legal burden of proof is all that has been shifted. On the other hand, a rule that made a positive test conclusive rather than merely *prima facie* evidence of the presence in the system of drugs would be invalid.
- 26 Gasser v. Stinson, (Unreported, June 15, 1988), Wilander & Tobin v. ITF, [1997] 2 *Lloyd's Rep* 293) and NWBA v. International Paralympic Committee, (CAS 95/122), C v. FINA, (CAS 95/141), V v. FINA, (CAS 95/150), USA Shooting and Q v. International Shooting Union, (CAS 94/129).
- 27 Beloff at pp.188 – 189 also suggests that the relevant standard of proof in such a case will probably be the civil standard of balance of probabilities. In its ad-hoc Olympic division in Atlanta in 1996, CAS said that it needed to achieve 'comfortable satisfaction' as to the veracity of the relevant evidence, but also insisted that the more serious the allegation, the more it would need to be satisfied by evidence. On the other hand in the application of its, (undoubtedly and admittedly strict liability rules) the IAAF requires proof beyond reasonable doubt.
- 28 McCutcheon at pp. 122-123 in Greenfield & Osborn.
- 29 See *ibid* for the view that in such circumstances, the response of the courts is generally to interpret such clauses as strictly as possible, giving all the benefit of the doubt to the athlete and generally reducing their impact, or to strike down such clauses as being in unreasonable restraint of trade. McCutcheon 'Judicial Control of Sporting Bodies; Recent Irish Experiences' (*supra*) at 21-22 further argues that because of the constitutional impact in Ireland, any attempt to require an athlete to waive constitutional rights, both to fair procedures and to freedom of association in this area would face enormous problems. See Murphy v. Stewart, [1973] *IR* 97. See also Beloff p. 201 for the view that such clauses might well be void as being in violation of public policy.
- 30 McCutcheon in Greenfield & Osborn at 121
- 31 See Cox, 'Legalisation of Drug Use in Sport', November, 2002 *I SLR*.
- 32 See e.g. Davis v. Carew-Pole, [1956] 2 *All ER* 524. See also Beloff, 'Pitch, Pool, Rink Court' at p. 98.
- 33 This approach is consistent with the requirement at Irish Law that all penal and tax statutes be interpreted as narrowly as possible in order to avoid uncertain imposition of fresh liability in either area. See *Inspector of Taxes v. Kiernan*, [1981] *IR* 117, *Mullins v. Harnett*, [1998] 2 *ILRM* 304.
- 34 [2001] 1 *IR* 434
- 35 An analogous situation arose in Quigley v. Union Internationale de TIR, CAS 94/129 (see Beloff p. 181) where the CAS struck down a strict liability test applied by the UIT (the shooting federation) not because such test was itself invalid but because according to the UIT rules, the relevant offence was the taking of drugs with the aim of improving performance – which implies malicious intention. Hence the rules did not provide for strict liability, and the application of such a test was thereby invalid.
- 36 [2001] 1 *IR* 434 at 437-438
- 37 See *ibid* at 438-439.
- 38 [1949] 1 *All ER* 109. See also Grayson at p. 391
- 39 Griffith-Jones p. 65. See also Raj Parker, 'Disciplinary Proceedings from the Governing Body Point of View', 3 (3) *Sport and the Law Journal*, (1995) p. 3 and Bitel, 'Disciplinary Procedures from the Point of View of the Individual', 3 (3) *Sport and the Law Journal*, (1995) p. 7.
- 40 Beloff p.176. Beloff further points out that a decision of such disciplinary panel will be struck down it involves a misunderstanding or misapplication of the rules of the federation. See *ibid* at 179.

Sports Governing Bodies and Fair Procedures – recent Irish developments

- 41 *Modahl v. British Athletics Federation*, CA 27 July 1997, High Court, 14 December 2000.
- 42 *State (Gleeson) v. Minister for Defence*, [1976] IR 280, *Hughes v. Garda Commissioner*, High Court Unreported, 23 July, 1996, *Keighley Football Club v. Cunningham*, Times Law Reports, May 25, 1960, *St Johnstone Football Club Ltd v. Scottish Football Association*, 1965 SLT 171. On the other hand see *Currie v. Barton*, Times Law Reports, February 12, 1988, for the view that lesser standards are required in the context of amateur sport.
- 43 *O'Brien v. Garda Commissioner*, High Court unreported, 19 August 1996.
- 44 *Dundee United Football Club v. Scottish Football Association*, [1998] SLT 1244. See *Beloff* p. 202.
- 45 *McCutcheon at 123 in Greenfield & Osborn*. On the other hand, once the criminal proceedings are finished, then it would seem that a defendant cannot rely on the principle of *autrefois acquit* to prevent such disciplinary proceedings from proceeding or material presented in evidence in the criminal trial being used in the course of such proceedings. *Mooney v. An Post*, [1998] 4 IR 288.
- 46 *Galvin v. Chief Appeals Officer*, [1997] 3 IR 240, *Mooney v. An Post*, [1998] 4 IR 288, *McCann v. An Bord Pleanala*, [1997] 1 IR 264, *Pett v. Greyhound Racing Association*, [1969] 1 QB 125. As *Beloff* notes (210) if the rules of sporting associations do not provide for costs, the disciplinary body may not make an order in this regard, and hence each party will have to bear his own costs.
- 47 *Haughey v. Mr. Justice Moriarty*, [1999] 3 IR 1.
- 48 *Merrigan v. Minister for Justice*, High Court unreported, 28 January 1998.
- 49 *Flanagan v. UCD*, [1988] IR 724, *Gallagher v. Revenue Commissioners*, [1991] 2 IR 370, *Maher v. Irish Permanent*, [1998] 4 IR 302
- 50 *Gallagher v. Revenue Commissioners*, [1995] 1 IR 65, *State (Haverty) v. An Bord Pleanala*, [1987] IR 485.
- 51 Court of Appeal, January 6, 1998.
- 52 See *Beloff* pp. 194-195 for a criticism of this case that it implies that it is invalid to operate an inquisitorial system of justice unless it has within it some elements of the adversarial system. See also *Moore* p. 14ff and *Griffith Jones* p. 59ff.
- 53 *Beloff* (p. 210) says that procedural fairness rules do not necessarily require an appeal. See for example the conclusions of the Court of Appeal in *Wilander v. Tobin*, [1997] EULR 265. Nevertheless in *Clancy v. IRFU*, [1995] 1 ILRM 193, one of the reasons why the validity of the player mobility rules in question were upheld was because of the possibility of internal appeal, (although the actual appeal procedure was deemed invalid). As with other areas of public law, however, it may well be that the defect at the first stage subsists at the appeal stage, (as for example where there is an error of law with which the appeal body is not competent to deal) and hence that the right of appeal is illusory.
- 54 *Thus in Newport Association v. Football Association of Wales (No. 2)*, Unreported, April 12, 1995), one of the reasons why the decision was deemed to be in violation of standards of fair procedures was because rules provided for a right of appeal but the appeal from the decision of the Welsh FA was to be heard by a Welsh FA Commission. For analysis see *Papworth 'Guarding the Game'*, at p. 71 in *Greenfield & Osborn at 78*. *Wearmouth* p. 34.
- 55 *O'Keefe v. An Bord Pleanala*, [1993] 1 IR 39. See *Beloff* p. 184.
- 57 *Thus in Wheeler v. Leicester City Council*, [1985] 1 AC 1054, [1985] 2 All ER 1106, [1985] 3 WLR 335, (See *Griffith Jones* p. 50ff) the respondents were deemed to have acted unreasonably (under the English standard in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, [1948] 1 KB 223) in refusing to allow Leicester RFC to use its facilities on the basis that three of its players had gone on tour in South Africa during the apartheid related ban on such sports tours.
- 58 It is also clear that a decision can be reviewed on its merits for adversely affecting the rights of a third party. See *Matthews v. Irish Coursing Club and Hogan*, [1993] 1 IR 346.
- 59 See for example *Modahl v. British Athletic Federation*. CA 27 July 1997.
- 60 *McArdle, 'Judicial Review, Public Authorities and Disciplinary Powers of Sports Authorities'*, (1999) *Cambrian Law Review*, 30 at 33-34.
- 61 *High Court, McCracken J*, 27 July 2001, ex tempore. See *Cox & Costello, 'Sports Law'* in *Byrne & Binchy* ed, 2001 *Annual Review of Irish Law*, (Roundhall, 2002).
- 62 See *'Kinane may miss Ascot over ban'*, Irish Times, 19 July 2001.
- 63 See *'Kinane lodges appeal'*, Irish Times, 21 July, 2001
- 64 See for *Horse Racing Industry Act, 1994*, *Horse and Greyhound Racing (Betting Charges and Levies) Act, 1999*, and *Horse and Greyhound Racing Act, 2001*.
- 65 See *Decision on Kinane today* Irish Times, 26 July, 2001 and *'Kinane misses Galileo ride as appeal fails'* Irish Times, 27 July, 2001
- 66 See *'Kinane's fate remains uncertain'*, Irish Times, 27 July, 2001
- 67 *'Jockey gets Turf Club ban lifted'*, Irish Times, 28 July, 2001 and *'Kinane's world will revolve once again around Galileo'*, Irish Times, 28 July, 2001
- 68 *American Cynamid v. Ethicon Limited*, [1975] AC 396, *Campus Oil Limited v. Minister for Industry & Energy (No.2)*, [1983] IR 88.
- 69 *'Too early to rate Galileo'* Irish Times, 30 July 2001.
- 70 *'High Court rules in favour of Kinane'*, Irish Times, 22 August 2001.
- 71 *'Kinane's 2 day ban is finally enforced'*, Irish Times, 27 August, 2001, and *'Kinane issue is finally resolved'*, Irish Times, 28 August 2001.
- 72 Unreported, High Court, 18 February 2002, per O'Sullivan J.
- 73 *The winning clubs of smaller national leagues and the runners up in major national leagues (of for instance England, Spain, Italy and Germany) play in qualifying rounds. The teams that emerge from such rounds then join the winning clubs (and indeed some runners up) from major leagues in the competition proper which commences in September of any year.*
- 74 See *'Dolan may face points deduction'*, Irish Times, 6 September, 2001
- 75 See *Malone, 'Marney affair threatens to derail European gravy train'*, Irish Times, January 15, 2002.
- 76 *(St Patrick's Athletic officials had a receipt from a Dublin Post-Office which it was accepted (albeit not without some controversy) pertained to the unregistered mail of Mr. Marney's registration.*
- 77 See *'St Patrick's Athletic escape with all the points'* Irish Times, 7 September, 2001
- 78 See *'Administrators must follow the rules'*, Irish Times, 18 September 2001 and *'League Leaders lose nine points'*, Irish Times, 26 September, 2001
- 79 See *'Marney Affair makes a mockery of the rule book'*, Irish Times, 8 January, 2002, *'Fury at Tolka as St Patrick's get Points'*, Irish Times, 8 January, 2002
- 80 *The arbitrator's report is available on the Eircom league website at <http://mmm.eircom.ie/soccer/eircomleague/news/index.asp?>*
- 81 See *'Shelbourne take Marney case to Court'* Irish Times, 6 February 2002,
- 82 *Keenan v. Shield Insurance Co Ltd*, [1988] IR 89, *Doyle v. Kildare County Council*, [1995] 2 IR 424, *Hogan v. St Kevin's Company and Purcell*, [1986] IR 80, *McStay v. Assicurazioni Generali*, [1989] IR 248
- 83 See *'A long season of one fiasco after another'* Irish Times, 20 March, 2002, and *'Rule Book Flaws begin to register'*, Irish Times, 26 March, 2002
- 84 See *Doyle 'St Patrick's keep points as Shelbourne lose in High Court'*, Irish Times, 18 February, 2002 and *Malone, 'No side wins in damaging dispute'*, Irish Times, 19 February, 2002.
- 85 *Malone, 'St Patrick's look set to be docked fifteen points'*, Irish Times, 20 March, 2002
- 86 *Malone, 'St Pat's lose 15 points in crushing blow'*, Irish Times 23 March, 2002
- 87 See *Malone, 'Dooney defends Inquiry'*, Irish Times, 28 March 2002.
- 88 *Malone, 'St Patrick's look to be docked fifteen points'* Irish Times, 20 March, 2002
- 89 *ibid.*
- 90 *This is borne out both in the arbitrator's report and in the High Court judgement.*
- 91 *Malone, 'St Patrick's look to be docked fifteen points'* Irish Times, 20 March, 2002
- 92 *ibid*
- 93 See *'St Patrick's to study the options'*, Irish Times, 12 April 2002.
- 94 *Malone, 'St Patrick's claims are rejected'*, Irish Times, 24 April, 2002.
- 95 See *Doyle, 'When the National League becomes an Irish Stew'*, Irish Times, 26 April 2002.
- 96 *Malone, 'Rule book claws begin to register'* Irish Times, 26 March 2002, *Doyle 'When the National League becomes an Irish Stew'* Irish Times, 26 April 2002.
- 97 *In the event and after some novel suggestions as to how the league would be decided (including the possibility of a two-legged match between Shelbourne and St Patrick's Athletic to decide the title ('Rivals may make peace and play for the title' Irish Times, March 29, 2002, and 'Play off plan looks dead in water' Irish Times, March, 30, 2002)) the league and the right to play in the European Champion's league was won by Shelbourne, who finished six points clear of their nearest rivals Shamrock Rovers, but crucially only ten points clear of St Patrick's Athletic, who had initially sought for the matter to be referred to arbitration and also had threatened to seek an injunction preventing Shelbourne being declared champions, which might have had the effect of meaning that no club could have played in the Champion's League ('When the National League becomes an Irish Stew' Irish Times, 26 April, 2002), but who later, following negotiations withdrew such claims. Finally, at the same time, it appeared that the outcome of the Eircom League first (i.e. sub-premier) division might also be decided in the High Court, this time as Dublin City objected to being docked three points for playing an unregistered player, Noel Hunt.*
- 98 *Hannigan, 'Menton clarifies Keane Comments'* Irish Times 19 June 2002, *'FAI still at odds with itself'* Irish Times June 8, 2002, *'Hamlet with FAI buffoons but no Prince'*, Irish Times, May 29, 2002.
- 99 See *inter alia*, *FAI/SKY: 1 Supporters: 0'* Irish Times, 6 July, 2002, *Hannigan, 'Supporters are sold down the river to Sky'* Irish Times, 6 July, 2002, *McNally, 'FAI defends seven million euro deal for soccer ties'*, Irish Times 6 July, 2002, and *Oliver, 'Green army asked to tune in, turn on and pay up'*, Irish Times, 6 July, 2002. See also *Cullen and Donohoe, 'Legal battle now looming in TV soccer dispute'*, Irish Times, 15 July 2002.
- 100 *'No side wins in damaging dispute'* Irish Times, 19 February 2002.

Mediating Sports Disputes

by Ian Blackshaw (May 2002, TMC Asser Press)

Book Review by Charles Woodhouse CVO

Ian Blackshaw concludes that mediation “can be a most suitable way of settling sports disputes quickly, effectively and relatively cheaply”. He notes how “mediation generally offers so many advantages over traditional dispute resolution methods” and reminds us of the potential “savings in monetary terms and management resources”. Fortunately all the UK sports bodies representing competitors and governing bodies

Right from the start mediation was identified by the founders of SDRP as likely to be every bit as important, if not more important, than arbitration.

alike came to the same conclusion in the 1990s as one expensive and wasteful catalyst case after another (Modahl is about the most often cited but there were others) led them to set up the Sports Dispute Resolution Panel (SDRP) as an independent provider of dispute resolution for sport in the UK.

Right from the start mediation was identified

by the founders of SDRP as likely to be every bit as important, if not more important, than arbitration. Today SDRP, after three years operational achievement, often asks parties in a dispute who come seeking arbitration if mediation might not be the better course. No different really from what divorce or family lawyers are trained to do and SDRP is as much part of the sport family as it is the sport industry.

Where Ian Blackshaw’s book is particularly helpful is in bringing together and publishing the mediation rules and procedures of virtually all the relevant players be they CAS, SDRP, CEDR (who played such a helpful role in guiding SDRP when it was set up), the Australian National Sports Dispute Centre (NSDC), FIFA, the American Arbitration Association and many others. These documents are all set out in full in appendices running to a hundred pages. One problem of course like all legal textbooks is that it will need constant updating. For example only this month (October 2002) SDRP has adopted revised rules and procedures based on

experience and lessons to date after a comprehensive exercise carried by SDRP’s hard working director Jon Siddall, who with others is much quoted in Blackshaw’s book, and Robert Datnow, the former BOA lawyer, with pro bono help from leading counsel Murray Rosen QC. As Ian Blackshaw indicates mediation in sport is a fast moving and growing area of sports law.

There are many good contributions in this book on how and why mediation has perhaps become the most popular form of ADR in sport. Inevitably there is repetition and some unevenness. Ian Blackshaw does not appear to have edited or pruned his contributors’ articles which he reproduces lock stock and barrel. To me one of the most readable is by Christopher Newmark who tackles over thirteen pages the question “Is mediation effective for resolving sports disputes?”. He concludes that “we are bound to see its use grow” but rightly stresses that flexibility must be retained and it should not be made mandatory. What should be compulsory reading as a cautionary tale is Newmark’s summary of the astonishing selection dispute between two US Greco-Roman wrestlers before the Sydney Olympics involving umpteen court and arbitration referrals and appeals.

Ian Blackshaw’s book helpfully touches on how bodies like Australia’s NSDC and the UK’s SDRP came into being without quite capturing how at the time these bodies emerged. In the real and competitive world of sports politics, away from academia, there were all sorts of obstacles and twists and turns to hurdle and navigate. In SDRP’s case it was crucial that it be seen as independent from the outset. We had the benefit of learning from the long, ineffective and expensive gestation of CAS between 1983 and 1992 when it was barely used because it was not perceived as being independent of its founder and funder, the IOC. When SDRP was incorporated as a not for profit company limited by guarantee it was (and still is) structured to be neither a governing body, a competitors’ body or a sponsors’ body. It was created in a real sense by sport for sport. SDRP’s principal funding from UK Sport, itself the result of lengthy negotiation covering the periods of office of the last three chief executives of UK Sport, has been structured so that SDRP’s independence is fully

Mediating Sports Disputes

respected and protected.

In the case of Australia's NSDC there is an echo or mirror in its membership structure with that of SDRP but interestingly for BASL members it was, Blackshaw's book reminds us, BASL's counterpart and precursor the Australian and New Zealand Sports Law Association (ANZSLA) that first in 1995 set up a Dispute Resolution Scheme in Australia. This later was reconstituted as

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NSDC by the Australian Olympic Committee, the Confederation of Australian Sport, the Australian Sports Commission and ANZSLA itself. Mention of the Confederation of Australian Sport prompts a timely reminder of the seldom-publicised Confederation of British Sport whose representative members cover the whole of the voluntary sector in UK sport and who tenaciously saw through to completion the

creation of SDRP. Now in New Zealand there is as I write the creation of a Sports Dispute Tribunal expected to be in action by early 2003 to serve as "an independent forum for sportspeople to resolve disputes".

This will be for Ian Blackshaw's next edition. I hope then he will give more of his own views and rely less on outside contributors because this developing subject of mediation in sport will benefit from his thoughtful, careful and independent analysis. In the meantime this first book with its national and international perspective on mediation in sport should find its way to the shelves of sports law practitioners.

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