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BRITISH  
ASSOCIATION  
FOR SPORT  
AND LAW  
LIMITED

# Sport and the Law Journal





**BRITISH  
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FOR SPORT  
AND LAW  
LIMITED**

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# Editorial

The board of British Association for Sport and Law Limited would like to thank Ray Farrell for his unstinting effort and sustained commitment over the ten years in which he has edited this Journal.

We wish him well.

# 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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## Conferences, Meeting, Lectures, Courses, etc.

### Seminar on Brazilian Code of Sporting Justice

On 5 and 6 March 2004, the Supreme Court of Sporting Justice (Superior Tribunal de Justiça Desportiva) of Brazil, supported by the Brazil Confederation of Football (Confederação Brasileira de Futebol – CBF) organised a seminar discussing various aspects of the country's Code of Sporting Justice (Codigo Brasileira de Justicia Desportiva) in Rio de Janeiro. The CBF was represented by its Vice-President, Nabi Abi Chedid. The Brazilian Minister of Sport, Agnelo Quieroz, was also in attendance<sup>1</sup>.

### ISLA conference on Olympic sponsorship rights

In mid-March 2004, the International Sports Lawyers Association (ISLA) organised a conference, in Lausanne, Switzerland, the theme of which was the various restrictions on the commercial rights of sporting performers and sponsors on the occasion of the Olympic Games. The topics discussed included:

- The marketing rights of athletes and sponsors within the framework of the relevant rules of the International Olympic Committee (IOC), seen from the viewpoint of the IOC, the sponsors and the sporting performers;
- The Olympic Games as a trade mark, and the question whether the IOC has exclusive rights in this respect in terms of trade mark law, copyright and competition law;
- Experiences in dealing with the IOC and with the Olympic symbols;
- Ad-hoc arbitration at the Olympic Games

The conference languages were German and English<sup>2</sup>.

## Obituaries

### Marco Pantani

Nicknamed “the Pirate” by his fellow-cyclists because of his habit of wearing a bandanna containing images of a skull and bones, Marco Pantani became the first Italian to win the Tour de France since Felice Gimondi almost a quarter of a century before. However, the circumstances surrounding this Tour win overshadowed even this magnificent achievement, and were to assume ominous significance, not only for his own future, but also for that of the sport as a whole. It may be recalled that this was the year in which the Tour nearly ground to a standstill when the Festina squad were dismissed from the event, the police having discovered an organised doping ring within the team. This set off one of the major drugs

scandals in the history of sport, to the point of casting doubt on the integrity and even the very future of professional cycling<sup>3</sup>.

As well as winning that Tour, Pantani also played a high-profile role in the scandal, acting as a ringleader in the strikes and go-slow actions staged by the cyclists in protest against what they regarded as police persecution. Even worse was to follow the next year. Having dominated the Giro d'Italia (Tour of Italy) for that year, he was dismissed from the race after blood tests revealed that he had excessively high levels of hematocrit in his body, which was interpreted as a possible, though not conclusive, indication of illegal drug consumption. Almost overnight, he became cycling's equivalent of athlete Ben Johnson, and remained mired in legal action and racing bans for the subsequent four years. The resulting court cases and scandals tipped Mr. Pantani into a cycle of recreational drugs, depression and increasing bitterness<sup>4</sup>. He was cleared of various charges after four years of investigations, but by then the damage, both to his reputation and his own fragile character, had been done<sup>5</sup>.

The autopsy on Mr. Pantani indicated that he had died from severe swelling of his brain and heart. However, the coroner, Dr. Giuseppe Fortuni, stated that further investigations would be necessary to determine the exact causes. He did not rule out the possibility that the cyclist's death could be linked to a possible cocktail of drugs<sup>6</sup>.

### Professor Sir Roland Smith

Sir Roland Smith was one of the prominent figures in Britain's boardrooms, as well as being a leading academic who in 1996 became the Chancellor of the University of Manchester Institute of Science and Technology (UMIST). He was also the Chairman of Premiership football club Manchester United for 10 years as from 1991, having resigned from the chair of British Aerospace that year. Sir Roland was widely acknowledged as having been the main who played a major part in turning the football club into a successful global business, having steered it through its debut on the stock market<sup>7</sup>.

Sir Roland was also a former member of the Advisory Board of this Journal.

### Eleanor Holm

The US swimmer and entertainer Eleanor Holm, who has died aged 90, will curiously be remembered for her non-participation in the 1936 Olympics rather than for any other feat of her versatile career. She was selected for the infamous Nazi-dominated Games, but was disciplined by the US Olympic Committee, which accused her of having passed out during a party en

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route to the Games and of having been diagnosed by the team doctor with chronic alcoholism – a charge which she vehemently denied. However, the charge was sufficient to have her banned from the competition<sup>8</sup>.

## Sir Oswald Cheung

Sir Oswald, who recently died in Hong Kong aged 81, became the first Chinese to be appointed QC in the colony, as well as being a loyal and judicious member of its Legislative and Executive Councils. He was also the first Chinese chairman of the Hong Kong Jockey Club, and the co-owner of the colony's most famous racehorse, River Verdon<sup>9</sup>.

## Tim Vigors

The death was recently announced of Mr. Tim Vigors, a veteran of the Battle of Britain who subsequently became heavily involved in the bloodstock market. He went into partnership with Vincent O'Brien and Robert Sangster to establish the Coolmore Stud in Ireland, which has since become the most powerful stallion farm in the world. Having been bought out of the Coolmore syndicate, he formed his own bloodstock agency. As an agent, he made several record-breaking sales, buying two subsequent Classic winners in Glad Rags and Fleet, who won the 1966 and 1967 1,000 Guineas races respectively<sup>10</sup>.

## Laszlo Papp

Mr. Papp was the first boxer to win gold medals at three successive Olympiads, a feat which has not been surpassed since. He was also the only fighter from beyond the Iron Curtain to pursue a professional career. This dispensation was, however, unceremoniously revoked by the Hungarian authorities in 1965 when he was on the verge of contesting the middleweight championship of the world. The official reason given for this decision was that a career as a professional sportsman was inconsistent with Socialist principles. He later coached the Hungarian national team<sup>11</sup>.

## Brent Benaschak

Mr. Benaschak, who died at the untimely age of 41, was the founder of the Whistler Gay Ski Week, being an event which he described as an "outrageous week of Olympic-sized fun and over-the-top excitement". This was held every February at the Canadian winter resort of Whistler, British Columbia<sup>12</sup>.

## Lawyers in sport

### Lawyers in sporting organisations under the spotlight

It will be recalled from a previous issue<sup>13</sup> that the English Football Association has experienced a good deal of internal turmoil recently, none more so than during the period immediately preceding and following Chief Executive Adam Crozier's departure in 2002. One of the officials saddled with the unenviable task of stabilising the institution has been its legal director Nic Coward, who subsequently shared the position of Chief Executive on an acting basis with David Davies. Although no-one has questioned Mr. Coward's integrity, some have called into question his effectiveness. More particularly journalist Tom Bower, whose recently-published book *Broken Dreams* purports to lift the veil on corruption in the game, has criticised Mr. Coward for being a "reluctant enforcer".

Mr. Coward had the opportunity to put the record straight in an interview which appeared in a leading professional journal<sup>14</sup>. He countered the criticism made by Bower by insisting that he had spent the last eight years introducing new rules and best-practice arrangements aimed at improving standards. In fact, it was when he was still a solicitor at Freshfields, which advised the FA at the time, that he recommended that the FA should establish a new unit dealing with financial compliance. Although this idea was initially rejected, it was adopted in 1998, and a former detective constable, Graham Bean, appointed as compliance officer. Nevertheless, in spite of these attempts to address the problem, both the FA and Mr. Coward continue to attract criticism for their allegedly *laissez-faire* attitude towards regulation. The compliance unit is viewed as overworked and under-supported, which must surely have been one of the circumstances which, as was reported in the previous issue of this Journal, prompted Mr. Bean's resignation from the Unit in September 2003<sup>15</sup>. In addition, many clubs continue to incur sizeable debts (as will be abundantly discussed in Chapter 10 of this issue) which suggests that the FA should take a tougher line with free-spending directors<sup>16</sup>, which the various penalties introduced for clubs which go into administration only address in part.

Shortly before going to press, it was reported that Mr. Coward was about to depart from the FA on an amicable basis, owing to the restructuring which new Chief Executive Mark Palios was putting into place at Soho Square. It has also been suggested that Mr. Coward has thus become yet another high-profile victim – some would also say scapegoat – of the Rio Ferdinand affair (see below, p.109). Certainly Mr. Coward was not assisted in this matter by the FA procedure under which

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every legal issue had to pass through Mr. Coward's office, causing a logjam of documents in relation not only to the Ferdinand case at its most incendiary stages, but also to other disciplinary cases which left players waiting for months for even routine hearings<sup>17</sup> (see, e.g., the Joe Cole case, below p.120).

The result of the restructuring at Soho Square will be a considerable amount of streamlining, which will involve legal work being allocated to outside firms rather than being dealt with by the in-house lawyer – a situation to which Mr. Coward's arrival was supposed to have put an end<sup>18</sup>.

Another high-profile legal man involved in the administration of sport to have caught the headlines recently is US lawyer Bruce Buck, managing director of the US London firm of Skadden Arps Slate Meagher & Flom. As an adviser to the billionaire Roman Abramovich, he was appointed chairman of Chelsea Village, the holding company for Premier League side Chelsea FC. Within a matter of weeks, he became involved with the media scrum at the time of the very public departure of his predecessor, Ken Bates (see below, p.48). In fact, as a feature in the Law Society Gazette has highlighted<sup>19</sup>, Mr. Buck is just the latest in a succession of lawyers given considerable public prominence as a result of events on and off the football field. Witness Maurice Watkins, a figure already frequently mentioned in these columns, who is the senior partner of Manchester firm Chapman & Co and a long-standing director of Manchester United. Mr. Watkins first came to public attention with the fall-out from the incident in which former United player Eric Cantona felled a spectator with a karate kick in 1995. Other leading lawyers acting as directors for football clubs are Michael Fiddy (Fulham), Chris Haddock (Halifax Town) Trevor Watkins (Bournemouth – no relation) and Michael Jepson (Coventry City).

Another example of this trend occurred in February 2004, when it was learned that Scott Duxbury, the head of legal affairs at First Division club West Ham United, who is also its company secretary, had accepted an invitation to join the club's board. Mr. Duxbury joined United in June 2001 following a spell with the aforementioned Manchester United lawyer and director Maurice Watkins advising the Manchester club, the FA Premier League, and governing bodies UEFA and FIFA<sup>20</sup>.

However, football has not been the only sport whose lawyers have clamoured for attention recently. As the Rugby Union World Cup reached its climax in November 2003, the spotlight fell on the Rugby Football Union's (RFU) in-house lawyer, Jonathan Hall, when he was required to review the agreement sent to all the Unions by tournament organisers Rugby World Cup Ltd. before the RFU could sign up to it. This agreement

went into immense detail about the number of players, where they could stay, transport, discipline, as well as the competition rules and regulations<sup>21</sup>.

Various sporting disputes have also caused the media spotlight to fall on the sports lawyers acting for each side. Thus in the Rio Ferdinand case referred to above, Manchester United called upon the services of Ronald Thwaites QC, one of the more colourful members of the Bar (already being hailed in some quarters as the new George Carman). The FA for their part opted for Mark Gay, a solicitor who has succeeded in building up a renowned practice in drug-related sports law. Mr. Thwaites was less experienced in sports law than Mr. Gay, but carved out a reputation as a barrister capable of dazzling a jury. He cut his professional teeth at the Old Bailey defending murder suspects<sup>22</sup>. The outcome of the case is described elsewhere (see below, p.109).

Another high-profile dispute involving sporting figures is the Chambers doping case, which is also extensively featured later (see below, p.108). This involved three heavyweights from the sporting Bar, all from Blackstone Chambers (sic), going head-to-head at the relevant enquiry: David Pannick QC (acting for the prosecuting body, UK Athletics), Michael Beloff QC (representing the accused sprinter) and Charles Flint QC, who chaired the three-man disciplinary tribunal<sup>23</sup>.

## London 2012 bid finalises legal team<sup>24</sup>

The London bid for the 2012 Olympics, of which more later (see below, p.56), was always going to require a strong legal back-up team, the final picture of which has emerged in recent months. London 2012, the bid vehicle created in August 2003, has not only its own legal function, but has also engaged an army of external legal advisers to assist with the bid.

Leading firm Ashurst Morris Crisp assisted with the formation of the company by virtue of its relationship with chairwoman Barbara Cassani which dates from her time as chief executive of the GO airline group. However, such firms as Clifford Chance, Freshfields Bruckhaus Derringer, and Berwin Leighton Paisner are all supporting the bid by agreeing to contribute legal services. All four firms will be recognised in London's 2012 marketing programme and will receive certain rights of association with the bid.

## Allens Arthur elevated to Commonwealth games role

The leading firm of Allens Arthur Robinson recently proved itself the top choice for major sporting events, having won the coveted role of official law firm to the Melbourne Commonwealth Games scheduled for 2006. It carried off this role over a host of other law firms, and will advise alongside the Games' in-house legal team<sup>25</sup>.

# 1. General

## Digest of other sports law journals

### Sports Law Bulletin

The March/April issue of this journal contains a number of thought-provoking contributions. One of them comes under the "In My Opinion" column. Its author, Simon Boyes, focuses on a directive recently issued by FIFA, the world governing body in football, to the effect that refereeing decisions involving the sending off of a player will automatically entail a one-match suspension regardless of the accuracy of the decision, which may not be corrected by video evidence. He argues that such a dogmatic position flies in the face of considerations of natural justice and fairness, and predicts that it will trigger a good deal of litigation and legal problems – not least for the national associations who will need to implement this new system.

This issue also contains features on recent cases, including the dispute between Middlesbrough FC and Liverpool regarding the transfer of German international Christian Ziege<sup>26</sup> and a High Court decision involving sports safety, which centred round an accident suffered by an experienced climber at a climbing centre<sup>27</sup>.

### Recent issues of International Sports Law Review

Apart from the usual diet of national case reports, the third issue for 2003 features a major contribution dealing with the fundamental rights of athletes in the light of the recently-adopted WADA anti-doping code, authored by A. Rigozzi, G. Kaufmann-Kohler, and G. Malinverni. After examining exhaustively all the human rights aspects of the Code, the authors express their satisfaction that, generally speaking, the Code corresponds to acceptable fundamental standards in this field. They attribute this mainly to the drafters having engaged in broad consultation of all the relevant stakeholders, which resulted in real concerns about fundamental rights being taken into account during the drafting process. This constitutes a major step forward, according to the authors, from an approach which ignores standards of fundamental rights and thus leaves the enforcement of such rights to the courts. In such conditions, the only rights protected are those of the individual athlete who has access to a court willing to intervene in sporting affairs, and who can afford to engage in legal action. The present Code, by contrast, will allow all athletes to benefit from the protection of fundamental rights which are incorporated in the Code.

The fourth issue for 2003 is also built round one major contribution – by author José Manuel Meirim, who examines in some depth the impact of the Euro 2004 football championships on Portuguese legislation. The author provides a clear idea of public involvement

in sporting competition which is organised on a private basis. Against the background of the scarcity of public resources, the approach thus far displayed by the public authorities in Portugal has been one of treating Euro 2004 as one of their first priorities, but at the expense of relegating other sporting areas to a secondary level. This fact has prompted a somewhat critical approach by the author towards this attitude.

Issue 2004/1 contains a number of major articles. In the first, "On the Foot against Corruption", author Urvasi Naidoo examines the cricket corruption scandal, extensively covered in this and other organs. He maintains that research into the problem has revealed the existence of corruption linked to betting on international fixtures which goes back more than 20 years. Since this corruption was permeating all aspects of the game, the International Cricket Council (ICC) was ill-equipped to deal with the magnitude of the problem. The author examines the manner in which the ICC tackled this ethical challenge and provides information on the two bodies which were established with the particular aim of addressing the problem of corrupt practices.

In "Who would be a Referee? The Developing Legal Liability of Sports Referees", Jonathan Bellamy examines the recent trend whereby the appellate courts of England have confirmed the existence of a legal duty of care which is incumbent upon the referee towards the players on the field. With reference to the approach adopted under other legal systems, the author discusses the potential effects of these developments on referees, governing bodies, insurers and clubs.

Finally, in "Garden-leave Injunctions in the Sporting Arena: Reading Football Club and West Ham United", James Goude QC and Simon Devonshire examine the legal principles at stake in the recent case which arose between these two clubs, and consider the more general application of the principles governing garden leave injunctions to sporting contracts.

### Recent issue of Zeitschrift für Sport und Recht

In the latest issue of this German sister journal (2004/1) author Frank Holzke examines the possibility that European professional sport will become considerably more internationalised as a result of the Kolpak decision, covered extensively in earlier editions of this organ<sup>28</sup>. In the light of the applicable rules, he concludes that professional sporting performers from the European Economic Area countries are placed on an equal footing, not only with those emanating from EU member states, but also with those from non-member states, inasmuch as they are in lawful employment. Author Rolf Majcen analyses the problem of legal claims to nomination for participation in European competition by reference to the relatively little-known sport of ski mountaineering, as

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well as the set of international rules which apply to this sport and which are closely linked to the rules applied by the relevant national associations. In the light of these rules, the author concludes that a claim for nomination brought against the national association must be admissible on the basis of the case law hitherto developed in the area of sports law.

Marius Breucker and Christoph Wüterich examine the question whether self-employed sporting professionals and sporting employers from non-EU member states should also benefit from free movement within the EU, and whether this will give opportunities to sporting associations which are not provided by the aforementioned Kolpak decision. This issue also contains a feature on the best-known internet sites in sports law.

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## Sport and international relations

### **Cricketing relations with Zimbabwe continue to trouble the authorities**

The withdrawal of the English national team from the 2003 World Cup fixture with Zimbabwe, and the ructions which this caused, not only within the game, but also in the wider arena of politics, have been well documented in earlier editions of this organ<sup>29</sup>. It will be recalled that not only did this withdrawal have considerable financial implications for the England and Wales Cricket Board (EWCB), but it also queered relations with other first-class cricketing nations who were incensed by this action. There was also the prospect of a repeat performance in the sense that England were timetabled to tour Zimbabwe in the autumn of 2004, which would undoubtedly prompt renewed calls for a boycott. All these issues have continued to make waves during the period under review.

At first, it seemed as though the international cricketing authorities had realised that there were many lessons to learn from this episode, and in late October 2003, the International Cricket Council (ICC) announced plans to prevent a repeat of some of the worst aspects of this affair, including the fiasco surrounding England's withdrawal from their World Cup match in Zimbabwe the previous February. A protocol was agreed at an ICC Executive Board meeting in Barbados for the cancellation of tours on safety and security grounds. It agreed to establish a panel of approved consultants, which any country having concerns about travelling to a host nation may employ in order to compile a report. The consultant will then report to the touring and host nations and the ICC. If the touring side still entertains objections, they will be obliged to explain them to the ICC and the host before making the final decision. These measures were intended to ensure that, where a nation

reneges on a tour commitment against the advice of the approved consultants, they will bear sole responsibility for the decision, and should be unable to claim, as the EWCB has done, that the advice was flawed<sup>30</sup>.

However, this only dealt with the security aspects of controversial tours. Any mention of a protocol or procedures for tours which might run up against moral and/or political objections was studiously avoided by the world governing body. Nevertheless, early in the new year 2004, the English cricketing authorities began turning their attention to devising ways of combining a regard for issues of principle with avoidance of the confusion and disarray which attended the World Cup boycott and, to a certain extent, the controversy surrounding the Zimbabweans' tour of England in the summer of 2003. In mid-January, the England and Wales Cricket Board (EWCB) issued a document, called *A Framework for Rational Decision Making*, produced by the Chairman of its corporate affairs committee, Des Wilson. This set out a number of conditions which any country should fulfil in order to be eligible for a tour. These are<sup>31</sup>:

- (1) The impact on the tour itself. On the issue of safety and security, it must be safe for the touring party, the media and supporters of the guest team to visit the country. As regards the integrity of the tour, there should be no racialism or political intervention involved in the selection of the host nation's side, and there should be freedom of movement and expression for those visiting.
- (2) Advice and opinion: As regards British foreign policy, the sport's governing body will, during the decision-making stage, take careful note of the Government's advice so that it does not undermine national foreign policy. In relation to public opinion, the team represents the country and therefore the views of the general public should matter. To ignore them would damage the image and reputation of the game. As far as the "cricket stakeholders" are concerned, the views of those who provide essential support for the game, whether they be players, administrators, business partners, sponsors, media or the public, should be heard before a decision is made.
- (3) The moral question: sport should seek to reflect its fundamental ideals and values in the countries in which it is played. A tour should only be cancelled on moral grounds in extreme cases, but the host country's political regime and human rights record must be taken into account.

Introducing this document, Mr. Wilson asserted that in the 21st century it was no longer realistic for sport to stand aloof from politics. This represents a considerable

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shift from the position adopted in principle by the International Cricket Council (ICC), which has steadfastly refused to deal with the political and moral issues surrounding a host country. The only grounds for cancellation were deemed to be considerations of safety and security<sup>32</sup>. However, it may raise as many questions as it answers, since what constitutes acceptable moral and political conditions is a matter of interpretation and the potential source of considerable disagreement – as indeed was demonstrated over the World Cup withdrawal affair.

Shortly before this document was launched, the EWCB started to float the possibility of offering to play Zimbabwe at a neutral venue in November as a way of avoiding a new crisis over the scheduled tour. This would enable the series to go ahead and allow England to meet its commitments, whilst avoiding the appearance of legitimising the dictatorial regime of Robert Mugabe. At the same time, key sponsors such as Vodaphone, who had also expressed reservations about maintaining cricketing relations with Zimbabwe<sup>33</sup>, would also be appeased, and much of the revenue emanating from media rights arrangements would be protected.

Alternative venues could include Sharjah, in the United Arab Emirates, which had hosted neutral matches before. South Africa was mooted as another possibility, although its government's tacit support for the Zimbabwe regime might deter them from being seen to undermine their neighbours. Although it was expected that the Zimbabweans would almost certainly veto this proposal initially, the speculation was that financial considerations might overcome this reservation<sup>34</sup>.

Nevertheless, a few days later confusion and disarray seemed once again to assert themselves as it emerged that the November tour was about to be cancelled on moral grounds. This has apparently resulted from pressure emanating from Government Ministers fearful that the tour might hand a propaganda coup to Mr. Mugabe<sup>35</sup>. However, the next day it also transpired that the EWCB faced the risk of court action and further conflict with the ICC should they decide to withdraw, ICC President Ehsan Mani met EWCB Chairman and Chief Executive Tim Lamb to remind the latter of the unanimous 2002 agreement concluded between ICC members, including the EWCB, that political considerations should not be used as a reason for withdrawing from tours. Breaching this agreement would enable the Zimbabwe Cricket Union (ZCU) to take the EWCB to the ICC's Disputes Resolution Committee (DRC) in order to determine whether any compensation should be payable or whether any other legal action could be taken. This DRC would be chaired by the renowned sports lawyer Michael Beloff QC, the ICC's code-of-conduct commissioner<sup>36</sup>.

At the same time, this gave substance to some of the fears expressed above in relation to the EWCB document setting out the conditions to be met by the host country. Indeed, some senior figures on the EWCB were reported to be incensed that Lamb and Morgan had brought the issue to a head by publishing the Wilson proposals earlier than was necessary<sup>37</sup>.

On the other hand, back in Zimbabwe, news of the planned withdrawal was greeted with approval by many fans and players, but not openly, for fear of retribution from the Mugabe regime. Such sentiments as they might have were expressed to reporters in private conversations. Thus one former international player forcefully expressed the view that cricket should not allow itself to be used for the purpose of covering up the oppression and abuses which were rampant in that benighted country<sup>38</sup>. Some also pointed to the brave stance taken by players such as Andy Flower and Henry Olonga, who had sacrificed their international careers by the "black armband" protest which they staged against the Mugabe regime during the 2003 World Cup<sup>39</sup>. (An interesting newspaper interview with Mr. Olonga, in fact, revealed that, far from being an apologist for "White Zimbabwe", he did not hold the "persecuted white farmers" in very high esteem. In addition, he had himself been the object of considerable vilification by his white team-mates in the international squad because of his vociferous objections to some of their racist taunts<sup>40</sup>.)

It seemed, therefore, as though the issue was once again being plunged into the state of uncertainty and confusion which the EWCB had sought to avoid. On this occasion, however, the British Government at least provided a clearer line of advice, strongly urging the EWCB to cancel the tour. More particularly, the Foreign Secretary, Jack Straw, stated that participation in the tour may undermine the efforts of the international community to isolate the Mugabe regime<sup>41</sup>. Some commentators, however, considered that this was not enough, and that the Government should actually take the decision itself rather than transferring the proverbial US currency onto the game's administrators<sup>42</sup>.

A few days later there appeared yet another twist to this saga, when it was learned that the ZCU had dramatically increased the stakes by writing directly to the 18 English first-class cricket counties, outlining the reasons why, in its view, the tour should go ahead. In this missive, Peter Chingoka, the ZCU Chairman, accused the EWCB of deceit and stressed the compensation for which English cricket might be liable in the event of withdrawal from the tour. Mr. Chingoka claimed that the EWCB Chairman, David Morgan, had given an undertaking in March 2003 that political and moral judgments on the Mugabe regime would not be

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used to decide the fate of the tour. In addition, the EWCB had, he claimed, given this commitment as part of the reciprocal arrangements for the 2003 tour of England by the Zimbabwe team<sup>43</sup>.

During the days leading up to the date on which the EWCB Management Board was set to meet in order to take a decision on this issue, there were hopeful signs that the issue would finally be decided one way or another. Thus it was announced that the EWCB were contemplating offering up to \$1 million by way of compensation to the ZCU if the tour were to be called off. It was hoped that making this offer would head off any calls by the international cricketing community for stronger action against the English authorities, possibly through the courts<sup>44</sup>. Even the ICC President, Ehsan Mani, was reported to be "resigned" to the prospect of the tour being called off<sup>45</sup>. But, once again, it wasn't to be. The intended judgment day turned instead into the habitual moist firework, with the Board deciding... to postpone the decision. Pleading the political and financial ramifications which cancellation of the tour could entail for the EWCB, the latter decided that it required a little more time "to make a thoroughly informed decision"<sup>46</sup>. Nor did the disarray end there. Initially it was reported that the decision would be postponed until the end of February; after the meeting, it emerged that the final outcome would not be known until the end of March. Nevertheless, there was agreement in principle that the tour could not go ahead as long as Mr. Mugabe remained in power<sup>47</sup>.

Following this latest fudge, Mr. Mani, who had donned the mantle of mediator in this increasingly farcical dispute, requested the EWCB Chairman David Morgan to address the next meeting of the ICC Executive in order to explain the Board's position. More particularly, Mr. Morgan would be expected to explain why, as had been mentioned above, the Board seemed unwilling to comply with the assurances given in March 2003 by Mr. Morgan that safety and security issues alone would decide the issue<sup>48</sup>.

At the time of writing, it was doubtful whether the extra time stipulated by the EWCB would deflect its Management Board from what seemed to be a united course towards cancellation. However, the English cricketing authorities have sprung some surprises on the game before, so only the clearest of decisions at the relevant time will suffice to quell any doubt. Since then, however, further developments have served to confuse the issue even further.

As if to emphasise that governments the world over are fond of passing over their responsibilities, the Australian Prime Minister, John Howard, announced that he would leave it for the Australian cricketing authorities to decide whether they would tour

Zimbabwe in May 2004, despite his Government's strongly expressed view that the tour should be cancelled<sup>49</sup>. Although it was too much to expect Mr. Howard to take account of the EWCB's difficulties, his decision once again failed to give the kind of leadership which many commentators expected from elected political representatives – who at the same time were part of the machinery which sets the course for the "international community" so stirring invoked by Mr. Straw (see above).

Then, in mid-February, the news broke that the Champions' Trophy, a mini-World Cup intended as a thrilling climax to the English season, would pit England against Zimbabwe at Edgbaston on 10 September in one of the opening fixtures. If England go ahead with cancellation of the tour, the Zimbabwean team could boycott the tournament, causing yet more financial and other setbacks. If, on the other hand, the Zimbabwe team decide to take part in the Trophy nevertheless, England might find themselves obliged to give their opponents a walkover. This would expose them to the same fate as that which befell them during the 2003 World Cup, when they were faced with heavy financial penalties as a result of pulling out of the fixture with Zimbabwe<sup>50</sup>. That is not to mention the myriad scenarios which could result from the attitude displayed by the other Trophy competitors towards any fixture in which they are due to play Zimbabwe.

Once again, the famous curse "may you live in interesting times" seems to have befallen English cricket. The next issue of this organ will naturally follow up this issue with the keenest of interest.

## India and Pakistan resume cricketing relations

It is extremely unfortunate that, as India and Pakistan gradually increased their stature in the game to become two of the most powerful cricketing nations on earth, they became estranged from each other through political circumstances, centred mainly on the disputed status of the Indian state of Kashmir, which brought the two countries to the brink of nuclear warfare a few years ago. However, this period of severed relations seemed set to end in late October 2003, when it was announced that India were to undertake their first Test tour of Pakistan in 14 years, following a government offer to restore full sporting ties between the rival countries. This tour was scheduled for March 2004<sup>51</sup>. However, this gave rise to a host of concerns, not least about the safety of the players. In fact, the tour appeared to be stillborn just before the end of the year, when India's players decided unanimously not to take part in the tour. This decision came in the wake of two assassination attempts made against the Pakistani president, Pervez Musharraf. Most of the senior players in the squad

habitually take their families with them on tour, and their decision to refuse participation was influenced mainly by concerns for their wives and children<sup>52</sup>.

This stance represented a serious embarrassment for the Board of Control for Cricket in India (BCCI), because it was they who had ceaselessly pressured the Indian government into resuming cricketing relations with their neighbours over the past few years. It also threatened to involve the BCCI in a head-on confrontation with the International Cricket Council (ICC), which had already threatened to ban India if it boycotted Pakistan on flimsy grounds. However, given the perilous conditions which had engulfed Pakistan, there were grounds for believing that the cricketing authorities would relax this uncompromising stance. This was particularly the case since cricketers had in fact already come face to face with danger when playing in Pakistan. Thus in 2002, there was a bomb blast in front of the Karachi hotel where the New Zealand team were staying. Also, South Africa had recently toured the country only after matches scheduled for Karachi and Peshawar, the flashpoints for most of the unrest, were moved<sup>53</sup>.

The players seem to have relaxed their opposition during the next few weeks. However, with a few weeks to go before the tour was due to commence, a detailed advisory note was sent to the BCCI by the Indian Home Department requesting that players' security be made the top priority before coming to a decision whether or not the tour should go ahead. This had been the result of considerable pressure exerted by India's leading players. Already, a three-member delegation from the BCCI had left for a week-long mission in Pakistan in order to review security at the various scheduled venues. The delegation was said to have demanded bodyguards for all the Indian players and party members<sup>54</sup>. The Indian Government had in the meantime given the green light for the tour, ending weeks of speculation (with BCCI Chairman Dalmiya adding the reservation that players could be excused from the tour because of security concerns). However, fresh concerns arose after the aforementioned delegation returned to India. These centred once again on two of the venues for the games, i.e. Karachi and Peshawar. The Pakistan Cricket Board remained insistent that two of the Tests should be played at these venues, whereas the BCCI had indicated their preference for only playing one-day matches there.

Ultimately, the Pakistan board compromised by agreeing to drop Karachi as a venue for one of the Tests, which meant that the tour could definitely go ahead. In addition, the Pakistani authorities relaxed their usually stringent visa procedures to allow 8,000 Indian fans to attend the matches (with the demand for tickets

causing a riot between police and fans at the High Commission in Delhi). Politicians and commentators on both sides and beyond expressed the hope that the resumption of cricketing contacts between the two countries could assist with healing the wounds inflicted during half a century of bitter separation<sup>55</sup>.

### **England tour of Sri Lanka goes ahead despite safety concerns**

Sri Lanka has been another Asian cricketing nation racked with political instability and related violence. Shortly before the England team's tour of the country was to commence in November, renewed political unrest broke out on the island when the nation's President, Chandrika Kumaratunga, suspended Parliament and dismissed three Government ministers. She also ordered troops to guard key installations as she was at odds with her Government over the peace negotiations with the separatist faction, the Tamil Tigers. Police were put on maximum alert and all leave was cancelled<sup>56</sup>.

In spite of these internal convulsions, the British Foreign Office insisted that this situation did not require any change of plan for the tour, which was to feature three Tests and three one-day internationals. Beyond being warned not to visit certain areas in the North and East of the country, where Government troops fought the Tamil separatists prior to a ceasefire in 2002, British travellers were not in general discouraged from visiting the island<sup>57</sup>. Nevertheless, the England and Wales Cricket Board (EWCB) lost no time in commencing discussions with the Foreign Office in order to review security in order to ensure a safe tour for the visiting side<sup>58</sup>. In the event, the tour passed off without any major security threat.

### **Iraq returns to sporting normality**

The invasion of Iraq by western troops has produced a number of consequences for the nation's sporting profile. In late February 2004, Iraq was reinstated by the International Olympic Committee (IOC), clearing the way for their athletes to compete under their national flag at the Athens Games<sup>59</sup>.

Earlier that month, it had been announced that the Iraqi national football team would tour England in the summer of 2004 in order to play a series of matches against Premiership and Football League sides. The Iraqi team would also use Football Association (FA) training facilities to help them prepare for the Asia Cup, which takes place later this year. The tour has the support of all leading football bodies and of the British Sports Minister, Richard Caborn, who has been closely involved in drawing up an itinerary for the Iraqi team. The Iraqis had even hoped to play the English national side, but the FA dismissed the request because of prior commitments<sup>60</sup>.

### World Cup helps to foster peace in Palestine

To an even greater extent than the various other areas of this globe which are continuously racked by armed conflict, Palestine has hardly registered a blip on the world's sporting arena. However, there are some hopeful signs that this is changing, in that the Palestinian national football team is making laudable efforts to leave its mark on international football and thus bring some much-needed relief to the beleaguered people of that nation. Scraped together from a hitherto ignored diaspora scattered mainly throughout South America, the team succeeded in beating Taiwan 8-0 in a World Cup qualifying match played in Doha, Qatar. Because of the nature of the Palestinian state, a neutral venue must always be its football team's home turf<sup>61</sup>.

The chances of the team making it to the final stages of the tournament are as remote as peace breaking out in the Middle East next week. Yet the team's relative success has brought a ray of hope to the people of this unfortunate land and may even make a contribution towards the peace effort.

### Rugby makes statement of entente

This year, it is exactly a century since a pact signed between Britain and France aimed at preventing warfare between these two ancient nations, called the entente cordiale. One of the many events staged to celebrate this event will be a rugby union international, to be played between the England and France later this year. Officials hoped that this and other centennial celebrations would assist with the thawing of relations between the two countries, following disagreements over the Iraq war, plans for a European defence force and the problems surrounding the planned European constitution. The proceeds of this friendly fixture will go to charity<sup>62</sup>.

*"To this (question) the answer must be that lawyers don't create litigation; it is clients who seek advice and decide whether or not to sue. We live at a time when more and more sports are becoming professional. No more gentlemen and players, they are all players now (...). As a result, not only fame, but fortune, rides on a game's result, even a referee's decision. So sport cannot be, in a famous judicial dictum, an Alsatia where the King's writ does not run; and the principles of legality, fairness and rationality must themselves be called in to regulate the regulators"*<sup>64</sup>.

However, in his conclusion, Mr. Beloff points out the dangers which the "compensation and blame culture" present for sport, with particular regard to the decision in Tomlinson v. Congleton, discussed in Section 4 of this contribution (see below, p.51).

### General work on Dutch sports law published

Earlier this year, there appeared a comprehensive compendium of the applicable legislation and case law relating to sport under the authorship of F.C. (sic) Kollen. Called *Bundel Sport en Recht 2004*. It is published by Kluwer (Deventer)<sup>65</sup>.

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## Other issues

### Leading sports lawyer reviews the year

Michael Beloff QC is a name which is regularly featured in these columns, mainly because of the eminence which this leading lawyer has achieved in the field of sports law. In a contribution appearing in a leading daily newspaper<sup>63</sup>, he casts a backward glance at some of the major events to have marked the discipline of sports law in the course of the year 2003, many of which have featured in these columns. More particularly he focuses on the exponential increase in sports-related litigation engaged in by a multitude of personalities involved in this medium, and asks the question whether this is good for sport (even if it is very good for the lawyers). He answers this question by going into a somewhat contrived neutral mode, writing:

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### Corruption in Sport

#### **Racing corruption scandal – an update**

##### *Background*

Ever since the arrest of jockey John Egan on charges of race-fixing, reported in these columns two years ago<sup>66</sup>, the world of racing has been rife with accusations – some more justifiable than others – of institutional corruption at every level of the sport. Suspicions of widespread malpractices in the sport were also fuelled by the televisual attention devoted to this issue, in the shape of investigative programmes such as the BBC's *Panorama* and *Kenyon Confronts* series which also claimed to uncover hidden layers of corruption in the Sport of Kings<sup>67</sup>.

It will also be recalled that, in response to all these allegations, a Security Review Group (SRG) was established by the sport's two regulatory bodies, the Jockey Club and the British Horseracing Board (BHB), which conducted a five-month investigation into the state of racing. The SRG's findings were that, although it rejected the accusation of institutional corruption, a number of measures should be taken in order to safeguard the integrity of the sport. To this end, the Group made 36 recommendations, some of which have already been implemented by the two regulatory bodies (not without some rumblings of discontent, not least amongst the fraternity of jockeys)<sup>68</sup>. Since then, further efforts have been made to safeguard the probity of the sport, as is detailed below.

##### *General measures adopted or proposed*

The seriousness of intent with which the racing authorities set out to tackle this problem was clearly in evidence when, in early November 2003, the Jockey Club named a high-ranking police officer to take charge of its troubled security department, to wit Detective Chief Superintendent Paul Scotney, hitherto responsible for organising and carrying out inspections of police forces around the country<sup>69</sup>. It was hoped that this appointment would herald a fresh start for a department which, under the previous regime of Roger Buffham and Jeremy Phipps, had been the butt of considerable ridicule by the *Panorama* programme referred to above. Mr. Scotney's immediate task was to oversee the implementation of the aforementioned SRG recommendations. He was also expected to take action in relation to the increasingly fraught question of betting exchanges, and the increasing number of suspect races, of which more will be said later<sup>70</sup>.

At the time of writing, it was also reported that the Jockey Club and Britain's major bookmakers were close to an agreement which would enable Mr. Scotney's department to gain access to punters' betting records

when a serious breach of racing's rules was suspected. This agreement, known as the Memorandum of Understanding, could be in place by the time the next issue of this organ goes to press. A similar agreement is already in place between the Jockey Club and Betfair, the leading internet betting exchange which allows customers both to place bets on winners and to "lay" bets from other punters in the hope that the horse will lose. In fact, shortly after Mr. Scotney took office, charges were brought against Miles Rogers, the director of a racing club which owns a number of horses, on the grounds that he used Betfair to take bets on horses owned by the club which were subsequently beaten<sup>71</sup>.

Two months later, the Jockey Club announced plans to join the Crimestoppers scheme in order to increase the flow of information on possible corruption in the sport. Crimestoppers offers anonymity to callers, and already collaborates with leading bookmakers Ladbrokes. The Jockey Club already operates its own confidential telephone line for informants, known as Raceguard, which offers rewards of up to £10,000 for information leading up to a successful prosecution. It was felt, however, that by joining Crimestoppers the racing authorities would increase the confidence of informants that their identities will be protected, whilst at the same time conveying the message to the racing industry that any attempt to corrupt the sport could amount to a criminal offence<sup>72</sup>.

##### *Panorama affair continues to fester*

It has been mentioned before, both in this and in other editions of this Journal, that one of the developments which have caused the present round of soul-searching within the racing industry is the series of programmes purporting to lift the lid on corrupt practices in racing. One of these was the *Panorama* programme devoted to this issue. Some of the allegations made during this programme, now look set to end up in court, at the suit of leading jockey Kieren Fallon.

Initially, the court action in question concerned the contribution made by a former Head of Security at the Jockey Club, Roger Buffham, to a story in the *News of the World* concerning alleged links between Mr. Fallon and a ring of Chinese gangsters. However, solicitors acting for the rider have now extended the action against Mr. Buffham to the *Panorama* programme, and more specifically his comments casting doubts on Mr. Fallon's fitness to hold a racing licence. Mr. Fallon's legal team intend to subpoena Jockey Club officials in support of their action<sup>73</sup>.

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

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### ***Bloodstock industry: yet another area of corruption?***

Although receiving less media attention than some of the practices described above and in other issues of this Journal, some of the practices occurring in the bloodstock industry have, for some time now, given rise to concern in racing circles. Thus in November 1999, trainers Oliver Sherwood and Paul Webber (a bloodstock agent at the time) were found guilty of “collusive bidding” at the Doncaster Sales of 1995. Both men were subsequently fined £4,000 for bringing the sport into disrepute. Other practices which have been the cause of concern have been the “buying-in” of horses by their owners, in order to ensure that these are not marked down as Not Sold, whilst at the same time setting a benchmark for a future sale.

It is also possible for bloodstock agents to act in a number of other capacities within the industry, including breeding or managing stallions, which is clearly capable of creating a conflict of interest. If these agents are involved with a particular stallion, for example, there is a clear incentive to ensure that its offspring achieve as high a price as possible in the ring.

In January 2004, the practices in this industry once again started to cause ructions in the racing industry, when the Jockey Club alerted the world of racing to the need for transparency in the buying and selling of horses. This followed certain claims made in the media concerning Charlie Gordon-Watson, a leading bloodstock agent, and David Elsworth, one of the country’s best-known trainers. The Club also invited representatives from various sectors of the bloodstock industry to meet at its Portman Square headquarters in order to address “allegations of malpractice” which might have an effect on the image projected by the racing industry<sup>74</sup>. The Club had already introduced a code of conduct the previous year to cover the dealings between trainers and owners, whilst the Federation of Bloodstock Agents has its own “code of working ethics” to which members are expected to adhere.

The claims involving Gordon-Watson and Elsworth arose from a civil court case which was decided the previous month and which followed the sale of the Elsworth-trained Foodbroker Fancy, a mare which had enjoyed two listed race successes as well as having placings in Group Two company to her name. In the course of the proceedings, it emerged that Mr. Gordon-Watson had paid the sum of £10,000 to Mr. Elsworth as part of the sale, making the payment to a bloodstock agent in the United States, without the knowledge of the mare’s owners, Foodbrokers Limited. The owners were also due to pay Elsworth a vendor’s commission amounting to 5 per cent of the sale price, i.e. £2675,000. When the judge discovered that Elsworth, who gave

written evidence on behalf of Foodbrokers, was receiving money from both sides of the transaction, he suggested that such practices were “illegal, quite illegal”. The case was ultimately settled by Mr. Gordon-Watson agreeing to pay £40,000 to Foodbrokers limited, and a further £10,000 to the US agent.

The Jockey Club then announced that it had passed a transcript of the decision to its lawyers for their consideration. Whilst the Club has no powers to act against Mr. Gordon-Watson, it may decide that Mr. Elsworth was in breach of its code of conduct for trainers and owners. More particularly, the Code states that where:

***“a trainer acts as an agent (...) for one of his existing owners (...) concerning the purchase or sale of a horse he must, whenever possible, give prior notice (...) if he is aware that he will benefit financially from any third party from such a transaction. Should the transaction take place, he is required to quantify any financial benefit that arises”***<sup>75</sup>

There is, however, a further complication in this matter, in that the sale of Foodbroker Fancy occurred over a year before the code of conduct took effect in March 2003. The Club’s lawyers will therefore need to decide whether Mr. Elsworth can be charged retrospectively.

The Club also announced that it will now invite various organisations involved, such as the Federation of Bloodstock Agents, the Racehorse Owners’ Association and the National Trainers’ Federation, to discuss the issues involved<sup>76</sup>.

### ***Moves made to ban betting exchanges***

The reader may recall that a relatively novel method of betting on the outcome of races, which involves the use of the “betting exchanges” on the internet, has already given cause for concern to those exercising authority over the sport<sup>77</sup>. Betting exchanges are gambling services which enable bettors to lay bets between themselves, normally offering longer odds than the eventual starting price, with the exchange earning a commission on winning bets. It will also be recalled that the Chairman of the British Horseracing Board (BHB), Peter Savill, had on several occasions openly accused the betting exchanges of endangering the integrity of racing, accusations which were refuted with equal heat by those speaking on behalf of the major exchanges. Interestingly, this issue was increasingly drawing together the BHB and the traditional bookmakers. The income from racing is currently tied to bookmakers’ gross profits rather than to turnover. Large profits from race betting are good news for both parties, and both now perceive the

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betting exchanges as a threat to their future prosperity – a fact that should be at least borne in mind when considering the various accusations being made by the Savills of this world.

The Annual General Meeting of the Association of British Bookmakers (ABB) was widely expected to feature this matter very prominently on its agenda, and this was certainly the case. Several speakers suggested that exchanges enjoy unfair fiscal advantages over traditional bookmakers, that they are depressing the market of the off-course betting market, and that they allow anyone to do that which previously only licensed bookmakers were allowed to do, i.e. lay horses to lose rather than back them to win. At this AGM, the BHB also released details of the oral evidence which Mr. Savill would put to the relevant parliamentary Committee, chaired by John Greenway MP, which is scrutinising the draft of the Government's long-awaited Gambling Bill<sup>78</sup>.

In this submission, Mr. Savill adopted very much the same line as that which was taken in the earlier written submission made by the BHB to the same committee – which the Board also published on the same day as the bookmakers' AGM. This includes the assertion that:

***“the scale and international nature of betting exchanges represent an unprecedented and substantial threat to the integrity of racing (....) the taxation of betting exchanges creates an unlevel (sic) playing field which (gives) betting exchanges an unfair advantage and results in less money flowing to government and racing”***

The solution proposed by the Board to this perceived threat was to compel betting exchanges to draw a distinction between “recreational” and “non-recreational” layers of horses, depending on the volume of their business. “Non-recreational” bet-layers would then require a licence on the same basis as any high-street bookmaker, with their profits being taxed accordingly. However, one of the other speakers at the AGM was Lord McIntosh, the Minister having responsibility for gambling issues, who made it clear that the Government saw this issue in a somewhat different light<sup>79</sup>.

Another forum on which this issue was being played out was the Levy Board. At a meeting of the Board Executive in January 2004, the National Joint Pitch Council, which represents on-course bookmakers, agreed a deal whereby the latter could legitimately use betting exchanges to lay off bets. This undoubtedly strengthened the on-course market for bettors. However, the “unholy” alliance of BHB leaders and traditional bookmakers started to intervene here as well – this time with the support of the Tote. At a Levy Board meeting held the following month, the representatives

of all three organisations outnumbered the independent members to reverse the January decision and outlaw the exchanges. It was expected that this decision would be ratified at the March meeting, which was held after this issue went to press<sup>80</sup>.

The reaction of the betting exchanges was predictable. Mark Davies of Betfair, which accounts for 95 per cent of the betting exchange market, commented:

***“By outlawing on-course bookies from using the exchanges they will encourage punters to use their mobile phones to ring us independently. They will thereby weaken the betting ring”***<sup>81</sup>

More generally, however, the fear was expressed in the media that starting prices would suffer by compelling the on-course bookmakers to shorten their odds.

The position which the Government will adopt on this issue is, pace Lord McIntosh, as yet unknown. However, in an interesting development which occurred in early February 2004, it emerged that senior US politicians had canvassed the UK Treasury for its views on the question whether the US should ban its citizens from betting over the internet<sup>82</sup>. This move was made by some leading figures in the North American betting industry, and could open up the \$20 billion per year US online market. With the exception of California, the US currently does not allow its nationals to place internet bets. In spite of this, US citizens account for 50 per cent of the \$40 billion-per-year internet gambling market, the betting being done via off-shore sites. US politicians, stimulated by religious lobby groups, have repeatedly attempted to close this loophole, thus far without success. However, Congressman John Conyers has recently written to Chancellor of the Exchequer, Gordon Brown, requesting his views on banning US nationals from placing internet bets with companies located outside the US<sup>83</sup>.

Dr. Brown's reply to this request was not known at the time of writing.

### ***Jockey Club deals with first cases under new Rule 247***

Regardless of any action taken by the outside world against betting exchanges, the racing authorities have already taken certain measures aimed at ensuring that those involved in racing and falling within their powers have no opportunity to undermine the integrity of races by using internet betting. In the previous issue<sup>84</sup> it was reported that, as part of this drive, owners, trainers and stable staff would be banned from laying their own horses to lose on these exchanges. This is the new Rule 247, and the Jockey Club has already been required to deal with a number of personalities accused of infringing this new rule.

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The first occasion arose in late December, when Miles Rodgers, the founder and former managing director of the 500-member Platinum Racing Club, was summoned to appear before the Jockey Club Disciplinary Committee to answer charges concerning two of his horses, which he was accused of laying to lose<sup>85</sup>. The odds laid on both horses grew significantly on leading exchange Betfair shortly before they were due to race. In fact, other runners owned by Platinum Racing had also been the subject-matter of controversial performances over the previous year<sup>86</sup>. Thus in late October, Kevin Ryan's Uhoomagoo drifted from 11-2 out to 9-1 on course, and during the race started slowly but finished well down the field, prompting officials at the track to investigate his performance<sup>87</sup>.

Another owner to have been accused under this new rule is Darren Mercer, charged with laying his horse Joss Naylor to lose in the run-up to the Coral Welsh National, which took place at Chepstow in December 2003. The disciplinary panel will also be presented with evidence that he laid the horse at a moment when he would have been aware that it was no longer running in the race<sup>88</sup>.

On the same day on which Kieron Fallon was suspended for the Ballinger Ridge affair (see below), the Jockey Club charged four other people with deliberately running a horse which they knew to be lame, then laying it to lose on Betfair. This resulted from the Club's investigation into the controversial defeat incurred by Hillside Girl at Carlisle in June 2003, as reported in the previous issue<sup>89</sup>. The charges have been brought against four men – trainer Alan Berry, jockey Paul Bradley, Steve O'Sullivan, a blacksmith, and Dale Jowett, an amateur jockey. If proved, these charged could well result in all four being banned from racing for life<sup>90</sup>.

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

[See also allegations made by Central Television documentary "Fixing the Odds", (below p.18) and the Kieron Fallon and Sean Fox affairs (below, p.18 and p.18).]

### **Regional racing – an invitation to cheat?**

Regional racing is a new form of low-grade action attracting minimal prize money (£12,000 per meeting) and is restricted to the poorest horses in training. The first of 70 such experimental meetings started on 3/1/2004 at Wolverhampton, all but 14 being run on all-weather tracks. The name "regional racing" is an attempt to divide racing on grounds of quality rather than geography. Regional racing represents the "division three" of racing, below the top "premier" fixtures and the mainstream action. It was introduced by the BHB in order to provide the bottom 25 per cent of horses who

struggle not just to win, but even to start a race. It was also intended to provide extra betting fodder for punters, and as an attempt to fend off the advance of foreign racing in betting shops, which provide no revenue to the sport via betting. What makes this medium particularly different from the mainstream racing action is the fact that, apart from maiden, selling and claiming stakes, there will be no handicaps. Horses of similar rating will compete on level terms in Banded Stakes, on the same lines as happen in greyhound racing. The theory is that they will rise through the bands by winning and, if they prove good enough, move to the more lucrative mainstream fixtures.

However, it now appears that regional racing is to be added to the ever-growing list of issues giving rise to concern in terms of their effect on the integrity of racing. At least this is the view expressed by Stephen Astaire, the longest-serving member of the Racehorse Owners Association's Council, who branded this medium a "cheat's charter"<sup>91</sup> even before the experiment began. Mr. Astaire believes that prize money as low as £1,750 per race can only encourage owners and trainers to attempt to dupe the handicapper and pull off coups. He elaborated:

***"Unlike the jumping fraternity, people in flat racing are in it for the money as much as for the fun. If you win races with prize money of £2,000 the owner will receive about half that amount, which will not be enough to pay for the jockey's fee, the transport, the entry, let alone a month's training fees. It is bound to encourage coups – there would be no other way of balancing the books. If you think there is an integrity problem with betting exchanges and people wanting to lay losers, you ain't seen nothing yet."***<sup>92</sup>

This view was backed by some trainers, particularly because many spend all year attempting to improve the ratings of their horses in order to get them into handicap races; now it appeared that some trainers were trying to decrease their ratings in order to participate in this new medium. This was seen as an invitation to cheat.

Further evidence that this new medium might invite malpractice came from a professional gambler, Dave Nevison, who concentrated on the smaller courses because he thought that the level of knowledge demonstrated by betters and bookmakers was much lower than at the Group One level. He claims that this brought him up against a large number of "dodgy races", particularly in regional racing – for the same reasons as those given by Mr. Astaire<sup>93</sup>.

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### *Another television documentary claims to expose racing corruption*

Following the spate of television programmes devoted to the standards of probity in the sport, referred to above, there appeared yet another documentary in early January, this time featured on Central Television under the title "Fixing the Odds". This programme concentrated on a flat race jockey said to have featured in a dossier covering 171 suspect races currently in the possession of the Jockey Club. However, the programme refused to name the jockey. During the transmission, a copy of betting accounts relating to the performance of racehorses in June and November 2003 were revealed. The odds for the horses had apparently drifted alarmingly on betting exchanges before they were beaten. John Maxse, the Head of Public Relations of the Jockey Club, had appeared in the programme, as did the Chairman of the British Horseracing Board, Peter Savill<sup>94</sup>.

The producer of the programme, David Fuller, commented that his brief had been to establish the extent to which betting exchanges constituted a vehicle for dishonesty in racing<sup>95</sup>. It obviously adds fuel to the calls for tougher regulation of betting exchanges (see above).

### *The Kieron Fallon affair*

The credibility of the sport, already in some jeopardy, was not given any assistance at all when, in early March 2004, it emerged that leading jockey Kieron Fallon had forfeited a certain winner at Lingfield Park in controversial circumstances. After the race, the local stewards referred Mr. Fallon to the Jockey Club for disciplinary measures, having been informed by the Club prior to the race that it had been the focus of "suspicious betting patterns". Fallon was riding Ballinger Ridge, who at 15-8 was second favourite for the one-mile maiden stakes, and the race seemed as good as won when he went ten lengths clear at the halfway stage. However, the rider then eased down with a furlong to go, and only started to ride vigorously when he realised that Chris Catlin, riding the odds-on favourite Rye, was closing in on him fast. Ballinger Ride was unable to regain the lost momentum and was beaten by a short head<sup>96</sup>.

Details then began to emerge about the "suspicious betting patterns" in question. The Jockey Club announced the next day that these related to the particular "accounts" which were betting on the race on Betfair, the leading internet betting exchange, and not to the actual volume of money involved. It also emerged that the same accounts might also have been involved in other suspicious races which were already under investigation. Betfair itself had alerted the Club's security department to these unusual betting patterns on the race, which was a low-grade maiden, shortly before it

was due to start. Rye attracted sustained support on Betfair, from odds-against to prices as low as 8-15, whilst Ballinger Ride drifted from 11-10 to 3-1 before returning to 5-2. In all, Betfair matched £1.48 on the race, a significant amount for such a low-grade event.

Betfair spokesman Tony Calvin claimed that several factors could have been responsible for the high trading volume, pointing out that this was essentially a two-horse race and an ideal one for exchange betting punters. There was also a ten-minute delay to the race, which apparently boosted turnover because this allowed more trading to occur. In addition, the race ended with a photo-finish, which itself attracted a large volume of betting<sup>97</sup>.

Several days later, however, fresh allegations of race-fixing were being made against Mr. Fallon, when a Sunday newspaper claimed to have secretly taped conversations with the jockey which indicated that he did pull up his horse during the race. As part of an elaborate and distasteful operation, the "newspaper" in question apparently plied the rider with champagne and prostitutes (which they claim is standard procedure in such cases) and alleged that they had secured from Mr. Fallon admissions of widespread race fixing<sup>98</sup>.

After the Jockey Club met to consider the Fallon case, it issued the jockey with a 21-day ban. However, that may not be the end of the story. The ban was issued because he had failed to ride out a horse in order to secure first place, which put him in breach of a breach of Rule 156(i). However, the Club also opened an investigation into claims made by the Sunday newspaper referred to above, as well as the betting patterns which gave rise to a suspicion of race-fixing<sup>99</sup>. If these allegations were found to be true, this could mean the end of Mr. Fallon's career.

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

### *The Sean Fox affair*

Following hard on the heels – so to speak – of the Fallon affair, a new scandal threatened to erupt as a result of a four-runner steeplechase at Fontwell Park, in which a jockey was found to have "stepped off" his mount. Once again, suspicious betting patterns appeared to have been involved, since the horse in question, Ice Saint, had been conspicuously easy to back on the Internet betting exchanges. The trade newspaper, the Racing Post, had estimated a starting price of 11-10 for the horse. However, he drifted out to 5.2-1 on the leading betting exchange, Betfair – which indicated that someone was happier to lay Ice Saint than the public evidence would seem to warrant. During the race, the rider in question, Sean Fox, had already taken a strangely wide course around the first bend and

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then seemed to bale out of the saddle at the ninth fence. Mr. Fox was suspended for 21 days by the local stewards, although the Jockey Club is entitled to increase this penalty should further examination of the evidence justify this<sup>100</sup>.

Mr. Fox reacted strongly to the ban, stating that, if the Club authorities thought him mad enough to dismount a horse at 30 miles per hour, they must be "barmy". However, the jockey had been painfully short of mitigation when invited to comment on the video in the stewards' room. The official notice indicated that the rider had admitted that the incident "looked awful", and that he could not give a satisfactory explanation for dismounting when he did<sup>101</sup>.

Two days after the race, the Jockey Club announced that it was to hold an investigation into the controversial race<sup>102</sup>. The outcome of this case was not yet known at the time of writing.

### *Gaye Kelleway accused of falling foul of Rule 243*

Another Jockey Club rule which was adopted in order to safeguard ethical standards against possible encroachment by bookmakers is Rule 243, which prohibits licensed jockeys, trainers or registered stable staff from communicating information about horses which is not publicly available for material reward. In January 2004, trainer Gay Kelleway was summoned to appear before the Disciplinary Committee following an investigation by the security department into her alleged links with a betting site. In November 2003, the site in question had offered customers the opportunity to subscribe to various services in order to receive information from Ms. Kelleway about her horses in training. The sums for each service varied between £10,000 and £35,000 per year<sup>103</sup>. The outcome of this inquiry was not yet known at the time of writing.

### *Other cases*

**Albert Davison.** Several years ago, this renowned betting coup king was banned from racing by the Jockey Club for six years, having landed some spectacular gamble worth up to £250,000. The methods which he used to prepare these gambles, however, brought him to the attention of the racing authorities. His ban followed a lengthy investigation into the victory secured by a well-backed horse, Will I Fly, at Leicester in 1994, after the horse was found to have tested positive for the banned substance Procaine. The investigation unearthed irregularities relating to the horse's ownership and registration, which involved Davison and two associates, who were also "warned off"<sup>104</sup>.

The reason why this man is once again in the news in racing circles is that, with his ban coming to an end this

year, he has informed acquaintances that he is considering renewing his involvement with the sport. In this connection, it is interesting to note that there remains a member of the Davison family in possession of a training licence, i.e. Mr. Davison's daughter Zoe. However, the latter has strenuously denied for a number of years that she has any dealings with her father. In spite of this, the racing world is unlikely to welcome the news of Mr. Davidson's continued interest with alacrity<sup>105</sup>.

### **Cricket corruption scandal – an update**

#### *General developments*

In the previous issue<sup>106</sup>, satisfaction was expressed that the various measures and safeguards put into place by the international and national cricketing authorities seemed to be putting the sport on the road to recovery from its previously tainted position. That is not to say, however, that there is any room for complacency on this score, as the relevant regulators have had occasion to experience during the period under review.

First of all, it appears that cricket, like racing (see above) could also be vulnerable to assaults on its probity because of the recent proliferation of internet betting exchanges. This has recently prompted the International Cricket Council (ICC) to sign an agreement with Betfair, the leading exchange, which will enable them to obtain more information on individuals suspected of corruption. ICC Chief Executive Malcolm Speed commented that this Memorandum of Understanding would allow greater levels of information to be obtained from the gambling industry. Thus the ICC's Anti-corruption and Security Unit will be able to request information to identify individuals suspected of corruption or match-fixing, as part of the ICC's continuous commitment to eradicate corrupt conduct and practices<sup>107</sup>.

One of the enduring problems with which anti-corruption officials have had to contend has been the malign influence exercised by a number of betting syndicates, mainly in the Asian subcontinent, more particularly the attempts which some of them might make to make match-fixing approaches towards players and officials. Indeed, it was this factor which prompted the investigations leading to the uncovering of widespread corruption in cricket four years ago. Particular vigilance was in order when it was learned that India and Pakistan were to resume cricketing relations, as is described above in greater detail (above, p. 11).

Accordingly, the authorities from both countries involved decided to employ special security officials to shield players from any such approaches during this much-awaited series, particularly since it was expected that millions would be wagered on the outcome of the matches involved. Security guards will accompany both

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teams at all times in order to prevent anyone who could represent an illegal syndicate from getting anywhere near the players. All calls from their hotel rooms and mobile phones will also be monitored. Anyone approaching the players in their hotels will be strictly vetted and be expected to provide a valid reason for desiring to speak to them<sup>108</sup>.

### ***Atapattu investigated over hotel money***

In mid-December 2003, an investigation was opened against Sri Lankan one-day captain Marvan Atapattu during the series of international fixtures between his country and the touring England side. A staff member of the Earls' Regency Hotel in Kandy, where the team was staying during the second Test, had found the sum of £1.1 million rupees (£ 7,000) in his room after the Sri Lankan team had checked out, and informed the management. This prompted a police investigation<sup>109</sup>. Mr. Atapattu was made aware of the investigation by the President of Sri Lanka Cricket a week later. He strenuously denied any connection with the sum in question<sup>110</sup>.

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

### ***Surrey player linked to gambling enquiry***

As part of the drive against corruption, it was agreed that all English county players sign an agreement under which they undertake not to bet on any match. Anyone breaching this agreement faces a maximum five-year ban from the game as a player or administrator, as well as an unlimited fine. In mid-December 2003, the England and Wales Cricket Board announced that it had opened an investigation into claims made against a certain Surrey seam bowler that he had infringed this pact. More particularly it was claimed that the player stood to win £7,000 after having bet on the team to lose a Norwich Union League match against Northamptonshire in August 2002<sup>111</sup>.

The player in question did not play in the match, which was won by Northants by 102 runs on the Duckworth-Lewis method. Surrey fielded a weak team because most of its regular players were in Leeds, preparing for a C&G Trophy semi-final against Yorkshire. The matter is being investigated by Gerald Elias QC<sup>112</sup>. No further details were available at the time of writing.

### ***Kale suspended pending investigation***

In late November 2003, it was learned that Indian player Abhijit Kale had been suspended pending an investigation by the Indian cricketing board into allegations that he offered bribes to selectors aimed at ensuring his selection for the India A team. More particularly Kiran More and Pranab Roy complained that Kale, a prolific scorer in domestic cricket who played for

India in a one-day series in Bangladesh earlier that year, approached them in order to advocate his selection in the squad to play Sri Lanka A later that month<sup>113</sup>. No further details were available at the time of writing.

### ***IOC Vice-President accused of corruption***

In January 2004, it was learned that Kim Un Yong, one of the most senior figures of the International Olympic Committee (IOC), was compelled to resign from the South Korean Parliament, as well as from senior national sporting positions, following an investigation linking him to practices involving bribery and embezzlement. More particularly, state prosecutors accuse him of having embezzled corporate donations awarded to the World Taekwondo Federation (WTF)<sup>114</sup>.

Several weeks later, Mr. Un Yong faced the prospect of being expelled from the IOC as well after having been arrested by the South Korean authorities and spending the night in a Seoul prison<sup>115</sup>. No further details were available at the time of writing.

### ***Winter Olympics bribery accusations dismissed by US court***

It will be recalled from a previous issue<sup>116</sup> that some of the curious results achieved at the 2002 Winter Olympics in the US had resulted in various accusation of bribery and corruption, made principally against the leaders of the Olympic bid, Tim Welch and David Johnson. Although at first instance the court in Utah had dismissed the charges, a Federal Appeals Court ruling decided that the two men should face 15 charges relating to corruption in the bidding process. They were formally charged in late October 2003<sup>117</sup>.

Four weeks later, however, the judge dismissed all the charges brought against Messrs. Welch and Johnson on the basis that the prosecution had offered insufficient evidence to justify continuing the trial. The main thrust of the accusation had been that Welch and Johnson were guilty of fraud by misappropriating money from a humanitarian programme in order to finance gifts and favours to the visiting delegation from the International Olympic Committee (IOC). The assistance programme in question was intended for impoverished athletes from less developed countries. However, according to the US Justice Department fraud prosecutor, Richard Wiedis, only 10 per cent of the money was expended on sports equipment. Mr. Wiedis claimed that the remainder was spent on tuition fees at US universities for the sons and daughters of IOC members, medical care for their relatives, and other expensive gifts, including Rolex watches<sup>118</sup>.

The conclusion of this case will come as an enormous relief to the IOC, who had feared that the publication of crucial documents could have caused

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additional damage to their reputation, already tarnished by the scandal which resulted in the expulsion and resignation of 10 of its members<sup>119</sup>.

### Fight rigging investigation opened in US

In January 2004, it was learned that US FBI agents raided the offices of major boxing promotor Top Rank as part of an investigation into accusations of fight-rigging. More particularly the authorities were said to be of the belief that the contest between Oscar de la Hoya and Shane Mosley had been fixed. Mosley had beaten de la Hoya for the super welterweight title in a controversial decision at the MGM Grand casino<sup>120</sup>.

Initially, Mr. de la Hoya had demanded an inquiry into the judges' scorecard, which had been turned down. Some insiders believed that this case could be the "tip of the iceberg"<sup>121</sup>.

### UEFA and Betfair "close to agreement on illicit gambling"

The phenomenon of betting exchanges appears to have affected many sports, as can be seen from the pages above, and football is no exception. This has impelled the European governing body for the sport, UEFA, to approach Betfair, the leading betting exchange, in the same manner in which other sports have done, i.e. by proposing a Memorandum of Understanding (MOU) which would give UEFA access to the betting records of individuals whose behaviour could cause suspicions that corruption has taken place. An agreement along these lines would represent a significant step forward in the sport's attempts to eradicate unlawful betting, and assist UEFA in the detection of match-fixing and other forms of corruption<sup>122</sup>.

It was hoped that an agreement could be reached in the foreseeable future.

### Tennis trade union investigates suspicions of illegal betting

Tennis is also a sport which appears to be vulnerable to the opportunities for corrupt gambling offered by the betting exchanges. Recently, the players' trade union, the ATP, launched an investigation seeking to find a way of identifying and penalising not only players, but also coaches, officials and others who are capable of obtaining inside information in order to fix odds and make money. However, ATP Chief Executive Mark Miles has admitted that there is very little the sport can do to limit the spread of internet betting and the abuses which this can entail. He said:

***"probably the greatest concern is simply that if a player twists his ankle and his coach, his personal trainer, his mother and father and girlfriend and eight people find out, then there is a potential that***

***they will each tell somebody and before long 50 people know. I think the biggest issue is not players betting on their own matches or having matches affected but, within the gambling industry, having people who have better access to information than others.***<sup>123</sup>

As is the case with other sports, tennis has strict rules which attempt to safeguard the integrity of the game, including those on taking bribes which affect matches. However, whilst the ATP are working hand in hand with Betfair to enable betting to be monitored, there is a feeling abroad that the internet is simply too big to control, because there are too many sites in too many countries to be able to supervise them all<sup>124</sup>.

### Bribery charges likely to cause takeover of Wembley group

It will be recalled from the previous issue<sup>125</sup> that, in September 2003, the track-based gaming group Wembley had been indicted on bribery charges by a federal grand jury in the US state of Rhode Island. The indictments claimed that intended payments of up to \$4.5 million to the law firm of McKinnon and Harwood constituted a conspiracy to influence improperly the actions of public officials.

It was recently learned that the sports entertainment group Wembley will probably be taken over by MGM Mirage, the US gambling resort operator, as it seeks to ringfence liabilities from this indictment. The £270 million bid for Wembley was announced as the company, whose business interests include slot machines and greyhound racing, announced that it had reached agreement with the US prosecuting authorities bringing the charge that the maximum fine it will be required to pay is \$8 million. The company continues to deny the charges<sup>126</sup>.

Wembley will now spin off a company which has assets worth only \$16 million in order to cover legal expenses as well as any fine imposed. If there are any funds left subsequently, these will be allocated to the shareholders<sup>127</sup>.

### German potential and actual involvement in major sporting events hit by corruption allegations

Thus far, Germany seems to have been spared some of the more lurid episodes in sporting corruption which have befallen other countries, as detailed both in this and in other editions of this Journal. However, this may be about to change dramatically, as can be seen from the developments reported below.

In mid-March 2004, Germany's preparations to host the 2006 World Cup were overshadowed by potential

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scandal when it was claimed that the company which won the contract to build the stadium where the first match will be played had paid bribes worth several millions of euros. This news resulted from the arrest of several top German football executives, including Karl-Heinz Wildmoser, the president of 1860 Munich, one of the country's leading clubs. He is alleged to have taken bribes from an Austrian construction firm which won the tender to build the new stadium in Munich, where the tournament is due to open. According to the public prosecutor's office (Staatsanwaltschaft), Mr. Wildmoser, his son and at least two other associates were secretly paid €2.8 million, amounting to 1 per cent of the total construction cost. In return, they are said to have provided inside information to the firm Alpine, enabling it to beat its rivals for the contract<sup>128</sup>.

The alleged irregularities came to light when the German authorities examined the tax records of a construction company owned by Mr. Wildmoser's son. This was followed by several raids in Austria, Switzerland and several German cities, including Munich. Detectives arrested Wildmoser at his home. These are not the first claims of corruption to have been made since Germany surprisingly beat off the challenge from South Africa by the narrowest of margins to host the Cup. In April 2003, the German newspaper *Süddeutsche Zeitung* alleged that the country's most powerful club, Bayern Munich, and a firm linked to media mogul Leo Kirch had bribed four small FIFA federations in an attempt to secure their support for Germany's bid. In return for their vote, Bayern were said to have offered to play friendly fixtures in the four countries concerned, with Kirch meeting the cost of the television rights<sup>129</sup>.

Germany's World Cup officials have since stated that the potential scandal would not impede completion of the stadium in time for the opening fixture of the 2006 finals.

Earlier, in mid-November 2003, the stench of corruption seemed also to be seeping from the bid made by the former East German city of Leipzig for the staging of the 2012 Olympic Games. It was learned that Burkhard Jung, a member of the Board of the company overseeing the bid, resigned from his position. This development resulted from an investigation commenced by public prosecutors into Mr. Jung's role in illegal commission payments made to a marketing company whilst Leipzig was bidding to represent Germany for the 2012 Games<sup>130</sup>. The outcome of this investigation was not yet known at the time of writing.

This journal will obviously follow further developments with keen interest.

## Hooliganism and related issues

### Public and football authorities prepare for trouble at Euro 2004 tournament

The Euro 2004 football tournament which takes place this summer in Portugal has, in common with every major event currently involving "the beautiful game", been marked by almost as much preparation for dealing with the crowds as for winning the matches. Also, very unfortunately, it has to be acknowledged that these preparations tend to be intensified whenever England succeed in qualifying for the final stages – as has already been trailed in the previous issue of this Journal<sup>131</sup>.

On this occasion, an additional element has been taken into account by the public authorities responsible for maintaining order at such events. This comes in the shape of the notorious behaviour of young English holidaymakers, even in locations where no football is taking place, which it is feared will add to the potential for trouble at the tournament. In the words of the anti-hooligan unit, the National Criminal Intelligence Service (NCIS):

***"Each summer it has become traditional for thousands of young English people, especially men, to go to Europe for their holidays for cheap drink, sex and sun. Portugal has all these but next year it will have the added advantage of a major football tournament. There are no doubt large groups of young men who are planning their holidays and thinking that, instead of going to Benidorm or other resorts, they will go to Portugal. English people have become infamous for their rowdy, often violent behaviour on holiday, even where there is not a major football tournament taking place"***<sup>132</sup>

The problem is that the NCIS are able to monitor known hooligans, but that it will be much harder to control rowdy holidaymakers. Police in Portugal have already sought advice from officers who operate in the country's holiday resorts such as the Algarve. This problem has also exercised the minds of the Football Association (FA), which has started discussions with European governing body UEFA in an attempt to ensure that England are not expelled from the championship because of British nationals on holiday rather than there specifically to watch football.

One particular aspect of this question is the fact that, amongst holidaymakers, England football shirts are a common sight. Separating those who are in Portugal to attend the fixtures from mere holidaymakers will be no easy task. With the threat of expulsion hanging over the team as a result of the crowd trouble of the kind which marred the 2000 European championships, the FA are eager to establish clear criteria for what constitutes

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football-related violence. It has also had meetings for this purpose with key agencies involved in security at the event, including the organising committee, Portuguese and British police, the Home Office, and the Foreign Office<sup>133</sup>. Over 50,000 England supporters are expected to attend the championships.

Another factor which has given rise to concern came to light during the run-up to the friendly international between the two countries in mid-February. This was the ease with which tickets for the game were available on the black market, with a number of bars and tour companies on the Algarve offering tickets to the match. Nearly 5,000 tickets were officially sold to British citizens, seated in the southern part of the stadium, these being divided between members of the official England fan club in the UK and expatriates who had to prove residence before being allowed to buy them. However, many of the remaining tickets found their way onto the open market<sup>134</sup>. This presented obvious problems of segregation. Although the match itself passed off relatively peacefully (see below), matters might be different with a major championship and title at stake.

In spite of this novel factor, the usual measures will naturally be taken in order to prevent known hooligans from making their way to the event. Police are making preparations to prevent as many as 2,500 troublemakers from travelling to Portugal this summer, with officers in 28 police forces across the country gathering information and securing convictions of suspected hooligans ahead of the tournament. At present, over 2,000 convicted hooligans are subject to banning orders which prevent them from travelling abroad when major England fixtures are being held. A further 300 cases are currently being dealt with by the criminal justice system, and police are hopeful that they will lead to banning orders. This operation, the largest of its kind ever mounted by British police, follows a troubled qualifying campaign which saw English fans banned from travelling to Macedonia and Turkey following violence at matches<sup>135</sup>. The Portuguese police authorities are also leaving nothing to chance, and are mounting the biggest security operation in the country's history. In the worst-case scenario, water cannons and pepper spray may be used as part of what General Leonel Carvalho, who heads the security operation, has described as a "gradually increasing response", going from softly-softly to half-soft, to hard and then aggressive<sup>136</sup>.

Nevertheless, the full panoply of measures announced by the authorities and aimed at preventing trouble display a marked change of emphasis. In both tone and substance, the strategy outlined by David Swift, who heads the anti-hooligan operations of the Association of Chief Police Officers (ACPO), appears to be the product of common sense and experience. The

object, said Mr. Swift, is to create "festival atmosphere" by having a police strategy which acknowledges that, whilst a substantial culture of drinking and boisterous behaviour exists, this is quite distinct from the few who have an outright desire to cause trouble. He went on:

***"You have to create an atmosphere where the majority of supporters feel comfortable with the police approach. Then they are more likely to marginalize the troublemakers, to self-police and to deny the opportunist hooligans the chance to create trouble"***<sup>137</sup>

Since the "boisterousness" displayed by a certain type of English visitor abroad is common practice on the Algarve anyway, it appears that the Portuguese authorities and people are willing to accept this strategy, in spite of having to accept peace at the price of incivility and lack of respect for the host country. This modified approach on the part of the police has in part been the outcome of co-operation with supporters' groups, some of whom at least appear willing to make an attempt at changing the face of England's support from within, rather than turning a blind eye to the outrages committed by some of their number<sup>138</sup>.

It also seems that a level of cautious optimism in relation to these revised methods is in order, since they were put on trial during the friendly international played between Portugal and England in mid-February 2004<sup>139</sup>. The experiment appears to have succeeded, with only five fans being arrested and later released without charge. And, wonder of wonders, the Portuguese police actually praised the behaviour of the English fans in attendance...<sup>140</sup> Let us hope such optimism is vindicated by the events of this summer (when, as has already been mentioned earlier, a major title rather than a friendly fixture will be at stake).

### Preparations for World Cup qualifying matches in Britain

The chance of the draw has brought together England, Wales and Northern Ireland in Group Six of the qualifying stages for the 2006 World Cup. This has naturally exercised the minds of the authorities, and in early December 2003, police officers from these areas started a series of meetings aimed at discussing security arrangements. Within minutes of the draw being made, officers from the National Criminal Intelligence Service (NCIS), which monitors football hooliganism, entered into contact with their counterparts in Wales and Northern Ireland, indicating their confidence that they could put into place an effective security operation<sup>141</sup>.

The NCIS stated that it already had extensive intelligence on Welsh hooligans, and has been

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responsible for issuing large numbers of banning orders to known troublemakers which would prevent them from attending the fixtures against England or Northern Ireland, either at home or away. It also claims that South Wales Police are experienced at dealing with security at football matches and organising high-security operations such as those at the Millennium Stadium in Cardiff for the FA Cup Final, and at Wales internationals. In addition, the way in which the fixtures are staged will take into account security concerns, which is why England and Wales are unlikely to meet in the closing or opening stages of the Group Six qualifying matches<sup>142</sup>.

The home fixture between Northern Ireland and England, however, could produce a different set of security problems because of the political situation there and the presence amongst the England support of a faction of extreme right-wing elements (who had already caused mayhem in Dublin a few years earlier). However, the NCIS stated that police in Belfast were probably more experienced than any other British police force, and would therefore be able to deal with an influx of England fans<sup>143</sup>.

### Courts “ignore pleas to bar football hooligans” claims FA

In late October 2003, it was alleged that magistrates have failed to ban around 500 convicted football hooligans from attending fixtures, even though the police have requested the imposition of such orders. The Football Association (FA) had in fact become so concerned about this situation that they have written to the courts asking them to issue such bans. According to the FA's legal and corporate affairs director, Nic Coward:

**“The FA is urging the courts of impose the maximum sentences and punishments on anyone convicted of a racist, violent or anti-social offence at our matches. We have received reports from clubs and police forces of cases where the magistrates have not made a banning order even though the police applied for such an order to be made”<sup>144</sup>**

One of the problems appears to be that magistrates are unwilling to impose the minimum three-year ban, maintaining that in some cases this is too harsh a penalty and that the maximum should be reduced to three months in order to give them more discretion in this matter. Thus Angela Newing, a Cheltenham magistrate, expressed the view that three years is a long period in the life of a 15 or 16-year-old, and that if they were disorderly in a shopping mall they would be not be banned for longer than a year. What tends to happen in such cases is that no order is made at all, as a result of which the offender believes that he has got

away without punishment – which is not what magistrates want. The Association of Chief Police Officers, however, do not want the bans to be more lenient, and consider that the minimum length which applies at present is about right. Similar sentiments have been expressed by the Home Office.

Part of the concern expressed by the FA is motivated by the impending Euro 2004 tournament, from which it is hoped to ban the worst footballing troublemakers to Portugal, as is described above. It is also motivated by some worrying statistics, which have shown an increase in the number of arrests at international and League matches in England and Wales during the 2002-3 season, which stood at 4,793 as opposed to 4,035 for the previous season<sup>145</sup>.

### Inquest on Leeds supporters' deaths in Turkey in 2000

The tragic events which occurred in Istanbul in April 2000, and resulted in the death of two Leeds United supporters, Kevin Speight and Christopher Loftus, during the run-up to the UEFA Cup semi-final between the Yorkshire side and Galatasaray, have been extensively documented both in this journal and elsewhere. Whilst the judicial process arising from this case continues in Turkey, as is reported in the previous issue of this Journal<sup>146</sup>, an inquest into this matter has at long last been held in this country.

During this hearing, it appears that some Leeds supporters acted quite heroically in their attempts to save the lives of the two men. Thus Mark Valentine, giving evidence to the enquiry, recounted how he attempted to give the kiss-of-life to Mr. Loftus, only to be hit with clubs and kicked from behind by a gang of Turkish football supporters. Another Leeds fan, Peter Hopton, also attempted to administer similar treatment to Mr. Loftus<sup>147</sup>.

In the course of the inquiry, the coroner in charge, David Hinchliff, launched a scathing attack on the Turkish police for what he described as their incompetent and arrogant mishandling of the violence which erupted before the match in question. Recording a verdict of unlawful killing on the two supporters, the West Yorkshire coroner described them as innocent victims of a deliberate ambush staged by Turkish fans. He told the inquest that police in Istanbul had repeatedly refused to co-operate with West Yorkshire officers during the run-up to the fixture. When the violence suddenly erupted in the tourist area of the city, the Turkish police were “disorganised, unco-ordinated, not in control of the situation and ill-prepared”<sup>148</sup>. He went on:

**“They gave the impression they were targeting the Leeds supporters. They seemed to be out of control and their ability was described by**

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**witnesses as being diabolical. Many Leeds fans who had played no part in the fighting were truncheoned and taken to police stations when what they clearly needed was hospital treatment”.**

Mr. Hinchliff also called for a ban on international fixtures if local police forces refuse to co-operate with their visiting counterparts<sup>149</sup>. He indicated that he would be writing to the FA and to European governing body UEFA to recommend the introduction of an international protocol aimed at protecting fans attending football matches<sup>150</sup>.

### Individual football incidents – UK

#### **Cardiff City face inquiry following coin-throwing incident**

When Cardiff City played Millwall at home in the Nationwide League in a pre-Christmas fixture and lost 1-3, their troubles were not restricted to the match statistics. During the second half, a coin was thrown from the crowd and hit a linesman, sparked off by a dispute over a throw-in. It was, however, thought that the coin was aimed at controversial Millwall player-manager Dennis Wise, who was involved in a set-to with Cardiff striker Robert Earnshaw at the time. The incident held up play for several minutes as stewards and police rushed to the area in order to quell any further trouble. South Wales police subsequently confirmed that an investigation had been opened and that three people had been arrested for public order offences<sup>151</sup>.

#### **Riot at Lincoln hotel results in 74 arrests**

In later February 2004, a riot which erupted at a hotel in Lincoln during a match between Nationwide League side Lincoln City and Hull resulted in the arrest of 74 people, all from Hull. No-one was injured, but police officers were pelted with bottles, and windows were smashed<sup>152</sup>.

#### **Dawn raids by police result in ten arrests**

In late October 2003, ten suspected football hooligans were arrested in dawn raid by police investigating violent incidents which involved Port Vale supporters following a match played at Wrexham on 4 October. The suspects, with the youngest being aged 16, were detained at homes across North Staffordshire<sup>153</sup>.

#### **Football fan on racism charge**

In late November 2003, football fan Terence Argyle, of Hayes, West London, was charged with racially abusing former Arsenal star Ian Wright at Carling Cup fixture the previous month<sup>154</sup>.

#### **Arrests made following Merseyside incident**

In early February 2004, 16 people were arrested by Merseyside police in connection with a clash which occurred between rival fans the previous September following a Tranmere Rovers v. Wrexham match<sup>155</sup>.

#### **Aberdeen fans jailed and banned**

In late January 2004, three supporters of Scottish Premier League side Aberdeen were jailed for three months and banned from every ground in England and Wales after admitting to violent disorder at a friendly tournament which was held in Bradford the previous July. They were the last of 22 men to be banned approximately 100 people joined in a pitched battle<sup>156</sup>.

#### **Eighty arrested before Spurs cup tie**

Another sorry chapter in English hooliganism was recorded in late October 2003, when fighting broke out between supporters of Tottenham Hotspur and West Ham prior to their Carling Cup tie at White Hart Lane. Police struggled to keep rival fans apart after trouble started just before 4.00pm in a pub located near the Spurs' ground. Extra police officers were summoned to attempt to quell the riot, and 80 arrests were made. Roads leading to the ground were closed off and a police helicopter was called out<sup>157</sup>.

### Individual football incidents – abroad

#### **Crowd trouble at German venue for Chelsea v. Besiktas game**

In mid-December 2003, crowd trouble erupted at the European Champions League fixture between Chelsea FC and Turkish side Besiktas, which was held at the neutral venue of Gelsenkirchen, Germany. Chelsea players were pelted with missiles, and the second half of the game had to be delayed because Besiktas fans hurled streamers onto the pitch. A missile narrowly missed Chelsea owner Roman Abramovich, and the small contingent of Chelsea fans had a flare thrown into their area by a fan of the Turkish team. Swedish referee Anders Frisk had to take the players off the field for about three minutes<sup>158</sup>.

European governing body UEFA were informed of these incidents through the report submitted by their match delegate, and the Turkish side are likely to receive a fine. However, the outcome of this case was not yet known at the time of writing.

#### **“Axis of Evil” fixture ends in riot**

Fate dictated that the football teams representing two of the countries described by the US as forming part of the “Axis of Evil”, i.e. North Korea and Iran, were paired to meet in this year's Asian Cup. The fixture, played in

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Tehran, ended in disarray as North Korea's players walked off the field of play in reaction to a large firecracker which was hurled by home fans as the visitors were celebrating taking the lead, injuring a North Korean player. The visiting team coach then ordered his players to leave the Azadi Stadium. The result was left in doubt<sup>159</sup>.

### Other sports

#### *Boxing show abandoned because of riot*

In late January 2004, police were forced to use CS gas in order to break up a fight between rival fans at a professional show held at the Magna Centre in Rotherham. The final bout, which was between super-middleweights David Teesdale and Patrick Sithy, had to be abandoned because of the riot. Promotor David Caldwell blamed the violence on football supporters. He alleged that Derby County fans were backing their local light-welterweight Scott Hayward, who had won his fight against Ave Mittoo of Birmingham, whereas Leicester fans were supporting Rendell Munroe, who won his super-bantamweight bout against John Paul Ryan of Northampton<sup>160</sup>.

#### *Cricket hooliganism refuses to die down*

Recent months have witnessed a renewed outbreak of crowd disturbances at cricket matches throughout the world. In February 2004, spectators invaded the field during the lunch break of a limited overs fixture between Griqualand West and Border in Kimberley (South Africa) in order to protest against the new structure of the South African game. The protesters left the field after 15 minutes, having handed a statement to the President of the Griqualand West Cricket Board. (From 2004-5 onwards, South Africa's first-class and limited-overs competitions will be contested by six franchises instead of 11 provinces)<sup>161</sup>.

Infinitely more serious, however, was the riot which occurred in the Indian state of Gujarat at around the same time as the incident referred to above. Police were forced to impose a curfew in Viramgam, 65 miles west of Ahmadabad in the Indian state of Gujarat, after three people were killed in a clash between between Hindus and Muslims. The trouble commenced at a scuffle during a cricket match and spread to the surrounding areas. Hindu rioters burned shops belonging to Muslims. Police then fired shots to disperse the rioters<sup>162</sup>.

#### *Worcester racecourse could close because of hooligan damage*

The racecourse at Worcester is a popular and well-run venue, but is nevertheless threatened with closure. The reason for this is the unwelcome attentions which hooligans are increasingly visiting upon it. The owners, Arena Leisure, appear to be losing patience with the

series of crises which are befalling the racecourse and have threatened to close it down. They have put the position plainly to the city council, who appear to have paid only lip-service to the endless problem of vandalism at the course<sup>163</sup>.

### "On-field" crime

#### Football

#### *Alan Smith arrested but not charged over bottle-throwing incident*

During a Carling Cup tie between premiership sides Leeds United and Manchester United at Elland Road in October 2003, a plastic bottle was thrown from the stands onto the pitch, whereupon the Leeds and England defender Alan Smith picked it up and hurled it into the crowd<sup>164</sup>. He was subsequently arrested by West Yorkshire police. However, Mr. Smith was fortunate in that the bottle hit the sister of one of his best friends, who did not press charges against the player. As a result, he escaped prosecution over this incident<sup>165</sup>.

This matter had, however, further implications for English football, as will be described elsewhere in this issue (see below, p.119).

#### *Sunderland defender faces police action after kicking ball into stand*

In early November 2003, it was learned that Darren Williams, a defender playing for Nationwide League side Sunderland, faced a police investigation after an incident which occurred at The Hawthorns, home to West Bromwich Albion, during a First Division fixture. At one point, Williams kicked a ball into the crowd, leaving a woman with concussion and requiring hospital treatment. West Midlands police requested the home club to supply a video of the game in order to study the incident, which poleaxed the victim and left her face covered in blood<sup>166</sup>.

No further details of any police action were available at the time of writing.

#### *Merseyside police warn Manchester United players over goal celebrations*

In late February 2004, a quartet of Manchester United players, including captain Roy Keane and England international Gary Neville, were warned by Merseyside Police over their behaviour at a Premiership fixture with Everton at Goodison Park earlier that month. The home club had received over a hundred written complaints, which were then communicated to the police, regarding the players' behaviour which followed Ruud van Nistelrooy's late winner for the visiting side. During this incident, Roy Keane was said to have gesticulated and

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verbally abused home fans seated in the family enclosure of the main stand as he celebrated. Similar accusations were levelled at Gary Neville and Portuguese star Cristiano Ronaldo by supporters seated in the Paddock on the opposite side of the pitch<sup>167</sup>.

### *Goalkeeper jailed for attack on referee*

In November 2003, a Sunday league goalkeeper, Robert Bunn, who plays for Oddbottle FC in Hull, was jailed for six months at Hull Magistrates Court. He had headbutted referee Jayne Cameron-McLayne as a match involving his side descended into a mass brawl<sup>168</sup>.

### *Foul capable of constituting criminal offence, rules Italian Supreme Court*

The "hard men" of Italian football have recently been served with notice that violent infringements of the game's rules could land them a criminal prosecution and possibly a jail sentence. This follows a recent ruling from the Italian Supreme Court (Corte di Cassazione) which decreed that, under Italian law, a foul on the field of play may constitute a criminal offence. The ruling upheld the conviction of a player who committed an offence during a Serie C game in Sicily almost eight years ago. The case began with a clash which occurred between two players on Boxing Day 1995. For Francesco Catanese, the accused player, the incident was a chance encounter which took place wholly in the context of a manoeuvre aimed at gaining possession of the ball – at least according to his lawyer. For the victim, Marco Di Prima, it meant a kick in the face and a broken jaw. The incident was then reported to the police, who prosecuted. Although at first instance the penalty imposed on Mr Catanese was only a fine, the player took the case up to the Supreme Court.

Mr. Catanese is not the first Italian player to end in court. However, previous cases have arisen either from civil actions brought by one player against another, or if they reached the criminal courts have ended in acquittal<sup>169</sup>.

This decision has provoked protests from commentators, referees and players alike. Pasquale Bruno, the former Juventus and Hearts defender, writing in a leading Italian newspaper, concluded that it was time to close the stadiums and leave this new football to those "who don't understand, those who would like to see games end 10-0 and only admire the play of the strikers". Even a more moderate assessment made in Milan's *Corriere della Sera* acknowledged that this ruling might give rise to a host of problems, in that:

***"coaches are now going to have to look again at athletic preparation, training methods and the dynamics of marking. If every hard tackle is going to end up in the courts, then football itself is heading for a tumble"***<sup>170</sup>

These reactions appear to err somewhat on the side of the hysterical. In 1995, Duncan Ferguson, the Everton attacker who then played for Glasgow Rangers, served 44 days in jail for headbutting an opponent. Yet this decision did not lead to an avalanche of prosecutions against footballers for on-field offences.

### **Motor racing**

#### *British Grand Prix threatened by European Union arrest warrants*

Britain is one of three European countries to have introduced the EU arrest warrants (Belgium and Spain being the others). This enables a magistrate anywhere in the EU to have a British citizen arrested, extradited and delivered into custody for a number of wide-ranging offences. Recently, Formula One officials have expressed the fear that these warrants could be used against them in the event of a fatal accident in a Grand Prix event. Max Mosley, the President of the world governing body in the sport (FIA) has taken a robust stance against such warrants, and has demanded assurances that these warrants will not be used against those involved in the organisation of Formula 1 events<sup>171</sup>.

Formula One team principals have voiced support for this demand. One of them, Eddie Jordan, expressed the fear that the opportunities opened up by this warrant are so far-reaching that those involved in motor racing, and their families, would ask the question whether it was worth racing in Europe. Frank Williams, who faced manslaughter charges after top driver Ayrton Senna died in one of his cars during the 1994 San Marino Grand Prix, also voiced his team's support for the stance taken by Mr. Mosley. Martin Whitmarsh, the managing director of the McLaren team, added:

***"The European arrest warrant, as I understand it, is intended to apply for really serious crimes such as terrorism, drugs or money laundering. But we have had it explained to us that it has potentially Draconian powers and its potential use in connection with a sporting event has not been ruled out"***<sup>172</sup>

Shortly afterwards, Mr. Mosley declared his intention to move his private office from London to Monte Carlo. He elaborated on his earlier fears, explaining that after a magistrate had ordered a high-profile arrest within the EU, once the accused had been extradited the local magistrate could offer the accused a choice between pleading guilty in return for release and a suspended sentence, or remain in custody for months pending trial. He claimed that the EU warrants had no safeguards against such abuses<sup>173</sup>.

At the time of writing, there was no further indication about a general European boycott by the world of

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Formula One racing. This column will naturally follow this matter with considerable interest.

### ***Bahrain GP "at risk from terrorist attack"***

The international climate is currently such that the potential targets for terrorist action have increased considerably – particularly where these are located near the flashpoints of international tension. It therefore came as no surprise when, in late December 2003, the Foreign Office warned that the inaugural Bahrain Grand Prix, which represents the third round of the 2004 Formula One World Championship, could be at risk from a terrorist attack. It warns that there is currently a considerable threat against western interests in that country, with officials being particularly concerned about potential threats to places where Westerners might gather. Although it was not considered as dangerous as Saudi Arabia, Bahrain was regarded as offering roughly the same threat as other neighbouring Gulf states<sup>174</sup>.

However, Formula One Management, the company which operates the international racing infrastructure, adopted an optimistic stance on the race. The various teams involved also seemed relaxed when confronted with this news<sup>175</sup>.

### ***Ferrari design theft inquiry widens***

In late October 2003, it was learned that an engineer from the Toyota racing team had been questioned by German police acting on a request from the Public Prosecutor's Office (Ministero pubblico) in Modena, Italy. This had followed a complaint brought by car manufacturers Ferrari that one of their former technical staff members had removed crucial design details when he joined Toyota at their factory in Cologne the previous year. Computers, drawing and CD-Roms were reportedly impounded during the raid. The Japanese firm denied any wrongdoing; the man was released immediately and has since returned to work<sup>176</sup>.

However, this matter took on a new twist the following week, when it was learned that three people, all of whom had previous links with Ferrari, had come under investigation. New details surfaced after further raids had been ordered by Fausto Casari, the Modena prosecutor heading the inquiry, who ordered police to search the premises of a business located near the city (where Ferrari has its home), as well as the home of its managing director. A third location was also raided, but the only details made available were that it was in the Modena area and was allegedly linked to the executive whose home and business were searched.

Thus far, Ferrari have refused to comment, but the investigation is thought to have been sparked off by the striking similarities between this season's Toyota TF103 model and the previous year's Ferrari F2002<sup>177</sup>.

No further details were available at the time of writing.

## Rugby Union

### ***Police called in after fight during Division Three game***

In late October 2003, it was reported that a rugby club had called in police after one of its players required 21 stitches to an eye after a fight which erupted during a match. The incident occurred during a National Division Three (North) fixture between Blaydon, for whom the victim, James Houghton, plays, and Longton (Stoke-on-Trent) during a brawl involving players from both teams. Although the touch judge was unable to identify the person who had thrown the punch causing the injury, Blaydon officials spoke to players and spectators who identified Paul Sheldon, a Longton player<sup>178</sup>.

No further details of any police prosecution are available at the time of writing. Naturally, this affair has produced disciplinary consequences.

## Rugby League

### ***Dressing room thief suspected by Aussie touring team***

Normally, the vocabulary of the criminal law used in rugby is restricted to stealing a line-out and smuggling a ball through the scrum. However, the world of criminality hit home too close for comfort for the Australian Rugby League team which toured Britain during November 2003, when officials were called upon to investigate the shocking possibility that one of their players robbed his own team-mates in the course of the tour. The team have confirmed reports that approximately £1,7000 was stolen from players' hotel rooms in four separate incidents, and that a member of the Kangaroos squad may have been responsible<sup>179</sup>.

No further details were available at the time of writing.

## Olympics

### ***Security planned for 2004 Games tight – but not without ructions***

Another sporting event which could be a target for terrorist activity is the 2004 Olympics in Athens. The sporting and public authorities involved are particularly aware of this, not only because of the current tension in international affairs, but because the Games have in fact been hit by terrorism before, as the dramatic events at Munich in 1972 demonstrated all too graphically.

The risk to which athletes at this year's Games are exposed were vividly brought to public attention in mid-February 2004, when it was announced by the Greek Ministry for Public Order that British athletes will be accompanied by armed troops. As part of one of the most sizeable security operations mounted in the

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history of the Games, Britons and other competitors emanating from “high-risk countries” will have military escorts when they travel from their heavily-guarded Olympic village on the outskirts of Athens to the various sports venues<sup>180</sup>.

Details have also emerged of the multinational security operation which has been mounted in order to safeguard the safety of the Games in a more general sense. In March 2004, even as the new Greek government was being sworn in, hundreds of international troops took charge of secret operations spanning the southern island of Crete to the country’s Balkan borders and the ancient site of Olympia. Codenamed “Shield of Hercules”, the two-week exercise constituted the main drill ahead of the opening ceremony, and was intended as the first clear indication that the decision by the Greek government to spend an unprecedented £500 million on security on the Games is working<sup>181</sup>.

However, not all Greek citizens are in agreement with the manner in which these security operations are being carried out. There have been many protests outside the US embassy at the presence of foreign troops on Greek soil. This protest action was in fact but the latest anti-Olympic sentiment being expressed, following a fire-bomb attack on two cars outside Government ministries involved in the preparation of the Games<sup>182</sup>.

### Baseball

#### *Coors Field escalator blamed for injuries to baseball fans*

On 2/7/2003, an escalator at the Coors Field baseball stadium in Denver (US) hurtled out of control, injuring dozens of fans. City inspectors later found that a major safety switch was missing from the escalator at the time when it malfunctioned. Yet the device was in place when the escalator was originally certified, and inspectors maintained that they inspected it in March 2003. The company responsible for maintaining the escalator, Kone Inc., has disputed the inspectors’ findings. It had previously issued a report which blamed the accident on overcrowding and a misconnected wire.

According to the city’s investigators, a sensing device which is supposed to bring the escalator slowly up to speed malfunctioned and allowed the moving stairs to hurtle out of control. Inspectors maintain that the overspeed board, which controlled the safety switch referred to above, would have shut down the escalator<sup>183</sup>.

#### *Yankees charged in Fenway brawl*

In January 2004, a magistrate in Boston, US, filed assault and battery charges against two New York Yankee players for their part in a bullpen brawl with a Fenway Park groundkeeper during the bitterly fought

American League playoffs. The brawl in question, between Yankees Jeff Nelson and Karim Garcia on the one hand, and groundkeeper Paul Williams on the other hand, fed off the intense rivalry between the two clubs. The magistrate also found probable cause to issue two similar charges against Mr. Williams for his role in the fracas, which took place in October 2003<sup>184</sup>.

No further details were available at the time of writing.

### “Off-field” crime

#### **Leicester City players involved in sex assault allegations**

The sorry procession of episodes in which footballers from the top flight are caught in situations which discredit their profession and sport shows no sign of abating. On this occasion, the incident in question involved a number of players representing Leicester City, who at the time of writing are struggling for survival in the English Premiership. The management of this club decided that giving their players a break in the Spanish sunshine in early March would be a sound investment in motivating them to raise their game for the last lap of the 2003-4 season. Unfortunately, it turned out to be anything but a pleasant diversion by the Mediterranean seaside.

On 5 March, the news broke that eight of the club’s players had been placed under investigation by a Spanish judge after a group of men were said to have carried out a violent sexual assault on three women at the La Manga resort of South-East Spain. Of these, six players had been detained in police cells following their arrest, whereas two others were provisionally released. The three women had reported the alleged assault to police at Alicante airport, whence they had been planning to travel to Germany. They claimed that the arrested men had forced their way into a hotel room occupied by them and then sexually assaulted by some of them. All the players vigorously denied the charges<sup>185</sup>.

The next day, five of the eight players arrested were released pending further investigations of offences such as breaking and entering and failing to assist a person in distress, whereas the three remaining footballers – Paul Dickov, Frank Sinclair and Keith Gillespie – were kept in detention whilst undergoing further investigation into the charge of “sexual aggression with penetration”. Details began to emerge of the alleged course of events leading up to the arrests. It appeared that the players had been out celebrating the birthday of one of the party, returning to the hotel from the casino bar late on the Sunday night. From there, it was alleged that they had forced their way into the women’s hotel room. It was also claimed that a British family staying at the

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hotel had heard screams and “sexual noises” emanating from Rooms 305 and 306 and had subsequently left, disgusted at the perceived behaviour of their fellow-countrymen<sup>186</sup>.

At the time of writing, the players continued to languish in the Spanish cells whilst the examining judge, Jacinto Areste, considered more than 300 pages of evidence and depositions at the Palace of Justice of Cartagena. Mr. Areste indicated, however, that he would refer the case to the state prosecutor even if the alleged victims dropped their charges. He refused to expedite proceedings in spite of pressure from the British Foreign Office. Political factors appeared to have played a part in this, in that, with the Spanish General Election due the following week, there was some pressure from within Spain to ensure that the footballers were given no special dispensation during the legal process<sup>187</sup>.

The following day, defence and prosecution lawyers called for additional forensic evidence. One key item which was undergoing tests was a blood-stained undergarment belonging to one of the alleged victims. It also emerged that the players may be involved in a *careo*, i.e. a procedure which brings the accused face to face with their accusers in the courtroom, during which the judge will decide whether, in his/her view, witnesses are telling the truth<sup>188</sup>. It also transpired that the arrested players had to be given special protection in the jail where they were incarcerated, having been booed and hissed by other inmates on their arrival at the prison<sup>189</sup>.

That is how the matter stood at the time of going to press. Obviously this episode will take some time to work through to its dénouement. However, regardless of the outcome, the commentary in the media, whilst refusing to jump to premature conclusions about the outcome, nevertheless deplored the circumstances in which it had come about. Thus they rightly questioned the wisdom of Leicester City’s management to organise the break, given that a previous holiday involving the same club at a Spanish resort had also ended in disgrace, even though the behaviour of the players on that occasion stopped a long way short of the allegations currently made. It was also questioned whether taking players on luxury breaks was appropriate for a club which, as has been adumbrated in previous issues of this Journal, had extricated itself from administration in highly controversial circumstances and could once again be on the verge of enormous financial difficulty should they once again be relegated to the lower reaches of the Nationwide League<sup>190</sup>.

### Case against footballers involved in “Grosvenor House” rape allegations dropped

It will be recalled from the previous issue<sup>191</sup> that, in late September 2003, the police commenced an investigation into the claim made by a 17-year-old girl that she had been sexually assaulted by a group of professional footballers at a top London hotel, the full outcome of which was not yet known at the time when that issue went to press. This affair has in the meantime drawn to a conclusion – at least provisionally, in that the prosecution has now been dropped. However, the possibility of a civil action has not been excluded.

Also in the meantime, the identity of the two players concerned was released into the public domain. It may be recalled that the Attorney-General, Lord Goldsmith, had gone to extraordinary lengths to keep these names confidential, even intervening to demand undertakings from the media that they would not identify the men for fear that this could jeopardise any future prosecution<sup>192</sup>. However, in late November, Lord Goldsmith’s office announced that, following the conclusion of identification procedures, the ban had been lifted. It emerged that the two players concerned were Titus Bramble, a Newcastle United defender, and Carlton Cole, a Chelsea striker. Scotland Yard then sent the case file to the Crown Prosecution Service (CPS)<sup>193</sup>.

In early January, however, the CPS concluded that there was insufficient evidence to proceed with a prosecution against the players. The two other men arrested in connection with this case, Nicholas Meikle and Jason Edwards, were not charged either. There is some authority for the view, however, that a prosecution could have been brought if the Sexual Offenders Act, due to enter into effect within the next few months, had applied, since this legislation is intended to make it easier to prosecute cases based on consent (as was alleged to have been the case here)<sup>194</sup>.

The girl in question and her family later met the police to discuss the case. Max Clifford, who acts as public relations adviser to the family, indicated that a civil action was still being actively considered. It appeared that the family were convinced that a prosecution would be forthcoming<sup>195</sup>. No further news of any such court action was available at the time of writing.

### WBA player accused of hit-and-run offence

In late November 2003, there occurred a collision between a Mercedes driven by West Bromwich Albion striker Lee Hughes and a Renault in Coventry. One of the passengers in the latter car, 56-year-old Douglas Graham, died as a result of his injuries, which caused the police to seek out Mr. Hughes. Having searched his home in Meriden, Warwickshire, they were unable to find him, and urged him to come forward<sup>196</sup>. The player

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later reported to a Coventry police station and was then questioned<sup>197</sup>. He was later arrested on a charge of causing death by dangerous driving and failing to stop after a road traffic injury<sup>198</sup>. Two days later he made an initial appearance before magistrates in Coventry, and bailed to appear at Coventry Crown Court the following month<sup>199</sup>.

No further details were available at the time of writing.

### Leeds United midfielder cleared of rape charge

In the previous issue<sup>200</sup> it was reported that a Leeds United player had been arrested in connection with an alleged assault against a 20-year-old woman in the Leeds city centre. The player concerned turned out to be midfielder Jody Morris, who, together with co-defendant Kristofer Dickie, was formally charged with rape at Leeds Crown Court shortly before Christmas, having previously appeared before a district judge at the magistrates' court<sup>201</sup>.

However, in late January the rape charge against Messrs. Morris and Dickie was dropped. The Crown Prosecution Service (CPS) explained that new forensic evidence had come to light which undermined the case against the two men<sup>202</sup>.

### George Best in trouble with the law – again

The glorified soap opera that has become the private life of the former Manchester United and Northern Ireland winger has had its entertaining side, but now threatens to become a full-blown tragedy. In the previous issue, it was reported that Mr. Best had been involved in a scuffle with a press photographer in a pub near his home<sup>203</sup>. Since then, there has occurred a further incident, i.e. just after Christmas 2003, which ended with Mr. Best being locked up in a police cell after police had been called to his Surrey home in the early hours of the morning. It appeared that the former star's wife, Alex, had dialled 999 after Best launched a drunken attack on her having spent most of the day consuming alcohol. Mrs. Best's friends reported that she incurred a bruised lip following the assault. Ms. Best was later released without charge<sup>204</sup>. Three weeks later, Mr. Best claimed that, far from carrying out an assault, it was he who had been attacked by his wife, and that the relevant police report proved as much<sup>205</sup>.

However, two weeks later he was definitely in trouble with the law – this time over a drink-drive charge, to which he pleaded guilty. Wimbledon magistrates' Court was informed that Mr. Best drove through South-West London whilst being drunk at the wheel, following a disagreement with his son in a restaurant. He was taken into custody after failing a breath test, which showed him to be nearly 2½ times over the legal limit. He was banned from driving for 20

months and fined £1,500. He also agreed to attend an alcohol rehabilitation course requiring him to keep a "drink diary". This could result in his ban being reduced by up to a quarter<sup>206</sup>.

### Vinnie Jones escapes jail after "air-rage" attack

As many readers will know, the term "air rage" (named after its equally unattractive cousin, "road rage") is one of these euphemisms used to explain (and in some cases excuse) acts of wanton violence on board an aeroplane. One of the perpetrators of such violence is Mr. Vinnie Jones, former footballer and currently described as "an actor". In late November, he was arrested and charged in more acceptable terms – i.e. with being drunk on an aircraft, using threatening, abusive or insulting words, and assault of a passenger. He was travelling (first class, of course) on a Virgin flight from London to Tokyo<sup>207</sup>.

The case was heard at Uxbridge Magistrates' Court in mid-December. The court heard how Mr. Jones had been drinking with a woman when his behaviour became boorish. She returned to her seat, but Jones wanted her to return and, as one does, dropped a plate of food into her lap. He then became enraged when a fellow-passenger, Stephen Driscoll, told him that he was being annoying, which sparked off a tirade of "frightening" threats. The former Wimbledon player slapped Mr. Driscoll 10 times and repeatedly asked the question whether people on the aeroplane knew who he was. As the passengers and crew attempted to restrain him, he declared "I can get the whole crew murdered for £3,000"<sup>208</sup>. Mr. Jones was penalised – if that is the correct word to use – by being issued with 80 hours of "community service" as well as being fined £500 and ordered to pay Mr. Driscoll £300 in compensation.

This sentence provoked outrage from some media commentators, who believe that a custodial sentence should have been issued<sup>209</sup>.

### Chelsea owner faces investigations over business practices

In late December 2003, it was learned that Roman Abramovich, the owner of Premiership club Chelsea, faced an investigation by the Russian Government into the financial affairs of his oil company Sibneft. This arose in the context of a wider examination by the powerful Audit Chamber into the financial practices of a handful of oil companies, in order to establish whether there is any evidence that executives may have broken the law during the controversial sell-off of state assets under former President Yeltsin in the 1990s<sup>210</sup>.

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

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### Owen and Houllier receive death threats

That passions are easily inflamed on Merseyside on footballing issues is a well-known fact. However, in recent months a more sinister aspect to this ardour, in that some people are expressing their dissatisfaction with the performance of Liverpool FC on the field of play in a manner which brings them within the criminal law. In early March 2004, it was learned that Merseyside Police had launched an investigation after having been informed by the Liverpool manager Gérard Houllier that he had received an anonymous death threat. Mr. Houllier brought the relevant letter to the club authorities, who took the threat seriously because the sender appeared to have knowledge of the layout of the manager's home and details of his daily routine. The message was said to have instructed Mr. Houllier to leave Merseyside or be killed. Another factor which prompted concern arising from this letter was that it followed a number of distasteful graffiti which had been daubed on the walls of the club's Mellwood training headquarters<sup>211</sup>.

In the wake of this affair, Liverpool and England striker Michael Owen stated that he too had received death threats in recent times. Moreover, Mr. Owen voiced the opinion that he and Houllier were amongst a large number of prominent personalities in the top level of football who found themselves on the receiving end of such hate mail<sup>212</sup>.

The results of the police investigation were not known at the time of writing.

### Belfast boxer's career finished following beating

In early March 2004, the news broke that Northern Irish boxer Eamonn Magee, the world welterweight champion, had been seriously injured as a result of a beating administered to him by a gang in Belfast. Mr. Magee was dragged from a car whilst travelling in West Belfast and assaulted by a group of men wielding baseball bats. No complaint was made to the police. There has been speculation that the boxer, a staunch nationalist, could have been the target of a paramilitary punishment beating. He had to undergo emergency surgery on his left leg, which was broken in two places, and required a second operation in order to alleviate breathing difficulties<sup>213</sup>.

Two days later, Mr. Magee announced that his boxing career was over, following medical advice. He expressed his disgust over this development, given that he was about to sign up for a bout against Sharmba Mitchell in Manchester, and hoped then to challenge champion Ricky Hatton. However, he indicated that he had refused to co-operate with police investigators<sup>214</sup>.

### Former Australian star batsman dies after assault

In mid-January 2004, David Hookes, one of the most gifted Australian batsmen of his generation, died as a result of injuries sustained in an assault which took place outside a Melbourne pub. Mr. Hookes had been celebrating the win recorded by state side Victoria, whom he coached, over South Australia in a one-day match before he was allegedly felled by a doorman outside the Beaconsfield Hotel in St. Kilda. Paramedics found the former Test player clinically dead on the pavement, and spent 30 minutes in a vain attempt to resuscitate him. Mr. Hookes played in 23 tests and 39 one-day internationals.

Later, a 21-year-old man, Zdravco Micevic, was charged with one count of assault<sup>215</sup>.

### British Olympic hope alleged to have been suicide bomber in Iraq

One of the most lethal forms of warfare encountered by the coalition forces occupying Iraq following the invasion which took place last year is that of suicide bombing. In mid-November 2003, it was reported that one of the people who had perished in the course of such an incident was a 22-year-old martial arts expert from Sheffield. This followed a report in the Yemeni newspaper Al Ayyam that the parents of a British-based Muslim, Wail al Dhaleai, had been informed by Islamic fighters in Iraq that their son had killed himself in an attack on US troops. According to his relatives, Mr. al Dhaleai was married to a British wife with one son, and was a Tae Kwon Do expert who had entered Iraq through Syria. He was one of this country's great hopes for the 2004 Games in Athens<sup>216</sup>.

### US basketball rocked by crime-related issues

In the course of December 2003, a number of incidents occurred which have caused serious disquiet in the world of US basketball, at all levels.

In early December 2003, it was learned that a youth basketball coach of Snohomish County, Washington State, was accused of raping two of his players when they were both 9 years old. His arrest came approximately a month after the alleged victims, two girls now 14 years of age, informed a mutual friend that they had been raped whilst playing for an Alderwood Boys & Girls Club team five years previously. The girls' friend reported the allegations to the authorities, prompting the investigation by the Snohomish County Sheriff's office. The man in question was booked for investigation of first-degree child molestation, and was later released on bail<sup>217</sup>. No further details of any charges were available at the time of writing.

That same week saw the – provisional – dénouement of

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a puzzling episode involving a high school basketball star. In October 2003, Robyn Stone, a core member of the Indiana Junior All-Stars the previous summer, and two other juveniles had been arrested after Mr. Dexter Moss reported the theft of his 1999 Jeep Cherokee. They were then charged with felony auto theft. Mr. Moss, however, failed to appear at the relevant hearing, as a result of which the judge dismissed the charges against Ms. Stone and her co-defendants. The judge noted that the case could be refilled, but the deputy prosecutors involved stated that this was unlikely. Ms. Stone's lawyer commented that his client had suffered considerably because of the allegations, having been detained for two weeks in the Marion County detention facility, as well as being suspended by her school pending the outcome of these proceedings<sup>218</sup>.

The following week, it was learned that a bullet was discovered lodged in the armpit of a Colorado player more than 24 hours after shots were fired at a party which he attended, according to the Rocky Mountain News. Chris Copeland was hit by a ricochet when gunmen fired around 15 shots at the gathering. Doctors had missed the bullet when they initially examined Mr. Copeland. Police later identified two Denver men as suspects, who were subsequently sought<sup>219</sup>. No further details of this case were available at the time of writing.

### Jockeys to risk jail over hunting ban

Although no legislation to that effect has yet been proposed, let alone enacted, a ban on foxhunting remains part of the Labour Party's political programme and could at some future point be converted into law. This has already aroused a good deal of opposition from many people involved in this activity (which this column steadfastly refuses to qualify as "sport"). This includes many leading jockeys, including Richard Johnson, who indicated that they were prepared to risk prison by flouting any such ban. They are among more than 40,000 "countryside supporters" who have signed the "Hunting Declaration" and who undertake to break the law in order to suffocate the justice system and generate public sympathy for their cause<sup>220</sup>.

The National Hunt fraternity is determined to protect foxhunting and its close relation, point-to-point racing, which acts as a "nursery" for racehorses, riders and trainers<sup>221</sup>.

### Bowling club closes over paedophile legislation fears

In early February 2004, it was learned that a lawn bowling club was being forced to close because of claims that its elderly members could breach anti-paedophile legislation. The reason was that the Carshalton Beeches bowling club, made up almost entirely of pensioners, has since 1930 shared its grounds with the private girls' Seaton House school. However, when the school submitted a planning

application aimed at modernising the grounds, it was informed by council officials that they were concerned about its use by "unaccredited adults" in the shape of the club members. As a result, the school informed the club that it will have to find alternative premises<sup>222</sup>.

### Corsican football club owner arrested for over extortion and terrorist link claims

Even since there occurred an upsurge in nationalist sentiment in the French autonomous region of Corsica, this development has attracted its extreme element which has from time to time resorted to terrorist tactics. It was sadly inevitable that football would at some stage become the focal point for such activity, particularly the club which has assumed an almost legendary status in the island's folklore, i.e. SC Bastia. In early February 2004, the club's president, François Nicolai, was arrested on suspicion of extortion after one of the club's principal sponsors informed the police that he had signed a deal, worth £300,000 per year, to halt a nationalist bombing campaign against his company.

Jacques Maillot, of the tour operator Nouvelles Frontières, informed the authorities that a series of six explosions at company agencies throughout France stopped as soon as he signed the "agreement". Responsibility for the attacks, which occurred throughout the 1990s, was claimed by the Corsican Liberation Front. Another leading tour operator had made similar claims<sup>223</sup>.

No further details were available at the time of writing.

### Other cases (all months quoted refer to 2004, unless stated otherwise)

#### Football

**Nicky Butt.** It will be recalled from a previous issue<sup>224</sup> that, in May 2003, the Manchester United and England midfielder Nicky Butt was arrested over allegations that he assaulted a woman in a nightclub. In late October 2003 it was announced that Mr. Butt would not now face any charges arising from this incident<sup>225</sup>.

**Mark Bosnich.** In December 2003, Scotland Yard announced that model Sophie Anderton would not pursue criminal charges against her former boyfriend, former Manchester United and Chelsea goalkeeper Mark Bosnich, over an alleged assault<sup>226</sup>.

**Leon Jeanne.** In October 2003, former Cardiff City footballer Leon Jeanne was cleared of conspiring to supply cocaine. Cardiff Crown Court heard how Mr. Jeanne, who was arrested as part of an investigation into an alleged Cardiff drugs ring, "blew all his wages" on drink and drugs<sup>227</sup>.

## 2. Criminal Law

**Titus Bramble.** In mid-December 2003, the Newcastle United player was issued with a seven-week driving ban and a £2,000 fine by Ipswich magistrates after admitting driving at 102 mph without a full driving licence<sup>228</sup>.

**Juan Sebastian Veron.** In January, a man was charged over the raid in which a machete-wielding robber threatened the Chelsea star, his partner and their children during a £60,000 gem raid on their London home. The 35-year-old man appeared at Richmond Magistrates Court charged with aggravated burglary<sup>229</sup>.

**Paul McGrath.** Since being voted Player of the Year a decade ago, the former Manchester United and Aston Villa defender has fallen very low. In November 2003, he was detained in custody after police were called to his first wife's home where he was allegedly causing trouble. His arrest came three hours after he was discharged from hospital where he was treated for a cut forehead. It is believed that the former Ireland international had nowhere to go after recently splitting up with his second wife, which led to his pleading with his first wife to accommodate him<sup>230</sup>.

**Gary Charles.** In January, a former England footballer, who was found in a drunken stupor on the floor of his convertible Mercedes after having driven it into a garden wall, was jailed for four months. Mr. Charles, who played for a variety of clubs including Nottingham Forest, West Ham and Aston Villa, had pleaded guilty to dangerous driving and to two counts of failing to provide a specimen. He was also banned from driving for four years<sup>231</sup>.

**Jimmy Davis.** In August 2003, this Manchester United under-21 star died in a motorway crash on the M40 in Oxfordshire. Police and witnesses said that he had been travelling at speeds of up to 120 mph when he crashed into a lorry. Blood tests subsequently indicated that Mr. Davis was nearly twice over the legal drink-drive limit when he crashed the car<sup>232</sup>.

**Wayne Rooney.** In February, it was learned that police were investigating reports that he Everton and England striker spat at a woman in a Manchester nightclub<sup>233</sup>. No further details were available at the time of writing.

### Boxing

**Audley Harrison.** In November 2003, the Olympic super heavyweight champion was banned from driving for three months by magistrates in Stafford after admitting speeding<sup>234</sup>.

**Herbie Hide.** In early January, the ever-controversial Mr. Hide was fined £750 by Norwich magistrates for having

been in possession of an offensive weapon, in the shape of a 10-inch kitchen knife, after being attacked by a group of men in a nightclub in the city before Christmas<sup>235</sup>.

### Cricket

**Graham Thorpe.** Just before the New Year, news broke that the England middle-order batsman was facing a police investigation following an alleged argument with his former wife and her current partner at their home in Epsom, Surrey. Mr. Thorpe had apparently arrived there in order to visit his two children when a disagreement ensued. The couple then alerted the police claiming that Mr. Thorpe had attempted to force his way into the house<sup>236</sup>.

**Sri Lankan Cricket Board.** In early January, it emerged that police had raided the headquarters of Sri Lankan cricket. In so doing, they seized accounts and other documents as part of an investigation into claims that the country's leading cricket official altered a passport for an alleged gangster<sup>237</sup>.

### Rugby League

**Adrian Morley.** The Great Britain forward was the subject of a drink-driving conviction at the hand of Salford magistrates in December 2003, for which he incurred 40 hours of "community service" and was banned from driving for six months. Unbelievably, this conviction was issued within a month of the international series against Australia in which Mr. Morley participated, and which was sponsored by the Government-supported "Think! Road Safety" campaign...<sup>238</sup>

**Bernard Long.** In February, it was learned that the former Widnes coach, who is also the father of Great Britain fly-half Sean Long, was being sought by police after failing to appear in court to answer charges of supplying the banned stimulants nandrolone and ephedrine. Mr. Long was rumoured to be in Thailand at the time. He faces four charges, dating back to January 2003, of selling prescription-only medicine from his stall in a Wigan market. Mr. Long had launched his "Longy's Health and Sports Nutrition" campaign three years previously, with appearances by Great Britain internationals Keiron Cunningham and Adrian Morley<sup>239</sup>. No further details were available at the time of writing.

**Julian O'Neill.** Whilst participating in the World Sevens in Sydney in the course of January, the Widnes captain was reported to have attempted to set fire to a teenage boy dressed as a dolphin. Earlier, he put the licence of a cruise operator at risk by stripping to his underwear and diving overboard<sup>240</sup>. It was not yet known at the time of writing whether police had brought any charges over this episode.

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**Leon Pryce.** It may be recalled from a previous issue<sup>241</sup> that, in late November 2002, the Bradford player and Great Britain international had appeared before magistrates charged with causing grievous bodily harm with intent, following an incident in a Bradford bar in which he assaulted the Bradford team's former fitness conditioner, Eddie McGuinness. The matter reached a conclusion in early December 2003, when Mr. Pryce was sentenced to 120 hours' "community service" at Teesside Crown Court. In explaining his decision to spare the player a custodial sentence, Judge Tony Briggs mentioned Mr. Pryce's remorse, his early guilty plea, and his work on the Bulls' community schemes<sup>242</sup>.

### Rugby Union

**Jonathon Cummings.** Mr. Cummings is a member of the Dundee University rugby union squad. As part of the "initiation rite" giving him access to the club, Mr. Cummings stole a BMW car, drove through Dundee at 80 mph, and crashed the car into a tree. He later went to the police station and confessed his misdeeds. Dundee Sheriff Court (naturally) spared Mr. Cummings a custodial sentence, preferring 120 hours of "community service", after the latter admitted to charges of careless driving, driving without insurance, stealing a car key and taking a car without the owner's consent<sup>243</sup>.

### American football

**Katie Hnida.** In February, Ms. Hnida, who made history when she became the first woman to play for a major US college team, claimed that she was raped by a team-mate. She came forward after three other women filed claims against the University of Colorado, alleging that they were attacked on the night of a team recruiting party. Gary Barnett, the University's head football coach, sensitively responded to these allegations by stating that "it's a guys' sport"<sup>244</sup>. This followed an allegation by a local prosecutor and a police officer that prospective players were recruited by the University by means of sex parties where women claimed to have been raped<sup>245</sup>.

### Tennis

**Boris Becker.** The former Wimbledon singles champion continues to find himself on the wrong side of the law. Having earlier received a two-year suspended jail sentence as well as a sizeable fine after having been found guilty of tax evasion<sup>246</sup>, Mr. Becker once again found himself in a court to answer charges over his role in the financial collapse of German sporting website Sportgate. He was fined €5,700 by the court<sup>247</sup>.

### Golf

**Christopher Francis.** In late November 2003, this professional golfer, who once captained Eton at this sport, was ordered to be detained indefinitely under the Mental Health Act by Winchester Crown Court. Mr. Francis, who suffers from paranoid schizophrenia, killed his grandmother and aunt by battering them with a brick before slitting their throats with a kitchen knife<sup>248</sup>.

### Motor racing

**Eddie Irvine.** In November 2003, the former Formula One driver was convicted in his absence on charges arising from an incident a few months earlier when he rode his scooter at 50 mph in Hyde Park, London, without insurance or driving licence. The following month, he also failed to attend Bow Street Magistrates' Court for sentencing<sup>249</sup>.

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### Other issues

#### Arrest after body is found on golf course

In late November 2003, police arrested a 42-year-old man after another man, believed to be in his 60s, was found stabbed to death on a golf course at Whitewebbs Park, Enfield (London)<sup>250</sup>. No further details were available at the time of writing.

#### Marathon with a difference

In late November 2003, it was learned that Trevor Lound, a Briton serving 25 years in a Bangkok jail for drugs offences, was informed by the authorities that he was allowed to take part in the city's marathon. However, he was expected to complete the distance around the prison's running track<sup>251</sup>.

#### Comatose football fan convicted

It may be recalled from the previous issue<sup>252</sup> that, in August 2003, a football fan was prosecuted after being found asleep during a match between Middlesbrough and Arsenal, which the home side lost heavily. The fan in question, Adrian Carr, later faced Teesside magistrates on a drunkenness charge. In his defence, Mr. Carr claimed that he was sober but bored and fed up with his team's performance. The August weather was also partly to blame, said Mr. Carr. None of this helped him, and he was convicted of being drunk inside a football ground, given a two-year conditional discharge and ordered to pay £150 costs<sup>253</sup>. The verdict will have irked Mr. Carr but doubtless be the occasion for relief at the Riverside Stadium.

# 3. Contracts

## Media rights agreements

### Racing media rights once again in turmoil

#### *Attheraces terminates deal with British racecourses – and could lose its US coverage*

The jinx which appears to pursue the media coverage of racing in this country, and which has been well documented in previous issues of this organ, seems to have struck again in January 2004, when the Attheraces consortium summarily ended its £307 million media rights deal. This development had been preceded by seven days of fierce negotiation between the Racecourse Association (RCA) and the consortium after the latter had given 90 days' notice of its intention to quit the deal. It issued this notice under the terms of a clause relating to Tote revenue gained through its interactive betting system. This provision stipulated that the gross margin on Tote bets should amount to at least 20 per cent over any three-month period. The margin fell below this figure once the Tote decided to reduce its take-out on some bets the previous year<sup>254</sup>.

The stakes were high for both sides. On the one hand, some of the nation's 49 racecourses could have their very existence imperilled by a collapse of the deal, since they faced not only the shortfall caused by the potential collapse of the deal, but also the prospect of having to repay some of the money they had already received under the deal, which many of them had already spent. On the other hand, it was felt in some quarters that the price paid by Attheraces for racing's media rights was far too high, whereas interactive betting revenues were running at a fraction of the level required to justify the initial price. Nevertheless, the consortium had already invested several millions in setting up a satellite channel and associated systems, which it was thought to be loath to abandon<sup>255</sup>.

However, these negotiations failed to save the agreement, which was terminated subject to 60 days' notice on 29 January. RCA Chairman Keith Brown accused the consortium of using the clause described above as an "excuse to get out" after Attheraces refused to renegotiate it<sup>256</sup>. It was hard to disagree with Mr. Brown's conclusion, given that the failure to live up to this clause was costing Attheraces a mere £25,000 per month, against a background whereby the consortium was paying the racecourses £18.2 million per year. This seemed to confirm the view, expressed above, that the consortium was paying well over the odds for the media rights in question<sup>257</sup>.

The collapse of the deal left the 49 race courses with just two months to negotiate and conclude individual deals with the consortium. Although the latter seemed keen to continue broadcasting racing, these deals

would inevitably be worth a good deal less than the original contract. In addition the negotiating position of the racecourses was weakened by the possibility that, as has already been mentioned, Attheraces could compel the courses to repay some of the money they had already received. Naturally the major tracks would enjoy a much better bargaining position than the small ones, which put the latter's future at some risk<sup>258</sup>. However, it was also reported that some of the courses could bypass the consortium, with the Racecourse Holdings Trust (a subsidiary of the sport's regulatory body, the Jockey Club) having examined the possibility of launching its own channel<sup>259</sup>.

On the other side of the Atlantic, however, the consortium appeared to be on the receiving end of agreement cancellation. In an interesting development which, once again, highlights the malign influence which internet betting seems to have on racing (see above, p. 15), Attheraces was, at the time of writing, widely expected to lose its live coverage of racing from the major New York tracks. This is an attempt by the New York Racing Association (NYRA) to prevent punters from betting on its races on Betfair, the leading internet betting exchange. NYRA believes that Betfair's business related to New York racing will fall dramatically if bettors are deprived of access to live pictures. However, in the process NYRA will lose money as well as Attheraces, since they receive a commission on the live interactive betting which Betfair organises on US racing. Obviously NYRA considers this to be a price worth paying if it restricts the ability of Betfair's customers to bet on its races. Another US track operator, Magna Entertainment, which runs such courses as Santa Anita and Gulfstream Park, had already dropped its signal from Attheraces in December 2003<sup>260</sup>.

(See also the discontinuation of Attheraces' sponsorship deal with Sandown Park, below p.46)

#### *Other developments in the media rights market for racing*

In December 2003, it was learned that, as part of its statutory obligation to commission at least 25 per cent of its television programmes from outside the corporation, the BBC had awarded a contract to produce more than 60 hours of racing coverage to an independent company, Sunset+Vine. This amounts to a two-year deal to produce coverage from seven leading racecourses, including Epsom, Ascot and Goodwood. Sunset+Vine, owned by the Television Corporation, also produces Channel Four's award-winning cricket coverage<sup>261</sup>.

In early February 2004, a threat emerged to Channel Four's racing coverage, when it was reported that Cheltenham racecourse was keen to see coverage of its Festival meeting return to the BBC as from 2005.

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According to a source at the Corporation:

***“The BBC has always been interested in getting Cheltenham back, and my understanding is that the feeling is now reciprocal. If both sides in a negotiation are keen for it to work, then it is likely to come to a favourable conclusion. I would be surprised if the Festival is not back on the BBC next year”***<sup>262</sup>

The growing confidence experienced by the BBC that it will retrieve the Cheltenham contract came amid press reports that Channel 4, which won the contract in 1995, had threatened to pull out of racing coverage entirely if it lost its agreement to broadcast the showpiece even of the National Hunt season. Cheltenham’s terrestrial television rights had become available following the collapse of the Attheraces deal, referred to above. The channel’s current racing portfolio comprises 180 hours of live coverage, including three of the five English classics on the flat, as well as deals with important dual-purpose venues such as Newbury, Sandown and Kempton Park<sup>263</sup>. This opportunity to acquire coverage of the Cheltenham Festival coincides with a renaissance for racing on the BBC, which had already hired several new faces over the previous year to supplement their team.

No further details were available at the time of writing.

#### **Newcastle United redraw Premium TV contract**

In late October 2003, English side Newcastle became the latest Premier League club to alter the terms of its agreement with Premium TV, the subsidiary of NTL which has invested millions of pounds in top-flight football teams. The Tyneside club took back ownership of its live television and radio rights in a move which could lead to the launching of a bespoke Newcastle television channel with a new joint venture partner. Premium TV also forfeited its right to the first £1 million by way of profits from the partnership, whilst the club indicated that it had significantly reduced its commitment to fund the joint venture. It has also renegotiated the terms under which it has an option to acquire Premium TV’s share of the joint venture, allowing it to buy out the NTL company for £4.5 million in 2007, rising to £9 million in 2012<sup>264</sup>.

This episode should be viewed in the context of the high point reached by the media’s love affair with football, which was half a decade ago (a period which also saw the signing of the ITV Digital agreement, the devastating consequences of which have been well documented both here and elsewhere). During that period, NTL loaned Newcastle £25 million in return for broadcasting and internet rights, as well as a shirt sponsorship deal. It also

took a 9.9 per cent stake in the club, which it has since sold, after a full takeover bid for the club was abandoned because of certain regulatory obstacles<sup>265</sup>.

#### **Rugby League boosted by new television deals**

When this Journal last reported on this issue<sup>266</sup>, the picture was far from rosy, and the general expectation was that any renewed television rights deal, be it with BSkyB or anyone else, would not be as lucrative as had hitherto been the case. Subsequent events, however, have proved these projections to have been unduly pessimistic.

In early February 2004, Richard Lewis, the Executive Chairman of the Rugby Football League (RFL), emerged from the crucial round of television rights negotiations to announce a modest increase in the cash which the game will receive from BSkyB. With fewer than three weeks to go before the start of the new season, and following more than a year of tortuous negotiations, the RFL confirmed the conclusion of a new five-year agreement for the Super League and international fixtures involving a sum which was reported at £53 million – representing a £7 million increase on the previous five-year deal. This means that each of the Super league clubs will receive over £700,000 per year, as compared with the £650,000 which they received under the previous agreement. According to Mr. Lewis, this deal would also increase the money made available to National League clubs<sup>267</sup>.

More good news was on its way later that month, when it was announced that the RFL was to broaden its terrestrial television coverage of the sport by means of a new five-year contract with the BBC worth £10 million for coverage of the Challenge Cup, as well as an extra £2 million for broadcasting a 50-minute highlights slot featuring Super League games and international fixtures on Sunday Grandstand. The new contract involved moving the Challenge Cup Final from May to August, and the Corporation is to play a bigger role in the marketing of the game<sup>268</sup>.

#### **Rugby Union knows the price of everything...**

England’s victory in the Rugby World Cup, and the orgy of self-congratulation which followed it, have ensured, that, at least in the short run, media rights to the top flight of the sport have become hot property – so hot, in fact, that it may have priced itself out of several markets.

It was obvious that one of the most prized moments to have been recorded from the entire tournament was the drop kick with which England fly-half Jonny Wilkinson clinched the final against Australia. However, unfortunately for rugby fans, this key moment is unlikely to be broadcast as frequently as was at first predicted since the International Rugby Board (IRB) has increased the price of the relevant footage by almost 600 per cent.

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Instead of its usual fee of £1,100 per minute, the IRB has set the price of pictures of the final to £6,500 per minute, being an amount which is beyond the reach of the majority of news budgets. This would appear to include that of the BBC, if the following memorandum leaked to a London evening newspaper is anything to go by:

***“The final and all Rugby World Cup games except 1987 are owned by the International Rugby Board. They have set a rate of £6,500 per minute, or part of, for clips of the 2003 World Cup, making it out of our reach”***<sup>269</sup>

Other BBC programmes, including those intended for children’s television, are understood to have inquired about the footage only to be deterred by the price. However, ITV, which bought exclusive rights to the tournament for £10 million, is entitled to broadcast the footage for the subsequent 12 months without extra charge. News broadcasters were allowed to show repeat footage up to 24 hours as part of the news access arrangement, but had to pay extra after this watershed<sup>270</sup>.

More bad news for the long-suffering rugby spectator came a week later, when it was learned that BBC viewers would be deprived of watching anything of the top European competition in the sport, i.e. the Heineken Cup. BSKyB, having outbid the BBC for coverage of the Cup, had made a three-year broadcasting deal with European Rugby Cup, the tournament organisers. Under this arrangement, Sky intended to broadcast 37 live matches, beginning with Llanelli’s home fixture with Northampton. However, BSKyB were so bullish about excluding the BBC altogether that there will be no highlights shown on terrestrial television. Although Sky claimed that there had been no offer from the Corporation about showing the highlights, a BBC spokeswoman denied this and claimed that Sky had resolutely refused to sell any broadcasting rights<sup>271</sup>.

However, the BBC is not totally excluded from top international ruggger, since, in late February 2004, it announced that it had extended its current contract for the exclusive coverage of the Six Nations Championship until 2010<sup>272</sup>.

#### **BBC continues to lose its grip on the nation’s sporting action**

The proliferation of television channels in recent years has made it inevitable that the venerable BBC no longer has a monopoly on the nation’s sports viewing. Nevertheless, it is fair to say that most armchair sports fans have a feeling of being let down by the organisation for which they pay their annual licence fee. In recent years, it has lost rights to many sporting events which at one stage were regarded as the birthright of the nation, including live top football and cricket internationals. Also, in spite of retaining the

rugby Six Nations championship, the BBC was also outbid for the Heineken Cup, as is described above.

These changes now appear to be reflected in the format adopted by the Corporation’s flagship sports programme Grandstand. This was relaunched early in the New Year 2004, but with less live action and more news and features such as interviews. However, it has become clear that not everyone at BBC Sport is ecstatic about the new-look programme, on the basis that viewers tend to prefer games and competitions to features. In fact, this had been the main criticism levelled at the ITV programme The Premiership when it first appeared on the small screen. The BBC, for its part, denied that this move was linked to the loss of any sporting rights, pointing out that it retained the media rights to 79 major events across a wide range of sports<sup>273</sup>.

Nevertheless, the British viewing public was once again given the impression that the BBC was losing its grip on the nation’s sporting heritage when it lost the rights to the Universities’ Boat Race, which is a quintessentially English event with which the Corporation has been associated since 1926, and which will be broadcast by ITV for the next five years. The BBC alleged that it had forfeited the rights in question because the race had become “too commercial”. This was challenged by ITV Sport executives, who claimed that this was a lame excuse aimed at covering up the commercial broadcaster’s audacious raid, and that the BBC had been in negotiations with the race organisers for five months. According to a race spokeswoman, both broadcasters had offered similar amounts of cash, but ITV had offered the broader package, including a bigger build-up on the day of the race, as well as a preview documentary<sup>274</sup>.

#### **Is the latest Italian sports channel legal?**

Italy is also a country which has experienced a sea change in the manner in which its sporting events are broadcast to the viewing public. However, for some years now at least some of these changes have had strong political overtones, particularly in view of the role played in this respect by the Prime Minister, Silvio Berlusconi, who also “moonlights” as a media mogul. Mr. Berlusconi is also involved in Sportitalia, the latest sports channel to be launched on the Italian airwaves. The channel is 51 per cent owned by Tunisian/French media entrepreneur Tarak Ben Ammar (who has links with Berlusconi’s Mediaset empire), whereas the remaining 49 per cent are owned by French group Eurosport, whose managing director, Angelo Codignoni, created the Prime Minister’s Forza Italia! (Come On Italy) party. Its terrestrial frequencies enable it to reach 81 per cent of the population, making it only the ninth free-to-air channel with nationwide reach. Many aspects of the channel remain shrouded in mystery. One of these is exactly which top-flight sporting events it will

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be capable of covering, most major events being broadcast by other media groups, including – inevitably – Rupert Murdoch's Sky Italia<sup>275</sup>.

The other controversial issue concerns the question how it succeeded in obtaining its licence, given that its infrastructure is quite elementary – for example, at the time of writing the company still had no listing in the telephone directory. In fact, on 19/2/2004 this matter was raised in the Italian Parliament, when the centre-left media spokesman, Paolo Gentiloni, demanded clarification of the way in which Sportitalia had acquired the all-important licence. In a written parliamentary question, he set out a chain of deals whereby the company had obtained frequencies originally allocated to the now-defunct subscription channel Telepiu. The circumstance which had prompted Mr. Gentiloni's question was the fact that this represented a change from restricted to unrestricted access, a fact which was confirmed by the Italian Communications Ministry on Christmas Eve. However, the 1998 legislation governing broadcasting licences specifically prohibits changing the type of licence once it has been granted. Therefore, the spokesman concluded, the Sportitalia concession was "blatantly unlawful". Mr. Codignoni's reply was of the blandest:

***"It is not up to Sportitalia to answer a question put by a Member of Parliament. That is for the ministry to do. But from the point of view of Sportitalia, everything has been done respecting the procedures and rules. We have done nothing without authorisation"***<sup>276</sup>

In fact this affair has come about at a time when Mr. Berlusconi and his Mediaset empire have already suffered a number of legal reverses. Italian media legislation has been drafted in such a way as to prevent exactly the kind of media concentration which the Prime Minister had skilfully contrived to build. Under a decision of the Supreme Court, Mediaset was supposed to have transferred its third channel, Rete 4, to satellite broadcasting at the end of 2003. In response, a proposed Law sponsored by the Government, which protected Rete 4 from blackout, was approved by Parliament shortly before the deadline set by the Court, only to be rejected by the country's President, Carlo Azeglio Ciampi. Since then, Mr. Berlusconi and his supporters have rushed a stop-gap measure through Parliament allowing Rete 4 to continue broadcasting. However, this is already coming under pressure, not only from the opposition, but also from the Government's own backbenchers. Some politicians suspect that Sportitalia is merely a fallback position, under which Rete 4 could be sold to the new broadcaster and this continue to operate<sup>277</sup>.

This Journal will naturally follow any further developments in this saga with keen interest.

### Legal issues arising from transfer deals

#### Manchester United deals once again under the spotlight

##### *Background*

For some time now, the manner in which leading Premiership side Manchester United have conducted many of their forays into the transfer market has been mired in controversy. Various allegations have been made about illegal approaches made to players employed by other clubs, and about the unhealthy involvement of manager Sir Alex Ferguson's son Jason in some of the deals involved. The reader will record from the last issue<sup>278</sup> that these controversies, of which the deals involving David Bellion and Fabien Barthez were but the latest examples, show no signs of abating. The period under review has brought a fresh batch of question marks over some of the more questionable moves to and from Old Trafford. It should be made clear that the questions which arise here are purely legal rather than moral. If the latter were to be taken into account, the sheer moral unacceptability of Louis Saha's move from Fulham would also need to be questioned – as indeed many in the media have done<sup>279</sup>. (The Saha move does, however, have some other question marks hanging over it – see below).

##### *The Kleberon affair*

It may be recalled from the previous issue that the Kleberon deal had already caused some concern because of the possible involvement by unlicensed agents, two of whom had to be warned off by one of the clubs interested in the player at the time, Atletico Madrid<sup>280</sup>. Ultimately, it was United who succeeded in enticing the player. Accordingly, expectations at Old Trafford were very high when the Brazilian international, who played a key role in his country's successful World Cup 2002 campaign, was transferred from Atletico Paranaense over the summer of 2003, particularly as Sir Alex Ferguson's side clearly needed reinforcements in midfield. However, certain question marks have arisen over this deal – and not only because the Brazilian has not exactly lived up to the predictions with which his arrival was greeted.

In mid-January, it was learned that the Brazilian club had submitted evidence to the Football Association (FA) purporting to show that it had been compelled to negotiate exclusively with agents stipulated by the Manchester club, thus shutting out Mr. Kleberon's own representative, Juan Figer. The latter, who was reported to have forfeited a £480,000 fee because of this, indicated that he was prepared to go to court if necessary to obtain justice<sup>281</sup>.

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A few days later, more details of the circumstances in which the deal has been concluded began to emerge. It appeared that, after one of its scouts had confirmed that Mr. Kleberson continued to perform at the level he reached in South Korea and Japan, Manchester United indicated their desire to transfer him. Paranaense were keen to sell the player for £6 million, and appointed a respected sports lawyer in Manchester to complete the negotiations. However, the Brazilian club's President, Mario Celso Petraglia, received a communication from Old Trafford stating that one Ian Hetherington, a little-known agent based in Stockport (a suburb of Manchester) had been authorised by United to negotiate the transfer. The problem with this was that Mr. Hetherington, whatever his other qualities, was not a licensed agent. United therefore appeared to have breached FIFA regulations<sup>282</sup>.

It is true that he works with Jorge Gama, a Lisbon-based agent who is licensed by FIFA. The document, however, made no mention of Mr. Gama, even though he was present at the negotiations which took place a few days later, and was then named on the transfer documents which were communicated to the FA. The deal was quickly completed, a visa rapidly secured for Mr. Kleberson, and the latter confirmed as a United player. This was a very lucrative episode for Hetherington and Gama, which can only have served to increase the ire experienced by the Brazilian's official agent<sup>283</sup>.

Two weeks later, it emerged that Paranaense had forwarded the document which they received from United to the FA, which passed the matter onto its compliance unit<sup>284</sup>. This would appear to set the scene for a high-profile FA investigation into the matter, although no such news had reached this Journal at the time of writing.

In the meantime, further details of the Kleberson deal have emerged which suggest that another hand may have been at work in this whole affair – that of Elite Sports Group, a Manchester-based firm which names the United manager's son, Jason, as one of its directors. It will be recalled from previous issues that the involvement of Mr. Ferguson in transfer dealing involving United has caused ripples of concern before – and not just in the Old Trafford boardroom<sup>285</sup>. It was alleged by a daily newspaper<sup>286</sup> that another Elite Sports Group director, Dave Gardner, entered into contact with Mr. Hetherington during the former's wedding celebrations and discussed the Kleberson deal. Mr. Hetherington, however, denied that he attended Mr. Gardner's wedding, and Elite were equally emphatic in their denial that they had any involvement in the Kleberson affair<sup>287</sup>.

#### *Howard's way from New York to Old Trafford investigated by FA...*

Another questionable deal attracting the attentions of

the game's authorities was that under which US goalkeeper Tim Howard was transferred from New York/New Jersey Metrostars. In mid-January 2004, it was learned that United were being investigated by the FA over allegations of secret payments made to agents on the occasion of the US international's transfer. A dossier on the conduct of the deal had been submitted to the English game's governing body, and once again, it raised the question whether there had been any inappropriate involvement by Jason Ferguson. According to reports, United made a six-figure payment to Gaetano Marotta, a Swiss-based agent, for his work on the Howard deal. It is alleged that Mr. Marotta then paid the sum of £139,000 to Mike Morris, a Monaco-based agent who is an associate of Mr. Ferguson and co-operates closely with the Elite Sports Group<sup>288</sup>.

Once again, Mr. Ferguson denied any involvement in the deal, whilst United claimed that they had no knowledge of any involvement in the deal by either Morris or Elite Sports. United officials also pronounced themselves satisfied with the work performed by Mr. Marotta on their behalf. It will, in fact, be difficult formally to arraign the club, for in order to do so the FA would have to prove that the club had chosen an agent knowing that the latter would be forwarding part of the cash to someone else, and it would have to be established that Marotta, Morris and Ferguson worked together on the deal. This looked unlikely at the time of writing<sup>289</sup>.

(There is also speculation that the documents alleging unlawful payments were leaked deliberately from within the club, as part of the power struggle for control of the boardroom and the plot to oust Sir Alex Ferguson<sup>290</sup> – see below, p.94.)

#### *Saha move involves tainted agent as well as morals*

As is indicated above, the move made by the former Fulham striker to Old Trafford has raised many eyebrows, but mostly on grounds of the sheer immorality of the deal. The contempt with which, by walking away from them in mid-contract, this French player showed towards the London club which had plucked him from the relative obscurity of Metz to the fleshpots of Premiership football has earned him few friends and no admirers<sup>291</sup>. However, there also appeared a question mark of a different order over this deal when Old Trafford revealed that, in the process, they had paid a substantial sum to an agent once implicated in a "bung" scandal. Four years ago, three coaches employed by Belgian side Club Brugge handed over envelopes containing a total of £20,000. They claimed that they received the money from the agent concerned, Ranko Stojic, between 1997 and 1999 at a time when former international Erik Gerets was manager. It was alleged that the money was offered in a

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bid to secure favourable reports about players whom Stojic managed. Five of his clients joined Brugge during Mr. Gerets's stewardship of the club, including Milan Lesjak. The latter was signed from the Serbian club run by one Zeljko Raznjatovic. This was none other than the infamous Arkan, the notorious Serb paramilitary leader assassinated before he could face charges of war crimes committed during the Yugoslav wars of the 1990s<sup>292</sup>.

The Belgian Football Association submitted the relevant evidence to world governing body FIFA in 2001. However, Mr. Stojic, who steadfastly denied the allegations, never faced charges, but only because the FIFA's rules prevent them from investigating cases where the alleged malpractice occurred over two years previously. Club Brugge secretary Jacques De Nolf has confirmed that the Belgian side no longer have any dealings with this man.

When asked to comment on this matter, Manchester United replied that all its deals are conducted in accordance with FA and FIFA rules<sup>293</sup>.

#### ***Healey moves to Preston – once again, questions are asked...***

One of the transfers which took place in the opposite direction was that of Northern Ireland international David Healy, who moved to Preston North End in June 2001 for the sum of £1,800,000. Here again certain voices in the media have started asking the question of any involvement by Elite Sports. When asked about this, the Preston finance director, Simon Beard, merely commented that this was "not a matter for the Press", but a "private business". This column wishes to stress that, at the time of writing, there is nothing to link the Elite Sports agency to this move, but the Preston spokesman's response hardly augurs well for the new age of transparency in transfer deals which we have been promised for so long...<sup>294</sup>

#### ***Barthez provisionally barred from move to Marseille***

It was reported in the previous issue of this Journal<sup>295</sup> that United were keen to sell the mercurial French goalkeeper, and had in principle settled terms with French club Marseille, subject to overcoming the transfer window hurdle. In the event, FIFA refused to sanction the move, and failed to be persuaded by the arguments put forward by the French club in favour of a special dispensation from the applicable rules. Both clubs would therefore have to wait for the next window to open, i.e. in the course of January<sup>296</sup>.

#### **Court orders Fulham to pay in Marlet case**

Another club whose transfer dealings have attracted obloquy is Fulham. More particularly the circumstances

surrounding the player's move from Olympique Lyon to Craven Cottage have come under some scrutiny, as was reported in a previous issue of this Journal<sup>297</sup>. This case took a decisive turn when the Court of Arbitration for Sport (CAS) has ordered English premier league club Fulham to pay €4.57 million to Lyon in settlement of this controversial transfer.

French international Marlet moved to Fulham in August 2001 for €18 million, but the club refused to pay the last instalment of the transfer fee due in December 2002. The London club said they withheld the payment because they were unhappy with the role Barcelona-based agents Sebastien and Pascal Boisseau played in the negotiations. Lyon complained to FIFA who ruled last February that the French club were in the right and that Fulham should pay the remainder of the fee in full. Fulham appealed against the decision, but in March the club's chairman Mohamed Al Fayed was ordered to lodge the amount of the last instalment with London's High Court. The chairman had personally guaranteed the money.

This case involved a complex relationship between the various deals which preceded and accompanied the deal. The contract Marlet had signed with Fulham provided that his basic £35,000 weekly salary would be topped up by signing-on fees and perks to ensure that the French player's income would be close to £10 million over his five-year deal. In addition to this, there were clauses in the contract between Mr. Marlet and his previous club which entitled him to a lucrative percentage of the transfer deal. More particularly, these two clauses were an entitlement to the whole of any additional fee between FF 45 and 48 million, as well as 43 per cent of any amount in excess of FF 65 million. Marlet would become entitled to this money from Lyon if he was sold at any time during the four-year deal he then had with the French club<sup>298</sup>.

Lyon had concluded a verbal agreement with Jean Tigana, the then Fulham manager, but refused to pay Marlet his due, knowing that the move would earn him a massive increase in pay. Marlet accordingly was placed before a choice – either hold out for his fee and risk the deal, or accept his enormous increase in pay and agree to Lyon's solution, which was to cancel his existing contract. He opted for the latter, and moved to Fulham in August 2001 for £11.5 million. The London club paid the first instalment of £8.5 million, but its owner, the ever-controversial Mohammed Al-Fayed, stopped payment of the final £3 million, and Lyon took the case to FIFA.

The latter's decision was to instruct Fulham to pay the final instalment. Fulham appealed against this decision, which is how it came before the Court of Arbitration for Sport (CAS). The latter found against

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Fulham, on the basis that, under Swiss law, the verbal agreement between Tigana and Lyon existed before the Marlet contract with Lyon was cancelled<sup>299</sup>.

Fulham now plan to appeal to a superior Swiss court, which could land them in trouble with FIFA, which had already warned Manchester United that they could be expelled from the Champions league, and even the Premiership and the FA Cup, if they took the appeal against Rio Ferdinand's ban (see later, p.109) beyond the present appeal or Court of Arbitration into the realms of civil action<sup>300</sup>.

#### Opposition to transfer windows increases

When the system of restricted transfer period for footballers, the so-called "transfer windows", was first introduced, it was always expected that some levels of the professional game would be less happy with this development than others. In a previous issue, some rumblings of discontent were already reported, particularly from the Nationwide League<sup>301</sup>.

It is now apparent that this opposition is not restricted to this country. In late November 2003, representatives from Europe's second-tier leagues decided that they would meet the following month in London in order to discuss tactics at putting an end to these restrictions, which they claim is restricting the manner in which they can sell their players and thus adds to their financial problems. The plan was to request the world governing body, FIFA, for a special dispensation from the transfer window system which would enable domestic moves to continue throughout the year. Talks had already taken place between the Football League and the Premier League in England on the prospect of continuing the existing temporary exemption for lower clubs from the transfer window<sup>302</sup>. (However, even under this dispensation, the Football League clubs cannot sell players to the Premier League.)

The meeting in question was held on 11/12/2003, and sanctioned the request to ask FIFA for this dispensation. Afterwards, the Chairman of the Football League, Sir Brian Mawhinney, indicated that he would be seeking a meeting with the FIFA President, Sepp Blatter, in order to plead the League's case<sup>303</sup>. Ominously, he also warned that the Football League would withdraw from the central agreement governing players' contracts unless transfer windows were abolished. At present, all players of Football League and Premier League clubs are bound by central contracts which have existed for over 25 years and allow collective bargaining agreements between clubs and players. The Football League is affiliated to the Professional Football Negotiating and Consultative Committee (PFNCC) which binds it to the collective bargaining agreement. Warming to his theme, Sir Brian explained:

***"Under the constitution of the PFNCC, no major changes in the regulations affecting a player's terms and conditions of employment can be made without agreement in that forum. Transfer windows have fundamentally changed the complexion of the employment regime so far as clubs are concerned. If our attempt to remove the imposition of transfer windows domestically fails we would need a major overhaul of contractual arrangements not least to give clubs flexibility to deal with these new adverse financial circumstances"***<sup>304</sup>

He added that the League had not been adequately consulted over the transfer windows system, which were introduced at the start of the 2003-4 season – in fact, he claimed that the concerns of Football League clubs had been ignored<sup>305</sup>.

However, the players' trade union, the Professional Footballers' Association (PFA), disagreed with this stance, and warned the League that it was heading down a dangerous road by threatening to withdraw from the agreement. Its Deputy Chairman, Mick McGuire, stated that, although he sympathised with the league's position, it would be an unwise move to jeopardise the collective bargaining agreement, which was designed to protect both players and clubs and is intended to prevent anarchy. By so doing, he continued, the League would be "shooting themselves in the foot"<sup>306</sup>.

#### Bean expresses continued concern over transfer market

It will be recalled from the previous issue<sup>307</sup> that, in September 2003, Graham Bean resigned from his position as the Head of the Football Association's (FA) compliance unit (or "bung buster" to use the vernacular). The main reason for this resignation was the lack of support which Mr. Bean alleged he was obtaining from his employers. Recently, he has been making further pronouncements on the state of the transfer market in English football.

He stated his satisfaction that the transfer fraud problem was starting to ensure that a certain degree of transparency prevailed over what happens to the agent's share of the deal. However, he added that there is no room for complacency. His concern is not the "secondary split" of fees with other agents, but the percentage that is immediately returned in the form of "bungs" to certain managers and other football officials. The difficulty facing the FA over this issue is their lack of jurisdiction over agents, who have already won certain court cases by successfully claiming that only world governing body FIFA may discipline them<sup>308</sup>. One such case, involving agent Dennis Roach, was reported in an earlier edition of this Journal<sup>309</sup>.

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### Employment law

#### Rugby League experiences problems with salary cap

Rugby League is one of the professional sports in this country which applies an upper ceiling to the amount which any club may expend on players' earnings. At present, this limit is set at £1.8 million per year. Recently, moves have been made by the majority of Super League clubs to lower the limit to £1.5 million, in order to narrow the gap between the big spenders and the rest even further. This was, predictably, not to the taste of the bigger clubs, the main opposition coming from Bradford Bulls, supported by Wigan and St. Helens, who threatened to take the Rugby Football League (RFL) to court should a decision to lower the cap be taken<sup>310</sup>.

This left Richard Lewis, the RFL Executive Chairman, with the unenviable task of brokering a compromise during the run-up to the two-day clubs' meeting called for this purpose. During the intervening period, the clubs seeking the reduction were advised to keep their nerve in the face of any threats of legal action by Shane Richardson, Chief Executive of Penrith Panthers, who were unexpected winners of the Australian National Rugby League the previous year. He said:

***"You've either got to have a holistic approach to the whole game or do a Bradford Bulls and have an approach to suit a few clubs. Our cap is much more effective and better than yours, and that's one of the reasons you've still got a few clubs dominating every year. In Australia, Penrith winning the grand final last year has not only underlined the value of the salary cap but given hope to all the other clubs, and that's great for the competition. I don't think that could happen here"***<sup>311</sup>

However, Wigan's majority shareholder, Dave Whelan, warned that lowering the cap further would be a retrograde step, and the Bulls' chairman, Chris Caseley, repeated his view that the cap is a restraint of trade and anti-competitive, and as such unlawful<sup>312</sup>. He added that the onus was on the smaller clubs to raise their performance to the highest level with consistency on the field, so that they could grow their business and generate the wealth necessary to pay their players proper wage levels<sup>313</sup>.

Prior to the date on which the decision would need to be taken, the various club executives met for a two-day session in order to discuss the position further<sup>314</sup>. This does not appear to have ironed out the differences on this subject, and the scene was therefore set for a major confrontation at the decisive March meeting referred to above. This meeting had not yet been held

at the time of writing.

Similar problems in relation to the restrictions on wage spending are being experienced in Australia. It was learned in late December 2003 that the Sydney Roosters were threatening to take legal action if the salary cap which applies there is not raised. This attitude was described by the general manager of a smaller club, Cronulla, as "very selfish and very arrogant". He too expressed the fear that, if the Roosters succeeded, the divide between the three or four top sides and the rest would become even wider<sup>315</sup>.

#### No pay rise for England's Rugby World Cup victors, but image rights to be renegotiated

In the wake of the England rugby team's outstanding success in the World Cup, it was only to be expected that they would express a desire to share in the wider financial benefits which this event would confer on the game in general. According to Damian Hopley, the Chief Executive of the Professional Rugby Players' Association, the current pay arrangements, in the shape of match fees and intellectual property rights, do not reflect the exponential increase in the England team's commercial worth. With the players being in increased demand for commercial appearances and endorsements, from which the game benefits, he felt that the fees should reflect that demand<sup>316</sup>.

As the Rugby Football Union (RFU) announced profits of over £18 million, it also indicated that it was reviewing the players' earnings. There would be no increase in pay, but RFU chief Francis Barron stated that the issue of the players' image rights was to be renegotiated. This move came in the wake of criticism made of the decision by Twickenham that players would not be allowed to exploit the England team's red rose symbol<sup>317</sup>.

No further details were available at the time of writing.

#### "Super union" for sporting performers about to be created

Thus far, trade union activity in the world of professional sport has tended to be factional, i.e. organised around the sport in which the professionals engage. This may be about to change, if certain press reports are anything to go by. In January 2004, it was learned that those professionally playing the major sports will be using the Institute of Professional Sport (IPS), chaired by former Tottenham Hotspur player Garth Crooks, as their combined multidisciplinary union. They have planned a conference for November this year. Representatives from 16 major sports, including football, cricket, rugby, racing and golf, plan to be involved in all the major issues affecting their joint memberships, such as the Rio Ferdinand ban, England's cricket tour of Zimbabwe and the attempt made to defer the Leeds United

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players' wages (see below, p.89)<sup>318</sup>.

The IPS is not, however a new organisation. In the words of Richard Bevan, who is the Chief Executive of the Professional Cricketers' Association (PCA):

***"The IPS have been around for some time but are now becoming far more proactive with the development of player associations. Players' image rights, which have been described as the oil of the 21st century, have given players' unions a lot more power and influence. That can only get stronger if we all act together on the important matters, which we certainly intend to do. Sponsorships, central contracts and awards functions could all benefit in certain ways from the unions working together and the presentations we did for the England rugby side is another example"***

Already, the IPS has met on the premises of the Professional Cricketers' Association (PCA), with the anti-doping code enacted by the World Anti-Doping Agency (WADA), extensively trailed in this and other publications, high on their agenda<sup>319</sup>.

#### **Tennis players back down on boycott threat**

It will be recalled from a previous issue<sup>320</sup> that the tennis players' union, the Association of Tennis Professionals (ATP), had started to issue dark threats about boycotting some of the leading tournaments if the players were not awarded a larger slice of the profits. By late October, however, at least some of their militancy seems to have abated. ATP Chief Executive Mark Miles made a brave face of the apparent climbdown, dressing it up as a statement that "everyone who was fit to play in Australia (for the Open)" would be in attendance<sup>321</sup>.

However, some saw this as a reflection of the problems which the ATP is currently facing. Its finances are currently in poor health following the collapse two years ago of a deal, worth £800 million, with sports marketing company ISL, which collapsed in controversial circumstances described in a previous issue<sup>322</sup>. It is also under pressure because, as was reported above (p. 18), some of its players are now being investigated over alleged betting irregularities<sup>323</sup>.

#### **Professional volleyball player in temporary contract tussle. French Supreme Court decision**<sup>324</sup>

In France, contracts of employment are in principle concluded for an indefinite period, and any temporary contract must meet certain strict criteria, or it can be converted into an indefinite contract by the courts. The case under review concerns the attempt made by a professional volleyball player to obtain such a conversion, on the basis that he had been employed

under a succession of temporary contracts which he considered to be unjustified. The Court of Appeal had awarded the action to him, ruling that (a) the club which employed him had failed to prove that it was established practice (usage constant) to use temporary contracts in this sport, and (b) since the duration of these contracts exceeded the sporting season, the employer had thus made provision for permanent employment rather than for employment restricted to that season.

The Supreme Court (Cour de Cassation) overturned this ruling. It held that the sole remit of a court to which application for such a conversion had been made was confined to making a sovereign assessment of the question whether, for the employment in question, and unless a collective bargaining agreement makes indefinite contracts compulsory, it is actually established practice not to use indefinite contracts in the sector of professional sporting activity by which the employer was caught. The question whether such established practice existed had to be examined on the basis of either the sector of activity in question as defined in the Employment Code (Code du travail) or of an agreement or an extended collective bargaining agreement. The Court of Appeal had therefore made its ruling on the basis of an ineffective ground.

The Court accordingly set aside this decision and referred it back for a new ruling.

#### **Are salary caps the answer to football's financial woes? Article in professional journal**<sup>325</sup>

From the previous issue of this Journal<sup>326</sup> it will be recalled that the English Football League have agreed on the principle of a salary cap as part of a solution to the game's financial worries. The wisdom of such a move is not universally endorsed by all commentators, including the author of the article under review. He examines the various possibilities of placing limits on the amounts spent by clubs on player's wages, such as the "hard cap", the "soft cap" and the "luxury tax", and assesses their possible application to football.

The first, which consists in a maximum ceiling on wages expenditure in any given period he considers to be impracticable for football because it might be open to challenge – pointing out that, as is reported earlier (above, p.43) certain Rugby League clubs are threatening to do just that in relation to the hard cap which applies in that sport. A "soft cap", which bases the limit on a percentage of the club's income, would leave the relativities undisturbed, whereas the luxury tax, which taxes and redistributes monies spent in excess of a certain limit, he dismisses because it would be given "short shrift" by the players, although he fails to explain why.

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### Other cases (all months quoted refer to 2004, unless stated otherwise)

**WSA.** In mid-December 2003, it was learned that the World Snooker Association (WSA) were to appeal against a High Court decision which they lost to World Snooker Enterprises (WSE), in which damages and costs have set them back more than £500,000. Buckley J found for the claimants WSE which had been dismissed as the WSA's commercial partner. The judge expressly denied the world governing body in snooker leave to appeal against his decision. However, acting on legal advice, the WSA would nevertheless lodge an appeal<sup>327</sup>.

**Laszlo Nemeth.** In December 2003, it was learned that the former England basketball coach, Laszlo Nemeth, was taking England Basketball (EB) to an industrial tribunal claiming unfair dismissal. The Hungarian, who was appointed in 1994, is seeking compensation after his post effectively disappeared when EB cancelled the national team programme as a cost-cutting measure<sup>328</sup>.

**Alpay Ozalan.** In late October 2003, English Premiership club Aston Villa terminated the contract of Turkish international Alpay Ozalan by mutual consent<sup>329</sup>. Mr. Ozalan had become a rather unpopular figure in English football after he appeared to goad England captain David Beckham after the latter had missed a penalty during a Euro 2004 qualifier in Istanbul<sup>330</sup>.

**Laura Church.** In the previous issue<sup>331</sup> it was reported that Laura Church was dismissed from her post as fitness trainer to Gillingham FC because of a text message congratulating a player, which allegedly caused the player's wife to become jealous. Ms. Church has in the meantime started proceedings against the Kent club for unfair dismissal and gender discrimination<sup>332</sup>. However, the outcome of this case was not yet known at the time of writing.

**Sunday Oliseh.** In December 2003, it was learned that the Nigerian international, who plays for Bochum, was dismissed by the German club for having broken the nose of his team mate Vahid Hashemian in a changing-room confrontation<sup>333</sup>.

### Sponsorship agreements

#### "Nationwide League" to become "Coca-Cola League" this year

In late February 2004, it was reported that the Football League had concluded a three-year sponsorship deal with Coca-Cola worth £15 million. This agreement, which is

the most lucrative sponsorship deal in the history of the League, will end the involvement of current sponsor, Nationwide, in domestic football. The First Division clubs will receive 70 per cent; the Second Division 17 per cent, and the Third Division 13 per cent<sup>334</sup>.

#### Chambers settles dispute over sponsorship deal

In February 2003, European 100 metres champion runner Dwain Chambers joined John Regis, the former sprinter, in setting up a new agency, called Nuff Respect, under the umbrella of the Stellar Group. Mr. Chambers was an attractive proposition in terms of seeking commercial sponsorship, as one of only three European sprinters to have broken the 10-second barrier in the very popular 100 metre event. It was therefore no surprise when, thanks to the agency, he landed a deal with sportswear manufacturers Adidas which was worth a basic £100,000 per year to Mr. Chambers, a figure which he would have increased substantially thanks to other incentives written into the contract, ranging from £10,000 for obtaining gold medal in the European championships of 2002 to £25,000 for performing well in televised Grand Prix events. He also stood to win a bonus of £50,000 if he won gold at the Athens Olympics – which feat would have at least trebled the value of his next contract<sup>335</sup>. All this, however, is in jeopardy as a result of the two-year ban imposed on Chambers for having taken the banned anabolic steroid THG (see below, p.105), which will almost certainly result in this deal being terminated by the sportswear company.

Before this drugs affair came to light, however, had Mr. Chambers left the agency, taking his lucrative sponsorship deal with him. Nuff Respect considered that it was entitled to compensation, since it was they who had negotiated the four-year deal with Adidas, but Chambers refused to comply with this claim. The dispute was due to be heard at a London court in mid-February. However, a few days before the trial was due to commence an out of court settlement was reached. The compensation paid by Mr. Chambers was said to run into five figures.

#### Sporting sponsorship and sports personalities. Article in academic journal<sup>336</sup>

In an article which is not unrelated to the issues discussed in the previous section, the author highlights the problem presented by the personality of the sporting performer or team which is involved in sponsorship and endorsement deals. He examines the various criteria which the sponsors apply when awarding such deals, and focuses on the problem which may arise where the sporting performer in

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question becomes involved in high-profile incidents and situations which reflect badly on him/her – and therefore also on their sponsors. The sections of this Journal devoted to the criminal law and drugs legislation are an all too vivid illustration of this problem.

The author urges the greatest possible caution and care on sponsors when negotiating and concluding such agreements. More particularly he advocates the insertion of a “morality clause” in the deal, enabling the sponsor to terminate the deal without penalty where the individual in question commits an act which the sponsor considers to be damaging to the image of the individual or the sponsor. He is fully aware of the legal difficulties which this could bring in its wake, for whereas the position of an athlete who had committed murder is quite straightforward, other types of behaviour are more of a grey area and could lead to myriad legal disputes.

#### **AOL seek \$7 million refund after revealing performance at Super Bowl**

America Online (AOL) is the world’s largest internet service provider. One of the sporting events which it sponsors is the Super Bowl in American football, more particularly the half-time show which is as much part of the proceedings as the game itself. This year, added piquancy was given to this entertainment when, during a duet between singers Justin Timberlake and Janet Jackson, the former saw fit to rip off part of Ms. Jackson’s costume to reveal her chest. This incident, which gave rise to an investigation by the US federal Communications Commission, was shown to 100 million viewers. The National Football League (NFL), which organises the Super Bowl, pronounced itself “embarrassed” at the mishap<sup>337</sup>.

This incident naturally did not pass unnoticed by the sponsors, announced that it would not honour an agreement to rebroadcast the Super Bowl over the internet to its 25 million subscribers. AOL prevents “adult” material from being shown to its subscribers and provides strict parental controls for the content it does allow. This made it inevitable that the company would seek a refund of a substantial proportion of the sponsorship money involved under the deal. However, none of the other advertisers in evidence at the event are believed to have requested a refund<sup>338</sup>.

#### **Racing suffers sponsorship blows**

The trials and tribulations experienced by British racing in relation to its media rights have been extensively covered elsewhere in this Journal (see above, p.36). Further bad news on the commercial front has come in the shape of the withdrawal from sponsorship by some of its major backers.

In late October, it was announced that the broadcasting and betting company Attheraces was not renewing its sponsorship of the important Gold Cup meeting which concludes the National Hunt season at Sandown in April. The company’s sponsorship and communications director, Tom Earl, explained that the firm could no longer justify spending such a large proportion of its sponsorship budget on one racecourse, given that it now regularly shows racing from 49 racecourses in the UK as well as some major international events. He stressed that the decision had not been reached on a financial basis<sup>339</sup>.

The very next day, more bad news was forthcoming when drink manufacturer Martell, one of jump racing’s biggest sponsors, indicated that it was pulling out of the Grand National race, thus imparting another serious blow to the sport (see previous section). The company had previously injected an annual amount of £650,000 by way of prize money into the Aintree meeting, and have spent the same amount again on marketing the race worldwide<sup>340</sup>.

#### **Other sponsorship deals (all months quoted refer to 2004, unless stated otherwise)**

**Cycling.** In February, it was announced that Persil, the washing powder firm, would sponsor a variety of two-wheel Olympic medallists and hopefuls for the Athens Games through a deal with governing body British Cycling, said to be worth over £300,000. It was hailed as the biggest venture into cycling sponsorship by a major British consumer brand since the Prudential company discontinued its support for the Tour of Britain in 1999<sup>341</sup>.

**Rugby League.** In December 2003, it was learned that Arriva Trains had lost the franchise to run rail services in the North of England, where the majority of Rugby League clubs operate. It was therefore expected that the current deal under which the firm sponsors a major knock-out competition in the sport will not be renewed after August<sup>342</sup>.

**Motor racing.** In late October 2003, car firm Toyota announced that they were ending their sponsorship of ITV’s Formula One coverage midway through a four-year contract. This left the channel just six months in which to secure a deal for the 2004 season. The Japanese firm stated that it would concentrate on traditional advertising instead<sup>343</sup>.

**Cricket.** Hitherto, the German public seem to have taken as much notice of cricket as of Gaelic football. This is why some surprise was registered at the tidings that the Deutsche Bank, one of the world’s leading

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financial service providers, was to become the first official partner of the Marylebone Cricket Club in respect of Lord's cricket ground. The MCC signed an agreement worth around £250,000 to create a "wide-ranging and mutually beneficial relationship" with the best-known German bank. The latter will be able to use the ground and its facilities, not only for corporate hospitality and enhanced advertising in the summer, but also for business meetings, product launches and other promotional events throughout the year<sup>344</sup>.

### Sporting agencies

#### Major Belgian work on the role of agents in sporting transfers<sup>345</sup>

The work under review is an important contribution towards one of the major issues to concern the legal framework of sport. It takes the form of a series of articles locating this question in the wider context of changes which have occurred in football finance since the Bosman decision and the substantial effect which this has produced on the transfer market, including the new FIFA rules on transfers. The work also contains the entire text, in Dutch, of the new FIFA rules on transfers, the implementing regulations to these rules, the FIFA rules on the activities of players' agents and the Belgian Football Association's rules on players' agents.

#### Saha move to United involved "tainted" agent

This issue has already been dealt with under the section "Legal issues arising from transfer deals" (above, p.40).

#### Beckham still at odds with agents over contract

The parting of ways between David Beckham and his agents is proving as expensive, protracted and complex as the England football captain's departure from Old Trafford for Real Madrid. In early December 2003, it was reported that Mr. Beckham had formally settled terms with SFX Sports Group, the athlete representation agency. However, it later transpired that legal negotiations were continuing, and this continued to be the case at the time of writing. Earlier, a newspaper report had claimed that Mr. Beckham, the world's most highly-paid footballer, had remitted to SFX the sum of £2 million in order to buy himself out of a contract tying him to the agency. In October 2003 he had given notice to the company by a fax message, despite having signed a two-year extension to their agreement. However, it soon transpired that no settlement had yet been reached<sup>346</sup>.

The major issue at stake is the England captain's freedom to pursue his own commercial agenda, in

consultation with his current Spanish employers (who demand 50 per cent of their players' off-field earnings) as well as any compensation payable to the company which has invested heavily in Mr. Beckham's promotion ever since he was a trainee at Old Trafford. SFX, which is owned by the US media giant Clear Channel, had relied on obtaining commissions ranging from 10 to 15 per cent on the player's ten key sponsorship deals for at least the next two years.

It appears that the player's consort, Victoria, has been putting pressure on her husband to join forces with Simon Fuller, the music "Svengali" behind the Spice Girls and the Pop Idol concept, whose management agency "19", is attempting to relaunch Ms. Beckham's faltering singing career with a single released just after Christmas 2003<sup>347</sup>.

No further details of this dispute were available at the time of writing.

#### Parliamentary football group demands tighter grip on agents – agents respond to criticism

Some readers of this organ may be unaware that the All-Party Parliamentary Football Group numbers 150 members (more than the committee dealing with international development, but then this is 21st century Britain). Be that as it may, this group of elected representatives has a profound influence on any legislation and public policy on the world of football, and if only for this reason their deliberations deserve to be taken seriously. In this context, they have been applying their formidable intellect to the question which puts such matters as the Middle East and the European constitution in the shade – i.e. football agents. They devoted no fewer than seven months to an inquiry to the problem of player transfers and the role played by football agents, and ultimately came up with the following recommendations:

- Agents should pay a maximum levy of 10 per cent on every commission which they receive from transfer deals, which could be reinvested in the game's grass roots
- Clubs should publicly declare the amount each agent receives by way of commission
- All employees of sports agencies should be licensed agents.

The publication of this all-party report came as the Football Association (FA) prepared to introduce new rules aimed at compelling clubs to disclose the identities of agents, managers and members of the coaching staff are involved in any transfer or contract negotiation. The governing body is concerned that the identity of those involved in such deals, the amounts

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they are paid and the services they have performed for their payment is normally shrouded in mystery<sup>348</sup>.

Earlier, former Football League chairman Keith Harris, a shareholder in Manchester United, had enjoined the English football authorities to join forces in order to prevent football agents siphoning off vast amounts of money from the game<sup>349</sup>.

Following this widespread criticism of their trade, several leading football agents responded by arranging to meet with a view to establishing a pan-European body which will award a trademark to reputable agents. They believe that such a move will encourage their peers to uphold more ethical standards<sup>350</sup>.

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### Other issues

#### Leading law firms advise in sporting deals

The following leading law firms have recently been advising in a number of important sports-related deals (all months quoted refer to 2004, unless stated otherwise):

- In November 2003, City firm Nicholson Graham & Jones acted for former Leeds United chairman Peter Ridsdale on the acquisition of Barnsley FC from Peter Doyle, assisted by local firm Mills Kemp & Brown, and the associated sale of property at the club to Oakwell Community Assets, a joint venture operated by Patrick Cryne (advised by Pinsents) and Barnsley Metropolitan Borough Council (advised by Leeds firm Walker Morris). (See also under the section headed "Company Law" below, p.89.)<sup>351</sup>
- That same month, London firm Mishcon de Reya acted for the West Indies Cricket Board in signing the host agreement for the 2007 World Cup with the International Cricket Council, advised by City firm Simmons & Simmons.<sup>352</sup>
- In December 2003, Leicester firm Spearing White acted for the Blenheim consortium on its purchase of Notts County Football Club from administrators Kroll, advised by Eversheds<sup>353</sup>. (See also under the section headed "Company Law" below, p.92.)
- That same month, City firm Charles Russell acted for the trustees of the E Davies Trust in its efforts to acquire a controlling interest in Burnden Leisure, the parent company of Bolton Wanderers FC<sup>354</sup>.
- In March, City firm Slaughter and May advised the Arsenal Group on the £357 million financing of Arsenal Football Club's new stadium in Ashburton Grove, London. Linklaters advised Barclays Bank on the provision of facilities to the Arsenal Group,

whereas Allen & Overy acted for a syndicate of lenders, including the Royal Bank of Scotland and the Bank of Ireland. US firm Jones Day advised the Arsenal Group on planning and property issues<sup>355</sup>. (See also under the section headed "Administrative Law" below, p.71).

#### Bates sues Chelsea FC for breach of contract

The various internal battles which have beset leading Premiership side Chelsea have been adumbrated in previous editions of this Journal<sup>356</sup>. When Roman Abramovich took over the club<sup>357</sup>, Mr. Bates had signed a two-year deal to remain as Chairman, and later Life President, complete with travel expenses and other allowances. Following the arrival of the new Chief Executive, Peter Kenyon, from Manchester United, Mr. Bates resigned as Chairman of the club, claiming he was being marginalised. Mr. Bates then issued a writ against the club, claiming £2 million for breach of contract, with a threat to subpoena Mr. Abramovich in the process<sup>358</sup>.

The trial had not yet commenced at the time of writing.

#### ECB fury at "cricket levy" imposed on tickets for Caribbean tests

For the tour of the England cricket team of the West Indies in March/April 2004, it was expected that many England fans would seek to follow their favourites during the various landmarks of the tour, in particular the test matches. No doubt sensing the advantage that stood to be gained from the high demand for tickets to these events, the West Indies Cricket Board (WICB) decided to impose a "cricket levy" on tickets sold to England supporters. This levy ensured that it would cost England fans approximately £300 for a five-day pass to watch England take on the West Indies in Barbados and Antigua.

This aroused the ire of the England and Wales Cricket Board (EWCB), which condemned the levy as "inequitable, disproportionate and unjustifiable". EWCB Chief Executive Tim Lamb indicated that the matter would be raised at the next meeting of the Full Member Country Chief Executives in an effort to avoid any repetition of this usurious practice<sup>359</sup>.

#### Cheltenham Racecourse compelled to change terms of brochure and members' guide

The Director General of Fair Trading, attached to the Office of Fair Trading (OFT), has the power to investigate allegations of unfair contract terms and to compel the relevant traders to change or delete these. Its spotlight has recently fallen on the Cheltenham racecourse and its brochure and members' guide<sup>360</sup>.

- On the issue of cancellation of membership, consumers who enrolled by distance were not informed of the existence of a right to cancel or how to exercise it. This

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was replaced by a new term providing the consumer with the right to cancel with a full refund within seven days of membership commencing. However, if there is a race meeting within this seven-day period, members may not cancel after the race meeting.

- The Members' Guide potentially unfairly excluded the operator's liability for the cancellation of race meetings. This was revised to provide that refunds will not be issued where race meetings are abandoned or postponed because of unforeseen circumstances, except where these were caused by the operator's negligence. The term included a non-exhaustive list of "unforeseeable circumstances".
- Regulations 5 and 1(b) of the guide unfairly transferred the risk of membership badges and tickets failing to arrive by post. Furthermore, they potentially unfairly excluded the operator's liability where non-arrival was caused by its own negligence. This was amended to recognise the operator's liability where the non-arrival of badges and tickets was due to its negligence. The term was also revised to provide that, in the case of membership including the Festival, the operator would despatch all badges by Royal Mail Special Delivery. The term sets out that, for membership without the Festival, the supplier will send the badges by special delivery if the consumer covers the Royal Mail fee and the operator's administrative costs.
- Regulation 5 and 1(b) also unfairly transferred the risk of membership badges and tickets being lost in the post, and potentially unfairly excluded the operator's liability where non-arrival was caused by its own negligence. This term was deleted.
- As regards renewal of subscription, Regulation 24 provided that membership would be automatically renewed by direct debit. This was changed to a new term which makes it clear that members are sent a letter explaining how to renew their membership if they so wish. The term was also revised to provide that existing members already paying by direct debit would be given adequate opportunity to inform the operator that they do not wish to renew their membership.
- Further to advice provided by the OFT, Cheltenham Racecourse, for reasons of clarity, now includes all its terms and conditions in one document.
- The Director-General also had some specific reservations – first of all, in relation to the term "If a badge is mislaid, stolen or lost Members will be

offered the opportunity of re-subscribing in full for a replacement. This term, included in the Members' Guide, was challenged on the basis that it required consumers to pay the full subscription fee once more where a membership badge was mislaid or stolen, regardless of the actual expenses incurred by Cheltenham Racecourse, in order to protect the operator against false claims. This term was subsequently revised to provide that the fee charged for replacing a membership badge would directly reflect the number of races remaining in the season when the badge was mislaid or stolen (after taking the additional value of the annual Festival into consideration). The OFT remained concerned that the term "potentially" allowed Cheltenham Racecourse to impose an unfair financial penalty in circumstances in which membership badges were mislaid, stolen or lost. However, in the light of the amendments made to the term, the OFT refrained from taking further action unless it received evidence of potential or actual unfairness to the detriment of consumers.

The operator's undertakings were accepted on 12/6/2003.

#### **Comparative study of restraint of trade in sport. Academic article**<sup>361</sup>

This contribution examines the extent to which sporting performers who have been suspended from taking part in their sport after having been found to have broken the rules on the use of performance-enhancing drugs may rely on the argument that such penalties constitute restraint of trade. It also compares the leading Irish cases on restraint of trade and the right to earn a living, namely *Landers v. Attorney-General* and *Murtagh Properties v. Cleary*, with many other cases from other common law jurisdictions, concluding that, although sporting performers are entitled to due process of law and natural justice when it comes to disciplinary procedures, their participation is ultimately a privilege and not a right.

#### **Major German work on sports marketing and the law**<sup>362</sup>

This major work examines, on an interdisciplinary basis, the commercial and legal issues involved in the marketing of sporting spectacles. The various problems are present in practical terms, on the basis of sporting spectacles as they actually occur. This applies in particular to the marketing of a professional league such as the German football league and to the organisation of a skiing world cup. On the legal issues, the work concentrates on the important question of the ownership of the marketing rights, being a question which arises in the context of every sporting spectacle,

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since it only the owner who may conclude the relevant contracts. One of the key issues which arise on the legal side of this topic is the competition law aspect of the manner in which television rights are marketed centrally. The author examines not only the competition law of the EU, but also that of individual member states in this regard. The marketing agencies, which play a very prominent part in practice, are examined from a legal and business standpoint. In so doing, the author compares the advantages of entrusting the marketing to a major rights marketing agency with those of the sporting organisation marketing the rights in-house. Because the individual contributions also concern themselves with detailed issues and typical contract clauses, this work contains useful advice on the drafting of marketing contracts.

#### **Eriksson's Portuguese "lovenest" gives rise to legal problems**

The management career of the current England coach, Sven-Göran Eriksson, has taken in many clubs all over Europe, including top Portuguese side Benfica. It was during his residence in Lisbon that the Swede first "entertained" his compatriot, the television presenter Ulrika Jonsson, which has caused some personal embarrassment to Mr. Eriksson, particularly in his relations with his current consort. However, the property has also been the source of legal problems for the England manager, which has brought him into a bitter dispute with his former employers.

In mid-November 2003, it was learned that the villa in question, called Vivenda Joli, had been seized by the Portuguese fiscal authorities in 1998 for failure to pay a tax bill amounting to £234,000, monies which were owed for the years 1990-92. Eriksson, for his part, claims that the bill should have been paid by Benfica, and is now suing the club for breach of contract, claiming £320,000 by way of compensation. More particularly he claims that the property would have been sold by the state if he had not paid the relevant tax bill<sup>363</sup>.

No further details of this case were available at the time of writing.

#### **General term of business applied by sports and fitness club is redundant. German court decision**<sup>364</sup>

Under German law, the courts have the power to strike out any general terms of business (allgemeine Geschäftsbedingungen – AGB) which cause the customer to incur an inappropriate disadvantage. One of the criteria by which such a disadvantage is measured is a considerable and unjustifiable mismatch between the customer's contractual rights and duties, in such a way that the bona fide principle is infringed. In the case

under review, the claimant sought the setting aside of two such clauses applied by a sports and fitness club. The first was that which prohibited the consumption of any drinks which the customer brought with him/her to the club. The second stipulated that, where the customer was in default of payment of two membership fee instalments, he/she had to pay the entire fee immediately.

The Court of Appeal (Oberlandesgericht) held that the first clause was unacceptable and therefore without effect. Neither the relevant clause, nor even the contract as a whole, allowed for the possibility of purchasing drinks at suitable prices. If the clause were to be interpreted in a manner which was the most detrimental to the customer – as it was appropriate to do in such circumstances – it could also be constructed as meaning that the customer would also be restricted to buying drinks from the club if the latter sought to offer drinks at unsuitable and inflated prices. In addition, the club was unable to prove that the clause in question involved any interests on the latter's part which were worthy of protection.

The Court, on the other hand, refused to outlaw the second clause. The latter did not constitute a contract penalty, and it did not cause an unacceptable detriment to the consumer. The available literature was of the view that this type of clause was appropriate where it concerns contractual breaches which are so serious that they would justify termination of contract without taking into account individual circumstances. Moreover, the relevant contract had elements of a tenancy agreement, and under the law of tenancy it was legitimate for the landlord to terminate the agreement without notice where the tenant was in default of two instalments of the rent.

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## Sporting injuries

### Parents' vicarious liability not dependent on fault committed by child. French Supreme Court decision<sup>365</sup>

In the case under review, the claimant, who at the time of the accident was 14 years of age, had been injured in the course of a "game of combat" organised and supervised by the sports and physical education teacher of the school which he attended. In the course of this game he received an elbow in the face from one of his fellow-pupils, as a result of which he sustained two broken teeth. The victim's parents accordingly brought an action against the parents of the pupil who caused the accident. The Court of First Instance (Tribunal de Grande Instance) of Rocroi dismissed the action, on the basis that the defendants' son had not committed any fault which was capable of engaging his tort liability on the basis of Article 1382 of the Civil Code, given that the consequences of the accident could not by themselves qualify the incident as a fault.

The Supreme Court (Cour de Cassation) disagreed with this view. It referred to its earlier case law, which was based on the Civil Code provision regulating vicarious liability (Article 1384), and according to which the liability of parents for the loss caused by their children is not dependent on the existence of a fault on the part of a minor child living with them. The first court had therefore wrongly applied Article 1384, as a result of which its decision had to be set aside and referred back to a different court for a new ruling.

This decision gave rise to some controversy. In a trenchant commentary to it, Professor Richard Desgorges applauds the first court's decision consciously to oppose the established case law of the Supreme Court. He considers that the Supreme Court's position leads to the redundancy of the notion that children should obey certain rules of conduct. Children need to know when they have committed a fault. He also fears that the Supreme Court's decision will lead to a degree of "privatisation" of justice in this field – since the element of fault is no longer indispensable for this type of tort liability, these disputes will be settled on the premises of insurance firms rather than in the courts. Can this really be the object of the Supreme Court's decision?

He concludes that reform of the French law of torts is urgently overdue – the adoption of a new Law every two centuries has nothing excessive about it.

### English court decisions on liability for injuries sustained by swimmers

In *Donoghue v. Folkestone Properties Ltd*<sup>366</sup> the Court of Appeal was required to deal with a claim brought under the 1984 Occupiers' Liability Act by someone who had

engaged in a night swim in Folkestone Harbour in December (sic) 1997, diving from the slipway. He broke his neck on a submerged pile and became tetraplegic. The Court dismissed the action. It held that the test whether a duty of care existed under the 1984 Act had to be determined having regard to the circumstances prevailing at the time that it was alleged that the breach of duty had resulted in injury to the claimant. At the time when the claimant had sustained his injuries, the defendant had no reason to believe that he, or anyone else, would be swimming from the slipway.

### Similar circumstances applied in two other cases.

In *Tomlinson v. Congleton Borough Council* and another<sup>367</sup>, the case concerned a claimant who had dived into the water of a lake located in a park in spite of warning notices not to do so, and had struck his head on the sandy bottom, as a result of which he became paralysed from the neck downwards. The House of Lords overturned the decision of the Court of Appeal to hold the local council owning the park liable. It held that the question of what amounted to "such care as in all the circumstances of the case is reasonable" as stated in the Occupiers' Liability Act 1957 depended not only on the likelihood that someone might be injured and the seriousness of the injury which might occur, but also on the social value of the activity which gave rise to the risk and the cost of preventative measures. These factors had to be balanced against each other. It would be extremely rare for the occupier of land to be under a duty to prevent people from taking risks which were inherent in the activities they freely chose to undertake upon the land. He would be entitled to impose conditions prohibiting risky activities, but the law did not require him to do so.

In *Rhind v. Astbury Water Park Ltd and Maxout Ltd*<sup>368</sup>, the claimant has suffered spinal injuries when he dived into a mere in order to recover a football. He alleged that he struck his head on a plastic object located on the bed of a lake. The mere, which was formerly used as a gravel pit, was located on the edge of a country park (having public access on one side) and in the vicinity of a suburban residential area. It was also used by a sailing school and by a diving school. Swimming was prohibited by a notice, which did not prevent local people from paddling in the water adjacent to the beach. The mere was owned by a development company which granted a ten-year licence to the first defendants, Astbury, who in turn had awarded a sub-licence to a diving school and to the second defendant, being the sailing school "Maxout". The claimant sued Astbury and Maxout, who were responsible for on-water safety under this licence, for breach of common duty to take care.

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In the High Court, Morland J ruled that the evidence showed that the public at large were invited to roam, and habitually did roam, all over the country park and the land abutting the mere itself. A finding that the claimant was a trespasser when he stepped into the water in order to retrieve a football would be unrealistic even though he knew swimming was prohibited. It was a prohibition frequently breached. In various capacities and for various purposes, a number of persons exercised various degrees of occupation and control over the mere and its immediately adjoining land. The trial judge held that where two or more persons were in occupation of the same premises at the same time, and under a duty of care to visitors, the question whether a particular occupier was in breach of a common duty of care to a particular visitor would depend on the circumstances. These would include the extent and purpose of a particular occupier's occupation and the nature of his activity on the premises, and his relationship with the visitor.

Mr. Rhind had no direct relationship with the defendants or with their activities on the mere. He was a visitor to the mere, including the adjoining land. In spite of the notices, he was not converted into a trespasser on entering the water. He was not a person "other than" a visitor, bringing into operation s. 1 of the Occupiers' Liability Act 1984. The defendants, as licensee or sub-licensee, had limited rights over the mere and carried out specific activities on it. They were not general occupiers. Their activities had no relationship whatsoever either to the claimant or to his entry into the water.

The risk of injury through diving because of the dangers of diving into shallow waters and of striking one's head on the bottom or on an obstruction on the bottom was so obvious that the defendants owed no duty to post specific warning of that risk or to exclude members of the public from the water's edge, whether by fencing, landscaping or notices, even assuming that they had the right to do so. The defendants were not reasonably required to scour the mere's bottom for obstructions or to organise patrols attempting to prevent people from entering the water. The claimant knew that swimming was prohibited in the mere, and that therefore so was diving. The real and effective cause of his tragic accident was his foolhardy action in performing a running dive into shallow water. There was no breach of duty owed by these defendants to this claimant. The action was accordingly dismissed.

### **Muscat/Holmes dispute settled out of court (UK)**

In early March 2004, it was learned that leading firm of solicitors Davies Arnold Cooper had negotiated a £250,000 no-liability settlement on behalf of Premiership club Wolverhampton Wanderers and one of

its players, Kevin Muscat, for an alleged bad tackle on former Charlton Athletic midfielder Matt Holmes. Mr. Holmes had claimed that the tackle, which occurred in 1998, had terminated his career in football. Mr. Holmes was advised by Collyer Bristow<sup>369</sup>.

### **Coaches to be given immunity from liability**

This particular section of the Journal has recently adumbrated a number of cases in which sporting officials at various levels have found themselves on the wrong end of an action for damages in respect of physical injury sustained by sporting performers in their charge. This is quite a controversial issue, with many commentators expressing the view that such litigation is both unfair and a potential deterrent to anyone to engage in this useful kind of activity (particularly in view of the rising concern over obesity amongst our population).

It is these developments which undoubtedly lie behind the initiative taken by Conservative MP Julian Brazier to introduce a Private Member's Bill in a bid to arrest the mounting number of such court disputes. Indeed, various cases involving teachers and community sports clubs are currently in the judicial pipeline. MPs have already voted to allow the bill to proceed to the Committee stage, to be examined by the relevant cross-party select committee. It is reported to have the support of all the major political parties and could be in force by the end of 2004<sup>370</sup>.

Under the proposed legislation, a certificate of inherent risk would be established for anyone taking part in sport, any adventure activities and even activities taking place during school trips. This would protect volunteers, coaches and organisations from unreasonable litigation, in respect of which sensible safety standards have been maintained, and would prevent an athlete suing a coach after sustaining injury even though all precautions had been taken to prevent it from happening. The bill has been drafted following extensive consultations with sports bodies such as the Football Association and the Central Council of Physical Recreation, which believe that the compensation culture is having an increasingly damaging impact on sport. They also claim that insurance premiums for activities such as rugby, sailing and gliding are spiralling out of control<sup>371</sup>.

This column naturally pledges to follow the progress of this Bill with the keenest of interest.

### **Motorist cannot be exempted totally from liability for hitting 14-year old sporting cyclist. German Supreme Court decision**<sup>372</sup>

In the case under review, a youthful member of a cycling club claimed damages from the motorist with whom he collided. In the company of other members of the cycling club, he was proceeding down the cycling

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path of a public highway, and at a certain point had to cross a road in respect of which the highway had priority. All the other cyclists did this by using a traffic island in the middle of that road, and subsequently continued their way on the cycling path. The claimant was the last to cross this road, but he by-passed the traffic island, turned into the road, crossed it, and attempted to join his clubmates on the other side of the cycling path. However, in so doing he met a car coming from opposite direction along the highway, whose driver attempted an emergency stop but only succeeded in slipping onto a "sleeping policeman", where he collided with the cyclist, causing him serious and lasting injury.

The first instance court (Landesgericht) and the Court of Appeal (Oberlandesgericht) dismissed his claim. The Court of Appeal had acknowledged that the motorist had been driving at a speed exceeding the official limit, and that had he adhered to the limit, the injury sustained by the cyclist would have been considerably less serious. In spite of this, the motorist should not be held liable even in part, because his error was dwarfed by the grossly negligent behaviour of the 14-year-old in crossing the road in the manner described above. This assessment could not be altered by the claimant's age, since as a sporting cyclist he was familiar with the rules and dangers of road traffic, and therefore could not be placed on the same footing as others who had not yet been properly integrated into the road traffic system.

The claimant accordingly made an application for review to the Supreme Court (Bundesgerichtshof). The Court disagreed with the findings of the appeal court. It pointed to the established case law (ständige Rechtsprechung) of the Supreme Court whereby the driver of a car can only be exempted from all liability where the incident in question constituted an unavoidable course of events. This could only be the case where the accident could not have been avoided even if the utmost care had been taken. This was not the case here. The Court of Appeal had itself admitted that, apart from the question of the car's excessive speed, it would have been more appropriate to brake the car gradually rather than use an emergency stop, since this would have enabled the driver to retain control over the wheel and avoid the cyclist. There was also the question of the excessive speed used by the driver, on which subject the expert witness appointed by the Court of Appeal had demonstrated that, if the driver had observed the official speed limit, the intensity of the collision would have been much less – if indeed there would have occurred a collision at all.

In addition, the appeal court had not taken sufficiently in account the youthful age of the cyclist. Again, the Court pointed to its established case law on the subject, which held that, for a driver to be exonerated entirely

from liability for an accident because of the conduct by the victim which was seriously in breach of road traffic regulation, the negligence in question must, in the case of children and young persons, be reproachable even in a subjective sense when taking into account the age of the victim. It could be part of youthful insouciance to attempt, as was the case with this particular accident, to take a short cut by venturing directly onto the highway and to be careless in the process.

The Court therefore set aside the decision and referred the case back to the Court of Appeal for a new ruling.

### **Sporting association may only be held liable for injury caused by one of its players where a fault on the player's part has been proved. French Supreme Court decision**<sup>373</sup>

In the case under review, a rugby player had sustained a serious spinal injury during a match. He claimed damages from the club and its insurer – curiously bringing the action against his own club rather against its opponents. However, his action was dismissed on appeal. The Court of Appeal had found that both the facts of the case and the expert witness's account showed that the injury was not caused by a fault committed by a player, since the player had collapsed as a result of a following kick from behind and could not thereafter recall any accident-causing event. The player then applied for review by the Supreme Court (Cour de Cassation), claiming that the liability of sporting clubs for injury caused by their players was not dependent on a fault having been committed by the latter. This application was dismissed by the Supreme Court, which found that, on the basis of the facts established by the first instance and appeal courts<sup>374</sup>, no fault taking the form of an infringement of the rules of rugby, even one committed by an unidentified player, could be established. The Court of Appeal had therefore not reversed the burden of proof and had therefore correctly applied Article 1384(1) of the Civil Code (which regulates vicarious liability).

### **Physical education teacher committed fault by ignoring danger presented by roll of floats in a swimming bath which caused injury to a pupil. French Supreme Court decision**<sup>375</sup>

In the case under review, the claimant, who at the time was 14 years old, was taking part in a swimming session at the Grasse municipal baths under the supervision of her physical education teacher. At a certain point, the pupil was injured by a roll of floats which fell on top of her. She alleged that her studies had suffered adversely because of this accident, and accordingly brought civil proceedings against the local

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Government administrator (Préfet), relying on the fault allegedly committed by the teacher, on the basis that the State (and therefore the Préfet) was responsible and liable for the latter's actions.

The Court of Appeal disclaimed jurisdiction to hear this case, finding that the maintenance of municipal swimming baths was a matter for which the municipality was responsible. It was the municipal authorities which were responsible for ensuring the safety of their equipment; more particularly they should have ensured that, because of its weight, the roll of floats was not on the floor on the edge of the swimming bath where it could roll about, but tied to a base. The teacher had not necessarily been able to notice immediately the unusual position occupied by the roll or the danger which this could generate, and therefore was not in a position to take the necessary measures in order to discontinue that danger. The duty of care which teachers have concerns their pupils in their direct environment but cannot be extended to monitoring the compliance of public utilities over which they have no powers. The case therefore could not be heard by the ordinary courts, but by the administrative judiciary which has jurisdiction in matters falling within the powers of local authorities.

The Supreme Court rejected this view. It held that, according to the appeal court's own findings, that the physical education teacher could not be unaware of the danger presented to the swimmers by the roll in the position it occupied, having been dismounted from its base and lying near the edge of the bath. By failing to take any steps to eliminate such danger, the teacher committed a personal fault. Under the Law of 5/4/1937, it is the state which is liable for faults, whether personal or service-related, on the part of teachers in the public sector, and it is the ordinary, rather than the administrative, courts which should hear any action under this heading.

The Supreme Court therefore set aside the appeal court decision and referred it back for a new ruling.

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### Libel and defamation issues

#### **Lennox Lewis and his lawyer face libel action from promotor King**

In late January 2004, it was learned that boxing promotor Don King was bringing a High Court libel action against the world heavyweight champion, Lennox Lewis, and his former lawyer, Judd Burstein, on the basis that the latter allegedly made defamatory statements suggesting King was an anti-Semitic bigot. Eady J gave Mr. King leave to pursue the case in Britain, even though the articles were published on the US websites Fight-News and BoxingTalk<sup>376</sup>.

This is the latest move in a tangled legal web

involving multi-million dollar claims brought by King, Lewis and the former world heavyweight champion, Mike Tyson. Mr. King is currently being sued by Lewis in the US courts, the latter claiming that the promotor persuaded Tyson, the former champion who was beaten by Lewis in 2002, not to enter into a contract for a lucrative rematch<sup>377</sup>. After that claim had been brought, Mr. King referred to Lewis's then legal adviser, Mr. Burstein, as a "shyster lawyer". King's legal team allege that King claimed this to be an anti-Semitic statement. Mr King is also alleged to have given a Hitler imitation at a press conference<sup>378</sup>.

Mr. King will be represented in the action by Trevor Asserson a senior litigation partner in the firm of Morgan Lewis & Bockius, who acted for the promotor in the protracted court hearing which followed the breakdown of his business relationship with the British promotor Frank Warren, which ended with the latter agreeing to a \$12 million out-of-court settlement. Far from being anti-Semitic, claims Mr. Asserson:

***"Don King has raised money for Jewish charities in America and has raised \$1 million, including a personal donation for Kisharon, a school in London for Jewish special needs children, and has donated the money he earned from his BBC promotion of the FA Cup. From my own experience I know how much he does for the Jewish community."***<sup>379</sup>

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

#### **Veterans may sue over "black union" claim**

It has been reported in earlier issues of this Journal<sup>380</sup> that black footballers were experiencing a sense of frustration at being unable to gain a foothold on a management career in the game. It also appears that another source of discontent is their lack of proper representation in the sport. In February 2004, it was learned that the newspaper New Nation had claimed that certain black players were supporting the formation of a breakaway black players' trade union. The footballers thus named, Garth Crooks, Cyrille Regis and John Barnes, were incensed at this allegation, and are reportedly considering legal action. All three stressed that they were totally opposed to a separate union for black players and had never made any public comments supporting it<sup>381</sup>.

#### **US magazine to appeal ruling in libel action brought by former Alabama coach**

Mike Price was the coach of Alabama's American football team, until a nocturnal indiscretion, which took the form of a somewhat wild party in which he admitted drinking heavily and visiting a strip club the night before a golf tournament, which led to his

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dismissal by University of Alabama president Robert Witt. This night out was subsequently described in the magazine *Sports Illustrated*, which also claimed that he had sex with two women at a hotel after leaving the bar, which was an account published after his dismissal and based largely upon an anonymous source.

Mr. Price, however, vehemently denied the magazine's interpretation of events, and sued the magazine, as well as the writer of the article in question, for libel and slander. Obviously one of the main items to be examined was the source of the contentious story, which the magazine would naturally seek to protect as closely as possible. However, in late December 2003, a federal judge ruled that an Alabama law protecting newspaper, television and radio reporters from being compelled to disclose their sources does not extend to magazine reporters.

The magazine in question indicated that it would appeal this decision<sup>362</sup>.

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### Insurance

#### **FIFA victorious in court action against AXA insurance company**

In late December 2003, it was learned that world governing body in football FIFA had won a court action against insurers AXA over the latter company's decision two years ago to halt World Cup coverage because of the fear of terrorist attacks. FIFA claimed that a district court in Cologne, Germany, had ruled that AXA acted illegally where it withdrew cancellation coverage for the 2002 tournament in Japan and South Korea.

In the wake of the attacks of 11/9/2001, AXA had declared null and void the \$850 million insurance policy which had covered disruption of the tournament caused by likely tension between North and South Korea, as well as potential terrorist attacks. At the time, the global insurance industry was still reeling from the repercussions of the 11 September attacks. AXA pleaded a "completely changed danger situation (sic)" to justify their stance<sup>363</sup>.

#### **Cricket club made liable for failure to insure independent contractor's agent. English court decision**<sup>364</sup>

In the case under review, the second and third defendants were independent contractors who agreed to conduct a pyrotechnic display on the ground owned by a cricket club (the first defendant), at a fundraising fair organised by the latter. The contractors engaged the claimant as a helper, whose task included placing gunpowder in a plastic bag and placing it in a tube containing an electronic igniter, to be fired by remote

control. As he was placing the gunpowder inside the tube, the latter exploded, seriously injuring the claimant. The claimant having brought an action against the defendants under the Occupiers' Liability Act 1957, as well as in negligence, the judge held the defendants liable for the claimant's injuries on the ground that they owed him a duty of care. The cricket club appealed.

The Court of Appeal dismissed the application, holding that the cricket club, as the owner of the land, owed a duty of care to all lawful visitors present on its land to ensure that they were reasonably safe when it carried out the dangerous display. It also ruled that such a duty imposed an obligation on the club to ensure that those engaged to conduct a dangerous pyrotechnic display on its land had taken out public liability insurance to cover the event, and that, since the club had failed to do what it ought to have done before it allowed the dangerous event to take place, it was liable for the injuries of the claimant who was within the proximity of its duty.

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### Other issues

#### **Wolves firework display injures spectator – may give rise to legal action**

Pyrotechnic displays have become a part of many football clubs' pre-match entertainment. However, on one occasion the event had unfortunate consequences, when at Premiership club Wolverhampton Wanderers a firework was shot sideways into the crowd prior to a match against Newcastle. It hit Ms. Denise Butler, a season-ticket holder, in the face and she had to be taken to hospital. Although the injury was not as serious as initially feared, Ms. Butler was kept in for the night for treatment because of a swelling in her face<sup>365</sup>.

This may result in an action for damages, although no news to that effect was available at the time of writing. Wolves have in the meantime indicated that they would abandon the practice forthwith<sup>366</sup>.

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## Sports policy, legislation and organisation

### That London Olympic bid – an update

#### *General developments*

Since this Journal last reported on this issue<sup>387</sup>, the London bid juggernaut has continued its inexorable journey, though whether it will be crowned with success is another matter. In spite of the glitter and fanfare which has accompanied the launching of the bid, and the obligatory optimistic noises made by organisers, sponsors and politicians alike, there remain some formidable obstacles to a victorious outcome, some more surmountable than others.

At least it now looks as though the bid team has at last been finalised. In late October 2003, the team made three new signings to complete the composition of the management team. These were Debbie Jevans, a former General Secretary of the International Tennis Federation (ITF), who was appointed as Director of Sport, Neil Wood was appointed Finance Director, and Charles Wijeratna the bid's Commercial Director. Mr. Wijeratna will be responsible for negotiating commercial deals for the bid, and Mr. Wood joined the bid committee from the accounting firm Deloitte and Touche, who are well versed in all matters sporting. Ms. Jevans, a former junior champion at Wimbledon, was responsible for the tennis competition at the past five Olympic Games<sup>388</sup>.

Three weeks later, the bid leaders gathered at the Tate Modern gallery to unveil the logo for the bid. The latter incorporates the familiar bow of the river Thames represented by a ribbon in the five colours of the Olympic rings snaking through the words "London 2012". The bid leader, Barbara Cassani, stated that the ribbon could be interpreted in a number of different ways, as it could represent the medals for which the athletes will compete, or the finishing line of the race. She added that it also represented the diversity of London and the people from five continents who make up the city. It was hoped that the ribbon (the shape of which will be familiar to viewers of the soap opera *East Enders*) will prove visually strong enough to be used on its own in a host of different contexts. The marketing director of the bid, David Magliano, said that he was negotiating with a number of organisations to have the logo displayed as widely as possible<sup>389</sup>.

The launch of the logo was, however, overshadowed by the outrage provoked by a donation from the Royal Mail's Chief Executive, Adam Crozier (the former Football Association chief). He had authorised a £1 million donation to the London bid as an apology for recent industrial action earlier that month which had caused

some inconvenience to the bid mechanism. This was not to the taste of the Communication Workers Union, which accused Mr. Crozier of "opportunism" and contrasted the donation with the heart-rending pleas of poverty made just a week previously by the organisation<sup>390</sup>.

The bid itself was launched in mid-January 2004, on which occasion Barbara Cassani publicly unveiled, for the first time, full details of London's plans. The day before, the team had submitted official answers to a detailed IOC questionnaire, along with a £85,000 deposit, to Olympic headquarters in Lausanne, Switzerland, which forms the basis on which the IOC decides which of the nine bidders goes forward to the next stage – at least in principle<sup>391</sup>. The following month saw a development in this regard which could complicate the London challenge.

This development came in the shape of the news, trailed at the biennial Congress of the Association of National Olympic Committees (ANOC) that, contrary to initial expectations, the field would not be narrowed down at the IOC Executive Board meeting at Lausanne on 18 May. Should this be the case, the spread of the 126 votes in question could make survival of the first two rounds of voting a high-risk affair, with even the alleged front-runners, New York, Paris and London, as vulnerable as any others. In addition, there is the concern that the presentations made by the various bidders will need to be spread over two days, six being the maximum possible during one day. Even the most alert IOC member's concentration will be flagging by late afternoon anyway; to remember definitely the first day's opener by the conclusion of the second day's last presentation would stretch anyone. Furthermore, the army of unofficial support staff for each bid – spin-master consultants seeking to capitalise on opposition weaknesses, hotel lobby groupies eavesdropping on rivals' lunchtime conversations, former IOC staff hired to interpret trends – could make the entire occasion the biggest circus in the history of the bidding process. There is also the question of emotional, tactical voting<sup>392</sup>.

Another development which cast a shadow over the bid came a few weeks before the bid team were due to submit their credentials for staging the event to the International Olympic Committee (IOC). It came in the shape of an announcement by the City's Mayor, Ken Livingstone, that London would be unable to host the 2012 Games unless the Prime Minister sanctioned a proposed £1 billion rail link. The bid leaders were known to be desperate to be able to declare that the North-East route through East London will be built, and railway insiders have been arguing for some time that the go-ahead is needed soon if the East London line is to be completed on time. It will be recalled that the proposed site for the Olympics is located in the Lower

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Lea Valley, East London. The Government had already failed to commit itself to CrossRail (the East-West link) in time for the Olympics, whereas rival bidders such as Madrid and Paris were already building new stations. If the bid team was only able to state in the relevant document that a route was being “planned”, this could go against London in the race for the 2012 Games. Mr. Livingstone claimed that the capital’s transport system would not be able to manage the Olympics without the link, which would enable tens of thousands of visitors to circumvent the city centre. Thus far, No. 10 Downing Street has expressed caution about the scheme because of the costs involved<sup>393</sup>.

London’s cause was not assisted either by the news that Tessa Sanderson had become involved in an unseemly legal battle involving her own company. In January 2004, Ms. Sanderson, the former Olympic javelin medallist and Vice-Chair of Sport England, had been chosen in a fanfare of publicity to act as figurehead for London’s bid. However, the next month it transpired that the Cardiff International Games, which were organised the previous summer by her company, the Universal Management Group (UMG), had not succeeded in balancing its books. It is claimed that Ms. Sanderson failed to pay the producers of the opening ceremony. As a result, Mr. Producer, the company in question, has taken out winding-up proceedings against UMG, naming Ms. Sanderson, who resigned as a director of UMG in November 2003<sup>394</sup>.

Stifyn Parri, the former actor and managing director of Mr. Producer, claims that Ms. Sanderson failed to sell tickets or attract competitors for the event at the Cardiff stadium, and that a mere 300 people attended the event. Mr. Producer apparently laid on a lavish opening ceremony with 200 dancers and opera singer Shan Cothi, but when the company presented its bill for £17,000, to which Ms. Sanderson had agreed in writing, she claimed this sum was excessive, and that it actually amounted to a little over £13,000. Mr. Parri claims that UMG used Ms. Sanderson’s name to trample on small companies by contracting them to provide services for which they did not pay<sup>395</sup>. Even though the outcome of this case was not yet known at the time of writing, it has done nothing to enhance the image of London’s bid – particularly since Ms. Sanderson is also facing bankruptcy proceedings for having failed to pay for improvements to her home.

### *The competition intensifies...*

In the meantime, the other bidders for the 2012 games were also making their own preparations, and speculation was mounting over the state of play in the race for the honour. This happened against the inevitable jockeying for position, rumour-mongering bluff

and gamesmanship which seems to accompany such bids in modern times.

London’s prospects appeared to receive a setback in mid-November 2003 when David Richmond, the administrator of 2000 Sydney games, ranked the British capital behind other bidders such as New York, Rio de Janeiro and Madrid. Mr. Richmond, in Switzerland briefing all nine competing cities, described London’s bid as merely “formative” at that stage<sup>396</sup>. Several media commentators seemed to endorse this view – one of these being James Lawton, who made Paris the firm favourite because it had world-class form – the French Government had invested seriously in sport, and memories were still fresh from the World Cup of 1998, which was a “triumph for organisation and style”. With London, on the other hand, the memories of fiascos such as Wembley and Picketts Lock was all too vivid an example of this country’s shortcomings in this regard<sup>397</sup>.

However, a contrary view was heard from Ed Hula, the editor of the influential US-based electronic newsletter *Around the Rings*, who claimed that bid leader Barbara Cassani had given London the edge over the rest of the field. He ascribed this mainly to her business acumen and to the fact that she had put together a team which in his view had more drive than the other cities. At around the same time, a poll of sports industry insiders conducted by *Sportsbusiness.com* had London as the early favourite<sup>398</sup>.

The bid received a further boost when it was assured the strongest support from the Cabinet after witnessing a presentation of the relevant plans by Keith Mills, the bid’s Chief Executive, in early December. His briefing included plans for the an 80,000 capacity stadium which would form the centrepiece of 1,500 acres of parkland stretching from the Hackney Marshes down to the Thames. The scheme had already won world-wide acclaim and caused even Australian bookmakers to favour the London bid<sup>399</sup>.

In the meantime, it was only to be expected that various cities were beginning to make attempts at stealing a march on their competitors by fair means or foul. Thus in mid-January, it was learned that the London bid team had recruited a global network of informants in order to help influence power brokers in sport who will select the lucky winner. More particularly they employed five “consultants” whose duty it was to pass on potentially crucial inside information about the 126 members of the IOC and to arrange introductions to them for bid leader Barbara Cassani and her colleagues. London bid officials were, of course, at pains to stress that these people were not “spies or fixers” (perish the thought!) but had the task of providing details of the IOC decision-makers’ tastes and opinions which could help Cassani’s team persuade the

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IOC that London should be selected<sup>400</sup>. So that's all right, then.

Naturally, the ranks of those involved in this jostling process also included the politicians of various hues. Their interventions have not been free from controversy either, as will be reported in the next section.

### *The politicians join the fray (Mark III) – some more fortuitously than others*

It has already been noted in earlier editions of this journal<sup>401</sup> that the politicians' role in this saga has not thus far invariably been of the happiest. This trend has unfortunately continued during the period under review.

The first statesman to receive some flak for his intervention was Britain's Prime Minister. IOC rules require cities not to lobby in order to promote their bids until the final stage of the selection process. However, Mr. Blair raised the London bid during an informal sports breakfast at the Commonwealth Heads of Government meeting. In so doing, he praised the "extraordinary success" of the Commonwealth Games in Manchester two years ago, and said that it was in part this success that inspired the London Olympic bid. His audience, which included two Olympic officials, was also shown television highlights of the Manchester Games.

The IOC issued no direct rebuke to Mr. Blair, but, in a letter to an IOC member, the British rower Matthew Pinsent criticised the Prime Minister in the following terms:

***"It appears the Prime Minister Mr. Tony Blair used the weekend's talks in Nigeria to boost London's chances of hosting the Olympic Games. As you know, the Olympic parties, such as cities wishing to host the Olympic Games, undertake to respect and ensure respect of the ethical principles, their Code of Ethics and its Implementing Provisions. All forms of promotion are forbidden until IOC acceptance of the Candidature File and the cities must refrain from taking advantage from any international event outside its NOC's (national Olympic Committee) territory"***<sup>402</sup>

Downing Street, the bid committee and the British Olympic Association immediately moved to play down the IOC warning, claiming that it was based on inaccurate reporting of the meeting. They said that Mr. Blair's only comment regarding the Olympics was made in the context of a wider discussion about the experience of hosting the 2002 Commonwealth Games, and that it was made as he explained that Britain was now more confident about making the Olympics bid. Even more disingenuously, British Olympic chief Craig Reedie said Mr. Blair had been promoting the bid as opposed to lobbying<sup>403</sup> – the exact difference between

the two being lost on the present writer, but then he is only a simple academic.

Less controversially, Mr. Blair attended the official launch of the London bid on mid-January referred to above, at which he addressed a select group of Olympic athletes, executives from sporting organisations and key officials giving his full backing to the project. It was seen as something of a masterstroke to have Mr. Blair give the event his blessing, particularly as French president Jacques Chirac failed to attend a similar event in Paris<sup>404</sup>. In the event, this did not turn out to be the only blunder by French politicians in relation to the Paris bid.

Around ten days before the said launch of the London attempt, the Mayor of Paris courted IOC censure when he made a number of critical comments of the British capital's bid when he delivered himself of the following message:

***"The French consensus, especially between Paris city authorities and the State, represented by the President, is stronger than that between the Mayor of London (Ken Livingstone) and the British Prime Minister"***<sup>405</sup>

These words were seen by some to be a much more direct infringement of the "no premature lobbying" rule referred to above than Mr. Blair's, although at the time of writing no official reaction was forthcoming from the IOC. Mr. Chirac himself faced IOC censure when, in a similar move to Mr. Blair's, he too pleaded the success enjoyed by his capital city in organising the World Athletics Championships in August 2003<sup>406</sup>.

Also somewhat controversially, in mid-November 2003 Gerhard Schröder, the German Chancellor, confirmed his commitment to Leipzig's bid for the 2012 Games – even though the German city's bid had been hit by a series of scandals<sup>407</sup>.

However, one intervention by politicians which can only be fully applauded came in the shape of a strong message of caution from the powerful all-party Public Accounts Committee (PAC) of the UK Parliament that the Government must learn from the enormous cost overruns and bad procurement practices over the Millennium Dome and the Wembley Stadium projects if it was not to repeat mistakes in its support for the London bid. The cost of each of these projects has turned out to be more than double the original estimates because Whitehall failed to appreciate the real costs needed to make them happen. Whitehall was also attacked by the PAC for failing to follow best procurement practice over Wembley, and singled out Sport England for blame because it initially awarded £120 million of national lottery money to the Football Association (FA) without demanding any guarantees or asking it to deposit any

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money itself<sup>408</sup>. (See also on this subject below, p.61.)

### ***Commercial sponsors continue to flock to the bid***

Whatever else may be said of the London bid, it cannot be said to have lacked attention from the world of commerce. By mid-February 2004, it became clear that the organisers of the bid were set to surpass their sponsorship budget, such is the enthusiasm for the Games to return to Britain's shores. Many major corporations have expressed an interest in sponsoring the bid, including British Airways. London plans to have four packages of support, with the highest tier including five to seven blue-chip backers who will pay in excess of £1 million. Companies which support the bid will be able to use the London bid logo and operate promotional campaigns within Britain. However, under new rules adopted by the International Olympic Committee (IOC), they will not be allowed to promote their bid sponsorship in other countries. This does not appear to have deterred companies from pledging their support. London organisers had initially budgeted £28 million for their bid, £18 million of which would emanate from public funds. It now looks as though this figure will easily be exceeded.<sup>409</sup>

Some sponsorship deals have taken on an original hue. Thus a number of top City law firms have made a pledge to back the bid by agreeing to write off their legal work for the bid company in exchange for association rights. In November 2003, Clifford Chance, Freshfields Bruckhaus Deringer, Ashurst Morris Crisp, and Berwin Leighton Price were named as the firms which will provide staff and legal expertise to London 2012 Ltd. Ashurst, which has close links to bid leader Barbara Cassani, was the initial adviser in setting up the bid company, whilst Clifford Chance offered its services to the bid. Berwin Leighton were approached specifically because of their planning expertise, and Freshfields were among those which responded to a request for interest from the company.

### ***Financing the bid: the controversies continue***

One of the issues which predictably has dogged the London bid from the outset has been that of financing the bid and, if successful, the Games themselves. It will be recalled from a previous issue<sup>410</sup> that agreement in principle had been reached with the Government that the largest source of revenue would be the national Lottery in the event of the bid succeeding. Early in the New Year, it introduced the Olympic Lottery Bill<sup>411</sup>. However, this did not answer all the questions surrounding the funding issue, mainly because many of those involved considered that this would be inadequate to meet the projected expenditure.

These campaigners also demanded that the Government should also abolish taxes on the lottery. It

was pointed out that the Exchequer receives 12 pence for every pound spent on the lottery, and stands to make millions from this new Olympic-themed game. Thus far, however, the Government have resisted such calls. Campaign leaders also wanted the Olympic lottery to be introduced in the summer of 2004, claiming that it would be more popular if it coincided with the Athens Olympics. The current plan is for the Lottery to be introduced in the summer of 2005, once a decision on the successful bidder has been taken<sup>412</sup>. The Government may will comply with this request, particularly since the IOC has informed it that such a move would not constitute an infringement of its rules – as long as it is made clear to all concerned that the cash generated will not be used specifically for the staging of the Games, but instead be spent on funding athletes, buying equipment and improving facilities<sup>413</sup>.

However, it appears that the Olympic authorities of this countries are not prepared to wait on the Government in this respect, since in mid-January the news broke that they were considering plans to launch their own lottery game aimed at helping athletes taking part in the 2004 Athens Games. Simon Clegg, the Chief Executive of the British Olympic Association (BOA), recalls that there is a precedent for this, in that before the 1996 Atlanta Games the BOA linked up with Scratch and Win and ran a scratch card promotion in order to generate funds for the team. This game would be run by national lottery operator Camelot, and it is hoped that it will raise £750 million<sup>414</sup>. No further details were available at the time of writing.

### ***Siting issues***

For any Olympic bid the proposed siting of the various venues is obviously an extremely important issue. It will be recalled from the previous issue of this Journal<sup>415</sup> that the original plan was to make a relatively run-down area of Stratford, East London, stretching from Hackney Marshes down to the Thames, the centrepiece of the Games. Three key sites, i.e. the main stadium, the swimming complex and the athletes' village, would be built there and form one of the most compact sporting centres in the history of the Games<sup>416</sup>. In so doing, the organisers had moved the main stadium from the disused Hackney dog track to a derelict industrial zone called Marshgate Lane, mainly in order to move the venue closer to public transport links<sup>417</sup>.

The organisers then set about the task of consulting the local community about these plans, organising a day-long exhibition in the Old Town Hall of Stratford for this purpose. If they expected a warm welcome, they were soon disappointed, with many locals expressing the view that the money involved should be better spent on generating employment and fighting crime in

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the area. Particularly the £20 increase in council tax which would help to fund the Games seemed to arouse a good deal of opposition in this regard<sup>418</sup>.

However, controversy over the proposed siting of the Games venues did not end there. In February 2004, the energy company Powergen faced mounting criticism over a planned off-shore wind farm in Portland Harbour, near Weymouth (Dorset), which could seriously compromise the proposed sailing venue for the 2012 bid. The wind farm, which would consist of 11 turbines built just inside the old breakwaters in the harbour, will be in the centre of the waters used by the new National Sailing Centre (NSC), which has been chosen as the site for the Olympic regatta. The problem here is that the large wind turbines, the tops of which would rise to 100 metres above sea level, will affect the flow of air around them and cause turbulence which would make world-class sailing impossible. The Royal Yachting Association (RYA), which is the body governing the sport in Britain, believes that the turbines will affect most of all the proposed five racing areas that would be used at the Games. Its research suggests that the structures would cause a "wind shadow" stretching up to 1,600 metres behind each one<sup>419</sup>.

It was not clear at the time of writing whether this development would in any way change this site as the venue for the sailing event at the Olympics in the event of a successful bid.

### Wembley saga refuses to die

One of the steadfast conventions of this column has become to express its heartfelt desire for a timely conclusion to the controversies which surround the project to replace the hallowed Wembley stadium with a new venue for the nation's showpiece football events. Just as faithful a tradition has been the refusal of this issue to die down. The body which has caused this issue to remain the subject of controversy is the House of Commons Public Accounts Committee (PAC), a committee of MPs which supervises the manner in which public money is expended.

In mid-February, the PAC published a report which severely criticised the Football Association (FA) over its handling of the entire issue<sup>420</sup>. Essentially, the Committee found that the stadium had been closed down too early, and that public funds should not have been released for this project so easily. It will be recalled that the project is being financed by public money to the tune of £161 million. More particularly, the MPs decided that the FA should have waited to embark upon the project until such time as the financing of the project had been secured. The decision to go ahead had weakened Sport England, the National Lottery-backed organisation which contributed £120

million of lottery money to the project.

On the subject of the lottery money, the PAC also found that the decision to restore provision for athletics at the stadium was merely a device to retain the lottery money which the FA would otherwise have been compelled to repay to Sport England. It buttressed this view by questioning whether the general public would ever be given the opportunity to watch athletics at the new arena, which is due for completion in 2006. No specific athletics event had been associated with the new stadium, and only a handful of track and field competitions may be staged in the next few decades.

Sport England was naturally also criticised for leaving itself exposed after having allocated the £120 million funding to the project without requiring the FA to contribute any funding or to provide a guarantee underwriting the grant.

The MPs warned that even if the stadium turns out to be a financial success, the FA will take all the profits, despite 20 per cent of the funding having emanated from the public sector. Therefore, any plan to "diminish" the number of seats accessible to the general public, as a way of providing further support for the project if it experiences financial difficulties, should be treated as if it were a request for additional funding. The MPs also warn that, if the costs of the project rise even further, the most likely loser will be the watching public, with large firms being likely to demand an increase in the premium seats for corporate hospitality as their price for injecting more money, or to apply more pressure to allow the stadium to be used by a Premiership club<sup>421</sup>.

The Committee demands that Sport England and the Department of Culture, Media and Sport receive regular and comprehensive progress reports in order to be ready for more cost overruns. They attack the Ministry and Sport England for having failed to make any comparisons with major European projects such as the Stade de France in Paris, which was used for the 1998 Football World Cup final<sup>422</sup>.

In spite of this damning criticism, the building of the new stadium appears to be progressing satisfactorily, and is due to be completed six weeks ahead of schedule. This has prompted a bold bid by the stadium company to hoist the European Champions League final in 2007<sup>423</sup>.

The project also received a boost when it was learned that the property firm Quintain, which has bought the 44 acres of land surrounding the stadium, has planned a major transformation of this currently derelict land. The firm has envisaged a complex which houses large public squares, bars, restaurants, designer factory shopping outlets and homes for over 8,000 people. This is aimed at keeping the fans fed and entertained for hours after the various sporting events

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to be staged at the new stadium<sup>424</sup>.

### Doubts continue to surround Athens games

That the return of the Olympic Games to their original venue has had its problems is a proposition which has long been evident not only to readers of this journal<sup>425</sup> but to anyone who has even the most superficial interest in matters sporting. Since the last issue of this organ went to press, there have been further disquieting indications that the event may not exactly feature amongst the best-organised Games in living memory.

In late October 2003, the risk appeared to be growing that the Games might become one of the major victims of the internal strife afflicting the country hosting them. One of the ways in which this has manifested itself is one of the worst waves of public sector strikes which the country has ever experienced.

A foretaste of what this might mean for the Games came in October 2003, when, amongst others, the refuse workers went on strike, causing natives and tourists alike to hold their noses at the pervasive stench blighting the capital<sup>426</sup>. Such public sector militancy has the potential seriously to disrupt the smooth functioning of this year's Games. However, it has already impeded the preparations for the big event. With six months to go before the opening ceremony, these were thrown into chaos with the city's two main showpiece projects grinding to a halt. As the Greek capital attempted to come to terms with the heaviest snowfall in decades, work came to a standstill at the main 80,000-seater Olympic stadium and on the ancient marathon route. The latter is central to the organisers' plans to highlight the capital's heritage. Previously one of the ugliest and most congested roads into the city, it was due to be widened and repaved. The new deadline for completion has been postponed from May to a few weeks ahead of the symbolic torch being lit at the Games<sup>427</sup>.

Later that month, Greek police fired teargas and clashed with demonstrators protesting against the staging of the Games, which coincided with a meeting of the Association of National Olympic Committees and the Executive Board of the International Olympic Committee<sup>428</sup>. Such public opposition to the event also fails to augur well for the event. Finally, with 163 days to go before the opening ceremony, the Greek media revealed that at least half of the city's projects for the Games remained unfinished, with the majority of these not even halfway through to completion. Both the marathon road and the main stadium were so far behind schedule that few believed that they would be completed on time<sup>429</sup>.

### Funding woes continue to afflict British sport

#### *Sport England reviews funding policies*

The precise effects of the stinging criticism of its

handling of the Wembley fiasco, which long predates the official censure by the Public Accounts Committee referred to above, on Sport England, the body which distributes lottery and government cash to sporting bodies, are difficult to measure. However, it is at least a possibility that this factor has prompted a fundamental rethink within the organisation as to its funding policies, which was announced in mid-November 2003. More specifically, Sport England announced a priority list of 10 areas which would receive special funding in an attempt to increase their success at the national or international level. These sports are football, rugby union, tennis, cricket, golf, badminton, netball, hockey, squash and rugby league. These arrangements spelt bad news for other sports, which were to be informed that their funding could no longer be guaranteed because of wider problems within the organisation<sup>430</sup>.

The priority sports in question would receive around 80 per cent of the Sport England budget, which has experienced considerable difficulties in recent times because of a decrease in lottery money following the decline in ticket sales. This had led to a growing feeling within the organisation that it should target its funding at those sports which are capable of achieving success, rather than at the 60 other bodies which have had little to show for their past funding. However, emerging sports such as basketball and table tennis feared that their funding might be cut altogether, which could have a disastrous effect on their development<sup>431</sup>.

The fate of British table tennis appeared to be a particularly cruel one in these circumstances. It is confidently predicted that, if London wins the 2012 Olympic bid, four domestic players could be amongst the medal winners in this sport. This was the result of an eight-year programme organised by the English Table Tennis Association (ETTA) aimed at securing gold for its most talented prospects who are currently amongst the world's leading young players. As part of the cost-cutting measures which the sport has experienced, it has been necessary to close down its residential training centre in Nottingham, which played a key part in the ETTA training programme<sup>432</sup>. Richard Yuile, Chief Executive of ETTA, commented:

***"Our youngsters were making fantastic progress and could have been serious contenders for victory in 2012 and that was our aim. The residential training centre was crucial for the development of table tennis and many of our youngsters had performed well at international level. They lived and trained at the centre but it's a very costly system and we just don't have the funds to continue with it"***

However, even those sports which were featured amongst Sport England's favoured few found that all

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was not as it seemed, and that this favoured status came with strings attached. This was the case with cricket, which was threatened by Sport England with the withdrawal of millions of pounds should the game fail to revolutionise the structure of county cricket by March 2004. Sport England feels that the current structure of county cricket is one of the main reasons why England fare so poorly against top sides such as Australia<sup>433</sup>.

The Sport England list of the favoured sports has also caused some raised eyebrows in various official circles. Exactly what British tennis had done to merit its place amongst the select few is a mystery which baffles many others besides the present writer. This may explain the action taken by Sports Minister Richard Caborn, who early in the New Year issued a warning to the underachieving Lawn Tennis Association to start producing some results or face having their funding withdrawn<sup>434</sup>. It has since been learned that Sport England and the UK Sports Council have launched an investigation into Britain's poor showing at the Athletics World Championships in Paris – even though our representatives of this particular sport have not exactly disgraced themselves at any level over the past two decades<sup>435</sup>.

Swimming is also a sport which is not featured amongst the select few identified by Sport England. This has merely added to the discontent experienced and expressed by the leading UK figures in this medium. One of these vociferous critics has of late been Bill Sweetenham, the Australian who has recently been given the task of revitalising the sport in this country. Mr. Sweetenham, invited to become National Performance Director after Britain left the Olympic pool in Sydney empty-handed at the last Games, minced few words in his devastating critique of the manner in which swimming is treated and funded in this country:

***“Britain (...) is a third-world country when it comes to facilities. The Government doesn't want to hear that but successive governments have not looked after this country well (in regard to swimming) or the young people of this country, by building suitable facilities for everyone, not just elite swimmers.”***<sup>436</sup>

He pointed out that Australia has 47 Olympic-size pools, with which Britain compares very badly, since the number of 50-metre pools open to the public in the country is a mere 19. He criticised the situation whereby British swimmers had to travel to Australia and the US in order to escape the high fees charged by British pools, whose attitude Mr. Sweetenham described as “parasitical”. As is the case with table tennis, this does seem regrettable in the light of the considerable advances made by the sport since Mr. Sweetenham took over. The tougher training programme introduced

by the latter is beginning to reap many benefits, as witness the fact that the UK carried off seven medals at the 2001 World Championships in Japan, and eight at the same event in Barcelona two years later.<sup>437</sup>

Nevertheless, not all is lost for the sports that, rightly or wrongly, consider themselves to have received a raw deal from Sport England. At a certain point, it became known that the cash-dispensing body had a surplus of £12 million as a result of various cost-cutting measures, and that the organisation was inviting governing bodies to apply for extra funding as soon as possible. Sport England officials were concerned that, if the money was left unspent, this could lead to a budget reduction the following year. This may be a somewhat haphazard way of bestowing largesse on the less favoured sport, but it is always better than nothing.

### ***Government (and others) in the dock over rugby union cash...***

All the above could leave the reader and casual observer somewhat bemused at official policy on the subject of sports funding in this country. This impression can only be reinforced when the Government in whose name public funding is expended also displays a good deal of incompetence in this field. Thus it was learned, within a few days of the England team lifting the coveted Rugby Union trophy aloft in Sydney, that millions of pounds pledged by the Government to the sport almost two years ago for the purpose of developing facilities had yet to be handed over to the game's authorities. The latter have expressed particular displeasure at the fact that, although the politicians have been quick to exploit the England team's success, they are doing very little to assist the sport at all levels.

It appears that the Government allocated £9.4 million to Rugby Union under a capital modernisation programme designed to improve new and existing facilities. This money has been earmarked by the Rugby Football Union (RFU) for the construction of clubhouses, floodlights, artificial pitches, resurfacing existing pitches and improving dressing rooms around the country. Rugby was one of a number of sports selected by the Government for this programme, which is known as the Community Club Fund. The total value of the programme is around £60 million. The game's authorities allege that 130 programmes for new and existing pitches had been planned since the summer of 2003, but, almost two years since the Government announced the programme, they had received not a penny, preventing work from commencing<sup>438</sup>.

In fact, there are indications that this kind of mismanagement merely represents the tip of the iceberg. This is certainly the view expressed by former Sports

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Minister and newspaper columnist Kate Hoey, who in early February 2004 related a tale of the hurdles faced by sports clubs which seek out funds aimed at improving facilities. The Cumberland Sports Arena is a project run by a Community Action Group in partnership with the Crewe and Nantwich Council, who own the land. The football pitch drainage system was so defective that the pitches in question badly needed resurfacing with Astroturf. Their application to the Football Foundation for a grant for these much-needed facilities in a deprived area was submitted in May 2002. Eighteen months later, this application was turned down. In the meantime, the voluntary co-ordinator of the scheme, Hamilton Smith, had frequently telephoned the Football Foundation office in order to check progress, and was informed on each occasion that the application was being processed. The Football Foundation representative took an eternity to meet the project leaders, and when he did it was plain to all that he had never even read the proposal. There followed a period of intense confusion, to-ing and fro-ing and lobbying by various authorities, including the local MP Gwyneth Dunwoody. All this ended in the request for funding being turned down on extremely spurious grounds – which could have been given to the project leaders before the 18-month period of futile tail-chasing which ensued<sup>439</sup>.

Ms. Hoey stresses that all this would be easier to stomach if the problem were attributable to a lack of funds; however, this appears far from being the case. The last published report of the Football Foundation for 2001-2 shows that, since it was established in 1999, the Foundation had only succeeded in allocating a total of £25 million in grants, which represents less than half their budget for a single year. They have a staff of 28, and list well-known auditors, solicitors and investment advisers in their annual report, who presumably earn considerable fees. Nor is this the only case of misallocation. In 1999, for example, the New Opportunities Fund, spent only £9 million of the £750 million Lottery money set aside for sports facilities. All this points to a fundamental flaw in the methods of fund allocation which has made for an inefficient and shambolic system<sup>440</sup>.

### *... but pledges to improve sports funding*

Nevertheless, the signs are that the Government may at last feel moved to action in this area. Just before the year 2003 ended, the Chancellor of the Exchequer, Gordon Brown, announced a number of proposals aimed at assisting sport at the grass roots level. The Government intends to increase the amount of taxation which small amateur clubs may reclaim from the Inland Revenue. Dr. Brown is also co-operating with the Culture Secretary, Tessa Jowell, to assist volunteers at sports clubs. The Government is also considering tax breaks for football supporter trusts, which are non-profit

making groups of fans. Andy Burnham MP, Chairman of Supporters Trust Direct, has also announced that he was pushing for measures which would make it easier for financially troubled clubs to be rescued through a mutual route, with help from supporter trusts. The body is also seeking tax breaks for the supporter trusts similar to those available to amateur sports clubs. Tax breaks for local sports organisations have already been introduced. If the latter register as a Community Amateur Sports Club, they are eligible for rebates on tax on income given as donations, as well as on the rent which they receive on property and income from funfairs and similar trading activities<sup>441</sup>.

### *“Let gambling fund sport” suggests academic economics journal*

According to a report in the respected journal Oxford Review on Economic Policy, money from the lucrative gambling industry should be used to fund sport which is no longer able to rely on the Government or on lottery funds. The report suggests that that sporting bodies should negotiate a levy with the bookmakers, since the gambling industry has hitherto benefited enormously from sport, to the tune of millions of pounds, without putting anything back into it. The authors, sports economists Rob Simons and David Forrest, claim that the problems facing many Premiership football clubs as a result of a projected decline in television revenue could also be alleviated by money from the gambling industry.

According to the authors, football betting is the fastest-growing form of gambling in Britain, with around 4 million people betting on the sport every week. This generates around £2 billion for the industry. They claim that the betting industry would be willing to redirect some of the profits it makes because it relies so heavily on sports betting. They go on:

***“Sport should be doing more to get some return from gambling. The way to do this is not legislation because there is always the risk that gamblers could go offshore because gambling is now a global business. There needs to be some kind of partnership between sport and gambling. Sports governing bodies need to reach a deal with bookmakers so that they receive money from them for their funding. The gambling industry needs sport but, so far, sport has not really benefited from gambling and that situation needs to be addressed”***<sup>442</sup>.

The report warns that sport can no longer rely on the national lottery. When the lottery first started in 1994, sport, being identified as one of the five “good causes”, received around £350 million per year. Following the decrease in lottery ticket sales, this figure

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is now down to around £160 million per annum. Whilst funding from central government has increased, this is not sufficient to finance sport and ensure success at the domestic and international levels<sup>443</sup>.

### *Crystal Palace rescued... for the time being*

Yet another sorry example of the manner in which sports funding has gone awry in this country is provided by the long-running Crystal Palace saga. It may be recalled from the previous issue<sup>444</sup> that this most evocative of venues in British athletics had been allowed to degenerate into a shameful condition, part of the reason for this being the decision by Sport England to discontinue the £1.8 million subsidy for this stadium. This was a particularly regrettable development in the light of the London bid for the 2012, since the demise of the Palace would deprive London of its own athletics stadium.

In mid-November, hopes that the venue would be saved for the world of athletics rose when London mayor Ken Livingstone announced a £18 million rescue package. However, for the money to be made available, the local authority which accommodates the stadium, Bromley Council, would have to raise additional funding in order to bring the dilapidated stadium up to standard. The stadium will revert to the council's control once Sport England's 25-year lease expires on 31/3/2004, with Bromley warning that the stadium would have to close the following day because it cannot raise sufficient money<sup>445</sup>.

Several days after this announcement, Mr. Livingstone and the Sports Minister, Richard Caborn, held crisis talks in order to find a deal which would save the stadium. Up to that point, Bromley had only been guaranteed £1.5 million from Sport England towards the maintenance of the track, which was due to stage the flagship London Grand Prix event on 30/7/2004. Mr. Livingstone, however, believed that Sport England and the Government could be persuaded to raise a further £10 million in order to help fund the remainder of the centre's facilities<sup>446</sup>. The next day, the Greater London Authority (GLA) offered to step in and take control of the centre in order to resolve the long-running funding crisis<sup>447</sup>. This move was agreed in principle by the Bromley Council, which met the same day, and a GLA spokesman announced that the practicalities for the proposed transfer would start immediately<sup>448</sup>.

However, all was not as it seemed. It soon transpired that Bromley Council had attached certain strings to their agreement to this takeover, which took the form of a guarantee of funding for the demolition and redevelopment of the 41-year-old sports centre at an estimated cost of at least £30 million. Two months later it was announced that funding body Sport England had agreed to give Crystal Palace an injection of national lottery cash of £5.5 million over the next two years in order to avoid damaging the London 2012 Olympics bid.

This seemed to secure the future of the Palace, at least in the medium term<sup>449</sup>.

The future of the Centre took on a new twist in late February 2004, when it was confirmed that Sport England had agreed to extend its lease on the site for a further two years. This would enable work preparing the stadium for the Grand Prix to start immediately<sup>450</sup>.

### **Sporting bodies and their internal problems**

#### *Callicott leaves UK Sport*

In mid-December 2003, it was learned that a major shake-up within UK Sport, the nation's elite sports agency, had resulted in the departure of its Chief Executive, Richard Callicott. He has been replaced, at least on a temporary basis, by Liz Nicholl, the former Chief Executive of the All England Netball Association, who was the director of performance at UK Sport<sup>451</sup>. The decision was reached following talks with interim chairwoman Sue Campbell, who had been given the brief by the Government to shake up the organisation which oversees the allocation of National Lottery funding each year<sup>452</sup>. This news followed a period in which Mr. Callicott and Michele Verroken, the head of UK Sport's anti-doping programme, had been at odds over the future of drugs testing in Britain.

(On the subject of Ms. Verroken's position in UK Sport, see also the Rio Ferdinand affair, below p.109).

#### *Coe stands down as AAEA President*

In early March 2004 it was learned that Sebastian Coe, the former Olympic middle-distance runner, was to stand down as President of the Amateur Athletics Association of England (AAAE) in protest over its reluctance to accept a programme aimed at modernising the sport. He believes that restructuring is essential if UK Athletics (UKA) is to prove itself worthy of £20 million of promised funding<sup>453</sup>.

#### *League appoints brewery director*

In January 2004, Stewart Regan was appointed as the director of the First Division in the Nationwide League (football). Mr. Regan was previously director of strategic planning at the brewery Coors, and took up his position as part of a major restructuring of the League's management structure. The appointment of a full-time director for the First Division was made at the suggestion of Brian Mawhinney, the League Chairman, and will give its top division a direct voice on the League's executive management team. Mr. Regan, whose background is in sales and marketing, will operate alongside the current operations director, Andy Williamson, and the commercial director, Richard Masters, and all three will report to Mawhinney. The second and third divisions will be represented by the deputy operations director, a new

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post which the League hopes to fill soon<sup>454</sup>.

### *Internal troubles at FA continue*

The various internal difficulties experienced by the governing body of the English game have been well documented in this organ, particularly the saga which accompanied the resignation of its former Chief Executive Adam Crozier<sup>455</sup>. Since then, Mr. Crozier has been replaced by Mark Palios, who seems to have had a steadying influence on the troubled organisation. This does not mean, however, that its internal problems have become a thing of the past.

In late February 2004, the news broke that there was increasing talk among the power-brokers of English football about depriving the FA of many of its most important and high-profile duties. Instead, the Premiership-based voices want the main decisions concerning the England team, the FA Cup and major financial and sponsorship issues made by the Professional Game Board, which was established in December 2002. If the influential group, led by Premier League and Professional Game Board chairman Dave Richards, succeed in bringing about the change, the FA would be left merely as an administrative and regulatory body dealing with disciplinary matters and grassroots football. Mr. Palios is known to be opposed to this restructuring<sup>456</sup>.

Some controversy has also attended some of the recent appointments made at Soho Square. Early in the New Year 2004, Trevor Brooking, the former West Ham and England striker, was appointed as the Association's Director of Football Development. This post aroused much adverse comment from some quarters, notably the League managers' Association (LMA), which raised the objection that Mr. Brooking did not hold the required qualifications to be put in charge of matters such as implementing the recommendations made by governing bodies UEFA and FIFA on the subject of coaching. Mr. Brooking, however, pronounced himself quite relaxed at this criticism, comparing his position to that of a manager of the railways – he/she may not know how to drive a train, but is involved in decisions which affect this activity<sup>457</sup>.

### *Government extends Tote monopoly by seven years (UK)*

It will be recalled from the previous issue<sup>458</sup> that the Government were proposing to privatise one of the more venerable institutions of British racing, i.e. the "Tote", which was initially established in the 1920s by the Government in order to provide more competition for bookmakers. Since then, this plan has been put into action, and in late November the Sports Minister, Richard Caborn, outlined details of the manner in which this proposal was to be carried out.

More particularly, Mr. Caborn provided details of the licence which will be offered to the Racing Trust, which

will buy the Tote from the Government. However, in the process the Tote will retain its monopoly on pool betting for the next seven years before Ladbrokes and other major bookmakers – or indeed anyone else who fancies their chances – can enter the fray. At the conclusion of this seven-year period, there will be a new regulatory regime which will allow such operators to provide pool betting. Mr. Caborn commented:

***"Selling the Tote to the racing Trust is the right way to fulfil the Government's commitment to sell the Tote. We firmly believe it is in the public interest to open up the pool-betting market to effective competition. But we also believe a reasonable period of preparation is necessary in order to safeguard the revenue racing receives from the Tote and its successor. That's why we are granting the Trust a seven-year exclusive market so that it can establish itself in the market. It strikes the right balance between these two priorities and I'm convinced it's the best way forward for racing, the betting industry and punters alike"***<sup>459</sup>

Mr. Caborn added that the necessary legislative proposals would be tabled shortly. The Shadow Racing Trust, which was put in place until such time as the sale is finally completed, responded favourably to the Government's announcement. Lord Lipsey, the Chairman, said that anything less than a seven-year extension would have threatened the Tote's very existence. The Trust, designed to represent all sectors of racing, is to consist of an independent Chairman and one representative from each of the British Horseracing Board (BHB), the Industry Committee, the Jockey Club, the Racecourse Association, the Racehorse Owners Association, the Tote staff and the betting public.

### *BAR racing team could pull out of Britain over tobacco rules*

The fraught relationship between the sport of motor racing and the rules on tobacco advertising have already been well documented in these pages<sup>460</sup>. This issue raised its head again in early February 2004, when David Richards, who manages the BAR racing team, warned that he could move his operation abroad unless the Government acts to end an anomaly in the anti-tobacco laws which penalises British-based Formula One teams. Mr. Richards fears that his team could lose millions of pounds in sponsorship, which could result in job cuts, under plans to end cigarette advertising in Formula One from 31/7/2005. BAR, along with McLaren and Jordan, would be banned from advertising tobacco at any race, but foreign-based rivals such as Renault and Ferrari could continue to carry cigarette sponsorship<sup>461</sup>.

Teams had accepted that all tobacco advertising would

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be removed from Formula One racing as from the end of the 2006 season, and had negotiated contracts with their sponsors on that basis. However, that agreement was undermined in 2003 when the EU decided to introduce the ban as from 31/7/2005<sup>462</sup>. Max Moseley, the president of the FIA, which is the world governing body in the sport, had already warned that this decision could lead teams to continue advertising tobacco by moving outside Europe. But even here, British teams would be banned from advertising under the proposed British legislation. Mr. Richards explains:

***“Ferrari are the best-financed team in F1, they are based in Italy and have an American cigarette sponsor (Marlborough) and so they will be able to advertise in places like China. But because we are a British team we will be covered by the British legislation and so we will not be able to run tobacco advertising in China. It’s a ludicrous situation. The UK Government should not countenance it and it’s down to them to do something about it. But I really do not know how this is going to work out. It could have serious consequences because it will affect our planned income stream from 2005. We would have to consider cutbacks in the team or look at other alternatives like moving the team abroad. You couldn’t move the actual structure but you could move parts of the team abroad.”***<sup>463</sup>

British American Tobacco have invested at least £300 million into BAR since the team was established in 1998, and losing that sponsorship would represent a serious blow to its existence. However, teams would only move from Britain as a last resort, and this is unlikely to be a consideration for McLaren<sup>464</sup>.

### ***Premier League rejects cash share plea by MPs (UK)***

The conclusions drawn up by the All Party Parliamentary Football Group as regards football agents have already been dealt with earlier (see above, p.47). The same report also had wider concerns about the game, more particularly the widening gulf between the top flight professional clubs and the rest. This is why it recommended that the Premier League should redistribute an extra 5 per cent of its broadcasting revenue to the Football League and Nationwide Conference, in addition to the 5 per cent which it already allocates. The Parliamentary group argues that giving extra cash to the clubs in the lower leagues would improve competitiveness within the game and help to close the gap between the League and the Premiership. This extra 5 per cent would amount to around £30 million<sup>465</sup>.

This proposal was, predictably enough, rejected by the

Premier League. Its Chief Executive, Richard Scudamore, claimed that his organisation already redistributed sufficient amounts of money from its television deal, and that, in this respect, English football was “the envy of Europe”. He also asserted that there was a good deal of indirect redistribution happening through the FA Cup and the Football League Cup. All in all, the Premiership claims to redistribute about £68 million to Football League clubs (which includes, however, the “parachute payments” of £6 million each to recently relegated clubs, which continue for two seasons unless the club returns to the top flight within that period).

The Parliamentary group’s report also made other recommendations aimed at closing the financial gap between the top and the rest. Thus it advocates that the Premier League should change the manner in which it distributes television money amongst its 20 clubs, increasing the equally shared amount from 50 to 60 per cent. It further urges Premier League and Football League clubs to consider gate sharing, and that the former should examine the prospect of salary caps<sup>466</sup>.

There was inevitably some tut-tutting at the Premiership’s refusal to countenance the prospect of additional revenue-sharing, but some media commentators pointed out that this reaction on the part of football’s top flight could hardly rank as a world-shattering surprise. After all, the very reason why the First Division clubs broke away from the Football League in the first place was because they wanted a greater share of broadcasting revenues. Thus increasing the share of television revenue allocated to the lower clubs would strike at the very heart of the Premiership’s *raison d’être*<sup>467</sup>.

Other proposals tabled by the Group concerned the manner in which football clubs were run, and included the introduction of a “fit and proper” person test for anyone wishing to operate a club or become a director, and a recommendation that each club should appoint a director responsible for liaising with fans. In addition, the Independent Football Commission should be allowed to receive complaints from fans and be funded by the Government<sup>468</sup>.

### ***British Government let themselves down over handling of Rugby World Cup***

It has become something of a truism to claim the politicians are only interested in sport insofar as it allows them to bask in the reflected glory of any success reaped by the country’s athletic representatives, and from this point of view, the current British government have very much been found to be wanting in every respect, as readers of this journal will be all too aware. The period under review has brought further evidence of this regrettable fact, particularly in relation to official reactions to the England team’s

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success in the Rugby Union World Cup.

First of all, it emerged that the Minister for Sport, Richard Caborn, had been ordered by government whips to attend the vote on foundation hospitals in the House of Commons, and thus fly back from Australia where he had intended to witness the final between England and the host nation. This may have been a move which was prompted – if not justified – by the need to have every available MP present in the House for the crucial vote, which had called forth a Labour backbench rebellion. However, confusion descended on this affair when it was learned that Mr. Caborn's place at the Sydney showdown would be taken by Culture secretary Tessa Jowell, whose vote as an MP is of equal weight to that of Mr. Caborn. In addition, the Sports Minister had hoped to use the time before the final in order to lobby for London's bid for the 2012 Olympics. It is hardly surprising, then that, when asked about the Sport's Minister's reaction to this decision by a television report, a spokesman replied that he could not tell him, as it would be broadcast before the watershed<sup>469</sup>.

Further embarrassment for the Government followed within a few weeks of England's win, when Mr. Caborn admitted in a Parliamentary reply that, since taking office in 2001, he had attended a total of eight Rugby matches, six of which were Rugby League. Only one match had involved the England team – i.e. the World Cup semi-final against France. Culture Secretary Tessa Jowell, for her part, had managed a grand total of two rugby matches since taking office. This may have caused some embarrassment when the successful England team met the instant New Labour rugby converts at the victory reception...<sup>470</sup>

### ***Casinos become riskier proposition for football and racing after slot machine curbs***

One of the more controversial measures to have been put to Parliament by the current Government in recent months is the Gambling Bill, which, once it reaches the statute book, will make it easier to start the operation of casinos. Many professional sports venues were initially expected to take advantage of such legislation by opening casinos on their premises. Indeed, Premiership club Newcastle United initiated the process by agreeing to a plan with American company MGM Mirage to build a casino on land adjacent to St. James's Park<sup>471</sup>.

However, the clubs' ardour for this new-found source of wealth may be cooled by the various restrictions which the Government intends to place on the use of slot machines. This reflects growing concern over gambling addiction problems caused by these devices. Research has shown that slot machines not only act as a main draw for casinos, but also cause the most addiction problems. This has led the Government to insert a clause

in the Bill to the effect that the number of slot machines operated in casinos shall be limited to three for every gaming table the casino has. There will also be a ban on linking slot machines to casinos which form part of a chain across the country, as is common in the US and Australia, which allow for much larger jackpots.<sup>472</sup>

### ***New rules on disabled access could spell ruin for clubs***

In mid-November 2003, it was learned that amateur sports clubs could face financial ruin because of new Government rules designed to give disabled people access to sporting facilities. Sports club, many of whose finances are already in a parlous state, have been warned that they are expected to build special facilities such as ramps and showers to accommodate disabled users, but that they will not be provided with any cash in order to carry out such alterations<sup>473</sup>.

### ***South Korea lifts sumo wrestling ban***

South Korea is a country which was occupied as a colony by Japan between 1910 and 1945. When this occupation ended, all Japanese cultural practices were banned, including sumo wrestling. However, these restrictions have been gradually lifted over the years, and this year the ban on sumo wrestling was officially abandoned. In mid-February 2004, thousands of spectators gathered at the Janggyung stadium in Seoul to witness the first official contest in this medium since Japanese colonisation ended<sup>474</sup>.

### ***French authorities decide to refurbish historic Paris stadium***

One of the most venerable sports grounds in Europe is undoubtedly the Stade de Colombes in Paris, which played host to a number of memorable sporting occasions such as the 1924 "Chariots of Fire" Olympics and various Five Nations rugby internationals. The stadium lost its status as a top venue when the Parc des Princes opened in 1972, and seemed to lose its purpose when the famous Stade de France opened its doors for the 1998 Football World Cup. However, in early January 2004, the provincial authorities of Hauts-de-Seine decided to save the stadium from decay and demolition by raising €250 million to rebuild it<sup>475</sup>.

## Public health and safety issues

### **MPs criticise sporting stars for endorsement of junk food**

Previous issues of this journal have reported on the concern currently felt in official circles and beyond that this country's health is declining because of obesity and

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the lack of exercise which seems to afflict the population, and particularly its younger members. On the subject of obesity, it is no secret that commercial advertising has a good deal to answer for in terms of the manner in which they encourage the population to consume food of very little nutritional value, generally known as “junk food”.

In mid-November 2003, MPs compelled a leading advertising agency to issue an apology for having breached the industry’s own guidelines by encouraging children to pester their parents into buying them fatty foodstuffs. The admission came during an investigation by the Select Committee on Health into the increasing health and economic costs of obesity. Labour MPs on the relevant Committee are already making plans to propose a ban on junk food advertising on television. In their report, they charged the advertising industry with using sporting icons such as David Beckham and Gary Lineker to promote fattening food to impressionable children. During the hearing, they challenged a private media brief produced by the Walkers Crisps firm. This called for children to be led to use their pester power to persuade parents to buy them “Wotsits” crisps<sup>476</sup>.

The leading advertisers, for their part, insisted that their advertisements were not aimed at children and did not increase the overall size of an already mature food market. They opposed a ban on advertising to children because there was no evidence that it would reduce consumption<sup>477</sup>.

### **The Observer’s “Fit for the Future” campaign continues (UK)**

The concern over the nation’s general health and standard of fitness has also reached the media, to the extent that some of its sections appear to be making a serious effort at involvement in measures to rectify this state of affairs. As was highlighted in the previous issue of this Journal<sup>478</sup>, The Observer, a prominent broadsheet Sunday newspaper, has taken up the challenge and organised a campaign aimed at improving the nation’s fitness. This campaign has continued during the period under review, and has produced some interesting findings. Thus in early December 2003, it was found that two-thirds of state school teachers believed that their sports facilities had deteriorated dramatically over the previous five years, despite an unprecedented investment in encouraging pupils to become more active. Just one in ten heads of physical education believed that the health of their pupils was “good”, with none describing the activity levels displayed by their students as very good, underlining the serious decline in physical play indulged in by children<sup>479</sup>.

These and other findings gave added urgency to the newspaper’s campaign, and a few weeks later it was

learned that Olympic medal-winning athlete Roger Black was to front a Government campaign to encourage sluggish Brits off their sofas and into the exercise routine. The campaign focused on nine pilot projects which offered everything from free swimming lessons for children outside school hours to organising walks for the over-fifties. The object is to make gentle but regular exercise a habit. Ministers will study the outcomes, together with Sport England, in order to find the most effective ways of encouraging Britons to become more actively involved in sport<sup>480</sup>.

### **Best’s continued drinking is “putting off” donors**

The battles which former Manchester United and Northern Ireland international George Best has waged with his drink problem (with varying degrees of success) are well documented in the various media (and, yet again, in this Journal – see above, p.31). This struggle has also involved major surgery, and in July 2002 Mr. Best was given a liver transplant in somewhat controversial circumstances, with many people believing that his was not the most deserving case for such treatment. These critics appeared to have been vindicated by subsequent events, as was recorded in recent issues of this Journal<sup>481</sup>.

These escapades have led many people to harbour fears about the effects this may have on potential donors. Thus in mid-December 2003, a liver transplant specialist who operated on Brian Clough, the former Derby County and Nottingham Forest football manager, criticised Mr. Best for making people think twice before offering their organs for transplants. Dr. Derek Manas, a liver consultant at the Freeman Hospital, Newcastle-upon-Tyne, where Mr. Clough had his transplant, said that Best’s binge drinking was deterring people from organ donation. He pointed out that consent for transplants from relatives had dropped from 70 per cent to 45 per cent. He attributed this at least in part to the fact that Mr. Best had not shown himself to be the most inspiring advertisement for this practice<sup>482</sup>.

## Nationality, visas, immigration and related issues

### **Southampton plea on foreign player system fails – but Manchester United “bend the rules” (UK)**

The influx of foreign footballers in the top echelons of the game in this country has undoubtedly had many beneficial effects in terms of spectator appeal, but has also been criticised because of the discouraging effect it may have on local talent. This is why, although clubs

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may have as many EU players on their books as they wish, there are restrictions on other overseas players. It may be recalled from a previous issue<sup>483</sup> that Home Office rules require that a non-EU footballer must have participated in 70 per cent of full internationals for his country over the previous two years before being issued with a work permit. The football Premiership, led by Southampton FC, have for some time now been seeking a relaxation in these rules, by replacing them with a voluntary quota system. However, in mid-December it was learned that the Government had rejected this proposal – a full 18 months after it had been tabled<sup>484</sup>.

This outcome, as well as the time it took the Home Office to reach it, was naturally extremely frustrating for a club such as Southampton FC, which most informed observers qualify as a model for the manner in which a top club should be run. However, to make matters worse, it transpired that the Home Office rules are not being applied uniformly, and that Manchester United succeeded in circumventing them with their acquisition of US goalkeeper Tim Howard, since he had not played the required number of internationals for his country. Under the current rules, clubs can appeal to a special panel for players who do not fulfil this requirement. This panel is made up of representatives of the Football association (FA), the Professional Footballers' Association (PFA), the league in which the club plays and three independent experts. It is by lodging such an appeal that Manchester United succeeded in obtaining the permit for Mr. Howard. According to a leading newspaper, there is a feeling abroad amongst the less glamorous clubs of that only clubs of the calibre of Manchester United can succeed in beating the system<sup>485</sup>.

### 1,000 per cent rise in cost of work permits for footballers planned

In mid-January 2004, it was learned that footballers may become the costliest overseas employees in this country under proposals which would hit clubs with a 1,000 per cent rise in the cost of work permits for foreign players. Football has been singled out in a consultation document published by the Home Office, which would see the price of applying for a permit rise from £95 to £1,000. Fees for non-footballers would rise to £180. At present, all non-EU overseas players are required to apply for such permits, and currently clubs pay the same fees as employers in other fields. However, if the proposed rise is approved, clubs will be required to pay the increased charge in order to ensure that players such as Dong Fangzhou, the Chinese striker who joined Manchester United early this year, can be legally employed in the UK<sup>486</sup>.

According to the Home Office, the increase is due to the cost of processing applications. Apparently the

current charge of £95 does not cover the cost of the process, so the taxpayer is left to foot the bill – under the proposed increase it is the employer who will bear the entire cost of the process. The reason why the increase is greater for football than for other professions is the possibility for clubs to appeal in respect of players who do not meet the requirement that they have completed the requisite number of international fixtures for their country, as is explained in the previous section. During the 2002-3 season, clubs applied for 61 work permits and 14 cases went to appeal. This number is set to increase considerably during the current season. A Premier League spokesman commented that it would make a submission to the relevant consultation process<sup>487</sup>.

### Change in visa rules could affect English rugby

In January 2004, the Home Office confirmed that changes introduced the previous September to the so-called Working Holiday visas granted to Commonwealth citizens also apply to professional sporting performers. This means that, henceforth, Australian or New Zealand rugby players between the ages of 18 and 30, who does not have a European Union passport, can follow their chosen career for the full two-year term of the visa they obtain for staying in Britain. In the past, the visa restricted individuals to working for 52 of the 104 weeks involved, and not on their line of work. The new system opens up a new vista for players who would not otherwise meet the more stringent work permit criteria, and could have far-reaching effects for sports such as Rugby Union<sup>488</sup>.

### Yamile Aldama chose Sudanese citizenship "out of desperation"

In early March 2004, it was learned that the Cuban-born triple jumper Yamile Aldama chose to accept Sudanese citizenship out of desperation to compete in a major championship. Ms. Aldama topped the world rankings in her medium in 2003<sup>489</sup>.

### Other issues

#### Sporting honours in New Year list as expected – but not without controversy (UK)

The annual ritual whereby the New Year is accompanied by the bestowal of various civic honours was duly completed in 2004, and as usual the sporting world was well represented at all levels. Unsurprisingly, the entire England rugby union side, which had just emerged victorious from the World Cup tournament, were honoured and their coach Clive Woodward knighted<sup>490</sup>. Other major sporting names to have been honoured

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included Martin O'Neill, the successful manager of Glasgow Celtic, who was awarded the OBE, Tessa Sanderson, former Olympic javelin medallist, who obtained a CBE, and lone yachtswoman Emma Richards, who was honoured with an MBE. Katy Sexton, the backstroke swimmer who became the first British female to win an individual gold medal at the World Championships in July 2003, was awarded an MBE<sup>491</sup>.

Less noted, but just as deserved, was the award of an MBE to former boxer Michael Watson, who twelve years ago became seriously brain-damaged as a result of a fight with Chris Eubank at White Hart Lane. Since then, Mr. Watson has succeeded in regaining not only his mental faculties, but has also become able to move without the assistance of a wheelchair. This fact alone is regarded as a minor miracle by leading neurosurgeons; that Mr. Watson should also be able to complete the London Marathon, as he did in 2003, caused even greater consternation<sup>492</sup>.

Another sportsman to be awarded an OBE was Tim Henman, the current No 1 of British tennis. Although he has so far failed to win a major championship, Mr. Henman has come close on several occasions, and certainly more so than virtually any other British tennis player of recent date. However, there was a whiff of controversy about this nomination when a leaked document seemed to indicate that his name had only been included "to add interest" to the list. Mr. Henman reacted to this news with characteristic politeness, commenting only that he would receive his honour with a "massive amount of pride"<sup>493</sup>.

Some eyebrows in the upper reaches of the Rugby Football Union also experienced an upward twist at the award of an OBE to Francis Baron, the RFU Chief Executive, as a result of England's World Cup triumph. This followed concerns that Mr. Baron may have put forward the names on the long Twickenham honours list himself. This was denied by an RFU spokesman, who commented that the Rugby awards were instigated from within the Government, and that the Chief Executive's award was on behalf of the entire RFU staff, which Mr. Baron has expressly acknowledged<sup>494</sup>.

### **PCC rejects England international complaint against The People**<sup>495</sup>

In August 2003, the Sunday tabloid *The People* published an article headlined "England ace's mum is hooker" and "England ace's mum is secret £60 hooker". This related to the England footballer Jermaine Pennant, who accordingly lodged a complaint with the Press Complaints Commission (PCC) through his solicitors, Huggins & Lewis Foskett, claiming that this article was misleading, in breach of Clause 1 (Accuracy) of the PCC Code.

The article had reported how Colleen Palmer, the "long term partner" of the England footballer's father, was a prostitute. Mr. Pennant's solicitors objected to the use of the term "mum" (both in the headlines and in the first paragraph of the article) to describe a woman who was not Mr. Pennant's biological mother but merely his father's former girlfriend. This was particularly serious, and particularly misleading, since Mr. Pennant's real mother, as was reported in the article, had died in February of that year. The solicitors considered that the article was a deliberately misleading attempt to sell newspapers.

The newspaper, for its part, did not accept that the article was in any way misleading. It highlighted particularly two statements, featured in the first and penultimate columns of the article respectively, that Ms. Palmer had raised Mr. Pennant only from the age of six, and that his "real mum" had unfortunately died of cancer. It considered that no reader of the piece as a whole – bearing in mind that all headlines must be read in conjunction with the attached article – could be in doubt that Ms. Palmer was not Mr. Pennant's biological mother. In any case, the newspaper had also indicated that the term "mum" was accepted shorthand for the person fulfilling a maternal role and submitted evidence to the Commission (in the form of photographs of Mr. Pennant and Ms. Palmer) that the latter had played such a role in the upbringing of Mr. Pennant. In spite of this, the newspaper expressed regret for having caused any additional distress to the complainant in the light of his biological mother's death.

The Commission, whilst expressing its sympathy to the complainant for the loss of his mother, and fully acknowledging his understandable reaction to this article – was bound to assess the complaint under the terms of the Code. It emphasised that, in reaching a decision, it must always have regard to an article in its entirety before coming to a decision as to its accuracy and, particularly, that headlines must be considered in conjunction with the attached text.

It was in this context that the PCC noted that, although Ms. Palmer was described as the complainant's "mum" in both headlines and in the first paragraph of the article, a number of other references made clear in the text that she was not the complainant's biological mother. The piece, when read as a whole, was not therefore significantly distorted or misleading, and the Commission concluded that there had been no breach of clause 1 of the Code. The Commission did, however, regret the newspaper's continued and unqualified use of the term "mum" in the first paragraph of the article, which, in its view, represented an error of judgment, even if it did not represent a breach of the Code.

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## Planning law

### Recent sports-related Planning Inspector decisions

In his decision concerning West Berks Council and West Berks Indoor Bowls Club<sup>496</sup>, the Planning Inspector was faced with an application for the construction of an indoor bowling club building. The Inspector rejected the application because the proposal conflicted with national and local policies designed to protect the countryside, would have a bad effect in bridging the important gap between Newbury and Greenham, and reduce opportunities for natural and passing surveillance.

In the case of Newcastle-upon-Tyne City Council and Newcastle Rugby Football Club<sup>497</sup>, the Inspector had to take a decision on an application to build a new sports stadium and rugby academy with related development. The applicants, i.e. Rugby Premiership side Newcastle RFC, put forward a number of very strong arguments in favour of the proposals, which were supported and supplemented by the City Council at the relevant hearing. The Inspector took the view, with which the Secretary of State concurred, that, with appropriate controls, the proposals would not cause material harm, and that had to be balanced against the very special circumstances put forward. The proposal was therefore approved subject to conditions.

### Planning proposals for various football clubs – an update (UK)

#### *Arsenal FC*

When this column last reported on the plans entertained by London's leading Premiership club to move to a new stadium at Ashburton Grove, progress was said to be satisfactory, with the plan having even received the blessing of London mayor Ken Livingstone<sup>498</sup>. Initially, the good tidings continued to flow, when the Government stated that it intended to approve Compulsory Purchase Orders (CPOs) for two properties on the site, which would give the club vacant possession and open the way for the banks to release essential funding<sup>499</sup>. Earlier, Arsenal's lawyers had defeated an attempt by Granada to pull the plug on a £30 million investment which underpins the stadium development project. Granada are attempting to strip back non-core business commitments as it prepares to merge with media industry rivals Carlton, and as part of this it sought a way out of its contract with Arsenal, which is part of a deal with various financial institutions to provide £265 million towards the project. Any such plans to renege on the deal were defeated when it was forced to issue a list of particulars to shareholders about the proposed merger with Carlton, which included a statement about its contractual

commitment to provide the £30 million in question<sup>500</sup>.

However, the clouds of opposition once again hove into view in late February 2004. The businesses and community groups which were contesting the proposed new stadium pronounced themselves taken aback at the club's announcement that it had secured the required £260 million loans which would enable it to go ahead with the project, despite considerable doubts still lingering over a significant portion of the proposal. Owners of some of the businesses on Queensland Road, which adjoins the stadium site, have pledged themselves to appeal to the High Court if, as expected, the Deputy Prime Minister approves the Compulsory Purchase Orders made against them. This could delay for a year or so the club's ability to buy up the businesses, demolish them and redevelop the site<sup>501</sup>.

#### *Tottenham Hotspur*

It has been mentioned before in these columns that Arsenal's North London rivals are increasingly disenchanted with their current accommodation at White Hart Lane, not least because of the poor public transport links of the adjoining area. For a while, the prospect of sharing with Arsenal the new Wembley stadium after its completion was mooted but subsequently dropped. However, the example set by Manchester City has caused new thinking in the Spurs boardroom. It will be recalled that, last year, Manchester City moved to the stadium which had hosted the main events of the 2002 Commonwealth Games, thus considerably increasing its crowd capacity. This has caused the authorities at White Hart Lane to consider a similar possibility should London win the bid for the 2012 Olympic Games, since this will yield a stadium at nearby Stratford (see above, p.59) which could similarly be taken into use after the Games had finished<sup>502</sup>.

#### *Heart of Midlothian*

In early February 2004, it was learned that the Edinburgh club are to sell their 118-year-old ground at Tynecastle and move to the 67,000-capacity Murrayfield stadium, hitherto the preserve of Scottish rugby union, in a ground-sharing deal which will commence next season. The club have apparently agreed a three-year lease with the Scottish Rugby Union in the hope of staving off administration<sup>503</sup>.

[See also under the heading "Company law", below p.93]

#### *Fulham FC*

This is also a long-running saga of a London club which has experienced considerable difficulties with its accommodation of late. When this Journal last went to press<sup>504</sup>, it was reported that, following the many

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shenanigans which surrounded the future of the club's ancestral ground at Craven Cottage, Fulham were to continue playing at Loftus Road for the remainder of the 2003-4 season, but return to the Cottage for the next. Since then, it has been confirmed that local council officials have approved the club's £5 million scheme to bring their ground up to Premiership standards. The Chairman of the club, Mohammed Al Fayed, has agreed to finance this low-cost refurbishment after abandoning a much more grandiose scheme for a 30,000 state-of-the-art ground, because of its wildly escalating costs. Builders will now move into Craven Cottage and bolt seats onto terraces, add roofing and install new floodlights, giving Fulham's traditional home a 22,000 all-seater capacity by August 2004<sup>505</sup>.

### *Wimbledon FC*

The sad decline of this club, whose star once shone so bright in the Premiership only a few seasons ago, has continued apace even after its move to Milton Keynes, reported in the previous issue<sup>506</sup>, since at the time of writing it looked highly likely that the "Dons" would soon be languishing in the Second Division of the Nationwide League. At present, they are accommodated in the National Hockey Stadium, but the club's authorities have set their sights on the construction of a new purpose-built stadium. In mid-December, they obtained planning permission for this project, which will involve the building of a 30,000-capacity stadium at Denbigh North, on the town's outskirts. The 62-acre complex will include a hotel, conference centre, office space and retail development<sup>507</sup>. (All this is, naturally, assuming that there will still be a club to build a stadium for, since at the time of writing Wimbledon are languishing in administration – see below, p.92).

### *Everton FC*

It will be recalled from a previous issue<sup>508</sup> that the Merseysiders had been unsuccessful in their attempt to move to a new home in the King's Dock area of Liverpool, since planning permission had been refused by Liverpool City Council. However, this has not removed the desire felt by the club's authorities to seek out alternative accommodation, and in mid-December 2003, the chairman, Sir Philip Carter, admitted at the club's AGM that they would be prepared to share a new stadium with Liverpool FC if the city council offered to fund construction as part of the European Capital of Culture celebrations in 2008<sup>509</sup>. No further news was available at the time of writing

### **Rugby Union also has its accommodation problems...**

#### *Wasps*

Early in the New Year, it was learned that the current Premiership champions had entered into negotiations with Nationwide League football club Wycombe Wanderers over the possibility of a 10-year ground-sharing arrangement at the Causeway Stadium, which has been their home for the past two years. The club, who had to move out of Loftus Road after Fulham FC left Craven Cottage (see above, p.71), were expected to inform Wycombe soon whether they intended to continue their occupancy of the ground. There is one problem however, in that Wasps are seeking a larger ground than the 10,000-capacity Wycombe ground can offer. They may sign a one-year deal in order to buy time and look for a larger ground<sup>510</sup>.

#### *Gloucester RFC*

The successful West Country side have also been considering their accommodation recently. Their initial plan was to redevelop their Kingsholm ground during the summer of 2004. However, in late December 2003 it was learned that the club had deferred the three-stage plan, which was launched the previous September. The first stage was to raise £2 million by the end of 2003 through an independent trust, called the Kingsholm Supporters' Mutual (KSM). Now that the plans have been shelved, these supporters have been offered a refund, although Tom Walkinshaw, the club chairman, hopes to establish by February 2004 whether the ground, which is one of the most famous rugby venues in this country, can still form part of Gloucester's future<sup>511</sup>.

#### *Farnham RFC*

That the Government have attempted to bask in some of the reflected glory of England's World Cup victory in Australia is only to be expected, and has already been commented upon earlier. However, it looks as though New Labour's new-found love for the game is about to be put to the test, with environment minister John Prescott facing an adjudication on a planning application emanating from this club, which is the one where England's fly-half Jonny Wilkinson learned to play the game. Officials at the club have been informed privately that their planning application for a new ground is likely to be rejected by the local authority, which is unhappy at the club's association with a private company which has been designed to fund the work<sup>512</sup>.

According to the plans, the David Lloyd Leisure group will develop a health centre on the site, which will include outdoor and indoor tennis courts, a swimming pool and a gym. In return for their assistance

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in pushing through the project, the Farnham club can expect a new two-storey, well-appointed clubhouse, four pitches, a floodlit training area and a cricket square. If their application is rejected, the club intend to appeal to Mr. Prescott's Department of the Environment. This will place the Government in an awkward position, particularly when the club's most famous son will undoubtedly add his voice to those calling for planning permission to be granted<sup>513</sup>.

### *Leicester RFC*

The Midlands club have recently tabled proposals to refurbish their ground at Welford Road to the tune of £20 million, potentially increasing their capacity to over 20,000<sup>514</sup>. No further details of this project were available at the time of writing.

### Judicial Review (other than planning decisions)

#### **French athletics federation unlawfully restricted members' freedom to contract. French Supreme Administrative Court decision**<sup>515</sup>

In the case under review, the French Athletics Federation had obliged its members to advance, during the entire athletics season, a sum which corresponded to the rates charged under insurance contracts which the federation sought to persuade its members to sign. This sum could only be reclaimed after repaying to the Federation the costs of sending their application by means of registered post. The Federation sought to justify this practice on the grounds that it was required under the conditions attached to the licence which was required to take part in official athletics competitions. This was ruled by the Supreme Administrative Court to be a restriction on the athletes' freedom to contract, which is guaranteed by Articles 37 and 38 of the Law on Sport of 16/7/1984, because the manner in which the Federation had acted took the form of a deterrent, even though it had not actually imposed the insurance contracts on its affiliated members. The Court therefore set aside the Federation's decision to operate this procedure.

The Court also decided that, since the conditions for the issuing of the licences necessary to take part in athletics competitions were a power which the Federation exercised by way of delegation by the relevant Minister, any dispute relating to this matter fell within the jurisdiction of the administrative courts.

Compensation awarded against mayor who failed to take the necessary measures to restrict access to municipal sports ground. French Supreme Administrative Court decision<sup>516</sup>

In the case under review, someone living near a sporting ground had claimed damages from the municipality of Moissy-Cramayel in respect of negligence committed by its mayor, who had failed to take the necessary measures to restrict access to the sports ground in question in order to reduce the noise nuisance caused by those using the ground. The Administrative Court of Melun had dismissed this application. The citizen appealed against this decision to the Administrative Appeals Court (Cour administrative d'appel) of Paris, which set aside the previous decision and awarded her the sum of FF50,000 by way of damages. The municipality applied for a review of this decision by the Supreme Administrative Court (Conseil d'Etat).

The Supreme Court found that, where the Administrative Appeals Court had ruled that the mayor in question, by failing to use his policing powers to issue a decree restricting access to the sports ground and aimed at reducing the noise emanating from it, had committed negligence which was capable of engaging the municipality's tort liability, without describing this as serious negligence (*faute lourde*), that Court had not committed any error of law. In the light of this, the appeals court was not bound to respond to all the arguments put forward by the municipality seeking to demonstrate the absence of negligence on the mayor's part and had therefore not committed an error of law by ruling as it did. The Court therefore dismissed the application and confirmed the appeal court's decision.

#### **Judicial review of commons registration case allowed. UK House of Lords decision**<sup>517</sup>

In a previous issue of this journal<sup>518</sup>, the case was reported of a number of residents of Sunderland who had applied to their local city council, as the registration authority under the Commons Registration Act 1965, to register an area of land near the town centre as a town or village green. The land, known as the "sports arena", was owned by the Council, which planned to sell the site for the development of a college of education. The sports arena had been used by the general public for recreational purposes since at least 1977, and a hard surface pitch had been laid in 1979. The Council had constructed wooden seats around the perimeter and had kept the grass mown.

Section 22(1) of the 1965 Act defines a town or village green as land on which the inhabitants of the locality had indulged in lawful sports and pastimes as of right for no fewer than 20 years. The council refused the application for registration on the grounds that the use of the sports arena had not been "as of right" but pursuant to an implied authorisation given by the landlord. In so ruling, the Council relied on their conduct in mowing the grass and providing benches, which,

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they argued, demonstrated that they had encouraged the general public to use the land, from which their authorisation to do so could be implied.

The residents' application for judicial review of the Council's decision had been dismissed by a High Court judge, and this decision was upheld on appeal. The Court of Appeal ruled that (a) the Council had been entitled to find, on the facts, that there was such implied authorisation, and (b) such a finding could defeat a claim that land had been used "as of right". The appellant applied to the House of Lords.

The law Lords allowed the appeal. There was no objection in principle to the implication of a licence where the facts warranted such an implication. To deny that possibility would be unduly old-fashioned, formalistic and restrictive. A landowner might so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land was pursuant to his permission. That might be done, for example, by excluding the inhabitants when the landowner wished to use the land for his own purposes, or by excluding the inhabitants on occasional days. In this way, the landowner asserted his right to exclude, and so made plain that the inhabitants' use on other occasions occurred because he did not choose on those occasions to exercise his right to exclude, therefore permitting such use. However, authority establishes that a licence to use land could not be implied from the inaction of a landowner with knowledge of the use to which the land was being put.

In the instant case, the council's conduct in mowing the grass and providing benches was equivocal: if the land were registered as a town or village green, so enabling the public to resort to it in the exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities, thus encouraging public use of this valuable local amenity. The self-same conduct could not be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence. Qualifying user having been found, the material before the council did not support a conclusion that such user had been otherwise than of right within the meaning of section 22 of the 1965 Act. Accordingly, the appellant was entitled to have the land registered.

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### Other issues

[None]

# 7. Property Law

## Land law

### **Ownership condition which removes whole power of alienation of land containing golf course is ruled void. Australian court decision**<sup>519</sup>

In the case under review, the claimant was the registered proprietor of land once owned by the family interests of the defendant trust. The land was developed in large part as a golf course. In order to facilitate development of the course, the original owner leased the land to the claimant, with provision made for later purchase by the lessee. That purchase eventuated and the claimant took an interest in fee simple in the land. However, that interest was subject to an encumbrance. The encumbrance provided, in part, that if the claimant determined at a later time to sell the land, it was first to offer to sell it to the Nitschke interests – persons being descendants of the original owner, but now represented by the defendant. The encumbrance also provided for the manner in which the Nitschke interests were to be notified of the claimant's intention to sell the land. The matter came before the South Australia Supreme Court in connection with the terms of the encumbrance.

The court held that (a) the function of a court of construction is to ascertain what the parties meant by the words that they used in the relevant context and to attempt to avoid an absurd or inconsistent end result; (b) the court will generally attempt to uphold commercial documents despite a lack of clarity, provided that a common sense approach to them can resolve apparent uncertainties relating to performance. In the present instance, the drafting of the document was so unworkable that it was not possible to resolve the meaning of the encumbrance by construction, and it was not the function of the court to redraft the document for the parties. The instrument could not be rendered unworkable and was void for uncertainty; (c) a condition imposed upon a devise of real estate – or a contractual covenant – which has the effect of substantially taking away the whole power of alienation is void.

## Intellectual property law

### **“Wilkinson cradle” could become trade mark**

The famous gesture made by England fly-half Jonny Wilkinson as he prepares to take a place kick has become a symbol of England's success in carrying off the World Cup in Sydney in November 2003. So famous has this gesture become, in fact, that most commentators believe that Mr. Wilkinson will soon apply to the Patent Office to have it registered as a

trade mark. In so doing, he would be responding to fears that his gesture, possibly worth millions as an advertising concept, could be exploited by advertisers and marketing firms without his authorisation.

When the Patent Office was asked by a leading newspaper to comment on this possibility shortly after the Sydney showdown<sup>520</sup>, a spokesman commented that, although the procedure was unusual, it had been used before. The Derbyshire Building Society had been the first company in Britain to register a gesture as a trade mark, which was an actor tapping his nose in a knowing manner, as their own. For a movement to become registered as a trademark, the Patent office must receive a detailed description, and will require an image of the gesture for their files.

Mr. Wilkinson had not yet made an application at the time of writing.

### **Thorpedo wins trade mark court battle**<sup>521</sup>

In a recent Australian court decision, the Olympic swimming gold medallist Ian Thorpe won a four-year court battle against a little-known company called “Torpedoes Sportswear” to register his nickname “Thorpedo” as a trade mark.

Torpedoes Sportswear was the owner of the registered trade marks “PARADISE LEGENDS TORPEDOES” and a “T device mark” in respect of goods in class 25. The company appointed a voluntary administrator in August 2001 and is subject to a Deed of Company Arrangement. Its sole unrealised assets to be sold are the two marks.

In March 1999, Thorpedo Enterprises, being a company owned by Mr. Thorpe's parents, applied to register the mark “THORPEDO” in a range of classes. The mark was accepted for registration and duly advertised in June 2000. Some months later, Sportswear lodged a notice of objection to the registration of the “THORPEDO” mark on several grounds, including the argument that the “THORPEDO” mark was substantially identical with, or deceptively similar to, the unregistered mark “TORPEDOES”, which had acquired a reputation in Australia which was such as to be likely to deceive or cause confusion, as covered by s. 60 of the Trade Marks Act 1995. Sportswear appealed against a decision by the Australian trade mark authorities which had dismissed its opposition and allowed the mark to proceed to registration. The matter came before Bennett J who stated that the appellant's opposition would only be upheld if the Court were satisfied that the trade mark should clearly not be registered.

Sportswear claimed that the “T device mark” was substantially identical, both in visual and oral terms, to the “THORPEDO” mark. The judge disagreed, holding

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that, when compared side by side, this was not the case. The judge also dismissed the allegation that the “T device mark” mark was “deceptively similar” to the “THORPEDO” mark, finding that these were not visually or aurally so similar as to cause confusion in the marketplace.

### **Sports hotel trademark registration refused. Canadian trademark authority decision**<sup>522</sup>

In the case under review, the applicant had applied to register the trademark “World’s Only Sports and Entertainment Hotel”, on the basis of its use in association with the operation of a hotel and its proposed use in association with a wide range of merchandise. This application was opposed by the SkyDome Corp. which alleged, inter alia, that (a) the applicant had failed to comply with s. 30 of the Trade-marks Act, since the applicant never intended to use the mark as a trade mark but rather as a generic slogan; (b) the trade mark was incapable of being registered under s. 12(1)(d) of the Act by reason of confusion with the opponent’s registered trade mark “Sports & Entertainment Inc.”, (c) the trade mark was incapable of being registered under s. 12(1)(b) of the Act; (d) the applicant was not the person entitled to registration of the trade mark by reason of confusion with the trade mark “Sports & Entertainment Inc” previously used by the opponent in Canada in association with publications, licensing and merchandising activities, the promotion of sporting events and television and video production services, and (e) the trade mark was not distinctive.

The Trade-marks Opposition Board held that the application should be refused. It was apparent from the evidence that the words “World’s Only Sports and Entertainment Hotel” appeared almost exclusively in close proximity with the trade marks “Canadian Pacific” and “Skydome Hotel”. There were also numerous examples of use by the applicant of the phrase “World’s Only Sports and Entertainment Hotel” in a descriptive manner. On cross-examination, the applicant had conceded that the phrase “World’s Only and Entertainment Hotel” would not be used separately from the trade mark “Skydome Hotel”. The public would not perceive the applied for phrase, viewed as such, as a trade mark, notwithstanding that the phrase “World’s Only Sports and Entertainment Hotel” was displayed in a different size and style of the lettering used. Ground (a) alleging use of the applied for mark as a “generic slogan” was therefore successful.

The Board did not fully address the remaining grounds. However, the opponent was likely to have succeeded on the grounds of opposition based on non-entitlement and non-distinctiveness.

### **Nasser Hussain takes legal action against uncle who misuses his name (UK)**

That relatives of well-known sporting personalities are tempted to take financial advantage of this association is nothing new. However, there are some who do so in a more lawful manner than others, and the case of Robin Price, the uncle of former England cricket captain Nasser Hussain, may well fall into the latter category if legal action taken by Mr. Hussain in this regard proves to be successful. The England batsman was furious to discover that he had been described as a patron of Media Arts International on the notepaper and website of an agency operated by Mr. Price, who claims to represent over 160 clients and to have major contacts in the worlds of film, television and publishing. A spokesman for Mr. Hussain stated:

***“Nasser had no knowledge of his name being used by these companies and he does not agree with what they are doing. We will be taking action to stop it.”***<sup>523</sup>

It appears, moreover, that Mr. Price is not exactly blessed with the Midas touch in business ethics. He has been investigated by police over alleged harassment after repeatedly telephoning and emailing one author in connection with another agency which he operated, under which he charges authors up to £250 to promote their books. Mr. Price, for his part, has denied any malpractice, stressing that he runs a legitimate agency and that various people had “a vendetta” against him<sup>524</sup>.

### **Premiership “to clamp down” on publicans showing Saturday afternoon football (UK)**

For many football fans, the pub has replaced the football ground as the main venue for watching the game, particularly Premiership matches played on Saturday afternoons. However, the Premier League has recently announced that it intends to clamp down on such showings, alleging that they are unlawful and costing the game vital revenue. Officially, Saturday afternoons, between 2.15 and 5.15 pm, are “closed” periods during which no live football matches may be transmitted anywhere in Britain. The Premier League holds the copyright to these fixtures. However, many publicans currently circumvent this closed period by installing satellite equipment which enables them to receive sports channels from Scandinavia, the Middle East or other parts of Europe which show the games live. The Premier League are now claiming that pubs engaging in this practice on Saturday afternoons are infringing their copyright and damaging ground attendance figures<sup>525</sup>.

An investigations group acting for the League has been gathering information on pubs which show live 3

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pm fixtures and the companies which sell them satellite equipment. A number of legal actions have been initiated. In late October 2003, the Premier League secured its first conviction against a publican in Radlett, Hertfordshire, whose manager was found guilty of infringing copyright by showing live matches during the closed period. He was fined £500 and ordered to pay £720 costs. According to one company which sells satellite equipment capable of receiving foreign sports channels, there are around 3,000 pubs in the country which show matches during the prohibited period.<sup>526</sup>

### David Bedford wins “118 118” ruling

It may be recalled from the previous issue<sup>527</sup> that the former Olympic athlete David Bedford was seeking legal redress for the use of what he claimed to be his image by The Number, the company which operates the 118 118 directory enquiries service, which had advertised its wares with the help of an advertisement showing two long-haired and moustachioed runners. Shortly afterwards, Mr. Bedford took his grievance to Ofcom, the regulator of the communications industry, which in January 2004 agreed with his complaint that the advertisement was an improper caricature of Mr. Bedford and therefore breached the Television Advertising Standards code.

However, the Ofcom action is but the first round in Mr. Bedford’s fight with the company. The former athlete is also reported to be contemplating a passing-off action in the High Court, on the basis that The Number illegally used his image to promote its services, thereby causing the general public to believe mistakenly that he in some way endorsed the campaign<sup>528</sup>.

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### Other issues

[None]

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## National competition law

### Dispute between OFT and British racing continues

It will be recalled from the previous issue<sup>529</sup> that, in April 2003, the Office of Fair Trading (OFT) issued a "Rule 14" notice in which it held that the racing industry had been found to be in breach of its legislation. More particularly it ruled that the control of fixture allocation by the British Horseracing Board (BHB), the BHB claim to ownership of pre-race data, and the BHB rules on prize money, programmes and entry fees all constituted unlawful anti-competitive practices. The BHB had responded by threatening to take the matter to the Competition Appeals Tribunal. However, prior to that a number of meetings were to take place with the OFT in order to attempt a settlement.

In the meantime, there was a good deal of lobbying and comment in connection with the OFT ruling, most of it critical. In mid-December 2003, Robin Cook, the former Foreign Secretary and the most senior politician to proclaim an interest in racing, made some extremely critical comments when addressing the 233rd Annual Gimcrack Dinner in York. The following passage is instructive:

***"It is right that Members of Parliament of all parties should be concerned about its impact on racing, because this is a mighty industry, which across stables, racecourses and betting shops provides 100,000 jobs. That is far more than, for example, the British motor car industry, and many others where public and parliament would never tolerate the upheaval and uncertainty that the OFT have casually tossed into British racing. However, the best way to find the most positive outcome to the unwelcome attentions of the OFT may not be on the basis that racing is big business, but on the grounds that it is a great sport. Any serious sport needs a plan for its fixture list. Racing needs it even more because horses are as varied as humans"***<sup>530</sup>

Mr. Cook went on to state that it was common ground among the various bodies involved in racing that a free-for-all in fixtures would destroy the balanced programme which is needed to provide the variety in racing which matches the diversity of horses. He added that it surely should not take a miracle to convince the OFT that it is common sense to have a planned fixture list.

The next month, Greg Nichols, the Chief Executive of the BHB, also mounted a spirited attack on the OFT findings. Speaking at the Annual General Meeting (AGM) of the Thoroughbred Breeders' Association (TBA), he expressed particular concern at the proposal to divest the BHB of the power to negotiate deals regarding data rights on behalf of the whole industry,

and to transfer this role to the individual racecourses. Mr. Nichol stated the view that, in the long term, this would cause money to be driven out of British racing and into the hands of the bookmakers. He expressed his surprise at the "naivety" of the OFT's logic if it seriously considered that the punter would be the beneficiary of all this, since:

***"the ability of bookmakers to act as a buyer cartel for racing's data rights will remain unimpaired if the OFT succeeds. The only means to negotiate with a collective buyer with the magnitude of market capitalisation of British bookmakers is for the sport to collectively sell its assets"***<sup>531</sup>

Shortly afterwards, the Chairman of the BHB, Peter Savill, announced that he was "very hopeful" that the industry could reach a settlement with the OFT within the next few months in order to meet the latter's concerns. This upbeat bulletin came as Mr. Savill was preparing, together with Mr. Nichols, to engage in face-to-face talks with the OFT a few days later. His optimism came as he identified what he believed to be the seven key issues which need to be resolved between racing and the competition regulator following the issuing of the Rule 14 notice. Some commentators ventured the opinion that, reading between the lines of Mr. Savill's comments, they could detect the BHB Chairman's opinion that the current lack of competition in the fixture allocation process was indefensible, which would be welcome news to the OFT<sup>532</sup>. It was also significant that Mr. Savill also outlined a scenario whereby the racecourses could become responsible for selling data, provided that there were sufficient safeguards to ensure that the money would flow back into the sport.

The meeting between the two sides had not yet been held at the time of writing.

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## EU competition law

### EU ends Sky monopoly on live Premier League fixtures

From previous issues of this journal<sup>533</sup> it will be recalled that the European Commission had commenced an investigation into the collective deal made between the English Premier League (football) and broadcaster BSkyB, on the basis that this constituted price fixing by excluding other broadcasters from this facility. The Commission had ordered the Premier League to advertise the availability of its broadcasting rights in four packages – which were all promptly won by Sky. It was clear that this would not be to the taste of the Commission, which was widely expected to veto this deal as well. This was in spite of several doom-laden

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warnings by various commentators inside and outside the game that this could spell financial ruin for half of the Premiership's clubs. One such prediction came from the then Director-General of the BBC, Greg Dyke, who himself was a former director of Manchester United<sup>534</sup>.

Undaunted by such warnings, the Commission increased the pressure on the Premier League by expressing its dissatisfaction with the fact that BSkyB had retained all the rights to live broadcasting of the fixtures for the next three seasons. It announced that it was concluding its investigation into the deal, and that it was hoping to pressurise the League into signing a deal with it under which other broadcasters would be given access and thus allow more people to watch the games. However, the fact that competition Commissioner Mario Monti had not yet issued the formal statement of objections to the Sky deal which he had promised some time before, speculation grew that both sides were edging towards a settlement, particularly as they had been holding regular meetings in Brussels over the previous months<sup>535</sup>. It was, however, expected that any such settlement would be conditional upon the Premiership renegotiating the Sky deal<sup>536</sup>.

Several days later, the Commission appeared to open a new front in its dispute with the Premiership when it signalled that the Sky contract may have to be shortened from three years to one. This was gauged from the following comment made by Mr. Monti:

***"The exclusivity of a contract does not necessarily hurt competition, but the duration and scope can create more serious problems and shut down the market. With regard to duration, the Commission maintains that contracts of one season are generally acceptable"***<sup>537</sup>

This was in spite of the fact that, currently both the German Bundesliga and the European Champions' League have three-year television deals. Mr. Monti also made it clear that he wanted football clubs to have an opportunity to broker their own deals with broadcasters as well as being party to the existing collective selling arrangements. He said that, in future, joint sales and individual deals could coexist<sup>538</sup>.

Some relief for the Premier league came a few days later, when European governing body UEFA gave its full support to the League over its BSkyB deal. Mike Lee, UEFA's director of communications, based this support on the fact that the Premier League had already been cleared by a restrictive practices court in the UK, and the amount of negotiation which the League had conducted with the Commission over this matter<sup>539</sup>. In addition, the Premiership chairmen added their voice to the dire predictions as to the effect which any move by the Commission to block the Sky deal would produce

on English football. Southampton chairman Rupert Lowe launched a particularly savage assault on the EU Commissioners in the following terms:

***"They're no more than a bunch of raving lunatics, a cancer growing at the heart of Europe which will destroy us unless they're stopped. They're not accountable to anybody, they're just unelected bureaucrats fuelled by rampant socialism. They're doing their best to be bloody-minded, undemocratic and have two objectives: to damage Sky and promote a European league. They don't understand a thing about football and are completely ignorant about everything other than their own agenda"***<sup>540</sup>

Exactly what EU competition policy has to do with "rampant Socialism" was never explained by the Hampshire seaport's leading intellectual. Leaving that aside, it was never even explained exactly why the break-up of the Sky deal would precipitate half the country's leading clubs into insolvency. Be that as it may, the Premiership and the Commission reached a compromise a few days later. Under the deal, up to eight fixtures per season will be screened by terrestrial broadcasters. This meant that the BSkyB monopoly on Premiership football had been broken and that broadcasters such as the BBC and ITV would be able to show live matches for the first time since the League was formed in 1992. ITV and the BBC are now expected to negotiate the rights to sub-licence these games as from the next season<sup>541</sup>.

However, the change is less dramatic than it might at first appear. Although these games were described as "high-quality" games, it is understood that they will come from the least desirable "copper" package of 31 matches which are earmarked for a Saturday tea-time kick-off. This means that Sky will still be able to cream off the best fixtures for the so-called "Gold", "Silver" and "Bronze" packages, which are played on Sundays, Mondays and Saturday lunchtimes respectively.

However, the new deal that BSkyB must start planning for radical changes to its programming and, in the worst case scenario, its customer base in three years' time when the current deal runs out. BSkyB became the largest pay-TV broadcaster in Europe thanks to the Premiership, since top-flight football is the content which persuaded millions of viewers to sign up for it. Sky may now have to become a more versatile medium if it is to retain this market share<sup>542</sup>.

### **Commission clears Telenor/Canal Plus deal**<sup>543</sup>

In early January 2004, the Commission cleared a number of agreements concerning the exclusive co-operation between Norwegian broadcaster Telenor, its satellite television platform Canal Digital and Canal+

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Nordic for the satellite distribution of Canal+ premium pay-TV channels in the Nordic region. These cover top sporting events and recently-issued popular films. By taking this clearance decision, the Commission took due account of the short- and medium-term benefits yielded by these arrangements, both for competition in this sector and for the end consumer. Consumers in the Nordic region will continue to enjoy the fruits of healthy competition in the Nordic satellite pay-TV market, particularly enhanced digital pay television and the roll-out of new decoder technology at low cost.

Canal Digital was initially created as a joint venture between Canal+ Nordic and Telenor. In 2001, Canal+ Nordic sold its 50 per cent share in Canal Digital to Telenor and, in parallel, concluded certain exclusive distribution agreements in order to guarantee the continuity of the pay-TV service. These agreements had been notified to the Commission. As initially notified, these agreements gave rise to a number of competition concerns, particularly in relation to the long duration of certain exclusive arrangements. After the parties had substantially shortened this duration, the Commission concluded that the restrictive effects of these exclusive arrangements were largely outweighed by the benefits provided. Co-operation between Canal+ Nordic and Canal Digital during a limited period allows the maintenance of reasonable degree of competition with the second satellite pay-TV distributor in the Nordic region, MTG/Viasat, whilst retaining the possibility of market entry for potential competitors in the Nordic pay-TV segments in the middle and long term. This ultimately benefits consumers in the Nordic region through the availability of two distinct pay-TV brands at competitive prices, as well as enhanced pay-TV services and new decoder technology at low cost. Moreover, by clearing the agreements, the Commission took due account of the legitimate interest which Telenor, Canal Digital and Canal+ Nordic had in achieving a reasonable return on their investment in their pay-TV venture thus far.

The notified agreements were therefore exempted from the application of EU competition rules for 5 years.

### Commission ends monitoring of FIA/Formula One compliance with 2001 settlement<sup>544</sup>

It will be recalled from a previous issue<sup>545</sup> that a number of rules applied, and deals concluded, by the world governing body in motor sport, the FIA, in relation to Formula 1 racing had come to the attention of the European Commission following their notification to the latter several years earlier. The Commission had initially objected to some of these rules and arrangements on the grounds that the FIA had abused its powers by placing unnecessary restrictions on promoters, circuit

owners, vehicle manufacturers and drivers, as well as to certain commercial agreements which had been concluded with television broadcasters. The FIA reached a settlement with the Commission on these issues in October 2001. Under it, the governing body agreed to restrict its role to that of sports regulator, to guarantee access to motor sport to any racing organisation meeting the required safety criteria, and to refrain from preventing teams and circuit owners from participating in other races. The Commission announced that it would be monitoring compliance with these undertakings.

In later October 2003, the Commission announced that it was satisfied that the conflict of interests identified in the FIA regulations, as well as the restrictions which had been placed on circuit owners, F1 teams and broadcasters, had been discontinued. The FIA's role is now restricted to that of sports regulator. Circuit owners can, if they wish, organise rival championships, and car manufacturers will in the future be able to participate in races other than those organised by the Formula One company. Television contracts have also been shortened considerably, which allows broadcasters to bid for coverage of this popular sport at regular intervals.

### Broadcasting companies win annulment of Commission decision on sporting event broadcasts<sup>546</sup>

The case under review concerned a challenge to a decision by which the Commission had granted an exemption from EU competition rules to the European Broadcasting Union (EBU). The EBU is an association of radio and television companies which was established for the purpose of representing its members and of facilitating the exchange of programmes by means of the Eurovision programme exchange system. Under the Eurovision scheme, EBU members were able jointly to acquire or share rights to broadcast international sporting events. Prior to March 1988, the Eurovision scheme was merely available to active members of the EBU. Thereafter, other broadcasters could also gain access to programmes via the Eurovision system as subcontractors to EBU members. In April 1989, the EBU requested the Commission to grant negative clearance or exemption to its internal rules and regulations relating to the acquisition of television rights to sporting events, the exchange of sporting programmes within the Eurovision framework and contractual access to such programmes by third parties. Such clearance or exemption is necessary under Article 81(3) of the EC Treaty if these rules and regulations were not to be considered as anti-competitive under Article 81(1).

In 1993, the Commission issued Decision 93/403, by which it granted a conditional exemption. This decision

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was then challenged by a number of broadcasters and was subsequently set aside by the European Court of First Instance (CFI). In March 1999, the EBU lodged a revised agreement relating to the utilisation of Eurovision rights on pay-TV channels, for which the Commission granted an exemption from Article 81 by Decision 2000/400.

The applicants in this case, all of which are free-to-air commercial television channels, then applied to the CFI for annulment of Decision 2000/400. They based this application on seven grounds: (a) infringement by the Commission of the obligation to apply Court decisions; (b) error of fact and a failure to state reasons (c) wrongful application of Article 81(1); (d) infringement of Article 81(3); (e) error of law concerning the substantive and temporal scope of the challenged decision; (f) violation of the principle of good administration, and (g) misuse by the Commission of its powers.

The Court held that Decision 2000/400 should be set aside, on the following grounds:

1. When the market for television rights for sporting events was analysed, it showed the existence of both an upstream market for the acquisition of rights and a downstream market for the televised broadcasting of sporting events. Rights to a sporting event were normally sold by their organiser and usually granted on an exclusive territorial basis in order to guarantee the value of the rights in terms of audience and subsequent advertising revenue.
2. In relation to the market for such rights, the Eurovision system led to two restrictions. First, the joint acquisition, sharing and exchange of television rights restricted or possibly eliminated competition amongst EBU members who would otherwise be competitors in both the upstream and downstream markets. Secondly, the Eurovision system restricted competition among third parties because the rights were often exclusive and third parties were refused access. The buying of television broadcasting rights was not in itself a restriction on competition which infringed Article 81(1), and it could be justified by reference to the special characteristics of the product in the relevant market. The exercise of those rights, however, could, in a specific legal or economic context, be a restriction on competition. By preventing third parties from gaining access to broadcasts of sporting events, EBU was depriving broadcasters who were not EBU members of potential revenue. This served to demonstrate the nature of EBU's exclusivity in that, if the rights had been acquired by another media group, third parties could have negotiated the rights for their respective markets.
3. In relation to the sub-licensing system, it was necessary to consider two areas of activity: live broadcasts and delayed coverage or edited highlights.
4. Even if it were acceptable for the EBU to restrict access to live broadcasts to its members, there was no justification for this restriction to be extended to those events which were not shown live by EBU members. The sub-licensing system did not ensure that live broadcasting rights of events which were not used by members of the EBU would be available to outside competitors.
5. The Eurovision system regarding delayed transmissions or edited highlights was subject to a number of severe restrictions, particularly in relation to embargo times and editing requirements. The sub-licensing system did not therefore allow outside competitors, with very few exceptions, to obtain access to live broadcasting of unused Eurovision rights. It also restricted the transmission of programmes containing highlights. The Eurovision system was therefore capable of eliminating competition with regard to a substantial part of the products in question.
6. The Commission had accordingly made a manifest error of assessment in its application of Article 81(3) in ruling that the system of sub-contracting ensured access to outside competitors and did not eliminate competition in that market. Decision 2000/400 therefore needed to be set aside.

### Commission investigates measures applicable to sports clubs in Italy<sup>547</sup>

In November 2003, the European Commission decided to request information from Italy regarding two aspects of a recent national law on financial reporting by professional sports clubs, including Serie A football clubs. Firstly, the Commission is concerned that the legislation may infringe EU legislation on accounting. Secondly, this system may involve the granting of state aid. Both these investigations represent the first step in the relevant formal procedures and are without prejudice to a final decision on the question whether the measures under review do indeed infringe EU law. If certain sports clubs are in effect being accorded financial advantages over others in Europe, this distorts competition both in business terms – the area covered by the EU Internal Market and competition law – and, by extension, on the field of play. The Italian authorities have two months in which to reply to the Commission's request. Unless a satisfactory response is received within that period, the Commission may continue its infringement procedure, and ultimately refer the case to the European Court of Justice.

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At the end of 2002, Italy adopted a number of measures on fiscal and accounting rules applicable to professional sports clubs. The effect of this legislation is that some clubs, particularly major football clubs for which players' earnings are the largest item of expenditure, may be able to submit accounts which underestimate their true costs in a given year, hide real losses and give a misleading picture to investors, whose funds are put at risk. Another side effect of this aspect, although not directly covered by EU law, is that the clubs involved may be able, at least in the short term, to pay inflated prices and wages for players, even where their true financial position should not allow them to do so, thus gaining an unfair advantage over the field.

In technical terms, the contentious measure allows sports clubs to place in a special balance sheet item, under "assets", the capital losses arising from the decreased value of the rights to exploit the performance of professional players, as determined on the basis of a sworn expert valuation. This item will be included amongst the assets in the balance sheet, and amortised over the years. The law in question specifies that companies opting for the special rules introduced by this law must proceed, for accounting and taxation purposes, to amortise the balance sheet item in ten yearly charges of equal amounts, even if rights established by contracts with the players concerned last for only two or three years.

The European Commission is concerned that the measure concerned may breach both accounting and state aid rules enacted by the EU.

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

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## Unbridled freedom? Polo players fear EU enlargement

On 1/5/2004, the EU became a community of 25, thus bringing opportunities for sporting performers to expand their horizons. Thus far, it has been glibly assumed that the sports which have most to fear from the ensuing removal of national barriers are the mainstream professional team sports such as football, rugby, basketball, and volleyball. However, it appears now that even some sports which hitherto do not appear to have been unduly concerned about foreign competition are becoming a trifle preoccupied at the effects of enlargement – including polo. Even before the admission of the new Member States, the nation's polo players were expressing their concern that they were being driven out by inexpensive foreign imports who cost less to employ and maintain. They feel that problem will get worse with EU enlargement, which in their view could lead to an even larger influx of foreign polo players<sup>548</sup>.

Britain is one of the leading polo countries in the world, and many foreign professionals in the sport are attracted to this country by the prospect of high salaries and a well-organised polo season which runs from April to September. There are currently around 160 British-born professional players taking part in the current season (2004), but around 200 foreign players are representing British teams. The British Association of Professional Polo Players (BAPPP) is concerned that many foreign players, such as those from South America, have European ancestry and are able to obtain EU passports, allowing them to play without restrictions anywhere within the EU<sup>549</sup>.

## Bosman was “a disaster for football” claims former UEFA chief

Last year, Gerhard Aigner retired as Chief Executive of the European governing body for football, UEFA. Mr. Aigner can look back on a career in which he was required to steer European football through one of the most turbulent periods in its history, set off by the famous Bosman ruling by the European Court of Justice (ECJ) in 1995 which established the principle of freedom of movement for players. With the benefit of hindsight, Mr. Aigner blames many of the current pressures besetting the game on this landmark decision. He states:

***“To be perfectly blunt, the introduction of the Bosman ruling was a disaster for sport and especially for football. All of the excesses we know of now and many of the problems in the game come back to the decision. I think we could have revised the transfer rules in a coherent way and kept the rule which limits the movement of players. Sport is going the wrong way due to this decision”***<sup>550</sup>

Mr. Aigner's criticism seems to be an oblique reference to the salaries earned by players at the top European clubs and to the manner in which some players' conduct has threatened the integrity of the sport. The pressures on the current game, according to him, stem from the fact that it is being challenged from many sides: the political sphere, the media and the commercial field. He believed that the major European leagues were flooded by too many foreign players, and that there should be a rule whereby the English championship should be played by a majority of English players. It would assist some of the smaller countries to retain some of their players and thus strengthen their leagues<sup>551</sup>.

## Ban on internet sporting bets illegal under EU law, rules Court of Justice

The problems which are inherent in internet sports betting have already been adumbrated in an earlier part of this Journal (see above, p.14). This has led certain countries to issue criminal legislation banning this practice. It now seems that such legislation will need to be repealed, at least within the EU, in the light of a recent decision by the European Court of Justice on this subject<sup>552</sup>.

In the case under review, the European Court was required to give a preliminary ruling under Article 234 of the EC Treaty on a reference by a lower Italian court, the Tribunale of Ascoli Piceno, in the course of criminal proceedings in which the defendants, involved in a widespread network of Italian agencies linked by the internet to the English bookmakers, Stanley Betting International Ltd (established in Liverpool) for the purpose of betting on, inter alia, football matches, were charged with having collaborated in Italy with a bookmaker located abroad in the activity of collecting bets. This is normally an activity which Italian law reserves to its own state authorities.

The ECJ ruled that the legislation in question infringed both the freedom of establishment and the freedom to provide services of those accused, unless they could be justified or were proportionate, which were matters for the national court to determine. The Court has accepted in the past that restrictions on gaming activities could be justified by imperative requirements in the public interest, such as the prevention of fraud and the need to preserve public order. However, it considered it pertinent to observe that the domestic court in the instant case had noted that the Italian state was pursuing a policy of substantially expanded betting and gaming at the national level with a view to obtaining funds, whilst at the same time protecting state licensees.

Insofar as the authorities of a member state incited and encouraged consumers to take part in lotteries, games of chance and betting for the benefit of the

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public purse, those authorities could not rely on public policy concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue.

### **Sport is important element of co-operation with China, says Commissioner**<sup>553</sup>

In December 2003, European Commissioner for Education and Culture (which includes sport) Viviane Reding, and the People's Republic of China Minister for Culture Sun Jiazheng, declared their willingness to strengthen co-operation between the European Commission and People's Republic of China in the fields of culture, audiovisual, education, training, youth and sport. They made this declaration in a ceremony concluding a three-day official visit of Commissioner Reding in China.

Commissioner Reding and Minister Sun Jiazheng recalled that strengthening the dialogue between cultures and between people ranks amongst the priorities of both the European Union and the People's Republic of China, as expressed in the strategy papers issued in October, and welcomed by leaders on both sides at the EU-China Summit of October 30th. Considering that, according to the principle of cultural diversity, states must retain room for manoeuvre for conducting proactive cultural policies, both the European Commission and China support the work to be carried out by UNESCO towards an international convention on cultural diversity to be adopted by UNESCO General Assembly in 2005.

Reding and Jiazheng agreed that furthering co-operation between the European Commission and the People's Republic of China is important, notably in order to improve mutual understanding and to strengthen their respective situations in a global economy and in a global society. Accordingly, they encourage initiatives to be taken improving the co-operation between the EU and China in the area of culture, arts, music, literature, and museums. They expressed their willingness to encourage the following aspects of such co-operation:

- High level dialogues and visits, in principle once a year, on culture, education, youth, audiovisual and sports policy to increase mutual understanding and identify possible areas of co-operation.
- The organisation on a regular basis of information meetings on policies carried out in the EU and in China aimed at improving performances of education and training. These meetings would notably be used to exchange best practices.
- The Organisation on a regular basis of information meetings on sport policy, notably on the issues of doping and the protection of young athletes. Exchanges of good practices between the Beijing

Olympics and former Olympic cities in the EU shall equally be encouraged, as well as well as initiatives such as the Digital Olympics.

Furthermore, they decided to consider the feasibility of the following initiatives, considering notably budgetary and human resources available on both sides:

- Measures to promote the participation of Chinese students in the new EU flagship programme ERASMUS MUNDUS.
- Definition of priority issues, where youth exchanges and training for youth workers could be supported in the framework of the EU YOUTH programme.
- Organisation of meetings between European and Chinese film producers and distributors, with the aim of increasing the distribution of Chinese audiovisual works in the EU and of European audiovisual works in China.
- Participation of Chinese trainees in training projects supported by MEDIA Training.
- Encouraging artists from each side to participate in festivals in the EU and in China.

### **Prohibition on TV alcohol advertising justified on public health grounds, rules Advocate-General**<sup>554</sup>

The French legislation on tobacco and alcohol addiction ("the Loi Evin") prohibits, in France, direct and indirect television advertising of alcoholic beverages. Infringement of that provision is an offence punishable by a fine of approximately €75 000 to which may be added 50 per cent of the amount spent on the prohibited advertising. A code of conduct, drawn up by the French Conseil Supérieur de l'Audiovisuel, lays down detailed rules for the implementation of that Law. It takes no account of the question whether the beverages are French or foreign but distinguishes, rather, between, on the one hand, international sporting events, whose images are broadcast in a large number of countries and which are therefore not considered to concern mainly French viewers, and, on the other hand, other events, the broadcast of which is specifically aimed at the French viewing public. The code requires that, where the latter events take place abroad, French broadcasters make use of available means in order to prevent advertising for alcoholic beverages from appearing on television screens.

Two cases are currently pending before the Court regarding the French rules. In the infringement proceedings (C-262/02), the Commission is seeking a declaration of the Court that the French legislation is incompatible with the freedom to provide services because of the obstacles which the Loi Evin places in the way of the broadcasting in France of foreign

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sporting events. In the proceedings for a preliminary ruling (C-429/02), the French television channel TF1 had required of the companies Groupe Jean-Claude Darmon and GiroSport, responsible for negotiating television broadcasting rights for football matches, to ensure that the brand names of alcoholic beverages did not appear on television screens. Consequently, a number of foreign football clubs refused to allow Bacardi France, which produces and markets many alcoholic beverages, to rent advertising hoarding space around the pitch. The matter landed before the French Supreme Court (Cour de Cassation), which sought to establish whether these French rules are contrary to Community law, in particular to the freedom to provide services and to the 'Television Without Frontiers' EU directive.

The Advocate General took the view, first, that the televised images of those panels placed around the playing field necessarily appear throughout the event without it being possible to separate them clearly from the images of the action on the field, as is required by the relevant EU directive. The directive is, in his view, therefore not applicable in this case. He considers that the measures adopted by the Conseil Supérieur de l'Audiovisuel, requiring the negotiators of television rights to use every 'means available' to prevent advertising for alcoholic beverages from appearing on French television screens, effectively constitutes a restriction on the freedom to provide services. This left open the question whether this restriction was justified.

On this issue, Advocate-General Tizzano agrees with the parties, which do not dispute that the purpose of the Loi Evin is the protection of public health, which is one of the justifications under the Treaty for restricting the freedom to provide services. It therefore had to be established whether such legislation is proportionate, the Advocate-General recalling that measures which are restrictive of fundamental freedoms are lawful only where they are proportionate to the objective pursued. In order to establish this, he ascertained, first of all, whether the French legislation achieved the objective of protection of public health. The choice of the French Government not to ban completely all advertising of alcoholic beverages in stadia may be questionable but, in the view of the Advocate General, it falls within the freedom which the Member States have to decide the degree to which and the way in which public health is protected. In his view, it is reasonable to consider the fact that the French measures limiting advertising for alcoholic beverages may also reduce instances in which television viewers consume alcoholic beverages in response to the blandishments of advertising. Furthermore, the distinction between international events and other events makes it easier to reconcile the objective of

protection of public health with the principle of the freedom to provide services in that it reduces the number of cases in which the broadcasting in France of sporting events abroad is prohibited. Mr Tizzano observes that neither French law nor practice restricts the prohibition at issue to alcoholic products marketed on the French market but applies the same prohibition to foreign alcoholic beverages.

Mr Tizzano goes on to examine whether the French legislation goes beyond that which is necessary in order to protect public health. In this regard, he takes the view that television broadcasters do not have the means to obscure hoardings advertising alcoholic beverages and that modern image masking techniques cannot be used because they are costly. Next, the Advocate General points out that excessive consumption of alcoholic beverages is a danger to health, irrespective of their alcohol content. The speed with which that form of advertising appears on the screen does not make it possible to control the content nor is it possible to insert a warning concerning the risks linked to alcohol. Finally, the Advocate General notes that, as the Court has held, the mere fact that another Member State imposes less strict rules concerning advertising of alcoholic beverages does not mean that the French rules are disproportionate.

The First Advocate General therefore proposes that the Court should rule that neither the directive nor the principle of freedom to provide services enshrined in the Treaty preclude the prohibition laid down by French law regarding televised advertising of alcoholic beverages.

The reader is hereby reminded that the opinion of the Advocate General does not bind the Court of Justice. The task of the Advocate General is to propose to the Court, in complete independence, a legal solution to the case in question. The Court will now begin its deliberations in this case. The judgment will be delivered at a later date.

### **Speech on the challenge of sport in an enlarged EU by Commissioner Reding**

At a recent EU Conference entitled "European Union and Sport" held in Budapest in October 2003 the European Commissioner responsible for sport, Viviane Reding, addressed the challenges in the field of sport in the enlarged EU, with particular reference to Hungary, one of the acceding states<sup>555</sup>.

She considered that the time at which the conference was held, i.e. October 2003 was a good time to take stock of what is currently happening in Community sport. First of all, she pointed to the major events which are looming up on the horizon: the work of the intergovernmental conference the now familiar ICG, the European Year of Education through Sport, etc.

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At the same time, this occasion provided an opportunity to cast a look back over the past and see what has been achieved.

On the international scene, European sport is prominent and often leads the field. On the whole, the European sports movement has managed to reconcile elite sport and widened access to sport, competitive sport and leisure sport, economic requirements and the joy of playing, the search for results and sporting ethics, thanks partly to steps taken by the public authorities. The Commissioner was not going to attempt to conceal certain recurrent problems doping, the ever-increasing drift towards a "money first" approach and all that this entailed. There were real problems in this regard, and the Commissioner declared herself personally in the front line of the fight against certain undesirable trends and developments. However, all in all, European sport was doing well.

Sport is not a traditional Community theme simply because no provision was ever made in the treaties in regard to specific competence in this area. Let us not forget that from the very start the Community was an economic Community. Its powers are clearly defined in the treaties and cover the areas of customs union, competition, the internal market, freedom of movement, agriculture, transport, etc. But there was no mention of sport. However, she went on:

***"That is not to say that the Community and sport are poles apart, for there are certain Community policies and decisions which have a very definite impact on the world of sport and the way it develops and is organised: social policy, freedom of movement, competition policy, internal market, public procurements, recognition of qualifications, research, audiovisual policy, training, education, youth-related matters, etc. In actual fact, sport has always been present, albeit indirectly, in Community concerns whenever it was perceived as an economic activity. Significantly, the most widely publicised ruling by the Court of Justice in Luxembourg – the Bosman ruling of 1995 – focused on a sports issue concerning freedom of movement. Cases concerning the international transfers of professional players, doping in sport, competitions organised by the International Motor Sports Federation, television rights for major football competitions have also been dealt with in Brussels. So you can see that there are close links between sport and the European Community! And that our influence can be very great and even decisive. On the other hand, for reasons stemming from areas of competence, the European Community, other than in limited exceptional cases, has not so far been involved in financing sport. Admittedly, some resources have been***

***allocated to sport, be it in the framework of the structural policy, of actions to fight against doping, and of policies on research or vocational training. But unlike in certain Member States there are no major programmes which grant subsidies to sports organisations or federations. Our approach has been altogether different. The emphasis has been on ensuring that the economic dimension of sport complies with Community law".***

Unfortunately, even though this was fully justified under the terms of the Treaties, this indirect approach to sport through other policies may have given the impression that the Community was not interested in anything but the economic aspects of sport, simply considering it a market like any other. This was regrettable at a time when Europe is opening up to a greater extent to its citizens and is seeking to understand their deeper aspirations and take due account of their daily concerns. The Commissioner believed that we have a duty to correct this impression, and had personally been making efforts to do so, for we had a role to play in promoting the social and educational values of sport.

This discussion on where sport fits into European integration is by no means new, but the debate has stepped up over the past few months, the focus being placed on consideration by the Community of the specific nature of sport and its intrinsic values. So how did matters stand at present? The adoption on 10/7/2003 by the Convention of its draft constitutional treaty was a breakthrough. For the first time, sport has been incorporated into the founding texts. In this draft Treaty, sport is mentioned as part of "areas of supporting, coordinating or complementary action". These areas are defined as follows:

***"In certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to coordinate, supplement or support the actions of the Member States, without thereby superseding their competence in these areas".***

The Draft contains no dedicated article on sport but sport is mentioned in relation to education, which gives it highly symbolic value. It stipulates that Union action in the area of sport shall be aimed at developing the European dimension in sport, by promoting fairness in competitions and cooperation between sporting bodies and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen. The Convention's proposals were a move in the right direction. They would allow the Commission to bring added value to clearly

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targeted themes such as the social and educational values of sport, voluntary work, protecting the health of sportsmen and sportswomen, etc. They would rule out any attempt to harmonise and would fully respect the areas of responsibility of the Member States, as well as the autonomy of the sports organisations.

This draft article offered us numerous opportunities for co-operation and action, which should now be seized upon. It gives us the wherewithal to highlight the European dimension of sport in terms of its social and educational functions, without impinging on the areas of responsibility of the Member States. The Commissioner believed everyone stood to gain from this. She therefore welcomed this draft article as a positive development. It was now up to the IGC to move forward quickly and efficiently, which is what the heads of state and government want. This is the moment to seize an historic opportunity, not the moment for drafting sessions, and she expressed the hope that the EU would not miss it because of discussions over details that in the greater scheme of things did not really matter.

The other major event for the Commission was the European Year of Education through Sport 2004. It was the first time that an initiative as ambitious as this has been launched at Community level on sport and its educational values. It has been welcomed enthusiastically by everyone involved in sport and the Commissioner pronounced herself anxious to ensure that it was a success. The Decision proclaiming 2004 as the European Year of Education through Sport was also good news for those who want a people-focused Europe, a Europe where everyone counts. It was the culminating point of several years of work and personal endeavour to promote European sport and its educational values. This work has been followed closely in the candidate countries.

Like all the acceding countries, Hungary would play a full part in the EYES 2004 programme as from 1/1/2004. In concrete terms, this meant the opportunity to take part in projects and receive project funding. Generally, a European Year has two central aspects: firstly, getting the message across in terms of promoting values and, secondly, funding projects. This is done through calls for proposals designed to select the best projects, the ones which correspond closest to the aims of the Year. This was the Community approach. It guarantees fairness, transparency and equal treatment for everyone with innovative ideas to put forward.

The Commissioner concluded by stating her confidence that this European Year will be a success in Hungary. Her conversations with the Hungarian authorities and the representatives of the sports movement told her that we were all on the same wavelength, that we shared the same aims and that we had a common vision of sport.

### 12th European Sports Forum meets

On 21-23 November 2003, the European Sports Forum was held in Brussels. Of particular interest were the conclusions of the working group on "The role of European sport in the international context", which were as follows:

1. The participants welcomed the European Commission's initiative to organise, in the context of the 12th European Sports Forum, a workshop on this subject.
2. They endorsed the particular values and specificity of European sport, and stressed its positive image and impact, mainly on the basis of its structures, organisations and diversity, its links with the public authorities, its healthy position and its ethical values. Even if there was no European sports model in the strict sense of the term, the participants considered that the common characteristics of European sport deserved to be promoted and their value recognised.
3. They believed that Europe can be regarded as the centre of the sporting world, since the vast majority of international sporting federations had their seat in Europe and a large number of sporting events took place in Europe. The Olympic games in Athens would be the flagship event in 2004; however, these Games were merely the tip of the iceberg.
4. However, the participants also recognised that, in spite of these signs of good health, European sport was beset with a number of serious problems such as doping, the ever-increasing drift towards a "money first" approach, violence, hooliganism, racism, etc. These weaknesses had to be fought without concession. This fight had an international dimension as these problems were international by nature.
5. The participants considered that the true value of the ideal of the Olympic truce had to be recognised. They believed that we need to revive the tradition of the Olympic truce in order to promote the Olympic ideals and peace during the Olympic Games and beyond.
6. The participants considered that sport could play a major part in the process of peace and fraternity in the Mediterranean area. The European Commission had already some experience of supporting sporting projects, especially in this area, notably through the MEDA programme. It thus contributed towards enhancing the image of European sport and its social and educational role.
7. The participants felt that the fight against doping should be strengthened and expressed the belief

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that the WADA code will contribute towards the efficiency of the fight against doping at the international level. They welcomed the initiative of UNESCO in adopting a universal tool, having legal force, which was accepted by everyone and which will assist in reaching the "zero tolerance" objective in this field.

8. The participants considered that, in the course or renegotiating the development agreements, the European sporting dimension should be taken into account
9. The participants emphasised the existence of the "Wider Europe" initiative, which aims at strengthening relations with the new neighbours of the enlarged European Union. It has set the objective of further developing the concept of a new neighbourhood policy and of drawing up action plans with the countries and regions in question (i.e. the Eastern and South Eastern European countries and Southern Mediterranean countries)
10. The participants considered that one of the major dimensions of sport in the international context could be to export "citizenship values". European sport is capable of contributing effectively towards promoting a certain view of sport, as a teacher of democracy, citizenship, health and tolerance and as a factor for social integration. Sport is a vector for social and educational values. Essentially, sport must be seen as a force for international understanding and an instrument of peace.
11. The participants requested the European federations, clubs and sporting organisations to attempt to be present throughout the world in order to promote the European values of sport.
12. The participants also expressed the hope that, with the possible inclusion of sport in the future Constitutional Treaty, sport will become an issue in the external relations of the European Union. Enshrining sport in the Treaty would undoubtedly justify giving sport a higher profile in the context of external relations. It would pave the way for initiatives in agreement with sporting partners such as the International Olympic Committee (IOC) and other international organisations which already make positive use of sport through their own initiatives.

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## Bankruptcy (actual or threatened) of sporting clubs & bodies

### Football clubs in crisis – an update

#### *Report exposes large-scale financial folly in football Premiership*

The fact that this section of the Journal has occupied an increasingly large amount of space is testimony to the fact that football's finances are currently not enjoying the most robust of health. As the year 2003 drew to a close, this trend was emphasised by a report issued by Deloitte and Touche, "football's accountants", which showed conclusively that the 20 clubs in English football's top flight are swimming in a sea of debt which threatens to engulf the entire competition. Altogether, the Premiership clubs owe a total debt amounting to a staggering £598 million. One of the leaders in this (if in no other) league were Leeds United, who on top of an annual loss of £49.5 million were also labouring under a long-term debt of £78 million. (The club's current parlous position will be returned to in detail below.) However, the dubious distinction of the nation's most indebted club unhesitatingly went to Fulham FC, the "small" club owned by mogul Mohammed Al-Fayed, which owes a mind-numbing £107 million<sup>556</sup>.

Perhaps the most dispiriting aspect of this mountain of debt is the fact that it has increased in spite of all the warning signs which have been on display over the past few years to the effect that football's financial bubble had burst. This is shown clearly by the fact that, incredibly, the collective debt figure mentioned above represented an almost 50 per cent increase on the previous year – which itself hardly represented a triumph in prudent management. The only club to make a substantial profit was leading side Manchester United, who posted a surplus of £39.3 million. All this is happening, as was pointed out by football finance expert Phil Clisby, at a time when the world transfer market has collapsed and the Premiership will, as has been indicated earlier, bank less money from its television deals in the future.

A typical example of this heedless profligacy is on evidence in Manchester's other Premiership club. In late October 2003, Manchester City conceded that it lost £15.4 million the previous year and saw its overall debt rise from £30 million to £50 million, which represents £1 million more than its annual turnover, after buying players such as Nicolas Anelka and Robbie Fowler in a bid to retain the club's place in football's top flight. It also transpired that the club spent 75 per cent of its turnover on players' salaries, which is dangerously high. Nor is this an isolated case. Clubs such as Everton, Tottenham and even Charlton, which until recently

applied a strict policy of living within their means, seem to be caught up in this particular vortex<sup>557</sup>.

Nor is this profligacy restricted to England. North of Hadrian's wall the picture is just as bad, with accountants PriceWaterhouseCooper reporting that the net debt of the 12 Scottish Premier League sides had risen from £132 million to a new record total of £144 million. Five clubs of its clubs were now effectively insolvent, according to these figures.

#### *Measures proposed and taken to counter this trend*

Clearly, some action is called for, and a hesitant start was made early in the New Year 2004, with a recommendation that a new financial investigation unit, equipped with powers to examine club accounts and impose penalties on those who are not conducting their finances properly, should be established. This controversial proposal, which was certain to arouse much opposition on the part of the majority of clubs and even football governing bodies, was one of 12 made by the Independent Football Commission (IFC) in its annual report, which was published in mid-February. In a hard-hitting attack on the manner in which the game manages its finances, the IFC claimed that greater safeguards needed to be put into place to prevent clubs from sinking into the financial abyss. It also recommended that new club owners need to be scrutinised more carefully by the game's authorities. In particular, the report insists that wealthy benefactors must be prevented from walking away from clubs, leaving them in dire financial trouble, once the attraction of their association with the club has palled<sup>558</sup>.

The report also calls for current football creditor rules to be reviewed, stating that it is iniquitous that footballers are treated as priority creditors when clubs go into administration, whilst other club staff and small business are not paid in full<sup>559</sup>.

In the previous issue of this Journal<sup>560</sup> it was reported that at least the Football League have been galvanised into some form of action in order to bring their financially wayward members to book, in that clubs entering administration will face an automatic penalty of up to 10 points as from the 2004-2005 season. However, it remains to be seen whether this move, described as the Football League Insolvency policy, will prove to be successful as a penalty for miscreants and a deterrent to others – or indeed an example for other Leagues to follow. For example, clubs will have a right to appeal against a sporting penalty, but only on grounds of force majeure. Indications of what the authorities will accept as force majeure include the circumstance that the club's insolvency has been caused by events which are deemed to have been

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“unforeseeable” and “unavoidable”. The test for each of these qualifications will be interesting, and will no doubt evolve over the years<sup>561</sup>.

### *The Leeds United saga*

As has been indicated above, and has already been apparent from previous issue of this Journal<sup>562</sup>, the Yorkshire club is one of the worst examples of the financial nihilism which seems to have gripped the professional game in this country. In late October, it announced that it was about to break its own unwanted record for financial losses at a British football club when it unveiled a deficit nearly £50 million<sup>563</sup>. Clearly, radical action was called for to prevent the club from going out of business altogether, and two days later it was announced that Trevor Birch, the former Chief Executive of Chelsea FC, was to take over as the new chief at Elland Road. Whilst the Leeds chairman, Professor John McKenzie, had the task of concentrating on restructuring the club’s debt and attempt to attract investors from the Far East, where he had close contacts, Mr. Birch was to take sole charge of the day-to-day operation of the club<sup>564</sup>.

Gradually, the full picture of and story behind this financial fiasco began to emerge. Professor McKenzie attempted to put the best possible gloss on the situation, claiming – in a manner not unlike that exhibited by that entertainingly notorious Iraqi television spokesman as the war raged around him – that the figures actually showed a considerable improvement. He claimed that two years ago, the club was swimming against the tide, now it was treading water and in a year’s time it would have a foot in the sand, mysteriously adding that afterwards he would hope to be running on the sand “with a beautiful blonde”. The actual figures, however, revealed a less cosy picture<sup>565</sup>. Not only had the club been forced to sell several players, such as Olivier Dacourt, Lee Bowyer and Robbie Fowler, well below their valuations, but it was also revealed that the club had been forced to spend £5.7 million on “first-team management” – most of it in compensation to former managers David O’Leary and Terry Venables. This bill reached £7.2 million when other employees were included. Along with the players’ salaries, this meant that a staggering 88 per cent of the club’s turnover was spent on playing staff. To all this had to be added the distinct possibility that the Yorkshire side could lose its place in the Premiership, which would cut its revenue by £20 million.

Prof. McKenzie left little doubt as to where the blame for this lay where he stated that Leeds “lived the dream and I inherited the nightmare” – a barely veiled reference to his predecessor, Peter Ridsdale<sup>566</sup>. It has transpired that, on the appointment of the new manager David O’Leary five years previously, Mr.

Ridsdale had placed £97 million at the Irishman’s disposal for the purchase of new players. The results had been spectacular in the short term, but the rot set in with a series of disasters both on and off the field (which have been extensively documented in this Journal). Mr. O’Leary left, to be succeeded by Terry Venables and, barely a few months later, by Peter Reid, whose reign was even shorter. Since all three still had contracts to run, Leeds found themselves in the ludicrous position of employing four managers at the same time – including the caretaker, former Scottish winger Eddie Gray<sup>567</sup>.

Naturally, some of the figures closely associated with the club had started to consider ways of staving off the worst possible fate for the side. One of these was Leeds Vice-Chairman Allan Leighton who, together with a business partner, offered to pour £4.4 million into the club. However, this did not come without conditions attached: Mr. Leighton informed the club’s financiers that they would have to “take a haircut” on the terms of their loans to the club, which meant reducing the interest paid to them by United. The alternative, he told them, was for him to call in the administrators<sup>568</sup>. In addition, the club’s lobbying abroad for financial salvation appeared to have paid off when, at the end of that month, Sheikh Abdul Rahman, a member of Bahrain’s royal family, announced that he expected to have a takeover of the club finalised “within weeks”. He refused to disclose any figures or terms, but a bid in the region of £20 million had been suggested. Moreover, it appeared that the Sheikh would actually not act alone in this bid: he would lead a group of investors from the Gulf<sup>569</sup>.

However, even this apparently positive news had its darker and controversial side. It was learned that, even if the takeover went ahead, Leeds could still go into administration as a means of shaking off their obligations towards their creditors. The Sheikh could then purchase the club without having to pay off the club’s extensive debts. Such a move is not unlawful – in fact, it may be recalled that Leicester City engaged in a similar manoeuvre<sup>570</sup> – but was likely to give rise to a storm of protest from (amongst others) clubs which have managed their finances with considerably greater prudence than Leeds<sup>571</sup>. A few days later, however, the Leeds Board indicated that it had received no bid approach from any party, and that reports of the Sheikh bid were accordingly mere speculation<sup>572</sup>.

Nevertheless, two days later they announced that there had actually been a take-over bid from a Middle East consortium. They also indicated that the club had made a deal with their creditors which would enable it to avoid the fate of administration. Under a “standstill agreement”, the Board had until 19 January to find another investor or potential buyer. This period of grace

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would allow the club to use the January transfer window to raise cash by selling more of its top players<sup>573</sup>. Leeds also appealed to its former players and managers who were owed money, as described above, to settle for less or see their former club go to the wall. In fact David O'Leary agreed to defer the balance of the compensation due to him a few days later<sup>574</sup>. This news came as the prospect of the Middle East bid was fast receding, with no offer being received by the club in spite of the high hopes of such salvation earlier<sup>575</sup>. As a result, professor McKenzie was again despatched to China in search of a potential saviour<sup>576</sup>. In fact, several days later it was announced that the learned Professor was about to yield his position as Chairman so that he would be free to mount his own takeover bid, which would be financed by a Chinese consortium<sup>577</sup>.

Prof. McKenzie was to step down in the very day of the club's Annual General Meeting on 23 December. If he expected any show of gratitude for his efforts, he was sorely disappointed. Both he and Allan Leighton, who had already resigned as Deputy Chairman, came in for stinging criticism for the manner in which they had handled the club's crisis<sup>578</sup>. More than 200 shareholders attended and accused the former Chairman and his associates of "telling a pack of lies" as well as "being rewarded for abject failure" – a less than subtle allusion to the £300,000 remuneration package which the club had awarded him in spite of its parlous finances. The acrimony felt by the shareholders present was not eased by an announcement by financial director Neil Robson that as part of the bizarre deal under which United continued to pay Robbie Fowler's wages at Manchester City, the player will have received a total of £3.76 million from them by June 2006.

Such was the disenchantment at the meeting that a proposal was put to the effect that, if the club did succeed in staving off administration, there would be a comprehensive inquiry into the reasons why the club got itself into its current debt-laden position. If indeed this came to pass, Leeds United would set yet another unenviable record, which is to become the first club in English football to hold an independent investigation into boardroom mismanagement<sup>579</sup>. The search for a buyer continued but became increasingly desperate. Because of the team's poor performances on the pitch, relegation now looked a distinct possibility, with financial analysts placing the value of the club at £20 million, which was less than half the value which they had placed on it the previous month<sup>580</sup>. By this time, interest from the Far East appeared to have subsided, and by early January Allan Leighton seemed to be the sole credible candidate for the purchase<sup>581</sup>.

With the 19 January deadline looming increasingly large, there appeared to be renewed interest from the

Bahraini Sheikh. Two days before the deadline, he was expected to produce a letter from his bankers indicating that he had £35 million to invest in the club. However, no such letter materialised<sup>582</sup>. Chief Executive Trevor Birch succeeded in obtaining a further week's grace from the creditors, and made optimistic noises about being in sight of obtaining the £5 million which he believed was necessary to keep the club going until the end of the season. Fresh hope also emerged that Mr. Leighton had put together a rescue package, although there was some doubt whether the creditors would accept the deal, which was a complex one<sup>583</sup>. In fact, the next day the creditors informed Mr. Leighton that they also rejected the interim offer of £5 million because they were reluctant to accept a raft of conditions attached to the proposal. These included the proposition that the consortium advancing the money would become the club's principal creditor in the event of administration<sup>584</sup>.

Frantic attempts were again being made to find some way of easing the club's financial plight during the stay of execution won by Mr. Leighton. The club officials met the players at their training ground, but the latter refused to countenance a deferral of even 15 per cent of their wages, which raised the prospect of at least one leading player being sold that week<sup>585</sup>. Even this prospect had its problems, since it emerged a few days later that Leeds turned down a £5 million joint offer for international goalkeeper Paul Robinson and James Milner because they were attempting to secure larger bids. This was seen, however, as merely part of a bargaining process, particularly as the Leeds officials had been actively hawking Mr. Robinson over the previous few weeks<sup>586</sup>.

Meanwhile, the players were coming under renewed pressure to accept a wage deferral<sup>587</sup>. The club's position was becoming increasingly desperate, particularly as they faced the near-certainty of relegation. Even if they avoided that fate, they could have points deducted if they went into administration, as an increasing number of Premiership chairman were lobbying for the introduction of such a measure, which had already been agreed for the Football League. This in turn would ensure that they were demoted to the lower division<sup>588</sup>. News of a further possible bid dawned in mid-February, when it was learned that Michael Ezra, the Ugandan property tycoon, claimed to have £90 million of funding ready to save the club<sup>589</sup>. A consortium headed by Yorkshire businessmen Geoffrey Richmond and Gerald Krasner was also known to have expressed an interest in making a bid<sup>590</sup>, as was another Yorkshire-based group, headed by investment house Zeus Capital<sup>591</sup>. The latter, however dropped out a few days after news of their interest emerged<sup>592</sup>.

In the meantime, United had succeeded in gaining yet another stay of execution from their creditors<sup>593</sup>. However, this deadline expired also, and the creditors

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indicated that no new standstill agreement would be reached, which compelled the club to suspend the trading of their shares, which had sunk to £2.75 each. Nevertheless, the creditors still seemed reluctant to push the club into administration, and the Leeds board continued to maintain steadfastly that they retained the confidence of the major creditors. Negotiations with the Krasner/Richmond consortium were continuing<sup>594</sup>.

Finally, in mid-March, the consortium agreed to the purchase. In addition, in a high-risk deal resembling a US "Chapter 11" administration, the club's solicitors, DLA, steered United away from administration as a result of the management-led restructuring of the debt which made the sale to the consortium possible. Under the deal, the principal creditors are reported to have accepted around 20 pence in the pound on the club's £82-million debt. The shareholders, for their part, would not get anything. Debtor-in-possession restructurings are common in the US, but remain a rarity in this country<sup>595</sup>.

### *Bradford City's woes continue*

It will be recalled from a previous issue<sup>596</sup> that the Nationwide League club had succeeded in having an administration order lifted because of a £5 million cash injection. However, financial trouble hit the club again in February 2004, as a result of a feud between the Rhodes family (who made the cash injection) and former chairman Gordon Gibb, both being major shareholders<sup>597</sup>. This caused them to dip back into administration. However, the club has succeeded in maintaining itself thanks to another cash injection from the Rhodes family, who increased by a further £5.5 million the considerable fortune they have already sunk into the club<sup>598</sup>.

### *Exeter City in administration.... and in High Court*

Few things have gone right for "Ziddy" in recent years. After a long period of languishing in the lower reaches of the Nationwide League, they were relegated to the even humbler environs of the Conference at the end of the 2002-3 season. The club's financial position has also deteriorated, and threatened to push them into insolvency. It will be recalled from a previous issue<sup>599</sup> that a supporters' trust had ridden to the rescue in the end; however, this group inherited a considerable debt. It is this financial albatross which caused the club to enter a Company Voluntary Arrangement (CVA), which splits its debt into two parts, i.e. football creditors and trade creditors, with the former being given priority, whilst the latter (who account for the bulk of the debt) are paid off at 10p in the pound. Although this action has an enormous impact on the debt it also causes the club to incur a 12-point penalty. The club decided to appeal against this sentence<sup>600</sup>. The Conference authorities referred the matter to the Football Association, who had

not given a ruling at the time of writing<sup>601</sup>.

This affair has in the meantime given rise to an interesting test case, which results from a change in the creditor position of the Inland Revenue (IR) under the Enterprise Act 2002. One of the provisions of this legislation has relegated the Inland Revenue from preferential creditor status to that of an ordinary creditor. Exeter City are the first club to drop into administration since the new Act entered into effect. The IR are now challenging the system whereby football creditors (mostly players' wages) are given priority over all others. The case had yet to be heard at the time of writing<sup>602</sup>.

### *Wimbledon FC remain in administration*

It has been reported earlier (see above, p.72) that the move made by the "Dons" to Milton Keynes has not proved to be the unalloyed blessing which some of their starry-eyed directors expected. Although crowds have been somewhat healthier than the dismal gatherings who showed up at Selhurst Park, the club remains mired in financial difficulty, and has not yet emerged from the administration in which it was put in June 2003<sup>603</sup>. In mid-December 2003, Wimbledon's administrators received a takeover bid from the InterMK consortium, headed by music entrepreneur Pete Winkelman<sup>604</sup>. This bid was put to the club's creditors in late January 2004<sup>605</sup>. No further news on this bid had been received at the time of writing.

### *Other English clubs*

**Port Vale.** The club's financial troubles have been extensively documented in a previous issue of this journal<sup>606</sup>. In late December 2003, a £530,000 offer from Italian football agent Gianni Paladini to buy a controlling interest in the club was turned down by the latter, in favour of an 11th-hour bid from a supporter-led consortium. The seven-man board voted to accept a £150,000 cash injection from Vale fan Peter Jackson and his consortium. Mr. Jackson will only have a 30 per cent stake in the club, but the cash is sufficient to ward off its immediate financial problems<sup>607</sup>.

**Notts County.** When this Journal last reported on the sad state of affairs at the oldest professional football club in the world, Notts County had been given until December 2003 by the Football League to sort out its problems, or face expulsion<sup>608</sup>. With barely a week to go before the expiry of this deadline, it was learned that a takeover bid by the Blenheim Consortium had been endorsed by the League. This was widely expected to put an end to the club's period of administration<sup>609</sup>.

**Oldham Athletic.** In the previous issue<sup>610</sup>, it was

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reported that the "Latics" had gone into administration under pressure of, amongst others, the Inland Revenue. In early February 2004, it was learned that the club were on the verge of coming out of administration after a bid to take it over had finally won approval. Three New York-based English businessmen had had their proposals for a buy-out rejected the previous month, but the Football League and Football Association finally allowed them to proceed<sup>611</sup>.

### *Scottish cubs in financial difficulty*

**Dundee FC.** The Tayside club has recently experienced a considerable revival on the field of play. However, this appears to have been at the expense of the laws regarding financial prudence, because, in late November 2003, the chief executive, Peter Marr, announced that the club faced debts totalling over £13 million, and would probably be forced into administration. This move was bitterly opposed by controversial lawyer Giovanni di Stefano, who was still awaiting clearance by the Scottish Football Association to become a director at Dens Park, and who is convinced that such a move will destroy the club<sup>612</sup>.

In fact, the club did go into administration shortly after this announcement was made. In late January 2004, there was more serious news for the club when they were informed that they would commence the next season in the Scottish Premier League (SPL) 10 points behind everyone else unless they had begun to come out of administration by the end of May of that year. This was the result of a meeting of SPL clubs held at Hampden Park, Glasgow, at which it was decided that clubs in administration would face not only a points deduction, but also a ban on signing new players<sup>613</sup>.

**Motherwell FC.** The same fate outlined above may befall Motherwell, who went into administration in April 2002. It has recently been reported, however, that the club is close to solving its financial problems<sup>614</sup>.

This deadline had not yet expired by the time this issue went to press.

**Heart of Midlothian.** This issue has already been dealt with under the heading "Administrative Law" (see above, p.71).

**Livingston FC.** This is not another tale whereby a relatively modest club reaches the upper echelons of the game, but in the process accumulated unsustainable financial liabilities. The club went into administration in early February 2003, owing £3.5 million. However, unlike the vast majority of clubs whose financial woes are discussed in this section, the West Lothian club owes its current difficulties, not to

excessive players earnings, but to an investment in a hotel and office complex at the stadium, which was embarked upon in order to diversify income. Livingston had a 75 per cent share in this venture. However, failure to rent sufficient office space has now affected the football team<sup>615</sup>.

The man who took the club from the modest environs of the Scottish Second Division to a place in the UEFA Cup, Dominic Keane, has been removed from office by the club's bankers. Mr. Keane expressed his bitterness at such treatment, given that the sums owed by the club are relatively modest compared to the debts incurred by other clubs<sup>616</sup>.

### *Parma suffer as a result of Parmalat scandal*

Britain is not the only country where football clubs are experiencing financial hardship. In the case of Italian club Parma, however, these troubles are not of their own making, but have resulted from one of the country's major financial scandals, which resulted in the global food group Parmalat being declared bankrupt towards the end of the year 2003. Parmalat is the 99 per cent owner of the club, whose honours include two UEFA Cups. It has recently been the subject-matter of a vast €8 billion fraud investigation by the Italian authorities. Accordingly, the club faces a real possibility of closure<sup>617</sup>.

In mid-January 2004, the entire Board of Directors of the club resigned, including the President, Stefano Tanzi, whose family is deeply involved in the Parmalat scandal. The club was put up for sale in an attempt to prevent their best players from being creamed off by other European top clubs<sup>618</sup>. At the time of writing, the club was still in existence, although its future very uncertain.

### **Financial difficulties beset motor racing**

#### *Motor Sport Developments*

In early December 2003, it was learned that Motor Sport Developments, Hyundai's rally team since 1998, was to commence legal action against the Korean manufacturer following a meeting at which the team's creditors agreed that MSD could continue to trade rather than face liquidation. Over 90 per cent of the creditors agreed to this move. MSD are taking this legal action to recover debts and in respect of defamation, after failing to contest the last four rounds of the World Championship as a result of the dispute. All but a dozen of the 100-strong staff have been lost their employment. It was also learned that Hyundai plan to return to the world championships with a new team in 2006<sup>619</sup>.

#### *Cart bankruptcy threat affects British firms*

In early December, it was learned that the Cart

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Championship, which at one time was the most important motor racing series in the US, is facing bankruptcy and the cancellation of all its events after talks to secure its future ended in deadlock. If this series is discontinued, this may produce disastrous consequences for British firms, particularly Cosworth Engineering, based in Northampton, and Lola Cars, chassis manufacturers based in Huntingdon. The Cart Board of Directors had been in negotiations to sell the series to a new company called Open Wheel Racing Series (OWRS), owned by a group of investors who include Gerald Forsythe (for whose team Jacques Villeneuve won the 1995 Cart title), Kevin Kalkhoven and Paul Gentilozzi. Shareholders were due to vote on the merger proposal, but OWRS had advised Cart that a number of conditions for the proposed merger would not be met by that deadline<sup>620</sup>.

Lack of sponsorship, as well as the commercial attractions of the rival Indy Racing League (centred on the Indianapolis 500) have recently threatened to reduce the Cart series to about 18 cars next season. OWRS said that this could be a major obstacle when it came to finalising the sale of the series<sup>621</sup>.

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

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### Other issues

#### **Manchester United boardroom struggle continues**

##### *Background*

It may be one of the most successful football clubs in the world today, but Manchester United have of late experienced the kind of internal disputes which are more suitable to a Texan oil company than for a sporting body.

When this Journal last reported on the internal affairs at Old Trafford<sup>622</sup>, there appeared to be taking place a power struggle for control of the club, which was interwoven with other undercurrents with legal implications. The two centres of interest here were Malcolm Glazer and the Irish duo of John Magnier and J P McManus. Mr. Glazer, a US citizen, is the owner of the American Football team Tampa Bay Buccaneers, and appeared as a United investor at the beginning of 2003. The Irish duo, on the other hand, are horse-breeding tycoons known under the unflattering soubriquet of the "Coolmore Mafia". Mr. Glazer had in the meantime doubled his stake in the club and looked poised to increase his holding to the 10 per cent mark, which would give him a seat on the Board of Directors. The Irishmen, on the other hand, had also raised their stakeholding in the club, to 23.1 per cent, in October 2003.

The Irish duo's bid for power, however, had an additional and increasingly acrimonious edge to it, in the shape of the legal dispute which was developing between them and United manager Sir Alex Ferguson over the breeding rights to the horse Rock of Gibraltar, which was owned jointly by Mr. Magnier and Sir Alex, and for which the latter was seeking 50 per cent of the proceeds of its stud fees, which could be worth up to £100 million. It was felt that Messrs McManus and Magnier could be seeking to pressurise Sir Alex into abandoning this claim, or even remove him from office, by increasing their financial hold over the club.

#### *"Rock of Gibraltar" action sets off internal warfare – and ends with Ferguson climbdown*

The Rock of Gibraltar dispute at first looked as though it was inevitably destined for court litigation. In mid-November 2003, the United manager's solicitors issued summons against Mr. Magnier. This news had implications for Sir Alex's immediate future at Old Trafford, since Magnier had made it clear to old Trafford that he wanted the dispute to be settled before Ferguson signed his new £5 million-per-year contract with the club<sup>623</sup>. The case was to be heard before the High Court in Dublin.

The scene was therefore set for an almighty confrontation, both inside and outside the courtroom. It also looked likely to be a struggle which would not be conducted entirely in accordance with Marquess of Queensberry rules, and early in the year 2004 the club was forced to investigate claims that the Irish businessmen were attempting to undermine Sir Alex. This centred around accusations that Magnier and McManus were behind a number of newspaper stories which were damaging to the manager, as well as allegations that various people were "planted" at the club's Annual General Meeting, apparently to ask questions which would be embarrassing to the Scot. It was also alleged that the Irish two had employed a firm of private investigators to probe the manager. This speculation was intensified by the news that Shareholders United, a pressure group of the club's shareholders, had passed a dossier of "evidence" about these allegations to Chief Executive David Gill, who holds this group in high esteem. Added credibility was given to the matter by the fact that the accusations stemmed from an investigation conducted by Michael Crick, an award-winning author and investigative journalist who is also on the club committee<sup>624</sup>.

That these were no idle accusations appeared to be borne out a few days later, when further details emerged about the security agencies whose services had been used against Sir Alex. It appeared that the operation had already cost some £150,000, with agents

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operating on three continents. The infiltration of the AGM, referred to earlier, was conducted by persons of whom it was suspected that they were linked to security company Kroll. The latter had already admitted to an in-depth investigation into Ferguson's personal and business interests, and to having been instructed by Mr. Magnier. They have also probed Sir Alex's interests in the US and the Far East, with no expense being spared in gathering as much information as possible which was capable of being used against the United manager<sup>625</sup>.

The anti-Ferguson manoeuvres intensified during the next few weeks, against the background of the news that, as will be discussed more fully below, the Irish duo had increased their stake in United to 25 per cent. First of all, Magnier and McManus called for a halt to negotiations with Sir Alex for renewal of his contract of employment. This demand came in the form of a letter from their company, Cubic Expression, to Sir Roy Gardner, the Chairman of the United holding company. The Irishmen wanted the talks with Ferguson to stop whilst the United directors carried out a probe into his business affairs, and particularly his dealings with his son Jason, a football agent (see also on this subject above, p. 39). The Club, however, reacted by stating that the talks would continue – although there was some speculation that any contract offered to Sir Alex would merely be for one year<sup>626</sup>.

Evidence of the increased hold which the Irish duo had acquired over the running of the club emerged a few days later, when the Board announced that they would be conducting a "thorough internal review" of recent transfer dealings. The statement was accompanied by a vigorous defence of United's corporate governance, which in one sense was a rejection of the concerns expressed by the Cubic Expression company, but the fact of holding the review also was a public admission that the club could ill afford to antagonize its biggest shareholder<sup>627</sup>.

The next day, it appeared that Magnier and McManus had submitted to the United board a list of 63 questions which relate to recent transfer deals, the use of agents, financial matters at the club and issues of corporate governance. The Irish pair expressed their irritation at not having received a reply to this list of questions, although they stressed that they did not seek a point-by-point reply but a response indicating that the club had addressed the general issues raised. One of the questions concerned the position of the player Rio Ferdinand, under suspension for having failed to take a routine doping test (see below, p.109), and who continued to be in receipt of his £70,000 per week salary<sup>628</sup>. Magnier and McManus seemed to have landed a blow against Ferguson when it was announced that the latter's employment at Old Trafford would continue,

but on a one-year rolling contract basis rather than the four-year deal sought by Sir Alex. Yet far from pacifying the horsebreeder millionaires, this deal appeared to incense them further. They continued to insist that an internal inquiry should have preceded any such deal, and that the details of the contract should be made public. The statement accompanying the announcement of the deal had been extremely supportive of the manager, and the Irish duo may have sensed that the deal in fact represented a minor victory to the Board in the power struggle<sup>629</sup>.

Magnier and McManus responded by submitting a new list of questions – 99 in all, accompanied by an equally damning covering letter from the Cubic Expression company. The documents contained a forensic dissection of the club's ability, as a plc, to provide the necessary information regarding every aspect of its transfer business. The questions also showed renewed concern about the use made of football agents, and the role played in this by Ferguson Jr.<sup>630</sup> In a further twist, Jason Ferguson announced the next day that he had lodged a formal complaint with Cheshire police that his mail and rubbish had been tampered with. He added that a suspicious person had been seen lurking in the vicinity of his Wilmslow home<sup>631</sup>.

Several days later, Sir Alex indicated that he was about to settle the legal action that triggered off this bitter civil war, meeting his lawyers in Dublin and commencing discussions which were expected to discontinue the Rock of Gibraltar litigation. It was understood that, as part of the settlement, Ferguson would drop his claim to the stud rights, but in return would receive the proceeds of several "nominations" by the horse each year for the duration of its career as a stallion, each worth £40,000<sup>632</sup>. It was also learned that Jason Ferguson was prepared to surrender his lucrative work as a football agent, citing the personal anguish which the entire dispute had caused him<sup>633</sup>.

However, the initial optimism which greeted this news soon gave way to renewed despondency when it appeared that, far from being over, the legal battle between the two sides was set to intensify. It was learned that Magnier's response to such talk of a peace deal was to turn up the heat on Ferguson by filing a motion in the High Court to force further disclosures from Sir Alex concerning his claim. Apparently Mr. Magnier's solicitors had been waiting for answers to questions about the claim for over a month. Although a relatively tiny detail in the context of this case, it did not appear to indicate any readiness on the part of the Irishman to settle<sup>634</sup>. In addition, the Irish duo appeared to be gearing up for a second legal battle – this time brought by themselves and relating to the possibility of bringing an action for defamation. For this purpose, they wrote to the

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Old Trafford board to demand the tapes and written transcripts of Ferguson's various interviews with the media the previous week. These concerned the story, referred to above, according to which his son Jason's mail and rubbish had allegedly been interfered with<sup>635</sup>.

Meanwhile, the prospect of a settlement in the stud rights dispute seemed to be receding as time passed. It became clear that the terms on which Sir Alex had indicated his willingness to settle were unacceptably high for Mr. Magnier<sup>636</sup>. Finally, however, the manager relented at the beginning of March, and the dispute was settled by Sir Alex accepting Magnier's offer of four "nominations" per year, two each in the Northern and Southern hemispheres, which will be worth an annual sum of approximately £175,000. This climbdown may have been prompted by yet another increase in the shareholding of the Irish duo, bringing their total to 28.9 per cent and giving them an increasingly powerful position in the boardroom<sup>637</sup>. A few days later, it was also learned that, as part of the settlement, Mr. Magnier was to abandon the claim for defamation mooted earlier<sup>638</sup>.

### *The battle for control intensifies*

The attentive reader will have understood that the legal battles above were being played out against a background of rapidly evolving power games within the club. Mr. Malcolm Glazer, the US sports tycoon, was never far from the action, and fresh speculation about his desire for power at Old Trafford began to surface in late November 2003, when it emerged that a stake of almost 6 per cent in the club had been bought through the agency of Mehmet Dalman, the London head of the German Commerzbank. City sources were immediately speculating whether Mr. Dalman was acting alone, on behalf of the German bank, or in conjunction with one of the existing investors at United. He was known to be a fan of American football, which prompted speculation that he may be an associate of Mr. Glazer<sup>639</sup>. This speculation intensified as it was learned that United's Chief Executive David Gill had travelled to the US for secret talks with Mr. Glazer in order to establish the latter's intentions towards the club<sup>640</sup>. Several days later, Old Trafford confirmed that Mr. Glazer had in fact increased his holding to almost 15 per cent<sup>641</sup>.

The meeting with Mr. Glazer may have established the amount of the latter's shareholding, but left the United directors with no clearer idea about his intentions, more particularly on the question whether he intended to launch a takeover bid for the club. Chief Executive Gill stated publicly that Mr. Glazer saw the club as just a good investment, which did not convince all observers and commentators<sup>642</sup>. Doubts as to Glazer intentions intensified further two months later, when it was learned that he had increased his shareholding to

16.69 per cent, and seemed to be contemplating a comprehensive take-over bid<sup>643</sup>.

The Irish duo, on the other hand, have made few secrets of their intention to take control of the club. As was reported in the previous issue<sup>644</sup>, they had already increased their holding in October 2003 when they purchased BSKyB's 10 per cent holding, bringing their total up to 23 per cent. The prospect of an Irish take-over moved a step nearer in early December 2003, when it was learned that they had spent £8 million buying a further 3.1 million shares in United, which fuelled fresh takeover speculation driving shares up to 267p. Thus the two millionaires – still operating through their secretive investment vehicle Cubic Expression – were in possession of 25 per cent of the club's shares<sup>645</sup>. Shortly afterwards, it was learned that their shareholding had risen to 28.89 per cent<sup>646</sup>, thus increasing their position of power even more, and finding themselves increasingly in a position of chief policy-makers at old Trafford – a fact which may have been decisive in causing Sir Alex to abandon his ill-fated court litigation over the Rock of Gibraltar.

In the meantime, a new dimension appeared to be hovering over Old Trafford, when it was learned that interest in the purchase of the club came not from across the Irish Sea or the Atlantic, but from the oilfields of Russia. As the old year turned into the new, there were reports that Ralif Safin, one of Russia's most powerful oil magnates, had joined the list of potential buyers of the club. Mr. Safin is the co-founder of Lukoil, the country's second biggest energy company, whose personal wealth was estimated at £225 million and rising. This inevitably raised the prospect of yet another top English side falling into the hands of a Russian tycoon, as had been the case of Roman Abramovich's spectacular acquisition of Chelsea the previous summer<sup>647</sup>. Since then, however, nothing further has been seen or heard about any such bid.

This represented the position at the time of writing.

### **Sporting bodies consider changing corporate status**

#### *Rugby League*

In February 2004, Richard Lewis, the Chief Executive of the Rugby Football League, proposed that the game's governing body should become a limited company. This announcement was made as the welcome news broke that the league had succeeded in clearing debts of almost £2 million over the past two years<sup>648</sup>.

#### *Cricket*

In February 2004, it emerged that the Marylebone Cricket Club, the game's most famous club, was

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considering acquiring the status of an incorporated company in the most fundamental shake-up of the institution's membership since its foundation in the late 18th century. The move is intended to protect Lord's (i.e. the Committee and its members) from liability in the event of a fire or a terrorist attack. The idea would be to protect the cricket ground, which is the club's principal asset, from a large insurance claim by creating a separate legal entity which could assume ownership of Lord's. The current insurance policy would continue. MCC President Charles Fry intimated that a working party which included three lawyers had been looking into the matter. Tax experts had also been called upon to clarify issues related to stamp duty and capital gains tax. He attributed the interest which his organisation had developed into this possibility to our increasingly litigious society<sup>649</sup>.

### ***Ajax pay financial price of Champions League defeat***

Ajax Amsterdam, thrice winners of the European Cup in the early 1970s, are not the force they once were. In an age that seems destined eternally to be dominated by large clubs from large countries, their early exit from the top European competitions has become the norm rather than the exception. When they lost to Club Brugge in the early rounds of the 2003-4 Champions' League, this also meant that they were also no longer eligible for the UEFA Cup, since they finished last in their group.

The effect of this early exit has been severe for the club's finances – and not only because of the loss of revenue in terms of spectator income, media fees and sponsorship deals. Shortly after the Club Brugge result, it was learned that Citibank, the world's largest financial services company, had sold its 7.4 per cent holding in the club. This emerged from the Netherlands Financial Services Regulator's files a few weeks after the event. The holding was in the name of Salomon Brothers, the bank which Citigroup took over in 1998. Ajax is the country's sole publicly traded football team, having floated in 1998<sup>650</sup>.

# 11. Procedural Law and Evidence

## **Article on CAS in professional journal**

In September 2003, there appeared in a leading professional journal an article introducing the reader to the Court of Arbitration for Sport<sup>651</sup>. The authors provide a rapid overview of the role and procedures of the Court, as well as its status. They make the comment that the main disadvantage of the CAS is that it assumes no automatic jurisdiction for sporting disputes, and state that, from their own experience in this field, sporting bodies will often do their utmost to avoid the Court's jurisdiction if they can. However, as the Court publishes its decisions both in case digests and online, the citation of its case law is growing and gaining increasing recognition.

## **Dispute over jurisdiction in ski accident case ends inconclusively. French Supreme Court decision**<sup>652</sup>

In the case under review, a skier had suffered personal injury as a result of an accident which occurred in the skilift area of a winter sports resort. The victim brought an action in damages before the ordinary courts (la juridiction judiciaire) against the company to whom the relevant municipality had subcontracted this operation, and which had failed to place an appropriate sign indicating the steepness of the slope, this having been the cause of the accident. The jurisdiction of the ordinary courts was challenged before the Court of Appeal by the defendant, who considered that the issue should be dealt with before the administrative courts. The Court of Appeal decided that this challenge was valid, on the grounds that, even if it were accepted that the layout of the area in question had been negligent, any such negligence would be incurred by the company in pursuance of the task assigned to that company, which meant that this negligence could not be detached from the service being operated (which is necessary, under a Law of 1790, to confer jurisdiction onto the administrative courts).

The Supreme Court dismissed this interpretation. It ruled that the fact that the negligence attributed to the company in question had occurred in the course of performing the task assigned to it did not exclude the possibility that the negligence could be detached from service being operated. The Court of Appeal had failed to investigate the question whether this negligence was sufficiently serious to be thus detached, which was the proper criterion to apply. This issue would need to be determined in the course of a new trial.

The Court therefore set aside the decision and ordered a new trial before a different Court of Appeal.

# 12. International Private Law

[None]

## 13. Fiscal Law

### Chancellor Brown aims tax breaks at sporting grass roots

In late November 2003, the Chancellor of the Exchequer, Gordon Brown, announced a comprehensive set of tax breaks aimed at the grass roots of English sport. He doubled the threshold at which clubs are required to start paying corporation tax, providing a boost to those searching for promising young talent. This threshold will be raised from £25,000 to £50,000, which will leave the vast majority of clubs exempt from tax. The £50,000 threshold will consist of £30,000 on the profits made by club bars and the sale of equipment, and £20,000 on rental income from club premises, which are often hired out for parties and functions.

Dr. Brown also confirmed that 100,000 amateur sports clubs were to be granted 80 per cent rates relief. Speaking in Parliament in the wake of England's victory in the Rugby Union World Cup, he commented:

***"The importance of sport to our communities and to our whole country has been demonstrated most powerfully as the England Rugby Union World Cup triumph is enthusiastically celebrated throughout the whole of the United Kingdom. I know that the whole House will not only want to congratulate their success but also encourage the next generation of sportsmen and women."***<sup>653</sup>

News of these tax breaks was warmly welcomed by Richard Caborn, the Minister of Sport, and Margaret Talbot, the Chief Executive of the Central Council of Physical Recreation, which represents the national governing bodies of sport and recreation in this country.<sup>654</sup>

### Will MCC leave Lord's for tax haven?

The prospect of ending the link between Lord's Cricket Ground and the game's ruling authority seems as unthinkable as that of the Promenade Concerts terminating their association with the Albert Hall. Yet this is precisely what is currently being mooted, at least if current plans put to the International Cricket Council (ICC) are anything to go by. The merits of Dubai, Malaysia, Ireland or even that well-known cricketing nation of Switzerland are currently being considered by the ICC, and were put to the Executive Board meeting

in New Zealand in early March. Many of the alternative venues being assessed have tax regimes which offer more fiscal advantages than the UK.<sup>655</sup>

### Abramovich faces new tax probe in Russia

In the previous issue of this journal<sup>656</sup> it was reported that Roman Abramovich, the new owner of leading Premiership side Chelsea FC, had on a few occasions attracted the interests of the fiscal authorities in his native Russia. In mid-November 2003, the news broke that Mr. Abramovich was once again coming under the scrutiny of the Russian authorities into accusations of "aggressive tax avoidance" policies adopted by his oil company, Sibneft. As part of the Kremlin's increasing assault on big business and the country's controversial oligarchs, inspectors ordered a further review of the company's "unethical" tactics for minimizing its tax liability. An earlier investigation had revealed no unlawful activity, but had criticised Sibneft for exploiting loopholes in the law to reduce payments to the national exchequer.<sup>657</sup>

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

### Footballers to face tax on agents (UK)

Football agents have not exactly endeared themselves to either the spectators or administrators of "the beautiful game", as these pages have already amply testified. Now players who make use of these intermediaries to handle their transfers between clubs are to face a potentially huge tax bill following a recent ruling by the Inland Revenue. The tax authority has determined that players must pay tax on payments made to agents who have been actively involved in their transfer deals. Although they do not receive the money, it is argued that the players benefit from the agents' work, which makes it a "benefit in kind".<sup>658</sup>

With agents regularly obtaining over £1 million for a successful transfer, this could leave players who are taxed at the top rate of 40 per cent having to pay upwards of £400,000 on the deal. All Premiership and Football league clubs have been apprised of this ruling. If they co-operate, the Inland Revenue will merely impose the tax on future deals. If they do not, the ruling will be imposed retrospectively, if necessary for up to four years.<sup>659</sup>

## 13. Fiscal Law

### **New York racing group settle tax evasion charges (US)**<sup>660</sup>

In December 2003, it was learned that the owner of New York State's main racing tracks will pay up to \$3 million in order to settle charges that it allowed employees to evade more than \$2 million in income tax. The US Attorney's Office and Internal Revenue Service stated that the New York Racing Association (NYRA) and seven people admitted that they had allowed, or participated in, a scheme which permitted some betting window tellers to avoid millions in taxation by dissimulating income. The NYRA, which owns the Triple Crown venue of Belmont Park, the Aqueduct Raceway and Saratoga Racecourse, permitted such activity as a means of keeping industrial peace. The administration added that NYRA agreed to the fine in order to avoid prosecution. Under the settlement, the Association also agreed not to discuss the matter in public.

According to the US Attorney's office, the penalised scheme involved the betting window tellers removing cash from their tills and reporting the money missing to the managers. Tellers were allowed to avoid disciplinary action by reimbursing the amount missing to the track, usually by having it deducted from their pay. That reduced the reported income and their taxes, allowing them to bank millions in tax-free earnings. The indictment stated that one employee, who was a trade union official, was allowed to report tens of thousands in lost money even though his job did not involve handling cash. Some employees went so far as to claim that they had lost cash equal to almost their entire pay cheques. Fearing its activities would be discovered, NYRA cracked down on the practice in January 2000.

NYRA also agreed to dismiss all the managers who oversaw the employees involved in this scheme.

### **RFU wins Twickenham VAT appeal (UK)**<sup>661</sup>

One of the obligations of the English Rugby Football Union (RFU) is to provide, maintain and operate the National Stadium at Twickenham, as well as developing the latter for use by members and others. The redevelopment of Twickenham, which occurred a few years ago, was financed by means of bank loans paid off by the proceeds of successive issues of debentures. These debentures carried no right to interest, but gave the debenture holder the right to buy at full price a ticket for each RFU match played at Twickenham. The debenture holder also enjoyed a priority right, at the end of the ten-year benefit period, to apply for further debentures carrying comparable benefits. Those debentures which were issued in 2000 and 2001 also carried the right to purchase, at full price, one car park ticket for every four debentures held. These rights were not available to non-debenture holders.

Under items 1 to 6 of Group 5 of Schedule 19 to the VAT Act 1994, a single supply of benefit-bearing instrument is exempt from VAT. The Commissioners of Customs and Excise, however, contended that there were two supplies: (a) the exempt supply of the right to repayment of the debenture, and (b) the standard-rated supply of the benefits. The value of the consideration for the benefits was the "opportunity cost", which represented that which the debenture holder was prepared to spend by forfeiting the right to use the money which he subscribed for other purposes. There was a direct link between the opportunity cost and the benefits obtained.

For its part, the RFU argued that the arrangement in question produced a single exempt supply of a bundle of rights to the debenture holder, which were not divisible into separate supplies. If there was a separate right to purchase tickets, there was no consideration for that right, because there was no direct link between the right to buy a ticket and the interest foregone. An issue of shares carrying a valuable right but no certainty of a dividend would need to be regarded in part as a taxable supply, the consideration for which would be the interest foregone less any dividends that there was a good expectation of receiving; that would be contrary to the published practice in Notice 700/67/02.

The London VAT Tribunal allowed the appeal against the Commissioners' ruling. Firstly, the question whether there was a single supply of the debenture must be approached having regard to all the circumstances and ascertaining the essential features of the transaction, whether there was a single supply where "one or more elements are to be regarded as constituting the principal service" and "one or more elements are to be regarded (...) as ancillary services which share the tax treatment of the principal service". Secondly, the advantages to the debenture holders lay in the benefits and in the fact that the debentures provided a means whereby the members could make a long-term, eventually repayable, contribution to the game. The RFU had obtained the funding at virtually no expense whilst the members obtained the benefits, which both legally and in fact were inseparable from the repayment rights. To separate the supply into two distinct elements did violence to the arrangements, and the suggestion that the benefits were ancillary to the right of repayment was unreal. The arrangement accordingly produced a single supply of benefit-bearing instrument which was exempt under items 1 to 6 of Group 5 of Schedule 19.

# 14. Human Rights/Civil Liberties

## Racism in sport

### Racial issues continue to beset football

#### *Is English football "institutionally racist"?*

To be "institutionally racist" is an accusation which, with varying degrees of justification, has been thrown at a number of our bodies and organisations of public life in recent years. In this, English football has not been spared, although no doubt the debate as to whether the accusation is justified will continue to rage for some time. Several recent developments have ensured that there will be plenty of scope for debate.

Thus in late October 2003, it was learned that the Commission for Racial Equality (CRE) was to investigate claims that the nation's football clubs were not doing enough to recruit non-white staff in coaching and administrative positions. The CRE indicated that it would write to all Britain's professional clubs and governing bodies, seeking to establish how many non-white staff they employ and what action they have taken to increase minority representation. This action followed a number of meetings with former black players and football anti-racism groups who had expressed concern that clubs were failing to adopt equal opportunity policies<sup>662</sup>.

The CRE will examine the responses which it receives from clubs and then attempt to co-operate with them to implement equal opportunity policies. If clubs fail to adopt these policies, the CRE threatened to take legal action against them under its statutory powers<sup>663</sup>. This may very well happen in view of the fact that, the following month, the CRE had been forced to extend its deadline for the survey referred to in the previous paragraph because of the poor response. Publicly, the CRE blamed the extension on the postal strike, but there was known to be widespread dismay within the organisation at the poverty of the response<sup>664</sup>.

Three months later, the Independent Football Commission published its report on race issues in the game, which contained serious criticism of the manner in which sport's authorities have dealt with the problem. Specific complaints included the failure of some clubs to follow up reports of racist behaviour within their grounds, and the game's overall failure to increase the number of Asian fans and players. IFC officials met in London in mid-January 2004 to discuss the implications of the report ahead of its publication, and to debate what can be done to ensure the recommendations contained in the report are followed. Privately, IFC officials stated that an independent statutory regulator may be forced upon the game if it fails to make any changes. There was general dismay within the Commission that many of the recommendations

contained in its first round of reports the previous year had not been carried out by the clubs<sup>665</sup>.

However, the claim contained in the report which caused the greatest concern was that the sport was "institutionally racist". Ever since Lord McPherson coined the phrase a few years ago, this has been a description which has been used and abused in many contexts, to the extent that its true scope and meaning have become the subject of ever-widening divergences. Thus Piara Powar, Director of the anti-racist Kick it Out campaign, commented that, having read the report, he accepted and understood the use of this phrase. He admitted that:

***"it has become so loaded that it can provoke defensive responses. We talk in terms of exclusions and lack of adequate representation. Our view is that there is an issue of exclusion within the game, whether it relates to the representation of ethnic minorities among players, supporters or coaches, as well as the governing bodies. We're hoping that this report can provide a positive springboard for further change, especially where change is not already on the agenda"***<sup>666</sup>

Mr. Powar believes that the responsibility for these changes must be shared between the governing bodies and the clubs. He pointed out that, although the Football Association (FA) had its ethics and equity policy, it was the manner in which it was implemented which would be the standard by which they were judged. Be that as it may, many commentators believe that to use the term "institutionally racist" because of a perceived lack of equal opportunities constituted gratuitously exaggerated language.

The report was not entirely negative, and highlighted the good work being done not only by the Kick it Out campaign, but also by individual clubs such as Southend, Oldham and Rotherham<sup>667</sup>.

Another major organisation which has been to the forefront of this debate in recent months has been the Football Foundation (FF). In late February 2004, it announced that it was to scrutinise its awards procedure after an independent review of a £500,000 grant to a football club in Yorkshire found that the FF had breached racial guidelines by failing to consult local ethnic minority groups. At a Board meeting, the FF accepted that an application for funding by Kirklees Metropolitan Council and Howden Clough Football Club was flawed because of this omission. A commitment to increasing participation among ethnic communities is one of the conditions for receiving FF funding. The grant was aimed at funding an artificial pitch and changing facilities, but it was suspended following objections from Inter Batley Sports Association, a local

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Asian football club. The FF stated that it would learn the lessons of this affair, but dismissed accusations that its procedures were fundamentally flawed<sup>668</sup>.

### ***Black footballers "back race lobbying group"***

In late February 2004, it was learned that a group of influential former and current black footballers were considering plans to establish their own lobbying group over issues of race which have arisen within the game. The reader may recall from the previous issue<sup>669</sup> an item which referred to the possibility that a black trade union could be set up, involving such former players as Cyrille Regis, Garth Crooks and John Barnes. Since then, however, these players have emphatically denied that any such union was being contemplated. However, there is growing support for a lobby group which would raise issues such as the lack of black managers and coaches, as well as the almost total absence of Asian footballers in the professional game in Britain. The lobby group would liaise with the Professional Footballers' Association (PFA), the footballers' Trade Union, as well as raising issues with politicians in an attempt to elicit a response to various areas of concern<sup>670</sup>.

### ***The Ferguson/Boa Morte affair***

In late January, Luis Boa Morte, the Fulham striker, made a complaint against Everton's Duncan Ferguson that he was racially abused by the latter. This was alleged to have happened in the course of the FA Cup fourth round tie, which ended in a 1-1 draw. Portuguese international Boa Morte claimed that Mr. Ferguson called him, amongst other things, a "black \*\*\*"<sup>671</sup>. Fulham made a formal complaint to the Football Association (FA) about the incident. In addition to the accused player, the document in which the complaint was made also listed at least one member of the Fulham team who backed up Mr. Boa Morte's claim. Mr. Ferguson<sup>672</sup>, through his lawyer, firmly denied the accusation.

However, no action was ultimately taken by the FA against Ferguson, representatives from Soho Square having visited the Everton training complex to interview the Scot. It appeared that the difficulties in gathering evidence against Mr. Ferguson stood in the way of a formal charge<sup>673</sup>.

### ***Ian Wright racially abused at Loftus Road***

When Manchester City played Queens Park Rangers away in an FA Cup tie, one of the visiting side's most vocal supporters was former Arsenal and England striker Ian Wright, since the team included his adopted son Shaun Wright-Phillips. After the latter scored the first goal of the game, a dispute arose amongst the spectators as to whether the goal in question resulted from an off-side move. In the course of the argument

which followed, Mr. Wright was racially abused by a spectator, who was arrested at half-time. A second fan was also arrested later for racial abuse, this time directed at a steward<sup>674</sup>.

### ***Millwall spectators accused of racism by Burnley manager***

In late February 2004, Millwall hosted Burnley in a Division One, Nationwide League, match. Following the game, Burnley manager Stan Ternent claimed that, in addition to his side's defender, Mohammed Camara, being booed by some sections of the home crowd, he was also subjected to monkey chants. However, these allegations were subsequently denied by Millwall owner Theo Paphitis<sup>675</sup>.

### ***NFL issues minority interviewing guide***

In early December 2003, the National Football League (NFL) (American football) issued 10 guidelines which it hopes will strengthen its current policy that at least one minority candidate be interviewed for each vacancy of head coach. A memo issued by the League's Committee on Workplace Diversity lists several provisions relating to the interviewing of coaching candidates. These include documenting each interview which is conducted, eliminating telephone-only interviews and involving the team's owner in interviewing finalists for the post. The memo also states that exceptions will be made where the team has a prior contractual agreement with a member of its coaching staff under which the latter will become head coach, and where the club files this contract with the League office as soon as it is signed. Penalties for failing to follow these guidelines could include fines<sup>676</sup>.

### ***Racial issues continue to dog South African rugby***

Previous issues of this journal have already drawn attention to the racial tensions which continue to underlie sporting activity in the southern part of Africa, the latest of these concerning the fracas over rugby player Geo Cronje's refusal to share a room with a black teammate<sup>677</sup>. It will also be recalled that this and other allegations of racism had led to the appointment of a committee of inquiry under former judge Edwin King<sup>678</sup>. In mid-December 2003, this issue flared up again when South Africa's new Rugby chiefs cancelled this independent investigation. Instead the South African Rugby Football Union, under its new President, Brian van Rooyen – who deposed Silas Nkanunu the previous week – said that its inquiry into specific allegations of racism would now be handled by an internal committee<sup>679</sup>.

Earlier, Mr. van Rooyen had also rekindled this most sensitive of issues by announcing that he would put an

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end to the system of quotas for black players. The Springboks have not fielded an all-white Test team since June 1999, and teams at the Super 12 and provincial levels are required to use between two and five black players, depending on the competition. Mr. Nkanunu had announced only two hours before Mr. Van Rooyen's accession that a new quota of three black players per starting XV would be in place for next year's Super 12 competition<sup>680</sup>. Mr. van Rooyen (who in spite of his name is a Cape Coloured) had stated that quotas had "failed dismally". There were signs that this move was being acclaimed by white and black players alike. The former believe teams have been weakened by this system and the latter dislike being stigmatised as undeserving "quota players"<sup>681</sup>.

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### Human rights issues

#### Sportswear firms investigate Oxfam sweatshop claims

It will be recalled from an earlier issue of this Journal<sup>682</sup> that manufacturers of sporting equipment have been accused in the past of making their produce in Third World countries under conditions which deny the workers essential human rights. Similar allegations surfaced in early March 2004, when a report by the worldwide charity Oxfam issued a report in which sportswear firms such as Puma, Umbro, Fila, Adidas, Reebok, Nike and ASICS were accused of having their goods produced by workers whose rights are being systematically violated. More particularly, the charity claims that most of these firms are using factories which ruthlessly exploit their workers. The business methods used by these leading companies, which have cut order times and reduced prices paid to their suppliers, have resulted in workers being forced into excessively long overtime, sometimes unpaid, and are paid wages which are too low to live on<sup>683</sup>.

The report in question, called "Play Fair at the Olympics", was prepared by Oxfam in conjunction with Labour Behind the Label and a number of international trade unions and was based on interviews with workers producing sports clothes and trainers in seven countries, namely Indonesia, Thailand, China, Cambodia, Bangladesh, Bulgaria and Turkey. Brendan Barber, the TUC General Secretary, commented:

***"The Olympic Games are supposed to be a showcase for fairness and human achievement. But the sportswear industry is violating that spirit by exploiting and abusing workers' rights. We want the companies to talk to us so we can work together for workers in the industry"***

According to the report, it was long working hours and forced overtime which were the principal concerns of the workers. In peak seasons, seven-day working had become the norm, and in certain factories 16-18 hours without proper breaks were common practice. In two Chinese factories producing for Umbro, workers claimed that they were all made to work a seven-day week. In four Turkish factories producing for Fila, Puma and other designer brands, workers all reported being forced to work overtime. In a Bulgarian factory supplying Puma, refusal to do overtime is often used as a pretext for dismissing a worker.

In response to previous allegations of exploitation, the main companies concerned have drawn up codes of practice with their suppliers. Oxfam concedes that these have led to limited improvements, but there is often a gap between ethical commitments and purchasing practices<sup>684</sup>.

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### Gender issues

#### Women's rights at the Olympics

One of the aspects of the Olympic Games which has often caused offence to observers is the fact that this festival of sport still allows blatant gender discrimination whilst banning all racial discrimination. There are, however, signs that this may be about to change. In mid-January 2004, it was reported that women's rights activists are to put pressure on the International Olympic Committee (IOC) and organisers of the Athens Games to promote the participation of female athletes from all countries<sup>685</sup>. It has also been learned that Afghanistan has recently been readmitted to the Olympic movement after they were suspended in 1999 because of the Taliban's ban on women athletes<sup>686</sup>.

#### Transsexuals' rights – a danger to sport?

In November 2003, the International Olympic Committee (IOC) announced that transsexual athletes would be allowed to compete at the Athens Games of 2004. This has forced the national sporting authorities, Britain's included, to consider the issue as a matter of urgency. In this country, this matter assumed an extra dimension as the Gender Recognition Bill was making its way through Parliament at the time when this new Olympic rule was adopted. Under this proposed legislation, transsexuals will be legally recognised as members of their new gender. However, sport is to be given a special exemption from certain aspects of the legislation, because it was felt that some transsexual athletes might have an unfair advantage in some sports, particularly physical ones<sup>687</sup>.

This is why it was decided to create a special

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medical panel which will examine the issue and decide whether such persons should be allowed to compete in international competitions under their new gender. The medical panel will examine areas such as testosterone levels, physique and an athlete's mental state before making their decision. If it is felt that a transsexual athlete will have an unfair advantage then the panel will be allowed to ban them from competing. In mid-December 2003, the House of Lords discussed the impact which the Bill would have on sport. Lord Moynihan, the former Sports Minister, called for guarantees that there would be a level playing field if former males competed as females, or vice-versa. A period of ineligibility is also likely to be introduced, during which transsexual athletes will not be allowed to compete in order to enable their bodies to adjust to their new gender<sup>688</sup>.

In fact, the problem has already arisen on many occasions in the past. The best-known transsexual in sport is undoubtedly Renee Richards, who played on the professional women's tennis tour in the 1970s, having been previously known as Richard Raskin. More recently, Michael Dumaresq, a Canadian who had sex reassignment therapy in 1996, competed in the 2002 women's world mountain bike championships for Canada, under the name Michelle Dumaresq. However, the most infamous case was undoubtedly that of the naturalised US citizen Stella Walsh who, as the Pole Stanisława Walasiewiczówna, won the 100 metres gold medal at the 1932 Olympics, and obtained the silver medal four years later. She set 11 world records in the course of her career. However, when an autopsy was performed in 1980 after her death, it transpired that "she" had been a man for "her" entire life<sup>689</sup>.

The sport of cycling has already been compelled to address the issue, and has accepted a gender-change competitor at the highest level of time-trialling in spite of a widespread protest which prompted a petition from over 300 women cyclists. The cyclist was accepted by the Cycling Time Trial Council after having been vetted by their medical commission, who were satisfied that she would have no unfair advantage<sup>690</sup>.

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### Other issues

[None]

# 15. Drugs legislation and related issues

## General, scientific and technological developments

### EU acts to stop athletes blaming supplements

One of the more controversial aspects of the rules banning the use of drugs in sporting competitions is the role played by those substances which are collectively, if often inaccurately, described as "supplements". Many sporting performers have taken these pills and powders allegedly in good faith, only to discover that these products were in fact banned and have led them into ignominious disqualification and suspension. Many experts have for some time now believed that this area has been regulated in far too lax a manner in this country, which is the main reason why they have led to such high-profile controversies. However, this state of affairs seems about to change with the imminent adoption of the draft Sports Nutrition Directive by the EU<sup>691</sup>.

Leaked drafts of this instrument have indicated that it will introduce strict new controls relating to products sold to sporting performers, and could result in some common supplements being withdrawn from the market. This will be because they are considered either unsafe or because there is inadequate proof that they are consistent with the public relations material advertising them. It is even rumoured that creatine may be among the high-profile victims of these controls – at the very least, maximum daily consumption limits will be drastically reduced.

One might expect the manufacturers of such supplements to be extremely disenchanted as this development. In fact, those who are concerned about their reputation in the wake of some recent fiascos in this field have given a cautious welcome to these new rules and have formed themselves into a trade organisation, the first of its kind, the better to represent the industry. Chaired by Dr. Adam Carey, nutritionist for the Rugby Football Union (RFU) and the England rugby team, the European Sports Nutrition Alliance (ESSNA) met in mid-January 2004 in order to discuss the best way of accommodating these rules and working with the EU in order to enforce the standards laid down<sup>692</sup>.

### The THG/Balco scandal – an update

It will be recalled from a previous issue<sup>693</sup> that the latest doping scandal to afflict the world of sport centred round a new "designer drug" called tetrahydrogestrinone (THG), which had been manufactured in such a way as to evade existing testing procedures. Since then, matters have taken a dramatic

turn in relation to this drug, and has reinforced the opinion, held in an increasing number of circles, that the "war on drugs" in sport – as in society in general – has become a classic case of the pursuit of the uncatchable.

In September 2003, the Bay Area Laboratory Co-operative (BALCO) laboratory in California was raided after revelations that quantities of THG had been discovered there following a tip-off from a man who claimed to be a well-known athletics coach. This led to a grand jury investigation into the laboratory and those who may have used the drug in order to enhance their performance<sup>694</sup>. This investigation became the focal point of a drive towards establishing exactly what this drug involved and how it was produced. The consensus amongst specialist chemists in this field is that it would probably have been easy to produce, and that it would not even take a scientific mastermind to do it – very probably a PhD chemist, or even student, could do so with relative ease. This was certainly the view of Dr. Simon Davis, chemist and anti-doping expert at Queen's University, Belfast<sup>695</sup>.

Drugs testing operates by analysing urine. As a drug breaks down in the body, a specific combination of traces manifests itself. If these waste products match the profile of a known prohibited drug, testers know that they are dealing with a positive. The challenge for steroid-producing scientists is to change the structure of the drug which enters the athlete's body, so that it produces a combination of waste products which are not recognised by testers as being a performance-enhancing drug. The name given to the new compound, tetrahydrogestrinone, indicates that it has been prepared on the basis of the existing steroid gestrinone, perhaps by adding four hydrogen atoms. Such an altered compound would break down in the body quickly and help users to avoid detection<sup>696</sup>.

However, there are doubts as to whether this simple alteration would have deceived anti-doping testers so comprehensively. Instead, THG may be a modification of the banned steroid trenbolone. Like all anabolic steroids, this trenbolone is similar in structure to the male sex hormone testosterone, which is based on rings of connected carbon atoms. This structure is fragile and breaks down fairly quickly in the body. Chemists making synthetic anabolic steroids tend to add other molecules or chemical groups such as acetate to the edges in order to delay degradation and give the steroid time to work. To slip trenbolone through the system, pharmacists would merely need to substitute a new chemical group in the steroid which is unknown to the testers and which the latter are not

## 15. Drugs legislation and related issues

primed to recognise. This could be done by using enzymes and would also be fairly straightforward for a trained chemist and a well-equipped laboratory<sup>697</sup>.

The hearings before the Grand Jury into the Balco laboratory started in late October 2003, with some of the leading athletes in the US being set to give evidence. The double sprint champion Kelli White, Tim Montgomery, the world 100 metre record holder, and baseball player Barry Bonds were among 40 competitors subpoenaed to appear before the Grand Jury. This number was expected to rise to 100 as investigations by both federal prosecutors and sporting administrators accelerated. It also transpired that Balco was founded and operated by one Victor Conte, who was identified by the head of the US Anti-Doping Agency (USADA) as the likely source of the steroid<sup>698</sup>.

Whilst the Grand Jury was grinding through its procedures, doubts were already being cast on exactly what stood to be gained from them in terms of the fight against doping. Dick Pound, the Chairman of the World Anti-Doping Agency (WADA) certainly sounded a very pessimistic note in this regard when he told reporters, following a panel discussion at King's College, London, that his organisation was "only one step behind" the cheats, and called THG a "dinosaur drug" which had already outlived its usefulness<sup>699</sup>.

In the meantime, several athletes had already tested positive for the drug, thanks to improvements in the testing procedures. In mid-November it was confirmed that four US athletes had tested positive in their back-up B samples. They have not been named as their appeals are still pending<sup>700</sup>. Samples taken at the World Athletics Championships in Paris also yielded a positive test result<sup>701</sup>. It had also been discovered that Dwain Chambers, the British sprinter, had also tested positive for the drug – a case which will be explored in greater detail below. This case naturally focused attention on the possibility that the drug was being used in Britain in as yet undetected cases. This fear was expressed unambiguously by Richard Callicott, the Chief Executive of UK Sport, which is responsible for drug testing in this country. He added:

***"In Britain, we have no idea how big the problem is. How do you develop a test for something you know so little about? It is part of the conspiracy of science, the use of illicit substances that are very difficult for us to break down"***<sup>702</sup>

Mr. Callicott thus added his voice to those who mooted the possibility that laboratories in this country could also be working on the development of performance-enhancing substances which are beyond testing. This has obviously caused serious concern in the British athletics community.

### Doping issues and measures – international bodies

#### IOC may re-examine Winter Games urine samples for THG – but not FIFA

Although it was in the context of athletics that the THG drugs came to the authorities' attention, it is obvious that the problem is likely to rear its head in other sports as well. This has prompted the International Olympic Committee (IOC) to examine the possibility of retesting the samples taken at the 2002 Winter Olympic held in Salt Lake City. Obviously this involves a number of legal issues, as Patrick Schamasch, the IOC medical director admitted. Not least of those is ensuring that the quality of the sample remains such that it has not been the subject of degradation – which would be sure to give rise to legal action on the part of those tested. It has to be borne in mind that these samples are now over two years old. It is true that the IOC allowed the retesting of samples taken at the World Athletics Championships in Paris, but these were barely two months old<sup>703</sup>. The Winter Games are stored at the University of California laboratory in Los Angeles – which, interestingly, is where the test for the previously undetectable drug was devised<sup>704</sup>.

However, one sport where this will not happen is football. In late October 2003, world governing body FIFA announced that it would not be re-examining samples for this purpose, following a meeting called to consider the issue in Zürich. The organisation later issued a statement which read:

***"For legal reasons and in view of the fact that samples are destroyed after 30 days in accordance with the doping control regulations, the sports medical committee decided not to carry out retrospective tests"***<sup>705</sup>

No other international sports body has pronounced itself on this issue to date.

#### FIFA signs up to WADA (but on its own terms...)

Football's reluctance to be subject to the World Anti-Doping Agency (WADA) has been documented and lamented in previous issue of this Journal<sup>706</sup>. However, it has now dawned on those in charge of the world governing body of "the beautiful game" that there is a potentially high price to pay for such recalcitrance in terms of exclusion from such top festivals of sport such as the Olympics. Accordingly, it caused little surprise when, following an executive meeting of the organisation in London held in late February 2004, Sepp Blatter, FIFA's controversial President, announced that a formal signing ceremony would take place on May 21 in

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Paris in the presence of Jacques Rogge, the President of the International Olympic Committee (IOC)<sup>707</sup>.

However, all was not as it seemed (it seldom is with FIFA). The world governing body will accept all WADA's strictures on the fight against doping – with the exception of the core requirement that those found guilty are suspended for a minimum of two years. This is bound to upset the governing bodies of other sports which have accepted this condition. Mr. Blatter justified this departure by reference to the fact that the WADA code allows individual assessment in exceptional cases. He added:

***“Now we have convinced WADA that all football doping cases can be considered exceptional as the word is defined in the Concise Oxford English Dictionary. Of course we have to fight doping but it's not possible to put everything into the same parcel. Everyone must receive correct treatment under the law. To do otherwise would not be correct from a human-rights standpoint”***<sup>708</sup>

Exactly why the human rights of footballers are affected by the two-year ban, as opposed to those of the exponents of other sports, was not made clear by the worthy President.

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### Doping issues and measures – individual countries

#### UK Sport shake-up in the wake of Ferdinand affair

The controversies surrounding the various aspects of the failure by Rio Ferdinand, Manchester United's star defender, to attend a drug test are dealt with in full below. The entire affair has, however, produced institutional consequences for the body which was at the origin of the test in question, i.e. UK Sport, which oversees drug testing in sport as a whole in this country.

One of the aspects of the case which did so much to anger both Manchester United and the professional Footballers' Association (PFA), the players' trade union, was the fact that Rio Ferdinand's name became public before the hearing relating to his case had been held. Someone obviously had to bear responsibility for this, and the person in question turned out to be Michele Verroken, the head of Ethics and Anti-doping within the organisation. At a meeting with Sue Campbell, the acting Chair of UK Sport, the hapless Ms. Verroken was informed that she had no future in her role with the agency, which prompted the latter's resignation. Ms. Verroken was the official to whom the drug testers reported the failure of Mr. Ferdinand to attend the test. Gordon Taylor, the PFA Chief Executive, had blamed

Ms. Verroken for releasing Ferdinand's name to the media, claiming that this meant that the England international could not enjoy a fair hearing<sup>709</sup>.

It must, however, be recalled that not only Mr. Taylor himself, but also sources at Old Trafford and the player's agent, Pini Zahavi, all confirmed Ferdinand as the player who had broken drug regulations. This is why there is at least some suspicion of scapegoating, the more so because Ms. Verroken has earned much praise from around the world for the manner in which she discharged her duties for the past 15 years. It is also perhaps not coincidental that Ms. Verroken had fallen out with several other leading sporting bodies, whom she has accused of not taking the problem of doping sufficiently seriously<sup>710</sup>.

Not surprisingly, this resignation caused outrage in some quarters. Shadow sports minister Colin Moynihan, who appointed Ms. Verroken in the first place, condemned the decision in very strong terms, saying that the latter:

***“sees the challenges in this critical area of policy where, without people like her, competition between athletes would all too soon become competition between chemists' laboratories (...) With a record like hers over the last 15 years she does not deserve to be treated like this. I have called time and again for an independent UK anti-doping agency reporting to the Minister and accountable to Parliament. That decision can be made in an hour. It does not need further review at taxpayers' expense. The anti-doping agency is one of the three principal functions of UK Sport”***<sup>711</sup>

Lord Moynihan went on to describe UK Sport as being “in chaos” and that Ms. Verroken's dismissal would have far-reaching consequences.

However, several days later, Ms. Verroken denied reports that she had resigned<sup>712</sup>. It appeared that she had indeed merely been suspended rather than dismissed. However, two months later the National Association of National Anti-Doping Organisations announced that she had, in fact, been removed from her position with them – having been informed by UK Sport that she no longer represented them<sup>713</sup>.

The Ferdinand affair, however, seemed to presage other changes at UK Sport, since it had exposed major shortcomings and flaws within the organisation. Consultants PMP were called in to examine the organisation's drug-testing procedures and any changes which should be made to them. More particularly PMP were requested to look into the possibility that drug-testing should be conducted by an independent body rather than by the main council for sport in this country. The consultants had not yet presented their report to

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UK Sport at the time of writing. However, it was expected that they would recommend a compromise solution, with drug tests being dealt with by an independent body which is still regulated by the Government<sup>714</sup>. Ironically, Ms. Verroken had been a firm supporter of setting up an independent body along the lines of the US Anti-Doping Agency.

If this is indeed the recommendation, it will be interesting to witness the reaction by our Sports Minister, since, in the immediate wake of the Verroken affair, Mr. Caborn had ruled out an independent agency. He denied that there was any conflict of interest in UK Sport being responsible for the funding of top athletes as well as for drug-testing them<sup>715</sup>.

### Concern is expressed at doping possibilities in “closed” societies

The THG scandal has obviously given rise to a good deal of concern with the anti-doping authorities. Equally worrying for them are the laboratories to which they do not have access because they are located in relatively closed societies. This was certainly the case with the former Eastern Bloc countries, particularly East Germany, whose secret laboratories are now known to have developed and used new drugs in the context of a state-sponsored doping programme. Although the Iron Curtain has now passed into history, there remain a number of countries which continue to operate largely in secret. The position of China is particularly critical in this regard, since it will be hosting the Olympics in 2008. The pressures on the host nation to perform well are always very intense, and many observers privately fear that the Chinese will repeat this kind of official cheating<sup>716</sup>.

These are certainly no idle fears, when it is remembered that, relatively recently, China’s once-mighty swimmers were devastated by a series of doping scandals and were consequently reduced to minnows at the Sydney Olympics. Even their physical appearance changed – gone were the deep-voiced, square-jawed muscle-bound women of the 1990s who gave rise to suspicions of widespread doping practices. Most of the Chinese athletes who have been caught in the doping net thus far have taken performance-enhancing drugs developed in the West, especially anabolic steroids and diuretics. However, they may now be tempted to produce their own<sup>717</sup>.

### US drugs ban described as “unenforceable” by WADA chief

During the concluding session of the US governing body in athletics, USA Track & Field, it was decided that any US athlete who tests positive for steroids will be banned from the sport for life. However, this ban will only become effective if it is approved by the

International Association of Athletics Federations (IAAF) and found to be in compliance with the US Amateur Sport Act. The latter prohibits a national governing body from applying harsher eligibility criteria than those applied by international sports federations. Richard Pound, the chairman of WADA, the world anti-doping body, casts grave doubts on this plan, describing it as “some kind of grandstand play”. He commented:

***“That’s unenforceable. If you enact legislation rules that you are know are going to fail, that run counter to your international federation, that you know that the courts in your country and every other country in the world will not enforce, you are setting yourself up for failure. This is a federation that on the one hand is saying steroids are so bad you should be banned for life, but they are quite happy for Jerome Young to be running around with an Olympic medal round his neck”***<sup>718</sup>

The latter point was a reference to the fact that Mr. Young, the world 400 metres champion, tested positive in 1999 for nandrolone but was cleared by the USATF review panel, and proceeded to win Olympic gold as part of the US 4x400 relay squad.

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## Doping issues – individual sports

### Athletics

#### *Chambers incurs two-year ban for use of THG (UK)*

It was reported in the previous issue<sup>719</sup> that European 100 metres champion Dwain Chambers had tested positive for the drug THG as a result of an out-of-competition test taken in the summer of 2003. In the first instance, Mr. Chambers proclaimed his total innocence of the charge, declaring that he had at no time sought to improve his performance through drugs<sup>720</sup>. Shortly afterwards, however, he admitted to testing positive for the drug, but put the blame on Victor Conte, the controversial nutritionist recommended to him by his coach (and who heads the Balco laboratory currently being investigated by the US authorities – see above, p.106)<sup>721</sup>.

It was therefore becoming clear that Mr. Chambers could be in for a lengthy ban. However, a few weeks later, the International Association of Athletics Federations (IAAF) suggested that the British sprinter could reduce any ban imposed on him by exposing others supplying and using the THG drug. The rule in question does, however, only allow such dispensations in “truly exceptional circumstances”<sup>722</sup>. This may have been inspired by the sudden and widespread concern caused by the THG bombshell which had exploded a few weeks earlier (see above). However, Mr. Chamber’s future looked

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even bleaker several days later, when it was revealed by sources at the IAAF that the sprinter had failed a second drugs test. His was one of two athletes whose urine sample collected at the World Championships in Paris was said to have tested positive for THG<sup>723</sup>.

This did not, however, deter Jacques Rogge, the IOC President, from advising Chambers to enter into a plea bargain and trade information about the THG phenomenon in exchange for a reduced ban. This appeared to set Dr. Rogge on a collision course with the IAAF, since the Chairman of its Medical Commission, Arne Ljungkvist, seemed to have gone out of his way to quash any hope that Chambers could avail himself of the "exceptional circumstances" rule referred to above<sup>724</sup>. In the event, no such "plea bargain" was concluded, and Mr. Chambers incurred a two-year ban following a hearing held in late February 2004. He will also be banned for life from the Olympic Games<sup>725</sup>.

Mr. Chambers has 60 days in which to appeal to the Court of Arbitration for Sport (CAS) against this decision. At the time of writing, it was not yet clear whether he would avail himself of such an appeal.

As an interesting footnote to this case, the coach whom Mr. Chambers claimed advised him to consult Victor Conte is himself in difficulty, being amongst four people charged in the US for running a distribution ring for illegal performance-enhancing drugs. The charges brought by a grand jury in San Francisco include conspiracy to distribute steroids and other drugs to Major league Baseball and NFL players, as well as elite athletes<sup>726</sup>.

### *Hunter claims IAAF cover-up deal*

In mid-December 2003, C J Hunter, the former world shot put champion, claimed that he had been offered a deal by Istvan Gyulai, the General Secretary of the International Association of Athletics Federations (IAAF) to cover up his positive drug test on the eve of the Sydney Olympics of 2000. Mr. Hunter, who at the time was married to the sprinter Marion Jones, claimed that Gyulai had offered to keep details of his positive test for the anabolic steroid nandrolone confidential if he withdrew from the Sydney Olympics claiming injury. He alleges that the offer was made before an event in Brussels in late August 2000<sup>727</sup>.

This claim chimes in with the findings of an independent report commissioned by USA Track & Field, which accused the IAAF of deliberately attempting to cover up these tests. It claimed that Mr. Gyulai had informed the US governing body on 26/8/2000 that it had "reached an agreement" to the effect that Hunter would not participate in the Olympics. Mr. Gyulai, for his part, claims that Hunter begged the IAAF to conceal four positive tests in 2000 in order not to upset Marion Jones<sup>728</sup>.

### *CAS confirms Boulami ban*

In mid-November 2003, the Court of Arbitration for Sport (CAS) confirmed a ban on Morocco's steeplechase world record holder Brahim Boulami, who tested positive for EPO. He had been tested in August 2002, on the day before he cut more than two seconds off his own world record<sup>729</sup>.

### *US athletes test positive*

**Calvin Harrison.** The world of athletics was still attempting to come to terms with the THG scandal when it was learned that Olympic gold medallist Calvin Harrison, from the US, had tested positive for the stimulant modafinil when scientists reviewed 350 samples taken at the US championships in June 2003. Interestingly, Harrison is also coached by Remi Korchemny, the man who also has Dwain Chambers as one of his charges<sup>730</sup>. At the time of writing, no hearing had yet been held to decide this athlete's fate.

**Regina Jacobs.** US athletics received a further shock a few days later when it was revealed that Ms. Jacobs, the middle-distance runner, had tested positive for THG. In fact some suspicion had already begun to surround her performances, since she seemed unaccountably to improve her performances with age. Thus at the age of 39 she had, in February 2003, become the first woman to run inside four minutes for the 1500 metres indoors event. Here again, Ms. Jacobs was a customer of the Balco laboratory<sup>731</sup>. Ms. Jacobs announced afterwards that she would challenge any attempt to ban her for this test<sup>732</sup>.

## Football

### *Rio Ferdinand banned for eight months (UK)*

As the previous issue went to press<sup>733</sup>, it was learned that the Manchester United and England defender had missed a random drugs test at his club's training round, and was therefore facing a hearing by the Football Association (FA) which was likely to lead to a ban. However, even before the hearing was held the background to this case continued to evolve rapidly.

It may be recalled that the bill for Mr. Ferdinand's mobile telephone was always going to prove a crucial item of evidence in the entire case, since the player had always maintained that his telephone was switched off on the day of the test. At a certain point it was alleged that Manchester United had changed these telephone records by making certain references to calls and text messages illegible. The club authorities lost no time in issuing a categorical denial of any such tampering<sup>734</sup>. The club's lawyers were also sharpening their weapons to deal with any ban to which the player could be subjected, and threatened a civil action should any such

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penalty be imposed<sup>735</sup>.

The media then reported that the FA had decided to charge Ferdinand with the more serious of the charges possible, i.e. that of wilfully evading the test, for which the maximum penalty is a two-year ban. There was also the possibility that United could be banned from European football if it was decided that the club failed to co-operate fully with the investigation<sup>736</sup>. Ultimately, neither charge was brought, and Mr. Ferdinand was charged with misconduct for “failure or refusal to submit to drug-testing”, with the word “wilful” having been avoided. However, the FA then went to great lengths to stress that this did not in any way imply that the penalty might not be just as severe as if the player had been charged with wilful refusal<sup>737</sup>.

The pressure on the FA to take a firm line in this case increased when FIFA president Sepp Blatter castigated it for being too slow to take action against the Manchester United star. He made it clear that the world governing body would monitor the case closely and intervene if it thought that the penalty was too lenient<sup>738</sup>. Blatter also castigated Manchester United for continuing to play the England international despite the charge brought against him, and even suggested that the club should have points deducted for their refusal to drop him<sup>739</sup>. Mr. Blatter subsequently repeated his attack on the FA on several occasions<sup>740</sup>. Criticism of the FA’s perceived lack of speed over this issue was echoed by Richard Pound, the WADA Chairman, who ventured the opinion that the FA had had sufficient time to deal with the Ferdinand case<sup>741</sup>. England manager Sven-Göran Eriksson also criticised the slowness of the FA procedures in drugs cases<sup>742</sup>. Some of the blame for this delay, however, could legitimately be given to Manchester United, who seemed at all times determined to make life as awkward as possible for the English governing body – for example, by waiting until the final few minutes of the two-week period for a response which was available to them before submitting their official reply<sup>743</sup>.

Came the day of the hearing, which resulted in an eight-month suspension for Mr. Ferdinand coupled with a £50,000 fine. This penalty was a record for this offence, and was to become effective on 12 January – which meant that he would miss more than 30 fixtures for club and country. The decision was reached after 17 hours of deliberation by a three-man FA disciplinary panel at the Reebok Stadium in Bolton<sup>744</sup>. The reaction on the part of Manchester United was predictably strong, with United solicitor Maurice Watkins describing the sentence as “savage and unprecedented”. PFA Chief Executive Gordon Taylor was equally condemnatory in his comments. WADA chief Dick Pound, however, welcomed the verdict, even claiming that Mr. Ferdinand was fortunate to receive this verdict,

and warning that the England international should think twice before appealing lest the sentence be increased<sup>745</sup>. In fact, a few weeks after the verdict WADA went on the offensive at one of its meetings, with one of the leading executives demanding that the ban be increased to two years, and another advocating that such a ban be sought before the CAS<sup>746</sup>.

For a while, it looked as though the reactions by those immediately affected would go far beyond the routine expressions of outrage. Manchester United threatened legal action over the ban<sup>747</sup>. When FIFA made it clear that any legal action by United would land them swingeing penalties from the world governing body, Rio Ferdinand himself threatened to take the matter to court. However, he too was taken to task by FIFA chief Sepp Blatter, who pointed out that, under FIFA and national association rules, no recourse may be had to the civil courts – the only other port of call could be the Court of Arbitration for Sport (CAS)<sup>748</sup>.

For the players’ trade union, Gordon Taylor warned that the PFA might sever its relations with the FA as a result of the ban<sup>749</sup>. However, it soon appeared that the PFA were far from happy at the manner in which the club had handled the issue. It had since transpired that it was United changing their story at some stage between Ferdinand’s missed drug test in late September and the FA hearing in mid-December which had led to the prolonged ban. The PFA wanted Mr. Ferdinand to plead guilty to misconduct and put forward a mitigating plea, which the trade union felt sure would have resulted in a ban of two, rather than eight, months. This would have removed the discrepancies between the explanation initially offered by United for the missed test and that which was put forward at the hearing<sup>750</sup>.

Ultimately, Mr. Ferdinand did appeal against his ban. However, an independent three-man panel ruled that the Manchester United defender should remain suspended from all football until 20 September, ruling him out of this summer’s European Championship which were to start in Portugal in June.

The panel decided not to alter the ban, and was content that Ferdinand had not missed the test to avoid detection for a banned substance, effectively clearing the player of any suggestion of drug-taking.

Nick Barron, the appeals panel spokesman, commented:

***“In reaching its conclusion, the appeal board has discounted the possibility that Mr Ferdinand’s reasons for not taking the test were drugs related. But having considered the matter very fully, the appeal board have today dismissed Mr Ferdinand’s appeals, both against conviction and sanction. They have also rejected the FA’s contention that the period of suspension should be increased.”***

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The panel, headed by independent QC Ian Mill, also including FA chairman Geoff Thompson and FA councillor Roger Burden, retired to consider its verdict at 3.15pm at Heathrow Airport Hotel, with the verdict announced just before 6.00pm. While there is no room for further appeal through the FA, if Ferdinand still wishes to fight the outcome of the second hearing, he could take his case to the CAS in Switzerland. Maurice Watkins, the United director and solicitor, led the delegation which hoped to have the ban cut to a length which would allow Ferdinand to play a full part in pre-season training. After the appeal hearing, he reiterated his and his club's view that the penalty in question was unduly harsh<sup>751</sup>.

Following this long drawn-out affair, it was always likely that a number of changes would be made in various procedures. Even before the appeal outlined above was heard and decided, the FA issued new directives on drug-testing in order to signal that they were toughening their regime in the wake of the Ferdinand affair. Procedures were to be streamlined, and moves towards instant charges and clear penalties were drawn up. Although no official announcement to this effect had been made by the time this issue went to press, it seemed likely that the new system would include the following points:

- Random tests shall be taken within two hours of names being selected;
- The club in question will have the responsibility to ensure that its players take the test, and failure to take the test must be immediately dealt with;
- Where the player randomly selected is not at the training ground at the time of the test, he will only have 24 hours in which to take the test;
- The initial private hearing aimed at clarifying any problems is to be abolished;
- Charges will be brought immediately<sup>752</sup>.

### *Wales fail in Russia drugs appeal*

After the first leg of a play-off tie for the Euro 2004 tournament between Wales and Russia, in Moscow, Yegor Titov, representing the home side, failed a drugs test. The drug in question was bromantan. Titov did not play in the return leg in Cardiff, which ended with the Russians as overall 1-0 victors. Wales subsequently applied to European governing body UEFA to have the Russians disqualified from playing in the final stages of the tournament for having fielded a player who had used illegal substances<sup>753</sup>. UEFA disallowed the appeal, much to the disappointment of Wales manager Mark Hughes, who slammed the European body for failing to make a stand against drugs cheats<sup>754</sup>.

Wales subsequently decided to appeal against the verdict. On 19/3/2004, the UEFA Appeals Body rejected the appeal lodged by the Football Association of Wales

(FAW). In a terse statement, UEFA announced that:

***“The Appeals Body based its decision in particular on the failure by the Welsh FA to present evidence of any implication of the Football Union of Russia in the alleged doping infringement, the occurrence of which was not established. Furthermore, the Appeals Body mentioned that the relevant UEFA regulations do not provide for a provision under which a team may be punished in the event of one of its players being tested positive”***<sup>755</sup>

Naturally, this decision also gave rise to a good deal of adverse comment in various sections of the media, who echoed Mr. Hughes's concerns about UEFA not taking the doping issue seriously enough.

### *Youth players banned by FIFA*

World governing body FIFA's assault in doping in football gathered pace towards the end of December 2003 when it imposed lengthy bans on two teenagers who had tested positive at the World Youth Championship. Amir Azmy, who represented Egypt at the tournament, was suspended for 14 months after traces of nandrolone were found in his test sample after the match against Japan, and Alexander Walke of Germany received a seven-month ban after testing positive for cannabis. The pair were also fined considerable sums<sup>756</sup>.

### *Other cases*

**Zhang Shuai.** China announced a crackdown on drugs-taking in early February 2004 after footballer Zhang Shuai, a defender playing for Beijing Hyundai who tested positive for the banned drug ephedrine in November, was banned for six months. New rules, to take effect as from March 2004, will add criminal penalties for serious offenders<sup>757</sup>.

**Saadi al-Gadafy.** In November 2003, this player, who is the son of Libyan leader Col. Gadafy and plays for Italian side Perugia, failed a doping test, having tested positive for the banned substance nandrolone<sup>758</sup>.

### **Tennis**

#### ***Rusedski fails dope test but is cleared – ATP procedures discredited***

It will be recalled from the previous issue of this Journal<sup>759</sup> that some concern had recently been expressed at the fact that the top performers in this sport, who up to that point had experienced few problems in this regard, had begun to reveal a number of miscreants in this regard. This concern seemed at first to have been amply justified when, in early January 2004, the news broke that Greg Rusedski, the British

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No 2, had tested positive for the banned performance-enhancing drug nandrolone. The sample had been taken at a tournament in Indianapolis in July<sup>760</sup>.

Mr. Rusedski professed himself innocent in the most incredulous terms. A few days later, he launched a remarkable defence against his positive test, claiming that tests on 47 of the world's leading 120 players had revealed high levels of the nandrolone steroid, and accused the Association of Tour Professionals (ATP), the governing body of the men's game, of covering up a major scandal in professional sport<sup>761</sup>. Certainly Mr. Rusedski seemed to enjoy a good deal of support amongst his colleagues, whose near-unanimous opinion was that the British No. 2, although sometimes found wanting in tact and finesse, was fundamentally an honest professional who would not contemplate taking prohibited substances in order to obtain an unfair advantage<sup>762</sup>. Nevertheless, the Davis Cup player had his critics, Todd Woodbridge, Deputy Chairman of the ATP, ventured to suggest that the British No 2 would have earned more support in the locker room had he not "gone public" on the issue in the way he did, and that he had in fact provided a demonstration of how not to fight a drugs case<sup>763</sup>.

Other players also came forward to defend the ATP's anti-doping policies<sup>764</sup>. Former Wimbledon champion André Agassi even went so far as to claim that tennis was the most drug-free of all the major sports<sup>765</sup>.

Support for Rusedski came from a surprising source, in the shape of Dr. Werner Franke, the drugs expert who uncovered the East German doping scandal and identified the notorious Dr. Eckard Arbeit as a Stasi (secret service) spy. Rusedski's sample had shown a nandrolone content of 5.5 nanogram. According to Dr. Franke, there is no "grey area" between a reading of 2.0 and 5.5 nanograms, as is asserted by the leading medical experts in the sporting world. It was simply that there was no evidence that low levels of nandrolone are not produced naturally by the body as a result of extreme physical exertion or of what we eat. Accordingly, he asserted that the case against Rusedski would be thrown out in a court of law<sup>766</sup>.

In the meantime, it was learned that, in July 2003, the ATP had overturned a two-year ban and fine imposed on the Czech player Bohdan Ulihrach, whilst six other players were not prosecuted despite registering high nandrolone readings. The independent inquiry in question had ruled that the Czech and the six other players could have taken contaminated electrolyte supplements handed out by the ATP's own trainers. On learning of this ruling, the ATP immediately ordered its staff no longer to issue these supplements. Rusedski, however, had tested positive two months later<sup>767</sup>.

The hearing was held on 10/3/2004, and as a result,

Mr. Rusedski was cleared. The adjudicating panel held that the latter had taken exactly the same substances as Mr. Ulihrach, which had been issued to him by the ATP, and had attributed the positive reading to this material. As such, he had argued that that it would be unfair for the ATP to prosecute him for substances which they themselves had given him, and which in all probability had caused him to test positive. The ATP had argued that Rusedski could be held to be positive, as he must be deemed to have known that he should not take the substances given to him by the ATP. The Tribunal unanimously dismissed this argument. It held that the ATP could and should have taken steps to notify its players in a meaningful and direct manner of the reasons for its decision to cease distributing the electrolyte tablets which it had previously handed out so freely. This created an estoppel, which prevents a person from adopting a position inconsistent with an earlier position if this results in injury to someone else. In these circumstances, the Tribunal held that the ATP could not in all fairness prosecute this case<sup>768</sup>.

This outcome naturally reflected very badly on the ATP and its anti-drugs procedures, to the point where it was doubted whether it could credibly continue to administer the men's game. By failing to enforce its own anti-doping code in this case and in that of Ulihrach, the ATP had abandoned the principle of strict liability whereby athletes are responsible for whatever is in their systems, regardless of the source. The fact that distribution of the electrolyte pills ceased in May, whereas Rusedski's sample was not given until July 2003, is also controversial. Either these pills were not the source of the nandrolone, in which case Ulihrach and the six others were guilty, or the pills were still in distribution by the time Rusedski gave his sample, in which case there are doubts about the ATP's control of its own trainers<sup>769</sup>.

Some commentators have drawn a parallel between the Rusedski affair and that of Rio Ferdinand, discussed above, in that they highlighted the single most pressing imperative in all professional sport, which is the need for a universally acknowledged testing system with a clearly stated operating procedure – and which is carried out exclusively under the control and authority of WADA. Both cases also pointed up the need for speedy procedures, since both cases were allowed to drag along into ridicule<sup>770</sup>. If the present writer may also be allowed a comment, it would be that the Rusedski case also indicated that tennis should perhaps take a hard look at a situation whereby a players' trade union also acts as a world governing body for the sport – could one, for example, imagine the PFA and Gordon Taylor regulating football in this country?

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### Cycling

#### *Succession of premature deaths linked to drugs shocks sport*

The death, at the age of 34, of Marco Pantani has already been dealt with under the heading "Obituaries" (see above, p.5). However, his death is not the only one to have caused consternation in the sport and raise concern that doping was the factor linking this extraordinary succession of early deaths.

This macabre sequence started in January 2003, with the demise of Denis Zanette (Italy), who collapsed after a visit to the dentist. This death was instantly linked to the use of EPO, and led to demands for stricter drug controls in Italy. In May, an elite amateur, Marco Ceriani, also from Italy, experienced a heart attack during a race, was admitted to hospital in a coma, and failed to recover consciousness. Fabrice Salanson, from France, was next, dying from a heart attack in his sleep and being found by his room mate in their team hotel. Next was Italian Marco Rusconi, who died in a shopping centre car park after leaving a party thrown by a friend in November<sup>771</sup>.

The following month saw the death of Jose Maria Jimenez (Spain). His case was special, in that drugs may well have been involved, but they were probably of the recreational variety – as was highlighted in confessional books published by members of the Festina team following the scandal-hit Tour de France of 1998<sup>772</sup>. In mid-February 2004, two other unexplained deaths occurred. One was that of Marco Pantani (see above) the other was that of Belgian Johan Sermon, aged 21, who died of a heart attack. Belgian police have launched an investigation into the latter's death<sup>773</sup>. Commentators have noted a disquieting similarity with a cluster of deaths which occurred amongst cyclists, mainly in the Low Countries, in the late 1980s and early 1990s, a period which is now held to have marked the arrival of EPO on the drugs scene.

#### *Cofidis team in doping probe*

In mid-January 2004, it was learned that Cofidis, the team which includes leading British cyclist David Millar, was at the centre of an investigation by French police attempting to unravel a smuggling network allegedly involved in supplying banned drugs from Eastern Europe to professional riders. Bogdan Madejak, the long-serving team masseur, and Marek Rutkiewicz, a former Cofidis rider, were assisting gendarmes with their enquiries after suspicious substances were reportedly found in the cyclists' baggage found at Charles de Gaulle airport. Police also detailed two women, understood to be Mr. Madejak's daughters<sup>774</sup>. The investigation widened with the detention of a former team member, Robert Sassone, a world

champion on the track and a member of France's Olympic squad for the Athens Games<sup>775</sup>.

As the investigation progressed, it gave rise to the disquieting possibility that blood doping through transfusion, a practice which went out of fashion two decades ago, could have returned to cycling. The French magazine *Le Point* published leaked transcripts from telephone calls tapped by police between Madejak and Rutkiewicz, in which the former asked the latter about his brother's blood group and Madejak at a certain point discloses that this could be the basis for a "new method" which involves transfusion. This method appears to be one whereby blood taken from the athlete and retained, or blood from a donor, is injected into the athlete's circulation, resulting in a rise in the number of oxygen-carrying cells – thus increasing endurance. This practice was not banned until the 1980s, and was in any case overtaken by the synthetic version of the red-cell boosting hormone erythropoietin (EPO) amid fears that transfusions could involve contaminated blood<sup>776</sup>.

During the next few weeks, two more riders were drawn into the investigation. Daniel Majewski, and amateur rider from Poland, was detained after a raid on a hostel in Limoux<sup>777</sup>. Then Philippe Gaumont was also detained by police, and in fact admitted that he had used EPO and given the drug to a fellow-rider<sup>778</sup>. Mr. Gaumont also claimed that doping remained as institutionalised in cycling as ever, and that in fact riders had little option but to take performance-enhancing drugs. In fact, he claimed that 90 per cent of cyclists used drugs. The French Cycling Federation claimed that this was merely a tactic on the French rider's part to diminish his personal responsibility for taking drugs<sup>779</sup>.

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

### Racing

#### *Round-up of cases (all months quoted refer to 2004, unless stated otherwise)*

**Francis Norton.** In December 2003, Mr. Norton, one of the country's most successful lightweight jockeys, was banned for four months after being found guilty of returning a positive drug test for cocaine in September 2002. The suspension, which is worldwide in scope, will keep him out of the saddle for the remainder of the all-weather Flat season and the first four weeks of the 2004 Turf campaign<sup>780</sup>.

**Keith Dalglish and Joe Fanning.** In early January, both jockeys left a hearing at Portman Square with only a caution after appearing before the Jockey Club disciplinary committee. Both jockeys had given alcohol readings of between 54 and 108 milligrams per 100

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millilitres of blood when they were tested and then stood down from racing before Flat meetings began in 2003<sup>781</sup>.

### Equestrianism

#### *Diane Lampard disqualified, but wins appeal against lifetime ban*

This most "genteel" of sports suffered a major blow after the Super League Nations Cup event in Rome, held in May 2003, when Britain's show jumping team were disqualified from third place after Diane Lampard's mount, Abbervail Dream, tested positive for two prohibited substances, Valerenic Acid and Felbinac Acid. The Judicial Committee of the Equestrian Federation (FEI), however, did not suspend the rider and merely issued her with a £230 fine.<sup>782</sup>

However, Ms. Lampard was also involved in another case which arose from an international event held in October that year, and at which the urine of Abbervail Dream was once again found to contain prohibited substances. She was initially facing a lifetime ban; however, the British Olympic Association allowed her appeal against this sentence, adjudging that the offence was a minor one.<sup>783</sup>

#### *Stockdale wins appeal*

In mid-January 2004, it was learned that Tim Stockdale would be allowed to represent Britain at the Athens Olympics despite having been found guilty of doping a horse. The British Olympic Association, which normally stipulates that anyone found guilty of a doping offence is ineligible for the British team, allowed Mr. Stockdale's appeal.<sup>784</sup>

### Baseball

#### *Steroid use "widespread" in US baseball*

Baseball is a sport which hitherto has taken a very relaxed attitude towards any drug abuse in its ranks, with testing being unheard of and penalties even less conceivable. All this, however, is set to change as a result of a "survey testing programme" carried out during the 2003 season which came up with five to seven per cent positive results. This report confirmed something which had been widely alleged over the past decade, i.e. that doping was widespread in the sport. It was this factor which was widely suspected as a reason for the sport's unprecedented "offensive explosion" since the early 1990s<sup>785</sup>.

As a result, Major League Baseball will introduce fines and suspensions as from the next season. Even these are modest compared to those which apply in other sports. Any first-time offender will merely be

required to undergo treatment. Even a player who has been caught out four times will merely face a 50-day suspension without pay<sup>786</sup>.

MLB has also added THG to its list of banned substances.

### American football

#### *Chambers plans highlights NFL inadequacy*

The case of British sprinter Dwain Chambers, who was suspended following a positive drug test, has been dealt with fully elsewhere in this issue (see above, p.108). Given that the two-year ban imposed on the British runner has probably put an end to his career in athletics, the latter has considered his options and next possible career moves. Top amongst the latter has been the possibility of carving out a new future for himself in American football. One of the reasons why it is possible for Mr. Chambers to entertain such ambitions is that, like baseball, American football is extremely relaxed in its approach towards doping offenders. Whereas Chambers was suspended for two years for taking the banned substance THG, NFL offenders are only likely to be suspended for four games, even after a second offence<sup>787</sup>.

Thus the New England Patriots signed the running back, Mike Cloud, at the start of the season, knowing that he had been found guilty of taking nandrolone<sup>788</sup>.

### Basketball

#### *Laettner banned for five games*

Basketball is another US sport which Dwain Chambers and Rio Ferdinand may wish they had been involved in rather than those in which they found fame. In mid-January 2004, it was learned that Christian Laettner, a forward playing for the Washington Wizards, was suspended for a mere five games by the National Basketball Association for infringing its anti-doping policy. Players have to fail three drugs tests before incurring a five-game suspension. Neither the League nor the team would comment on the time at which the violation occurred or the substance involved<sup>789</sup>.

### Rowing

#### *Austrian dope offender allowed to compete in Athens Games – WADA investigates*

Just before the world championships for this sport were held during the summer of 2003, three Austrian runners, Martin Kobau, Helfried Jurtschisch and Norbert Lambing, were caught out by an out-of-competition test during which they tested positive for nandrolone. When called to account before the world governing body FISA, the rowers said that they had been told by their coach

## 15. Drugs legislation and related issues

to take food supplements which, unbeknown to them, contained the metabolic steroid. The rowers were given a six-month suspension, which was backdated to August 2003, which will allow the rowers to compete in the Olympics in Athens. This has aroused bitter opposition from Britain's Mark Hunter, who is likely to compete against them, and who commented that taking creatine, the substance involved, amounted to cheating as a matter of principle, and that backdating penalties was wrong in itself<sup>790</sup>.

Later, it was learned that WADA had begun an investigation into this decision.

### Weightlifting

#### *World championship samples yield 11 positive tests*

In mid-February 2004, 11 competitors, including five medal-winners, tested positive for prohibited drugs from the 2003 World Championships. This was the greatest number of positive tests since the 1976 Montreal Olympics. Officials of the International Weightlifting Federation were accordingly compelled to reallocate medals, banning the guilty athletes for two years and amending the result of the World Championships, held in Vancouver in November 2003<sup>791</sup>.

### Rugby League

#### *Lunt banned for two years*

In early February 2004, Rob Lunt, the elder of two highly-rated Cumbrian brothers playing for Castleford, was banned for two years after having tested positive for the banned substance stanozolol. The club employing him protested at the "harshness" of this sentence<sup>792</sup>.

### Rugby Union

#### *"Penygraig Three" found not guilty*

In mid-January 2004, it was learned that three players belonging to the Welsh amateur club Penygraig had been found not guilty of doping charges. The three were amongst 22 charged by the Welsh Rugby Union (WRU) with failing to take a drugs test. Of these, 19 players were banned, and three players found not guilty<sup>793</sup>.

# 16. Family Law

[None]

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## 17. Issues specific to individual sports

### Football – Internal rules and institutions

#### “Club v. country” controversy resurfaces

**Mark Viduka.** In mid-February, the Australian international was called up to play for his country in a friendly tie with Venezuela in Caracas. Mr. Viduka did not, however, play because he suffered a slight hamstring injury in a game the previous weekend, and did not consider that a trip to Caracas would help him recover. Nevertheless, the Australian Soccer Association invoked the rule which stops playing for their clubs for five days following an international in which they have been involved. This prevented Viduka playing for his beleaguered Leeds United side against a key Premiership fixture against Manchester United, which was naturally not to the taste of the club’s leadership. Chief Executive Trevor Birch delivered himself of a verbal attack against the Australian governing body, and even threatened to take legal action in relation to this matter<sup>794</sup>. No further news about any such legal action was available at the time of writing.

**John-Arne Riise.** In a friendly fixture held in February 2004, Norway beat Northern Ireland 4-1 in Belfast. One of the players involved in the away side’s win was Liverpool’s John-Arne Riise. At the time, Riise was suffering from a groin problem, but nevertheless played for 71 minutes of the international. This greatly displeased the Merseyside club, who immediately sought an explanation from their former full back, Stig Inge Bjornebye, about this decision<sup>795</sup>.

#### Controversy surrounds future of friendly internationals

There was a time when friendly internationals commanded considerable interest and attendances, but these days seem numbered in today’s highly competitive environment. Interest in such fixtures has dwindled to the point of casting serious doubts over their very existence. One of the reasons for this lack of interest may also reside in the fact that these fixtures

are seen as mere excuses for experimenting with players, which involves making a high number of substitutions in the course of the match, thus detracting from its spectator appeal.

This has prompted the world governing body FIFA to propose changing the rules on substitutions for such fixtures, and limit them to five per team<sup>796</sup>. The decision was to be made at a meeting of the International FA Board, which governs the rules of the game, at which the FIFA proposal was accepted, although the number of substitutes allowed was finally increased to six. This was as a result of Mark Palios, the Chief Executive of the English Football Association (FA), and its executive director David Davies having done their utmost to dissuade the Board from acceding to this rule change. The England manager, Sven-Göran Eriksson, was disappointed with this outcome, even though the new rule would only come into effect on 1 July, leaving the England coach with sufficient time to experiment up to the start of the Euro 2004 tournament<sup>797</sup>.

#### Winter break to be introduced in Premiership next season (UK)

There was a time when a mid-winter break in professional football was exclusively a matter of necessity for Central European teams in order to accommodate a severe winter in their programmes. More recently, however, the winter break has been adopted by other countries, not out of climatological necessity, but in order to allow players a brief respite from the rigours of an increasingly arduous sport. One of the benefits of such a break included the avoidance of end-of-season burn-out on the part of leading players, leaving them fresher and more alert in preparation for international tournaments following the domestic season. For some time, leading figures in the English game have advocated such a break, but without success.

However, this year the efforts of those who have been lobbying for this change seem to have borne fruit when, in late January 2004, it was announced that the Premiership clubs had agreed in principle to introduce a mid-winter

## 17. Issues specific to individual sports

break as from next season. One of the major factors in this decision has been the ceaseless lobbying by England manager Sven-Göran Eriksson, who has frequently expressed his frustration at what he saw as a handicap in preparing his squad for such tournaments such as the World Cup and the European Championships<sup>798</sup>.

### **New off-side rule causes controversy**

The off-side rule is a safeguard against the effective but uninteresting ploy whereby players would constantly hang around the opponents' goal waiting for the opportunity to score at close range. Its implementation has always required match officials to make instant decisions in fast-moving games and has given rise to many a controversial match result. At the beginning of the 2003-4 season, world governing body FIFA issued a directive to the various domestic associations aimed at clarifying the rule. Under this new interpretation, a player may be adjudged to be gaining an advantage by being offside only if he touches the ball after it has come back off a post or the bar, or rebounds to him off an opponent. As a result, an attacking player lurking behind the last defender when a free kick was being taken would no longer automatically be regarded as offside<sup>799</sup>.

Following a good deal of adverse comment from most people prominently involved in the game, whose unanimous view was that the football authorities had succeeded in making a grey area greyer still, senior officials of the Premier League, the Football Association (FA) and the Football League met in mid-February to clarify the ruling. Their conclusion was that any player deemed to be deceiving or distracting an opponent could be judged to be offside. This was welcome news to those who viewed with foreboding the tactics applied by some teams such as Wolverhampton Wanderers and Bolton, whose players had, when free kicks were being taken, made a tactical point of assuming positions which up to the current season would normally have been ruled offside<sup>800</sup>.

### **FIFA relaunches World Club Championship – amid much opposition**

When FIFA launched the notion of an inter-continental tournament aimed at discovering the club champions of the world, this appeared to be an entirely laudable and even exciting proposition. However, the manner in which the first World Club Championship was organised in Brazil four years ago seemed to be designed to deter rather than attract, what with its mismatch between certain teams and the dubious criteria for qualification. This is why there has not been much clamour from any part of the footballing world for its return. This has not, however, deterred FIFA from deciding to reintroduce it for the 2004-5 season, hopefully with less chaotic results on this occasion<sup>801</sup>.

### **FA considers plan to licence clubs**

That many football clubs are not in the best of financial health is something which is all too apparent from the various horror stories on display in Unit 10 of this survey. The Football Association (FA) have reacted accordingly, and are now considering the introduction of new financial regulations which could result in clubs being fined, have points deducted or even expelled from their League if they fail to comply with them. In February 2004, there appeared an interim report by the FA's Finance Advisory Committee, chaired by leading economist Kate Barker, which recommended that clubs should adopt a licensing system aimed at ensuring financial health and probity in the game. The report also recommends regulating the activities of agents by requiring clubs to reveal the identity of all agents, managers and coaching staff involved in transfers and contract negotiations<sup>802</sup>.

Ms. Barker commented that the measures were intended to challenge poor business practice and a culture of secrecy within the game. Under the proposed licensing system, clubs could face stiff penalties if they fail to submit accounts on time, publish interim results and demonstrate they had sufficient cash flow to last the season. As from next season, all clubs competing in European tournaments will be required to acquire UEFA licences<sup>803</sup>.

## Disciplinary cases and procedures

### **New disciplinary procedures in English football**

In November 2003, the Football Association (FA) introduced a number of changes in its disciplinary procedures. The FA bowed to pressure from world governing body FIFA by appointing the deputy head of the Professional Footballers' Association (PFA), Brendan Batson, to oversee a review of its procedures following concerns expressed by FIFA President Sepp Blatter that its rules were being ignored in England. FIFA had warned all 204 national associations that they should comply with its new disciplinary rules in a circular issued in early 2003. Mr. Batson will report on his review by the end of the current season but is unlikely to oppose the changes demanded by FIFA.

Under the proposed rule changes, players who are awaiting a disciplinary hearing will be suspended until such time as their cases have been resolved. Under another major change, all footballers who have been sent off will be immediately banned for the following game. Players will be allowed to appeal against red card decisions only on grounds of mistaken identity or other "obvious reasons" (which have not thus far been stipulated by FIFA). Under current FA rules, a player

## 17. Issues specific to individual sports

who is sent off does not start a ban for a further 14 days, and virtually any grounds for appeal are considered. Players are not suspended whilst awaiting their appeal or disciplinary hearing<sup>804</sup>.

### Disciplinary implications of “Battle of Old Trafford” (UK)

The unseemly scenes which attended the concluding moments of the Premiership fixture between Manchester United and Arsenal in September 2003, described in the previous issue<sup>805</sup>, subsequently resulted in a number of disciplinary charges being brought, mainly against the visiting side. Arsenal were fined £175,000 for failing to control their players and were warned as to their future conduct. Cameroon international Lauren was suspended for four games and fined £40,000 for having jostled Ruud Van Nistelrooy following his penalty miss and for kicking at South African international Quentin Fortune. Martin Keown, whose unseemly war-dance was the most potent image of the incident, was banned for three games and fined £20,000. Ray Parlour incurred a one-match ban a £10,000 fine for his behaviour towards Van Nistelrooy and Gary Neville. Patrick Vieira was banned for one game and fined £20,000 for refusing to leave the pitch swiftly after being dismissed for kicking out at Van Nistelrooy. Ashley Cole incurred a £10,000 fine and a reprimand for confronting Cristiano Ronaldo<sup>806</sup>.

The penalties were harsher than those inflicted on other clubs and sides in similar circumstances – the financial penalty was 65 times the size of that incurred by England for their involvement in the tunnel fracas in Istanbul (see below, p.119) – but clearly the FA saw the need to rein in the players (and manager) of a club whose disciplinary record in recent years has been truly appalling. Arsenal signalled that they would not appeal against this verdict<sup>807</sup>.

However, the opposing team did not cover themselves in glory either. For their part in the fracas, Ryan Giggs and Cristiano Ronaldo were fined a total of £11,500 for “improper conduct”. Far from accepting this relatively mild penalty with grace, the club, through their solicitor Maurice Watkins, once again (see the Ferdinand affair, described earlier) showed the full measure of the contempt in which they hold the game’s authorities by issuing the following statement:

***“The feeling is that if a similar situation occurred again – and hopefully it won’t – they would do exactly the same thing. They both believed they found themselves in that situation through no fault of their own and all they were doing was protecting a team-mate in the face of extreme provocation. Ryan Giggs, for one, has an exemplary disciplinary record. In 11 years in the***

***Premiership he has never been sent off, never been the subject of any disciplinary hearing and received only 16 yellow cards”***<sup>808</sup>

If 16 yellow cards constitute an “exemplary record”, the present writer would be interested to meet, preferably at a safe distance, the player whose record Mr. Watkins would consider to be even remotely worthy of criticism. (On the subject of Mr. Giggs’s peerless reputation for gentlemanly demeanour, the reader is also referred to the next item under this heading.)

The manager of the opposing team also proceeded to talk himself into disciplinary trouble when he commented that the sentences handed out to the club and players were “part of a bargain deal”, and, even more damagingly, that this kind of deal had been going on for years. Sir Alex Ferguson was immediately asked to explain himself by the FA, although since then there has been no further news of any action taken against Sir Alex<sup>809</sup>. (The reader is advised not to hold his/her breath.)

### Giggs charged with “improper conduct” during Russia v. Wales international (UK)

During the first leg of the European Championship decider between Wales and Russia, played in Moscow, there occurred an incident in which one of the visitors, Manchester United’s Ryan Giggs, appeared to elbow Russian right-back Vadim Evsees in the face. The Welsh player was charged with “improper conduct” over this incident<sup>810</sup>. Mr. Giggs subsequently incurred a two-match ban for this incident at a UEFA disciplinary hearing held in early December<sup>811</sup>.

### Phillips fined over Lehmann incident

Towards the end of 2003, Arsenal faced Southampton FC in a Premiership fixture at St. Mary’s, which ended in a 1-0 away victory. As the final whistle went, Arsenal goalkeeper Jens Lehmann threw the ball at Southampton striker Kevin Phillips, who responded by squaring up to the keeper before other players intervened to separate them. Earlier, Mr. Phillips appeared to stand on Mr. Lehmann’s foot. The Southampton striker was fined £2,000 for this incident and warned as to his future conduct<sup>812</sup>.

### Mihajlovic banned for spitting at Chelsea player

In November 2003, Siniša Mihajlovic, Lazio Roma’s Serbian international, was banned for eight European matches and fined £9,000 for “repeated, particularly unsporting behaviour” following an incident which occurred during a fixture against Chelsea, during which he spat at the visitors’ Romanian international, Adrian Mutu. In addition, he had kicked another opponent and

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engaged in improper conduct towards an official when he was sent off after incurring two yellow cards. Three years ago, Mr. Mihajlovic served a two-match ban for racially abusing Arsenal captain Patrick Vieira<sup>813</sup>.

### Roberto Carlos banned for two matches

In early March 2004, Real Madrid's Brazilian star was suspended for two matches by European governing body UEFA for "Improper conduct", having retaliated after suffering a foul during a Champions League tie with Bayern Munich. Normally, the sentence would have been a three-match suspension, but the disciplinary panel took into account the foul committed on Mr. Carlos<sup>814</sup>.

### Diouf in trouble – again (UK)

Liverpool's Senegal international, El-Hadji Diouf, has undoubtedly proved a very useful signing for the Merseysiders, but he has at the same time been the focus of some unwanted attention on the field. It may be recalled from a previous issue<sup>815</sup> that, during a fixture with Glasgow Celtic at Parkhead, he was involved in a spitting incident which not only earned him disciplinary penalties, but also earned him the attentions of the Strathclyde constabulary. Mr. Diouf was once again the subject of on-field controversy during an international between Senegal and Tunisia, which was marred by ugly incidents both on and off the pitch. After Tunisia scored a disputed goal, which turned out to be the winner, Mr. Diouf was one of several players who came off the Senegal bench to harass the referee. After the match, the Liverpool star had to be restrained as the referee was led off the pitch surrounded by security men. For this offence, Mr. Diouf was banned for three international matches<sup>816</sup>.

However, there was better news for the Senegal player when the FA rescinded the second yellow card which he received during a Chelsea v. Liverpool fixture at Stamford Bridge. The referee admitted he was wrong to caution Diouf after the latter had tangled with Adrian Mutu during the final moments of the match<sup>817</sup>.

### Alan Smith ban following bottle-throwing incident sparks off England team protest

Leeds United striker Alan Smith has one of the worst disciplinary records in the Premiership, and seemed intent on confirming this reputation in late October 2003 when, during a home Carling Cup tie with Manchester United, he picked up a bottle which had been thrown from the crowd and hurled it into the spectators. The bottle rebounded off a seat and struck a female spectator on the head. By some remarkable coincidence, the victim was the sister of one of Smith's close friends<sup>818</sup>. As has been mentioned earlier (see

above, p.26) the victim failed to press charges, thus exempting Smith from any further criminal prosecution. However, the game's authorities clearly could not let the matter rest there.

This matter was naturally bound to produce disciplinary consequences, but on this occasion, the reverberations went far beyond the bleak surroundings of an FA disciplinary panel. Shortly after the police released Mr. Smith on bail for this incident, the player was called up for training with the England squad in Manchester in preparation for the friendly international against Denmark. However, it was only once Smith had arrived at the training camp, that the FA realised that he had been arrested over the bottle-throwing incident, which caused them to despatch the Leeds player back across the Pennines<sup>819</sup>. This caused uproar amongst the England squad, with Gary Neville contacting the Professional Football Association (PFA) Chief Executive, Gordon Taylor, about the matter, and for a while it seemed as though the militancy which had bedevilled the build-up to the crucial game against Turkey following the Rio Ferdinand affair (see above)<sup>820</sup>.

However, the football authorities' embarrassment was not to end there. As a replacement for Smith, Southampton striker James Beattie was called up, only for the FA to find out that the latter was currently serving a 30 month drink-driving ban. The FA had no option but to send Mr. Beattie on his way. It was also revealed that Manchester United player Nicky Butt had been allowed to play for England whilst on police bail following an incident in which he allegedly assaulted a woman in a nightclub. Mark Palios, the FA Chief Executive, commented that had the FA known about the charges against Mr. Butt, the latter would not have been allowed to play<sup>821</sup>.

The FA disciplinary hearing relating to the bottle-throwing incident was held in early January, and resulted in a two-match ban (and no fine) for Smith. Leeds United issued a statement to the effect that, in their view, the player had been harshly treated. On the same day as the hearing, the FA also announced that they would enlist the aid of four former England captains to help ease relations with the England players<sup>822</sup>.

### England fined over Istanbul incident

It will be recalled from the previous issue<sup>823</sup> that the disciplinary consequences of the incident involving several England and Turkey players during the tempestuous Euro 2004 qualifier in Istanbul had not yet been decided. The UEFA panel charged with making a decision on this issue met in late October 2003, and surprisingly contented itself with issuing a mere £4,400 fine<sup>824</sup>. Many expressed surprise at the mildness of this verdict, coming as it did within days of the relevant FA

## 17. Issues specific to individual sports

panel issuing much more severe penalties for the Old Trafford fracas reported elsewhere in this journal (see above, p.118).

### **Nigerian internationals sent home in disgrace**

In late January 2004, it was learned that Nigerian internationals Celestine Babayaro, of Chelsea, Yakubu Ayegbeni (Portsmouth) and Victor Agali had been dismissed from Nigeria's African Cup squad for "indiscipline". Apparently they broke the rules of the training camp. Taiwo Obunjobi, the General Secretary of the Nigerian Football Association, refused to confirm suggestions that the three players had returned late to the camp after a late night out<sup>825</sup>.

### **Bureaucratic error doubles Bowyer ban**

Lee Bowyer is another player who is never far from the game's headlines for the wrong reasons (Journals passim!). When he was transferred from West Ham United to Newcastle, he brought with him a six-match European ban carried over from his days as a Leeds United player. Newcastle, having played six games in Europe before Bowyer's transfer, believed he would be available for their UEFA Cup tie against Norwegian side Valerenga. However, it soon became apparent that there had been a communications failure. When the Tyneside club requested the FA to obtain confirmation from European governing body UEFA that Mr. Bowyer was allowed to travel to Oslo, the answer was in the negative. UEFA decreed that, because Newcastle had failed to name Bowyer on the player list, as all sides are required to do before taking part in European games, the "clock had not yet begun ticking" as UEFA put it in relation to Bowyer's suspension. In other words, he will be banned for the next six European fixtures, which in effect doubles the sentence. The FA insisted that it was not responsible for this and denied claims by the club that it was consulted when the player list was first drawn up in August<sup>826</sup>.

### **Other cases (all months quoted refer to 2004, unless stated otherwise)**

**Terry Fleming and Justin Walker.** In March, the Football Disciplinary Commission backed the decision of nationwide League side Cambridge United to suspend Messrs. Fleming and Walker. The panel found that the pair had breached club disciplinary rules<sup>827</sup>.

**Joe Cole.** The Chelsea and England midfielder was banned for two matches and fined £15,000 for incidents which occurred whilst the player was still employed by West Ham United, and related to the match away to Bolton during the 2002-3 season<sup>828</sup>.

**Christophe Dugarry.** In January, the Birmingham City striker was issued with a three-match suspension after being charged with violent conduct. The Frenchman was alleged to have elbowed Blackburn player Craig Short, who sustained a broken nose, during a Premiership fixture at St Andrew's in December 2003<sup>829</sup>.

**Jimmy Floyd Hasselbaink.** In January, Chelsea's star striker was charged with violent conduct after the FA viewed video evidence of an incident which occurred during an FA Cup tie against Scarborough<sup>830</sup>.

**Micky Adams.** In December 2003, the Leicester manager was charged by the FA for remarks which he made to referee Mike Riley during a Premiership match against Birmingham City<sup>831</sup>.

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## Other issues

### ***Don't wear it like Beckham – at least not in China***

In late February 2004, the Chinese Football Association issued a ruling prohibiting its under-17 squad from copying the flamboyant hairstyles sported by England captain David Beckham. Dyed hair, long hair and "weird hairstyles" were all placed on the strictly prohibited list in the training camp, and all players were instructed to adhere to short haircuts<sup>832</sup>.

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## Rugby Union – Internal rules and institutions

### **"Super Nine" series proposed – but rejected**

The Rugby World Cup, and its dramatic finale, have certainly done a great deal to increase worldwide interest in the sport. Barely had the dust settled on the tournament than plans were being made to capitalise on this popularity. John O'Neill, the Chief Executive of the Australian Rugby Union (ARU) revealed plans for a biennial tournament between the countries making up the Six Nations tournament and those constituting the Tri-Nations, which would amount to a mini-World Cup without the lesser-rated teams<sup>833</sup>. However, it was always unlikely that this idea would find much favour – and not only amongst the teams who would thus find themselves excluded (and who include countries such as Argentina and Samoa, which can by no stretch of the imagination be dismissed as minions). The European Six Nations have also rejected this plan<sup>834</sup>.

### **Worcester RFC ire at new ground capacity rules (UK)**

It will be recalled from a previous issue<sup>835</sup> that the top

## 17. Issues specific to individual sports

flight in English rugby have come under suspicion of attempting to make life extremely difficult for any “upstart newcomers”, which was certainly the suspicion entertained by many over the “Rotherhamgate” affair. Similar suspicions have recently been aired by the authorities at Worcester RFC, the winners of the National First Division and therefore candidates for promotion to the lofty environs of the Zurich Premiership. In order to do so, however, they have to meet certain criteria, one of which relates to ground capacity.

Under a recent rule change, this capacity was raised to a minimum of 8,200. This was much to the annoyance of Worcester, whose Sixways ground currently can accommodate a maximum of 5,200. The club’s operations manager Mike Robins accused the Premiership clubs of trying to ensure that they remain as a closed shop by introducing this change. He said that, although the local safety officer had approved plans to raise capacity to the number required, this would cost a good deal of money. The cost will include that of moving their pitch in order to effect the necessary changes. However, Howard Thomas, Chief Executive of Premier Rugby, hotly denied this charge that the rule change was designed to exclude clubs from the Premiership<sup>836</sup>.

### Disciplinary cases and procedures

#### Betsen banned for Dawson kick

During the World Cup semi-final fixture between France and England, there occurred an incident for which French flanker Serge Betsen appeared to kick England scrum-half Matt Dawson in the head, for which offence he was sent to the sin bin and later cited. As a result, Betsen was suspended for six weeks. The penalty would have been harsher – an 18-week suspension is not uncommon in such cases – but for a number of mitigating circumstances. These included a letter of apology to Mr. Dawson, the fact that there had been no intention to injure, and the representations made as to the player’s previous good record in disciplinary matters<sup>837</sup>.

#### Argentina props banned for “gouging” incident

Following a World Cup group match between Ireland and Argentina, which took place at the Adelaide Oval, Argentina props Roberto Grau and Mauricio Reggiardo were cited for eye-gouging<sup>838</sup>. Grau and Reggiardo received none and six-week suspensions respectively. The penalties could have been a good deal worse, since the offence carries a maximum three-year suspension. However, following a marathon seven-hour hearing in Sydney, Grau was found guilty of the lesser offence of

“raking his hand over the face of an opposition player”. The action of Reggiardo was described as “reckless rather than deliberate”<sup>839</sup>.

#### England fined for Luger incident

During a group match in the recent World Cup between England and Samoa, England centre Mike Tindall sustained an injury on the field, and Dan Luger was sent on as a substitute – without securing authorisation from the referee. For half a minute, England thus had 16 men on the field<sup>840</sup>. It was also reported that this incident was accompanied by some heated verbal exchanges between a member of England’s backroom staff and a match official. This matter naturally came to the attention of the tournament organisers<sup>841</sup>.

The relevant disciplinary hearing took place a few days later, and merely resulted in a £10,000 fine and a two-match touchline ban for Dave Reddin, the man whose illegal substitution of Dan Luger had caused the presence of 16 England players. The England camp were obviously relieved at this outcome, since the worst-case scenario was that they could have had points deducted from their group total<sup>842</sup>.

#### Northampton v Gloucester clash results in three bans

The Zurich Premiership clash between Northampton and Gloucester, played in 1/11/2003, was an extremely tempestuous affair, which at a certain point degenerated into a mass brawl amongst the players. The violence erupted during injury time following the first half, and was sparked by a confrontation between Shane Drahm and Duncan McRae, with Mark Robinson receiving a straight red card for joining the melee<sup>843</sup>.

Mr. Robinson was issued with a three-week suspension for his part in the violence, whereas Mr. Drahm received the more lenient penalty of a two-week suspension for the same offence. McRae’s case was dismissed, but Gloucester flanker Andy Hazell, who was shown a yellow card for flattening Drahm with a late challenge during the same fixture, incurred a three-week suspension<sup>844</sup>.

#### Other cases (all months quoted refer to 2004, unless stated otherwise)

**Harry Ellis.** In late November 2003, the Leicester scrum-half was suspended for 10 weeks by the Rugby Football union (RFU) for striking an opponent with his head<sup>845</sup>.

**Chris Fortey.** The Gloucester hooker was suspended for a week by the RFU for his part in a physical exchange during a game with Harlequins in December 2003<sup>846</sup>.

## 17. Issues specific to individual sports

**Martin Leslie.** In October 2003, the Scotland flanker was banned for 12 weeks for having kneed US player Jason Keyter during a World Cup group match in Brisbane<sup>847</sup>.

**Martyn Wood.** In December 2003, the Bath scrum-half was banned for six weeks after having been sent off for kicking during a Zurich Premiership game with Leicester<sup>848</sup>.

**Dan Baugh.** In January, Cardiff's Canadian back-row forward was suspended for eight weeks for kicking an opponent in the head during a match with Leinster<sup>849</sup>.

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### Other issues

[None]

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### Rugby League – Internal rules and institutions

#### **New Zealand challenge Britain's right to host Tri-Nations tournament**

In January 2004, it was learned that New Zealand were to challenge Great Britain for the right to stage the 2005 Tri-Nations tournament, which involves Great Britain, Australia and New Zealand. Britain were due to host this new competition in each of the next three autumns, and negotiations for television coverage with BSkyB were well under way. However, the Kiwis were profoundly unhappy with this arrangement, which would mean that they would play even their "home" games against Australia in England, probably at Griffin Park in London. New Zealand's Rugby League representatives therefore started to lobby other members of the International Federation. However, at the time of writing it looked as though Britain's ability to compromise over this issue could be restricted by the five-year broadcasting contract, referred to earlier (see above, p.37) which has already been agreed with BSkyB to televise both Super League and international fixtures<sup>850</sup>.

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### Disciplinary cases and procedures

#### **Morley fined but not suspended for Test dismissal**

In November 2003, Adrian Morley, the Great Britain forward who plays for Sydney Roosters, set the unenviable record for being dismissed from the field with the first tackle of the first test against Australia at Wigan. This was unprecedented in Test rugby, and it looked as though the authorities might exact a heavy

disciplinary price for this misdemeanour. As it was, however, Mr. Morley was fined £2,000 but not suspended. This left him free to play in the remaining two Tests<sup>851</sup>.

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### Other issues

[None]

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### Racing – Internal rules and institutions

#### **BHB abolish Triple Crown**

In January 2004, the British Horseracing Board (BHB) bowed to pressure from the top racecourses by agreeing to abandon the Summer Triple Crown in favour of a Grand Prix-style championship of 24 Group One races. The Triple Crown series was based on one horse winning three of the seven championship races. The Derby, Oaks, Coronation Cup or Prince of Wales's Stakes qualified a horse to proceed onto the Eclipse, the King George and the Juddmonte. Winning the Triple Crown carried a potential £5 million bonus, but required a horse to qualify by winning one of the first four and then go on to win the remaining three races<sup>852</sup>.

The racecourses, however, made it clear to the BHB that they were unhappy with the sheer difficulty of winning the prize and with the brief period for which the competition ran. They preferred it to last all season, which explains their demands for change<sup>853</sup>. The new format was still under discussion at the time of writing.

#### **"SP reform will cost punters" warns bettors' champion (UK)**

One of the bedrocks of racing in this country is the "starting price" (SP) system. As matters stand at present, SPs are compiled by reporters in the betting ring, who determine the average price of every runner the moment the race starts. Around 90 per cent of off-course bets are settled at SP, making the prices a crucial factor in the profitability of the major bookmakers. However, the SP Executive, the body which oversees the compilation of starting prices, is now proposing to replace SP reporters by a computerised system, which would link the computers used by on-course bookmakers to manage their bets and issue tickets to a central server. This would enable a continuous record of the average price of each runner to be kept. It would not, however, enable the punter to establish whether an individual bookmaker is laying any particular horse to worthwhile sums at the odds on offer<sup>854</sup>.

This is why Keith Elliott, a respected champion of British punters' rights, has warned that plans to scrap the current system will boost bookmakers' profit

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margins and cause a fundamental shift of wealth from punters to bookmakers. The latter have been keen to reverse the trend whereby fierce competition in the betting ring has seen their overall profit margins decline significantly. The average over-round is currently significantly less than 2 per cent per runner, which many off-course bookmakers believe to be unacceptably low. The SP Executive insists that it is merely modernising and streamlining the current system, and intends to introduce full computerisation in the course of 2004<sup>855</sup>.

### Top courses issue blueprint on saving National Hunt

In mid-November 2003, Racecourse Holdings Trust (RHT), which owns 10 of Britain's leading National Hunt courses, issued what amounts to a "fight or die" warning to the rest of the jumps industry as it faces up to increasing competition from all-weather racing in its core winter season. RHT launched its review of National Hunt racing at Newbury, which includes a series of proposals to increase the competitiveness of jump racing. More particularly the report calls for the following measures:

- serious investment in watering systems in order to ensure that the ground is never worse than good-to-firm, seen as a fundamental requirement for both the welfare of the horses and the support of customers;
- more imaginative race programming to reflect the variety of jumping horses and fit better with off-course bookmakers' requirements;
- better projection in the media to bring out the "shape and narrative" of jump racing, with coverage aimed at building public profiles of horses and jockeys;
- a more "proactive" take on animal welfare to attract more horses into the sport, with "schooling trial" races at disused courses and races possibly over less than the current two-mile minimum;
- more active encouragement of young British riders to become jump jockeys with a series of pony races, perhaps with a final at Cheltenham, to be considered;
- splitting of the jumping season into two, with a core championship from October 1 to April 30. Racing in this period to be rebranded as British Jump Racing, with appropriate brand management and promotion.

### Disciplinary cases and procedures

#### Penalties imposed after two race meeting descend into chaos

If a bookmaker were to lay odds on two races within the same week causing havoc because of several riders taking the wrong course, he/she would lay very long odds on such a coincidence. Yet this is precisely what happened during the third week of December 2003. First at Towcester, all but three of the 11 runners, including the first five past the post, were disqualified for taking the wrong course. The confusion arose after three fences in the home straight were omitted because of the low sun. As the field passed by, they approached a hurdle wing in the middle of the course, with its hurdle removed in advance of the final race on the card. The leading horses, including the 7-2 joint favourite Lord Broadway, all passed on the wrong side of the wing, effectively meaning that they had run out. Though Lord Broadway went on to be the first past the post, the stewards had no option but to disqualify all but the three horses which had passed the hurdle wing correctly. No further penalties were imposed on the jockeys involved in the confusion<sup>856</sup>.

The second incident occurred four days later at Ludlow, when seven of the 14 runners were disqualified for taking the wrong course. When jockey Claire Stretton fell from her horse Mizinsky, this causes such confusion that all but three riders chose the correct course. The others did not and were disqualified. However, on this occasion there were also further disciplinary consequences, with the jockeys concerned, including Timmy Murphy and Marcus Foley, being banned for a total of 19 days<sup>857</sup>.

#### Other cases (all months quoted refer to 2004, unless stated otherwise)

**Charlie Mann.** In November 2003, this jockey was fined £5,000 for committing the offence of sending the wrong horse to the races for the third time in 36 months. He was also informed by the Jockey Club that any further repetition of this misdemeanour would lead to his licence being removed<sup>858</sup>.

**Tony McCoy.** In January, Mr. McCoy was issued with a five-day ban for hitting his horse Deano's Beeno 50 times before the start of a race<sup>859</sup>.

**Richard Fahey and Dale Swift.** Trainer Fahey and jockey Swift were fined £1,600 and banned for 10 days respectively, and their horse Market Avenue suspended from running for 40 days. They were penalised after the Jockey Club disciplinary committee held an inquiry into

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Market Avenue's performance in the Whitby Handicap at Redcar on 28/10/2003. The panel found Swift to be in breach of rule 157, in that he had intentionally failed to ask the filly for sufficient effort. Fahey, the horse's trainer, was found to be in breach of Rule 155(ii) which states that it is a trainer's duty to ensure that a jockey is given instructions which will ensure that a horse runs on its merits<sup>860</sup>.

**Richard Phillips.** In February, the trainer won an appeal which ended with Jockey Club stewards setting aside a £1,700 fine and lifting a 40-day ban imposed on his horse, Newsplayer. He successfully argued that he had given jockey Jodie Mogford adequate riding instructions, and convinced stewards that if Mogford had carried out those instructions, he would not have been in breach of the rules of racing. Mogford had been found to have "tenderly ridden" Newsplayer at Haydock Park earlier that month<sup>861</sup>.

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### Other issues

[None]

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### Athletics – Internal rules and institutions

#### Paris failure prompts review

At the 2003 World Championships in Paris, Britain only came away with two silver and two bronze medals, which drew a good deal of adverse comment from many observers. As a result, Sir Andrew Foster, the former controller of the Audit Commission, will examine all aspects of the manner in which the sport is organised in Britain and report back to Sport England in early 2004<sup>862</sup>.

One of the key areas which will be considered by Sir Andrew is the relationship between UK Athletics and the Amateur Athletics Association (AAA) of England, which is holding up funding promised by the Government in the wake of the Picketts Lock fiasco (Journals passim!). Tessa Jowell, the Secretary of State for Culture, Media and Sport, had confirmed the previous year that £41 million of funding would be made available to UK Athletics following the Government's decision not to stage the 2005 World Championships. Although £21 million of that sum had already been distributed to capital projects, the remainder of this money will not be made available until the current system of three area bodies within the AAA is replaced by one involving 10 regional hubs<sup>863</sup>.

### Disciplinary cases and procedures

#### Financial threat to Norwich Union absentees (UK)

In late December 2003, it was learned that UK Athletics will deduct earnings from athletes who choose not to attend the Norwich Union Trials and AAAs, in a bid to raise the profile of this indoor event. 25 per cent of an athlete's promotional earnings and prize money could be docked from the pay packets of those who fail to be present at the meeting at the Institute of Sport, Sheffield, in February. UK Athletics's performance director, Max Jones, said that it was vital for the health of the sport that as many top athletes as possible attend this event<sup>864</sup>.

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### Other issues

[None]

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### Cricket – Internal rules and institutions

#### Cricket Reform Group set out manifesto for change...

It will be recalled from the previous issue<sup>865</sup> that a forum, called the Cricket Reform Group, had recently been set up. It consists of a coalition of former players, including former England captains Michael Atherton and Bob Willis, and is calling for widespread changes in the manner in which cricket is organised and managed in this country. In late November, the Group launched a radical manifesto outlining their proposals. It proposes fundamental changes such as a dramatic reduction in the number of professional players and the establishment of an elite league of six clubs. In a letter accompanying the document, the group calls for an end to the influence of the First Class Forum on the management board of the England and Wales Cricket Board (EWCBC). The letter states:

***"We passionately believe that a more streamlined management board must be given full control of the running of the game. The financial monopoly of the first-class counties must be challenged in order that the England team and the grassroots of the game, especially, receive greater financial support."***<sup>866</sup>

This is one of six key proposals. The others are greater investment in the England team, an elite division to act as a stepping stone between first class and test cricket, a reduced county programme, increased investment in the upper tier of the

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recreational game and greater interaction between the professional and amateur games. The restructuring of the professional game would create 18 cricket associations based on the existing counties, which would draw in minor counties<sup>867</sup>.

### ... as does Des Wilson (ECB)

In January 2004, Des Wilson, the Chairman of the corporate affairs and marketing advisory committee of the England and Wales Cricket Board (EWCB) used the inaugural meeting of a new sporting pressure group, called Sports Nexus, to propose a way forward for English cricket. He expressed the hope that the outcome of two reviews of the game's governance and professional playing structure, which is currently taking place, will lead to a merger between the EWCB and the First-class Forum, as well as a new deal for the first-class counties. Mr. Wilson hopes that the outcome of the internal reviews will be a guaranteed future for the 18 first-class counties in return for a more streamlined governing body and the allocation of money according to the amount which they commit to the production of England players and the development of schools and youth cricket in their area<sup>868</sup>.

## Disciplinary cases and procedures

### Round-up of cases (all months quoted refer to 2004, unless otherwise stated)

**Rahul Dravid.** In January, the Indian star batsman was fined half of his match fee for ball tampering during a one-day international with Zimbabwe. Dravid was caught by television cameras apparently rubbing a cough sweet on the ball during the Zimbabwe innings<sup>869</sup>.

**Shoaib Akhtar.** In late October 2003, the Pakistan fast bowler lost his appeal against a three-match ban imposed for using offensive language during Pakistan's victory in the first Test against South Africa the previous year<sup>870</sup>.

**Rikki Clarke.** In October 2003, the England fast bowler was fined £2,750 by Pakistani match referee Wasim Raja after being found guilty of using obscene language during the first test against Bangladesh in Dhaka<sup>871</sup>.

## Other issues

### ICC acts to stop another Zimbabwe-type fiasco

This issue has already been dealt with earlier under the heading "Sport and International Relations" (see above, p.9).

### Most international fast bowling is illegal, says report

In late October 2003, a study organised by Cricket Australia's biomechanics expert Mark Portus purported to show that most international fast bowlers have illegal actions. Twenty-one pace bowlers from five nations were filmed without their knowledge over an 18-month period for the study (their names were not revealed). Until last year, bowlers were prohibited from bending their arms whilst delivering a ball. The ICC then changed the rule to allow bowlers to straighten their elbow by a maximum of 10 degrees before releasing the ball. The study recommends that bowlers should be allowed to have a 15-degree straightening, because of the 34 deliveries<sup>872</sup> analysed at least 14 were unlawful under current rules.

## Motor Racing – Internal rules and institutions

### Grand Prix developments

It may be recalled from the previous issue<sup>873</sup> that there had been some doubt as to whether the Canadian Grand Prix would continue in existence, in view of the country's legislation banning tobacco advertising. The event was finally saved when a rescue deal, worth £11.7 million, was agreed between the state of Quebec and the Canadian federal government<sup>874</sup>.

Over the past few months, the Grand Prix calendar has been subject to other doubts and threats. Thus the French GP, whose removal from the Formula One timetable was announced in late November 2003 by the race organisers. This was due to the financial difficulties besetting this event, with the race organisers owing the Formula One impresario, Bernie Ecclestone, £6 million in sanctioning fees<sup>875</sup>. However, following a meeting between Bernie Ecclestone, Max Mosley, the president of world governing body FIA and the Formula One team principals, the GP was reinstated, with the French organisers having agreed to Mr. Ecclestone's financial requirements<sup>876</sup>.

However, in the meantime doubts had begun to arise as to the future of the Brazilian GP, when it was learned that a court in Sao Paulo had ruled that next year's race cannot take place because it is a waste of public money. Judge Joao Andres de Vincenzo ruled that the contract for the race between the civic authorities and its promoter, International Promotions, should be suspended. If work in preparation for the race continued, the judge ruled that the promoter would be liable for a fine of £10,200. The FIA made no comment other than that this appeared to be part of a continuous battle between Sao Paulo and Rio de Janeiro over which city should host the event in the future. However, there are problems with Rio as well, since the

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main racing circuit there is to be the site for the athletes' village at the Panamerican Games of 2007<sup>877</sup>.

The San Marino GP also seemed to be experiencing problems. Bernie Ecclestone announced in February 2004 that the event would be removed from the calendar as from the next season. At the time of writing, negotiations were in progress with Mr. Ecclestone aimed at safeguarding this event<sup>878</sup>.

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### Disciplinary cases and procedures

#### **Mosley plan to end in-race penalties could mean bans for drivers**

In mid-December 2003, it was learned that Formula One drivers could face bans as from the next season under a totting-up points system similar to that used for ordinary motorists who break the law. Max Mosley, the President of world governing body FIA, is proposing such legislation under which drivers who clock up too many points would be banned for a race<sup>879</sup>. No further details were available at the time of writing

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### Other issues

[None]

## Footnotes

- 1 See [www.cev.org.br](http://www.cev.org.br)
- 2 [2004] 10 *Neue Juristische Wochenszeitung*, p. XXII.
- 3 *The Independent* of 16/2/2004, p. 34.
- 4 *The Guardian* of 16/2/2003, p. 19.
- 5 *The Independent*, loc. cit.
- 6 *The Guardian*, loc. cit.
- 7 *The Guardian* of 22/11/2003, p. 29.
- 8 *The Guardian* of 6/2/2004, p. 31.
- 9 *The Daily Telegraph* of 18/12/2003, p. 27.
- 10 *The Independent* of 21/11/2003, p. 41.
- 11 *The Independent* of 24/10/2003, p. 40.
- 12 *The Times* of 9/1/2004, p. 31.
- 13 [2003] 1 *Sport and the Law Journal* p. 77 et seq.
- 14 *In-House Lawyer* of May 2003, p. 26-27.
- 15 [2003] 3 *Sport and the Law Journal* p. 15.
- 16 *In-House Lawyer*, loc. cit.
- 17 *Daily Mail* of 18/2/2004, p. 84.
- 18 *Ibid.*
- 19 *Issue 101/12* of 25/3/2004, p. 27.
- 20 *The Lawyer* of 2/2/2004, p. 5.
- 21 *Gazette* of 20/11/2003, p. 24.
- 22 *The Independent* of 18/12/2003, p. 33.
- 23 *The Lawyer* of 23/2/2004, p. 5.
- 24 *The Lawyer* of 24/11/2003, p. 4.
- 25 *The Lawyer* of 23/2/2003, p. 5.
- 26 See [2003] 1 *Sport and the Law Journal* p.50.
- 27 *Day v. High Performance Sports Limited* [2003] *EWHC* 197 QBD.
- 28 [2003] 2 *Sport and the Law Journal* p. 99; [2003] 3 *Sport and the Law Journal* p. 81.
- 29 [2003] 2 *Sport and the Law Journal* p. 11; [2003] 3 *Sport and the Law Journal* p. 10.
- 30 *The Guardian* of 1/11/2003, p. S18.
- 31 *The Independent* of 21/1/2004, p. 76.
- 32 *Ibid.*
- 33 [2003] 3 *Sport and the Law Journal* loc. cit.
- 34 *Daily Mail* of 13/1/2004, p. 71.
- 35 *Daily Mail* of 21/1/2004, p. 2.
- 36 *The Guardian* of 22/1/2004, p. 36.
- 37 *The Mail on Sunday* of 25/1/2004, p. 116.
- 38 *The Guardian* of 22/1/2004, p. 35.
- 39 *The Guardian* of 26/1/2004, p. S19.
- 40 *The Independent* of 28/2/2004, p. 60.
- 41 *The Guardian* of 24/1/2004, p. S18.
- 42 See e.g. the comments by John Rawling in *The Guardian* of 26/1/2004, p. S19.
- 43 *The Guardian* of 27/1/2004, p. 35.
- 44 *The Guardian* of 28/1/2004, p. 33.
- 45 *The Times* of 28/1/2004, p. 73.
- 46 *The Independent* of 29/1/2003, p. 33.
- 47 *Daily Mail* of 30/1/2004, p. 87.
- 48 *The Guardian* of 30/1/2004, p. 34.
- 49 *The Independent* of 31/1/2004, p. 32.
- 50 *The Guardian* of 10/2/2004, p. 27.
- 51 *The Times* of 23/10/2004, p. 42.
- 52 *The Observer* of 28/12/2003, p. S10.
- 53 *Ibid.*
- 54 *The Guardian* of 12/2/2004, p. 31.
- 55 *The Times* of 9/3/2004, p. 32.
- 56 *The Daily Telegraph* of 5/11/2003, p. S8.
- 57 *Daily Mail* of 5/11/2003, p. 77.
- 58 *The Guardian* of 6/11/2004, p. 33.
- 59 *The Guardian* of 28/2/2004, p. 34.
- 60 *The Guardian* of 7/2/2004, p. S15.
- 61 *The Observer* of 22/2/2004, p. S16.
- 62 *Sunday Times* of 28/12/2003, p. 5.
- 63 *The Daily Telegraph* of 31/12/2003, p. S5.
- 64 *Ibid.*
- 65 *Nederlands Juristenblad* of 16/1/2004, p. 140.
- 66 [2002] 1 *Sport and the Law Journal* p. 20.
- 67 [2002] 2 *Sport and the Law Journal* p. 21 et seq.; [2003] 1 *Sport and the Law Journal* p. 14 et seq.
- 68 [2003] 3 *Sport and the Law Journal* p. 12-13, and 122-3.
- 69 *The Guardian* of 4/11/2004, p. 29.
- 70 *Ibid.*
- 71 *The Guardian* of 6/1/2004, p. 32.
- 72 *The Guardian* of 8/3/2004, p. S28.
- 73 *The Times* of 23/10/2003, p. 43.
- 74 *The Guardian* of 28/1/2004, p. 32.
- 75 *Ibid.*
- 76 *Ibid.*
- 77 [2003] 2 *Sport and the Law Journal* p. 29; [2003] 3 *Sport and the Law Journal* p. 13.
- 78 *The Guardian* of 20/1/2004, p. 29.
- 79 *Ibid.*
- 80 *Daily Mail* of 20/2/2004, p. 78.
- 81 *Ibid.*
- 82 *The Daily Telegraph* of 9/2/2004, p. 27.
- 83 *Ibid.*
- 84 [2003] 3 *Sport and the Law Journal* p. 124.
- 85 *Daily Mail* of 30/12/2004, p. 79.
- 86 *The Guardian* of 30/12/2003, p. 22.
- 87 *The Guardian* of 29/10/2003, p. 29.
- 88 *The Guardian* of 21/2/2004, p. 34.
- 89 [2003] 3 *Sport and the Law Journal* p. 124.
- 90 *The Guardian* of 9/3/2004, p. 34.
- 91 *Daily Mail* of 9/12/2004, p. 76.
- 92 *Ibid.*
- 93 *Daily Mail* of 10/3/2004, p. 81.
- 94 *The Guardian* of 3/3/2004, p. 29.
- 95 *Ibid.*
- 96 *The Guardian* of 3/3/2004, p. 31.
- 97 *Ibid.*
- 98 *The Observer* of 7/3/2004, p. S1.
- 99 *The Guardian* of 9/3/2004, p. 34.
- 100 *The Times* of 9/3/2004, p. S1.
- 101 *Ibid.*
- 102 *The Independent* of 11/3/2004, p. 32.
- 103 *Daily Mail* of 24/1/2004, p. 80.
- 104 *The Observer* of 25/1/2004, p. S12.
- 105 *Ibid.*
- 106 [2003] 3 *Sport and the Law Journal* p. 12.
- 107 *The Independent* of 20/1/2004, p. 76.
- 108 *The Guardian* of 6/3/2004, p. S21.
- 109 *The Guardian* of 22/12/2003, p. S15.
- 110 *The Independent* of 22/12/2003, p. 34.
- 111 *The Guardian* of 17/2/2004, p. 25.
- 112 *Ibid.*
- 113 *The Guardian* of 22/11/2003, p. S23.
- 114 *The Guardian* of 10/1/2004, p. 19.
- 115 *The Guardian* of 28/1/2004, p. 35.
- 116 [2003] 2 *Sport and the Law Journal* p. 23.
- 117 *The Guardian* of 30/10/2003, p. 32.
- 118 *The Guardian* of 6/12/2003, p. S19.
- 119 *Ibid.*
- 120 *Daily Express* of 10/1/2004, p. 102.
- 121 *The Guardian* of 10/1/2004, p. 19.
- 122 *The Guardian* of 22/1/2004, p. 32.
- 123 *The Sunday Telegraph* of 26/10/2003, p. S13.
- 124 *Ibid.*
- 125 [2003] 3 *Sport and the Law Journal* p. 16.
- 126 *The Guardian* of 23/11/2003, p. 21.
- 127 *Ibid.*
- 128 *The Guardian* of 11/3/2004, p. 28.
- 129 *Ibid.*
- 130 *The Daily Telegraph* of 11/11/2003, p. S7.
- 131 [2003] 3 *Sport and the Law Journal* p. 18.
- 132 *The Guardian* of 7/11/2003, p. 30.
- 133 *The Guardian* of 21/1/2004, p. 32.
- 134 *The Guardian* of 13/2/2004, p. 35.
- 135 *The Guardian* of 5/2/2004, p. 10.
- 136 *The Times* of 6/2/2004, p. 56.
- 137 *The Guardian* of 5/2/2004, p. 34.
- 138 *Ibid.*
- 139 *The Guardian* of 13/2/2004, p. 35.
- 140 *The Times* of 20/2/2004, p. 23.
- 141 *The Guardian* of 6/12/2003, p. 34.
- 142 *The Guardian* of 9/1/2004, p. 32.
- 143 *The Guardian* of 6/12/2004, loc. cit.
- 144 *The Sunday Times* of 26/10/2004, p. 15.
- 145 *Ibid.*
- 146 [2003] 3 *Sport and the Law Journal* p. 20.
- 147 *The Guardian* of 21/1/2004, p. 4.
- 148 *The Guardian* of 23/1/2004, p. 6.
- 149 *Ibid.*
- 150 *The Independent* of 23/1/2004, p. 22.
- 151 *The Guardian* of 22/12/2003, p. S11.
- 152 *The Guardian* of 1/3/2004, p. 5.
- 153 *The Guardian* of 24/10/2004, p. 35.
- 154 *The Guardian* of 26/11/2004, p. 9.
- 155 *The Guardian* of 5/2/2004, p. 7.
- 156 *The Times* of 27/1/2004, p. 24.
- 157 *The Guardian* of 30/10/2004, p. 36.
- 158 *The Guardian* of 11/12/2003, p. 36.
- 159 *The Guardian* of 13/11/2003, p. 35.
- 160 *The Daily Telegraph* of 25/1/2004, p. S8.
- 161 *The Guardian* of 12/2/2004, p. 31.
- 162 *The Guardian* of 6/2/2004, p. 35.
- 163 *The Times* of 12/2/2004, p. 74.
- 164 *The Guardian* of 29/10/2003, p. 33.
- 165 *The Daily Telegraph* of 20/11/2003, p. S2.
- 166 *The Guardian* of 3/11/2003, p. S18.
- 167 *The Guardian* of 24/2/2004, p. 32.
- 168 *The Guardian* of 6/11/2003, p. 34.
- 169 *The Guardian* of 6/11/2004, p. 30.
- 170 *Ibid.*
- 171 *The Independent* of 20/1/2004, p. 71.
- 172 *The Guardian* of 21/1/2004, p. 29.
- 173 *The Independent* of 2/3/2004, p. 54.
- 174 *The Guardian* of 24/12/2003, p. 22.
- 175 *Ibid.*
- 176 *The Guardian* of 5/11/2004, p. 31.
- 177 *Ibid.*
- 178 *The Daily Telegraph* of 31/10/2003, p. S6.
- 179 *Daily Mail* of 9/12/2003, p. 77.
- 180 *The Guardian* of 17/2/2004, p. 29.
- 181 *The Independent* of 11/3/2004, p. 34.
- 182 *Ibid.*
- 183 See [www.findlaw.com](http://www.findlaw.com)
- 184 *Ibid.*
- 185 *The Guardian* of 5/3/2004, p. 1.
- 186 *The Guardian* of 6/3/2004, p. S2.
- 187 *The Guardian* of 9/3/2004, p. 5.
- 188 *The Guardian* of 10/3/2004, p. 35.
- 189 *The Observer* of 7/3/2004, p. 6.
- 190 *The Independent* of 5/3/2004, p. 27.
- 191 [2003] 3 *Sport and the Law Journal* p. 23 et seq.
- 192 *Ibid.*
- 193 *Daily Mail* of 25/11/2003, p. 18.
- 194 *The Guardian* of 9/1/2004, p. 11.
- 195 *Ibid.*
- 196 *The Guardian* of 24/11/2003, p. 6.
- 197 *The Guardian* of 25/11/2003, p. 5.
- 198 *The Independent* of 25/11/2003, p. 15.
- 199 *The Guardian* of 27/11/2003, p. 12.
- 200 [2003] 3 *Sport and the Law Journal* p. 25.
- 201 *The Daily Telegraph* of 18/12/2003, p. 11.
- 202 *Daily Mirror* of 31/1/2004, p. 46.
- 203 [2003] 3 *Sport and the Law Journal* p. 26.
- 204 *Daily Express* of 27/12/2003, p. 8.
- 205 *The Mail on Sunday* of 18/1/2004, p. 37.
- 206 *The Times* of 3/2/2004, p. 13.
- 207 *The Guardian* of 29/1/2004, p. 8.
- 208 *The Guardian* of 13/12/2003, p. 7.
- 209 *The Independent* of 16/12/2004, p. 76.
- 210 *Daily Mail* of 30/12/2003, p. 82.
- 211 *The Times* of 3/3/2004, p. 86.
- 212 *The Independent* of 5/3/2004, p. 54.
- 213 *The Guardian* of 3/3/2004, p. 29.
- 214 *The Guardian* of 5/3/2004, p. 32.
- 215 *The Guardian* of 20/1/2004, p. 28.
- 216 *The Observer* of 16/11/2003, p. 2.
- 217 *The Seattle Times* of 9/12/2003.
- 218 See [www.indystar.com](http://www.indystar.com) of 6/12/2003
- 219 See [www.findlaw.com](http://www.findlaw.com) of 16/12/2003.
- 220 *The Daily Telegraph* of 5/11/2004, p. 10.
- 221 *Ibid.*
- 222 *The Mail on Sunday* of 1/2/2004, p. 45.
- 223 *The Guardian* of 6/2/2004, p. 18.
- 224 [2003] *Sport and the Law Journal* p.41.
- 225 *The Guardian* of 30/10/2003, p. 8.
- 226 *The Guardian* of 5/12/2003, p. 7.
- 227 *The Guardian* of 28/10/2003, p. 6.
- 228 *The Guardian* of 17/12/2003, p. 9.
- 229 *The Guardian* of 13/1/2004, p. 5.
- 230 *Daily Express* of 13/11/2003, p. 20.
- 231 *The Times* of 28/1/2004, p. 18.
- 232 *Daily Mail* of 4/3/2004, p. 37.
- 233 *The Independent* of 14/2/2004, p. 80.
- 234 *The Guardian* of 5/11/2003, p. 31.
- 235 *The Guardian* of 7/1/2004, p. 33.
- 236 *The Observer* of 28/12/2003, p. 7.
- 237 *The Independent* on Sunday of 4/1/2004, p. S11.
- 238 *The Times* of 6/1/2004, p. 32.
- 239 *The Guardian* of 31/1/2004, p. S19.
- 240 *The Guardian* of 26/1/2004, p. 33.
- 241 [2003] 1 *Sport and the Law Journal* p. 35.
- 242 *The Guardian* of 6/12/2003, p. 29.
- 243 *The Guardian* of 28/11/2003, p. 15.
- 244 *The Times* of 20/2/2004, p. 41.
- 245 *The Guardian* of 31/1/2004, p. 33.
- 246 [2003] 1 *Sport and the Law Journal* p. 108.
- 247 See [www.findlaw.com](http://www.findlaw.com) of 18/12/2003.
- 248 *The Guardian* of 22/11/2003, p. 33.
- 249 *The Times* of 12/12/2003, p. 5.
- 250 *The Guardian* of 27/11/2003, p. 7.
- 251 *The Guardian* of 6/12/2003, p. 19.
- 252 [2003] 3 *Sport and the Law Journal* p. 31.
- 253 *The Guardian* of 3/2/2004, p. 3.
- 254 *The Guardian* of 16/1/2004, p. 33.
- 255 *Ibid.*
- 256 *The Guardian* of 30/1/2004, p. 32.
- 257 *Daily Mail* of 30/1/2004, p. 86.
- 258 *The Guardian* of 30/1/2004, loc. cit.
- 259 *The Guardian* of 31/1/2004, p. S13.
- 260 *The Guardian* of 15/1/2003, p. 33.
- 261 *The Guardian* of 18/12/2003, p. 31.
- 262 *The Guardian* of 7/2/2004, p. 20.
- 263 *Ibid.*
- 264 *The Guardian* of 23/10/2003, p. 23.
- 265 *Ibid.*
- 266 [2003] 3 *Sport and the Law Journal* p. 32.
- 267 *The Guardian* of 4/2/2004, p. 27.
- 268 *The Guardian* of 25/2/2004, p. 29.
- 269 *The Guardian* of 27/11/2003, p. 2.
- 270 *Ibid.*
- 271 *The Guardian* of 3/12/2003, p. 31.
- 272 *The Independent* of 28/2/2004, p. 69.
- 273 *Daily Mail* of 8/1/2004, p. 77.
- 274 *The Guardian* of 24/2/2004, p. 5.
- 275 *The Guardian* of 9/3/2004, p. 21.
- 276 *Ibid.*
- 277 *Ibid.*
- 278 [2003] 3 *Sport and the Law Journal* p.36-7.
- 279 See, e.g., *The Independent* of 20/1/2004, p. 70.
- 280 [2003] 3 *Sport and the Law Journal* p. 42-3.
- 281 *The Independent* of 19/1/2004, p. 86.
- 282 *Daily Mail* of 24/1/2004, p. 95.
- 283 *Ibid.*
- 284 *Daily Mail* of 10/2/2004, p. 79.
- 285 [2002] 1 *Sport and the Law Journal* p. 43-4; [2002] 2 *Sport and the Law Journal* p. 46.
- 286 *Daily Mail* of 24/1/2004, loc. cit.
- 287 *Ibid.*
- 288 *The Independent* of 12/1/2004, p. 31.
- 289 *Ibid.*
- 290 *Daily Mail* of 13/1/2004, p. 79.
- 291 *The Independent* of 20/1/2004, p. 70.
- 292 *The Mail on Sunday* of 25/1/2004, p.122.
- 293 *Ibid.*
- 294 *Daily Mail* of 21/2/2004, p. 77.
- 295 [2003] 3 *Sport and the Law Journal* p. 37.
- 296 *The Guardian* of 31/10/2003, p. 32.
- 297 [2003] 2 *Sport and the Law Journal* p. 46-7.
- 298 *Daily Express* of 26/12/2003, p. 75.
- 299 *Ibid.*
- 300 *Ibid.*, p. 78.
- 301 [2003] 2 *Sport and the Law Journal* p. 46.
- 302 *The Guardian* of 22/11/2003, p. S21.
- 303 *The Independent* of 12/12/2003, p. 61.
- 304 *The Guardian* of 12/12/2003, p. 37.
- 305 *Ibid.*
- 306 *The Independent* of 12/12/2003, loc. cit.
- 307 [2003] 3 *Sport and the Law Journal* p. 14-5.
- 308 *Daily Mail* of 30/1/2004, p. 89.
- 309 [2002] 1 *Sport and the Law Journal* p. 44.
- 310 *The Guardian* of 7/1/2004, p. 30.
- 311 *The Guardian* of 6/2/2004, p. 37.
- 312 *Ibid.*
- 313 *The Times* of 17/2/2004, p. 69.
- 314 *The Guardian* of 17/2/2004, p. 27.
- 315 *The Independent* of 23/12/2003, p. 70.

## Footnotes

- 316 The Independent of 25/11/2003, p. 47.  
 317 The Guardian of 10/12/2004, p. 32.  
 318 Daily Mail of 26/1/2004, p. 67.  
 319 Ibid.  
 320 [2003] 3 Sport and the Law Journal p. 39.  
 321 Daily Express of 25/10/2003, p. 76.  
 322 [2001] 2 Sport and the Law Journal p. 62-64.  
 323 Daily Express of 25/10/2004, loc. cit.  
 324 Decision of the French Supreme Court (Cour de Cassation), Social Affairs Division dated 26/11/2003, in SA d'économie mixte AS Cannes Volley Ball v. Glowacz, JCP-La Semaine Juridique – Edition Générale of 21/1/2004, p. 159.  
 325 Thomson, R., «Caps the stars don't want» SLC March 2004, p. 57.  
 326 [2003] 3 Sport and the Law Journal p. 51.  
 327 The Daily Telegraph of 16/12/2003, p. S6.  
 328 The Guardian of 24/12/2003, p. 32.  
 329 The Independent of 24/10/2003, p. 32.  
 330 See [2003] 3 Sport and the Law Journal p. 116.  
 331 [2003] 3 Sport and the Law Journal p. 40.  
 332 The Guardian of 19/2/2004, p. 6.  
 333 The Independent of 3/2/2003, p. 45.  
 334 The Independent of 28/2/2004, p. 82.  
 335 The Guardian of 11/2/2004, p. 35.  
 336 Bond, D., «Sports Personalities: Sponsorship and Endorsement Deals» [2004] Entertainment Law Review p. 5.  
 337 The Times of 6/2/2004, p. 55.  
 338 Ibid.  
 339 The Guardian of 30/10/2003, p. 29.  
 340 The Daily Telegraph of 31/10/2003, p. S1.  
 341 The Guardian of 25/2/2004, p. 33.  
 342 The Independent of 23/12/2003, p. 70.  
 343 Daily Mail of 30/10/2003, p. 85.  
 344 The Times of 17/2/2004, p. 69.  
 345 Hendrickx, F. (ed.), Transfers en makelaars in sport [2002] Antwerp, reviewed by Boes, M., in Rechtskundig Weekblad 2003-4, of 22/11/2003, p. 479.  
 346 The Times of 11/12/2003, p. 59.  
 347 Ibid.  
 348 The Observer of 8/2/2004, p. 8.  
 349 The Independent of 2/2/2004, p. 87.  
 350 The Guardian of 7/2/2004, p. S15.  
 351 Gazette of 20/11/2003, p. 7.  
 352 Ibid.  
 353 Gazette of 19/12/2003, p. 6.  
 354 Ibid.  
 355 Gazette of 4/3/2004, p. 8.  
 356 [2003] 3 Sport and the Law Journal p. 89 et seq.  
 357 Ibid.  
 358 The Independent of 11/3/2004, p. 60.  
 359 The Independent of 21/11/2003, p. 56.  
 360 Unfair Contract Terms Bulletin 24 and 25, p. 118.  
 361 Donnellan, L., «Restraint of trade in sport: a comparative analysis», in [2003] SLA&P10(4) 10-13, reviewed in European Current Law November 2003, p. 188.  
 362 Fritzweiler, J., Sport-Marketing und Recht. Vermarktungsrechte, Verträge, Konflikte (2003) Munich/Basle/Vienna. Reviewed in [2004] 5 Neue Juristische Wochenschrift p. 348.  
 363 The Sunday Telegraph of 16/11/2003, p. 5.  
 364 Decision of the Court of Appeal (Oberlandesgericht) of Brandenburg of 25/6/2003, in [2004] 1 Neue Justiz p. 34.  
 365 Decision of the Supreme Court (Cour de Cassation) dated 3/7/2003, in Epx Gueret v. Epx Baudy in JCP-La Semaine Juridique – Edition Générale of 21/4/2004, p. 137.  
 366 2003 EWCA Civ 231 [2003] 4 All ER 1101  
 367 [2002] EWCA Civ 309, (2003) UKHL 47.  
 368 [2003] EWHC 1029, QBD, reported in [2003] 3 Journal of Personal Injury Law at C131.  
 369 The Lawyer of 1/3/2004, p. 11.  
 370 The Guardian of 6/3/2004, p. S21.  
 371 Ibid.  
 372 Decision of the Supreme Court (Bundesgerichtshof) dated 18/11/2003, in [2003] 11 Neue Juristische Wochenschrift p. 773 et seq.  
 373 Decision of the Supreme Court (Cour de Cassation) dated 20/11/2003, in Le Grouiec v. CPAM d'Ille-et-Vilaine et al. in: JCP-La Semaine Juridique – Edition Générale of 4/2/2004, p. 237.  
 374 It should be noted that the Cour de Cassation no longer assesses the facts of the case – these are taken as read on the basis of the findings of the lower court.  
 375 Decision of the Supreme Court (Cour de Cassation) dated 23/10/2003, in Poinsot v. Préfet des Alpes-Maritimes [2004] Recueil Dalloz p. 798.  
 376 The Guardian of 27/1/2004, p. 32.  
 377 See, inter alia, [2002] 1 Sport and the Law Journal p. 112.  
 378 The Guardian of 27/1/2004, loc. cit.  
 379 Ibid.  
 380 [2003] 3 Sport and the Law Journal p. 101.  
 381 The Guardian of 14/2/2004, p. S17.  
 382 Associated Press, see www.findlaw.com of 18/12/2003.  
 383 Associated Press, see www.findlaw.com of 22/12/2003  
 384 Bottomley v. Todmorden Cricket Club (Secretary and Members) and others EWCA 7/11/2003, as reported in Gazette 19/12/2003, p. 18.  
 385 The Observer of 30/11/2003, p. 7.  
 386 Daily Mail of 1/12/2003, p. 80.  
 387 [2003] 3 Sport and the Law Journal p. 51 et seq.  
 388 The Guardian of 29/10/2003, p. 32.  
 389 The Guardian of 18/11/2003, p. 6.  
 390 Ibid.  
 391 The Guardian of 15/1/2004, p. 36.  
 392 The Sunday Telegraph of 29/2/2004, p. S12.  
 393 The Independent of 22/12/2003, p. 10.  
 394 The Mail on Sunday of 15/2/2004, p. 43.  
 395 Ibid.  
 396 Daily Mail of 19/11/2003, p. 82.  
 397 The Independent of 17/1/2004, p. 4.  
 398 The Guardian of 3/1/2004, p. S17.  
 399 The Guardian of 6/12/2003, p. S17.  
 400 The Observer of 18/1/2004, p. 4.  
 401 [2003] 2 Sport and the Law Journal p. 65; [2003] 3 Sport and the Law Journal p. 55.  
 402 The Independent of 23/12/2003, p. 15.  
 403 The Guardian of 23/12/2003, p.3.  
 404 The Guardian of 17/1/2004, p. 12.  
 405 Daily Mail of 8/1/2004, p. 83.  
 406 Ibid.  
 407 The Daily Telegraph of 11/11/2003, p. S7.  
 408 The Guardian of 10/2/2004, p. 28.  
 409 The Guardian of 18/2/2004, p. 29.  
 410 [2003] 2 Sport and the Law Journal p. 68.  
 411 The Guardian of 10/1/2004, p. S13.  
 412 Ibid.  
 413 The Guardian of 24/1/2004, p. S13.  
 414 The Guardian of 16/1/2004, p. 35.  
 415 [2003] 3 Sport and the Law Journal p. 54.  
 416 The Guardian of 12/11/2003, p. 32.  
 417 The Guardian of 14/11/2003, p. 32.  
 418 The Guardian of 13/11/2003, p. 33.  
 419 The Times of 26/2/2004, p. 54.  
 420 House of Commons Public Accounts Committee, Eighth Report 2003-4, 19/1/2004.  
 421 The Guardian of 10/2/2004, p. 28.  
 422 Ibid.  
 423 The Daily Telegraph of 9/2/2004, p. S4.  
 424 The Observer of 2/11/2003, p. B21.  
 425 [2003] 3 Sport and the Law Journal p. 56.  
 426 The Times of 23/10/2003, p. 45.  
 427 The Independent of 14/2/2004, p. 33.  
 428 The Guardian of 26/2/2004, p. 31.  
 429 The Guardian of 3/3/2004, p. 14.  
 430 The Guardian of 18/11/2003, p. 33.  
 431 Ibid.  
 432 The Guardian of 11/12/2003, p. 33.  
 433 The Independent of 22/12/2003, p. 31.  
 434 The Independent on Sunday of 4/1/2004, p. S2.  
 435 Daily Mail of 12/12/2003, p. 93.  
 436 The Guardian of 28/1/2004, p. 34.  
 437 Ibid.  
 438 The Guardian of 28/11/2003, p. 34.  
 439 The Daily Telegraph of 9/2/2004, p. S6.  
 440 Ibid.  
 441 The Guardian of 11/12/2003, p. 23.  
 442 The Guardian of 10/1/2004, p. 12.  
 443 Ibid.  
 444 [2003] 3 Sport and the Law Journal p. 58.  
 445 The Guardian of 20/11/2003, p. 35.  
 446 The Guardian of 27/11/2003, p. 31.  
 447 The Guardian of 28/11/2003, p. 35.  
 448 The Guardian of 29/11/2003, p. S17.  
 449 The Guardian of 22/1/2004, p. 31.  
 450 The Guardian of 25/2/2004, p. 29.  
 451 The Daily Telegraph of 18/12/2003, p. S8.  
 452 The Observer of 14/12/2003, p. S11.  
 453 The Times of 9/3/2004, p. 67.  
 454 The Guardian of 9/1/2004, p. 32.  
 455 [2003] 2 Sport and the Law Journal p. 72-73.  
 456 Daily Mail of 1/3/2004, p. 83.  
 457 The Guardian of 18/1/2004, p. 34.  
 458 The Independent of 28/11/2003, p. 31.  
 459 Ibid.  
 460 [2003] 2 Sport and the Law Journal p. 80; [2003] 3 Sport and the Law Journal p. 63.  
 461 The Independent of 2/2/2004, p. 78.  
 462 [2003] 1 Sport and the Law Journal p. 98.  
 463 The Independent of 2/2/2004, loc. cit.  
 464 Ibid.  
 465 The Guardian of 12/2/2004, p. 35.  
 466 Ibid.  
 467 The Guardian of 14/2/2004, p. S13.  
 468 The Guardian of 12/2/2004, loc. cit.  
 469 The Independent of 19/11/2003, p. 20.  
 470 The Guardian of 6/12/2003, p. S17.  
 471 The Guardian of 13/12/2003, p. S19.  
 472 Ibid.  
 473 The Guardian of 22/11/2003, p. S21.  
 474 The Guardian of 16/2/2004, p. 14.  
 475 The Observer of 4/1/2004, p. 22.  
 476 The Guardian of 14/11/2003, p. 14.  
 477 Ibid.  
 478 [2003] 3 Sport and the Law Journal p. 63.  
 479 The Observer of 21/12/2003, p. 9.  
 480 The Observer of 11/1/2004, p. 12.  
 481 [2003] 3 Sport and the Law Journal p. 26.  
 482 The Daily Telegraph of 16/12/2003, p. 8.  
 483 [2003] 1 Sport and the Law Journal p. 82.  
 484 Daily Mail of 12/12/2003, p. 93.  
 485 Ibid.  
 486 The Guardian of 15/1/2004, p. 36.  
 487 Ibid.  
 488 The Times of 28/1/2004, p. 59.  
 489 The Guardian of 5/3/2004, p. 34.  
 490 The Daily Telegraph of 31/12/2003, p. 4.  
 491 Ibid.  
 492 The Daily Telegraph of 31/12/2003, p. S1.  
 493 Ibid.  
 494 Daily Mail of 7/2/2003, p. 93.  
 495 See www.pcc.org.uk  
 496 [2003] Planning Appeal Decisions 663.  
 497 [2003] Planning Appeal Decisions 88.  
 498 [2003] 3 Sport and the Law Journal p. 67.  
 499 The Guardian of 13/12/2003, p. S5.  
 500 The Guardian of 10/12/2003, p. 35.  
 501 The Independent of 28/2/2004, p. 79.  
 502 Daily Express of 13/11/2003, p. 75.  
 503 The Guardian of 10/2/2004, p. 31.  
 504 [2003] 3 Sport and the Law Journal p. 68.  
 505 The Guardian of 17/12/2003, p. 32.  
 506 [2003] 3 Sport and the Law Journal p. 116.  
 507 The Times of 12/12/2003, p. 57.  
 508 [2003] 2 Sport and the Law Journal p. 86.  
 509 The Times of 22/12/2003, p. 29.  
 510 The Guardian of 3/1/2004, p. 32.  
 511 The Times of 23/12/2003, p. 28.  
 512 The Guardian of 29/11/2003, p. S15.  
 513 Ibid.  
 514 The Times of 23/12/2003, loc. cit.  
 515 Decision of the Supreme Administrative Court (Conseil d'Etat) of 29/9/2003, in JCP-La Semaine Juridique, Edition Générale 191.  
 516 Decision of the Supreme Administrative Court (Conseil d'Etat) dated 28/11/2003, in Revue française de droit administratif January/February 2004, p. 205.  
 517 R (on the application of Beresford) v. City of Sunderland, 13/11/2003, [2003] UKHL 60, reported in Estates Gazette of 22/11/2003, p. 155.  
 518 [2001] 3 Sport and the Law Journal p. 72.  
 519 Hahndorf Golf Club Inc v. John Nitschke Nominees Pty Ltd Supreme Court of South Australia, [2003] SASC 286.  
 520 The Times of 25/1/2004, p. 4.  
 521 Thorpedoes Sportswear Pty Limited v. Thorpedo Enterprises Pty Limited [2003] FCA 901, as reported by Lee, C., in [2004] Entertainment Law Review p. 59.  
 522 Sports and Entertainment Inc. v. Skydome Corp. Trade-marks Opposition Board 10/10/2002, [2003] Canadian Patent Reporter p. 240.  
 523 The Mail on Sunday of 7/3/2004, p. 45.  
 524 Ibid.  
 525 The Guardian of 1/11/2003, p. 5.  
 526 Ibid.  
 527 [2003] 3 Sport and the Law Journal p. 71.  
 528 New Law Journal of 12/3/2004, p. 386.  
 529 [2003] 3 Sport and the Law Journal p. 74-75.  
 530 The Daily Telegraph of 10/12/2003, p. S4.  
 531 The Independent of 7/1/2004, p. 71.  
 532 The Daily Telegraph of 14/1/2004, p. S5.  
 533 [2003] 2 Sport and the Law Journal p. 95; [2003] 3 Sport and the Law Journal p. 79.  
 534 The Sunday Telegraph of 30/11/2003, p. B1.  
 535 The Guardian of 2/12/2003, p. 22.  
 536 The Observer of 7/12/2003, p. S2.  
 537 The Guardian of 10/12/2003, p. 23.  
 538 Ibid.  
 539 The Times of 12/12/2003, p. 57.  
 540 The Sunday Telegraph of 14/12/2003, p.52.  
 541 The Independent of 17/12/2003, p. 32.  
 542 The Guardian of 18/12/2003, p. 23.  
 543 Press release IP/04/2 of 5/1/2004.  
 544 Press release IP/03/1491 of 31/10/2003.  
 545 [2001] 3 Sport and the Law Journal p. 82-3.  
 546 Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, Métropole Télévision SA (M6) and other v. Commission of the European Communities [2003] 5 E.C.D.R. p. 260 et seq.  
 547 Press release IP/03/1529 of 11/11/2003.  
 548 The Guardian of 6/3/2004, p. 9.  
 549 Ibid.  
 550 The Guardian of 7/1/2004, p. 31.  
 551 Ibid.  
 552 Case C-243/01 Gambelli and Others, as yet unpublished, reported in The Times of 14/12/2003, p. 39.  
 553 Press Release IP/03/1784 of 19 December 2003.  
 554 Opinion of First Advocate General Antonio Tizzano in Cases C-262/02 and C-429/02, Commission v France Bacardi France SAS v Télévision Française TF1, Groupe Jean-Claude Darmon SA Giprosoft Sarl (11/3/2004).  
 555 Speech/03/471  
 556 The Observer of 2/11/2003, p. B9.  
 557 Ibid.  
 558 The Guardian of 31/1/2004, p. S13.  
 559 Ibid.  
 560 [2003] 3 Sport and the Law Journal p. 86.  
 561 Caldwell, B.A., "Football's red card" in

## Footnotes

- Solicitors' Journal December 2003, p. 57.  
562 [2003] 3 Sport and the Law Journal p. 87.  
563 The Observer of 26/10/2003, p. B1.  
564 The Guardian of 28/10/2003, p. 30.  
565 The Guardian of 29/10/2003, p. 34.  
566 Ibid.  
567 The Daily Telegraph of 11/11/2003, p. S7.  
568 The Observer of 9/11/2003, p. B1.  
569 The Sunday Telegraph of 30/11/2003, p. S1.  
570 [2003] 1 Sport and the Law Journal p. 101.  
571 The Sunday Telegraph loc. cit.  
572 The Independent of 2/12/2003, p. 77.  
573 The Daily Telegraph of 5/12/2003, p. S4.  
574 The Guardian of 11/12/2003, p. 37.  
575 The Guardian of 9/12/2003, p. 31.  
576 The Observer of 14/12/2003, p. S8.  
577 The Daily Telegraph of 16/12/2003, p. S3.  
578 The Guardian of 24/12/2003, p. 26.  
579 Ibid.  
580 The Guardian of 9/1/2004, p. 36.  
581 Ibid.  
582 The Independent of 17/1/2004, p. S1.  
583 The Independent of 19/1/2004, p. 87.  
584 The Guardian of 20/1/2004, p. 30.  
585 The Guardian of 21/1/2004, p. 34.  
586 The Guardian of 23/1/2004, p. 38.  
587 The Times of 28/1/2004, p. 87.  
588 The Independent of 5/2/2004, p. 31.  
589 The Independent of 11/2/2004, p. 61.  
590 The Guardian of 6/2/2004, p. 34.  
591 The Guardian of 24/2/2004, p. 32.  
592 Daily Mail of 27/2/2004, p. 91.  
593 The Independent of 14/2/2004, p. 56.  
594 The Guardian of 28/2/2004, p. S6.  
595 The Lawyer of 29/3/2004, p. 12.  
596 [2003] 2 Sport and the Law Journal p. 104.  
597 The Guardian of 24/2/2004, p. 32.  
598 The Independent of 28/2/2004, p. 79.  
599 [2003] 2 Sport and the Law Journal p. 104.  
600 The Independent of 31/10/2003, p. 32.  
601 The Daily Telegraph of 16/12/2003, p. S6.  
602 The Independent of 31/1/2004, p. 78.  
603 [2003] 3 Sport and the Law Journal p. 88.  
604 The Guardian of 17/12/2003, p. 29.  
605 The Independent of 23/1/2004, p. 63.  
606 [2003] 2 Sport and the Law Journal p. 104.  
607 Daily Mail of 30/12/2003, p. 79.  
608 [2003] 3 Sport and the Law Journal p. 87.  
609 The Times of 4/12/2003, p. 51.  
610 [2003] 3 Sport and the Law Journal p. 86.  
611 Daily Mail of 4/2/2004, p. 93.  
612 The Independent of 24/1/2004, p. 71.  
613 The Independent of 23/1/2004, p. 30.  
614 Ibid.  
615 The Independent of 5/2/2004, p. 85.  
616 Ibid.  
617 The Guardian of 30/12/2003, p. 21.  
618 The Observer of 11/1/2004, p. 21.  
619 The Guardian of 3/12/2003, p. 30.  
620 The Guardian of 4/12/2003, p. 31.  
621 Ibid.  
622 [2003] 3 Sport and the Law Journal p. 92 et seq.  
623 Daily Mail of 18/11/2003, p. 80.  
624 The Guardian of 12/1/2004, p. S3.  
625 The Daily Telegraph of 14/1/2004, p. S2.  
626 The Observer of 25/1/2004, p. S1.  
627 The Times of 27/1/2004, p. 70.  
628 The Guardian of 28/1/2004, p. 30.  
629 The Guardian of 29/1/2004, p. 31.  
630 Daily Mail of 30/1/2004, p. 96.  
631 The Independent of 31/1/2004, p. 1.  
632 The Observer of 1/2/2004, p. S1.  
633 The Independent of 2/2/2004, p. 2.  
634 The Times of 3/2/2004, p. 71.  
635 The Guardian of 4/2/2004, p. 32.  
636 The Guardian of 26/2/2004, p. 36.  
637 The Guardian of 6/3/2004, p. S4.  
638 The Guardian of 9/3/2004, p. 33.  
639 The Guardian of 28/11/2003, p. 22.  
640 The Guardian of 29/11/2003, p. 30.  
641 The Guardian of 2/12/2003, p. 19.  
642 The Guardian of 3/12/2003, p. 33.  
643 The Guardian of 26/2/2004, p. 36.  
644 [2003] 3 Sport and the Law Journal p. 93.  
645 The Guardian of 9/12/2003, p. 17.  
646 The Guardian of 26/2/2004, p. 36.  
647 Daily Mail of 30/12/2003, p. 65.  
648 The Guardian of 5/1/2004, p. 28.  
649 The Times of 17/2/2004, p. 63.  
650 The Independent of 26/12/2003, p. 34.  
651 Nicholson, M. and Caldwell, B., "Marquess of Queensberry rules" in [2003] 9 JLS p.53.  
652 Decision of the Supreme Court (Cour de Cassation) dated 13/11/2003, in Lacombe v. SEPAD, see JCP-La Semaine Juridique of 7/1/2004, p. 41.  
653 The Times of 11/12/2003, p. B1.  
654 Ibid.  
655 The Independent of 5/3/2004, p. 51.  
656 [2003] 3 Sport and the Law Journal p. 91.  
657 The Sunday Telegraph of 9/11/2003, p. 26.  
658 The Guardian of 23/12/2003, p. 25.  
659 Ibid.  
660 See www.findlaw.com  
661 Rugby Football Union v. Commissioners of Customs and Excise, 10-12/3/2003, [2003] VAT and Duties Tribunals Reports p. 45 et seq.  
662 The Guardian of 23/10/2003, p. 8.  
663 Ibid.  
664 The Guardian of 29/11/2003, p. 13.  
665 The Guardian of 10/1/2004, p. S13.  
666 The Independent of 5/2/2004, p. 87.  
667 Ibid.  
668 The Guardian of 26/2/2004, p. 35.  
669 [2003] 3 Sport and the Law Journal p. 101.  
670 The Guardian of 28/2/2004, p. S15.  
671 The Independent of 31/1/2004, p. 79.  
672 The Guardian of 6/2/2004, p. 36.  
673 The Guardian of 27/2/2004, p. 37.  
674 The Guardian of 29/10/2003, p. 32.  
675 The Observer of 29/2/2004, p. S6.  
676 Associated Press, see www.findlaw.com  
677 [2003] 3 Sport and the Law Journal p. 103.  
678 Ibid.  
679 The Guardian of 12/12/2003, p. 33.  
680 The Guardian of 6/12/2003, p. S16.  
681 Ibid.  
682 [2002] 2 Sport and the Law Journal p. 112.  
683 The Guardian of 4/3/2004, p. 2.  
684 Ibid.  
685 The Guardian of 27/1/2004, p. 31.  
686 The Independent of 21/1/2004, p. 45.  
687 The Guardian of 20/12/2003, p. S15.  
688 Ibid.  
689 Daily Mail of 13/1/2004, p. 73.  
690 Ibid.  
691 The Guardian of 19/1/2004, p. 55.  
692 Ibid.  
693 [2003] 3 Sport and the Law Journal p. 106.  
694 See www.findlaw.com  
695 The Guardian 23/10/2003, p. 28.  
696 Ibid.  
697 Ibid.  
698 The Guardian of 23/10/2003, p. 30.  
699 See www.findlaw.com  
700 The Guardian of 13/11/2003, p. 35.  
701 The Guardian of 22/11/2003, p. S19.  
702 The Guardian of 24/10/2003, p. 33.  
703 The Guardian of 11/11/2003, p. 31.  
704 The Guardian of 30/10/2003, p. 31.  
705 Ibid.  
706 [2003] 2 Sport and the Law Journal p. 120.  
707 The Guardian of 1/3/2004, p. S5.  
708 Ibid.  
709 The Guardian of 18/12/2003, p. 36.  
710 Ibid.  
711 The Guardian of 19/12/2003, p. 31.  
712 The Guardian of 29/12/2003, p. S23.  
713 Daily Mail of 7/2/2004, p. 90.  
714 The Guardian of 21/2/2004, p. S17.  
715 The Guardian of 19/12/2003, p. 31.  
716 The Guardian of 24/10/2003, p. 29.  
717 Ibid.  
718 The Independent of 8/12/2003, p. 57.  
719 [2003] 3 Sport and the Law Journal p. 109.  
720 The Times of 23/10/2003, p. 48.  
721 The Guardian of 23/10/2003, p. 7.  
722 The Daily Telegraph of 11/11/2003, p. S5.  
723 The Guardian of 24/11/2003, p. S13.  
724 The Guardian of 28/11/2003, p. 37.  
725 The Independent of 25/2/2004, p. 53.  
726 The Guardian of 13/2/2004, p. 30.  
727 The Guardian of 10/12/2004, p. 31.  
728 Ibid.  
729 The Guardian of 20/11/2003, p. 35.  
730 The Observer of 26/10/2003, p. S1.  
731 The Daily Telegraph of 24/10/2003, p. S1.  
732 The Guardian of 11/1/2004, p. 20.  
733 [2003] 3 Sport and the Law Journal p. 110.  
734 The Daily Telegraph of 24/10/2003, p. S1.  
735 Ibid.  
736 The Mail on Sunday of 26/10/2003, p. 128.  
737 The Times of 30/10/2003, p. S1.  
738 The Independent of 11/11/2003, p. 28.  
739 The Sunday Telegraph of 30/11/2003, p. S6.  
740 The Guardian of 6/12/2003, p. S5.  
741 The Independent of 19/11/2003, p. 24.  
742 The Guardian of 8/12/2003, p. S7.  
743 The Guardian of 14/11/2003, p. 30.  
744 The Guardian of 20/12/2003, p. 1.  
745 Ibid.  
746 The Independent of 7/1/2004, p. 27.  
747 The Observer of 21/12/2003, p. 4.  
748 The Independent of 23/12/2003, p. 28.  
749 The Independent on Sunday of 21/12/2003, p. S4.  
750 Daily Mail of 27/12/2003, p. 96.  
751 The Scotsman of 19/3/2004, p. 25.  
752 Daily Express of 10/1/2004, p. 111.  
753 The Times of 27/1/2004, p. 45.  
754 Daily Mail of 4/2/2004, p. 87.  
755 See www.euro2004.com of 19/3/2004.  
756 The Guardian of 24/12/2003, p. 28.  
757 The Guardian of 5/2/2004, p. 30.  
758 The Guardian of 6/11/2003, p. 1.  
759 [2003] 3 Sport and the Law Journal p. 113.  
760 The Guardian of 9/1/2004, p. 1.  
761 The Guardian of 10/1/2004, p. 1.  
762 The Guardian of 12/1/2004, p. S17.  
763 The Guardian of 13/1/2004, p. 33.  
764 The Guardian of 14/1/2004, p. 31.  
765 The Daily Telegraph of 14/1/2004, p. S8.  
766 The Observer of 2/3/2004, p. S8.  
767 The Guardian of 17/1/2003, p. S15.  
768 The Guardian of 11/3/2004, p. 29.  
769 Ibid.  
770 The Independent of 11/3/2004, p. 23.  
771 The Guardian of 17/2/2004, p. 28.  
772 The Guardian of 8/2/2004, p. S12.  
773 The Guardian of 15/2/2004, p. 32.  
774 The Guardian of 14/1/2004, p. 31.  
775 The Guardian of 15/1/2004, p. 31.  
776 The Guardian of 23/1/2004, p. 35.  
777 The Guardian of 30/1/2004, p. 29.  
778 The Times of 27/1/2004, p. 61.  
779 The Guardian of 28/1/2004, p. 31.  
780 The Guardian of 12/12/2003, p. 34.  
781 The Guardian of 9/11/2004, p. 33.  
782 The Daily Telegraph of 20/11/2003, p. S6.  
783 The Guardian of 24/1/2004, p. 31.  
784 The Guardian of 22/1/2004, p. 33.  
785 The Independent of 19/11/2003, p. 29.  
786 Ibid.  
787 The Mail on Sunday of 1/2/2004, p. 115.  
788 Ibid.  
789 The Independent of 15/1/2004, p. 83.  
790 The Guardian of 4/3/2004, p. 32.  
791 The Times of 12/2/2004, p. 77.  
792 The Guardian of 5/2/2004, p. 35.  
793 The Guardian of 21/1/2004, p. 29.  
794 The Guardian of 20/2/2004, p. 30.  
795 The Guardian of 2/3/2004, p. S9.  
796 The Independent of 11/2/2004, p. 78.  
797 The Sunday Telegraph of 29/2/2004, p. S3.  
798 The Guardian of 29/1/2004, p. 34.  
799 The Guardian of 7/2/2004, p. S7.  
800 The Guardian of 14/2/2004, p. S11.  
801 The Times of 3/3/2004, p. 81.  
802 The Guardian of 9/2/2004, p. S9.  
803 Ibid.  
804 The Guardian of 12/11/2003, p. 36.  
805 [2003] 3 Sport and the Law Journal p. 118.  
806 The Daily Telegraph of 31/10/2003, p. S1.  
807 Ibid.  
808 The Daily Telegraph of 6/11/2003, p. S4.  
809 The Guardian of 6/11/2003, p. 29.  
810 The Guardian of 19/11/2003, p. 34.  
811 See www.bbc.co.uk  
812 The Guardian of 2/3/2004, p. 31.  
813 Daily Mail of 8/11/2003, p. 96.  
814 The Guardian of 2/3/2004, loc. cit.  
815 [2003] 2 Sport and the Law Journal p. 36.  
816 Daily Mail of 10/2/2004, p. 77.  
817 The Guardian of 10/1/2004, p. S11.  
818 The Guardian of 30/10/2003, p. 33.  
819 The Daily Telegraph of 14/11/2003, p. S1.  
820 Ibid.  
821 Daily Mail of 15/11/2003, p. 88.  
822 The Independent of 7/1/2004, p. 79.  
823 [2003] 3 Sport and the Law Journal p. 116.  
824 The Daily Telegraph of 31/10/2003, p. S3.  
825 The Independent of 31/1/2004, p. 70.  
826 The Guardian of 25/2/2004, p. 32.  
827 The Independent of 11/3/2004, p. 61.  
828 The Guardian of 3/12/2003, p. 32.  
829 The Independent of 15/5/2004, p. 68.  
830 The Guardian of 31/1/2004, p. S7.  
831 The Guardian of 19/12/2003, p. 30.  
832 The Guardian of 27/12/2003, p. 6.  
833 The Independent of 25/11/2003, p. 67.  
834 The Guardian of 9/12/2003, p. 30.  
835 [2002] 2 Sport and the Law Journal p. 23; [2003] 2 Sport and the Law Journal p. 140.  
836 The Guardian of 7/1/2004, p. 31.  
837 The Guardian of 20/11/2003, p. 32.  
838 The Guardian of 28/10/2003, p. 28.  
839 Daily Mail of 30/10/2003, p. 81.  
840 [2003] 3 Sport and the Law Journal p. 28.  
841 The Guardian of 29/10/2003, p. 30.  
842 The Daily Telegraph of 31/10/2003, p. S1.  
843 The Guardian of 12/11/2003, p. 33.  
844 Ibid.  
845 The Guardian of 26/11/2003, p. 33.  
846 The Independent of 7/1/2004, p. 71.  
847 The Guardian of 23/10/2003, p. 33.  
848 The Guardian of 3/12/2003, p. 31.  
849 The Guardian of 6/1/2004, p. 29.  
850 The Guardian of 16/1/2004, p. 35.  
851 The Independent of 11/11/2003, p. 75.  
852 Daily Mail of 13/1/2004, p. 70.  
853 Ibid.  
854 The Guardian of 7/11/2003, p. 33.  
855 Ibid.  
856 The Guardian of 16/12/2003, p. 25.  
857 The Guardian of 19/12/2003, p. 29.  
858 The Daily Telegraph of 14/11/2003, p. S7.  
859 The Guardian of 2/1/2004, p. 25.  
860 The Independent of 16/12/2003, p. 73.  
861 The Daily Telegraph of 20/2/2004, p. S7.  
862 The Independent of 3/12/2003, p. 79.  
863 Ibid.  
864 The Independent of 23/12/2003, p. 67.  
865 [2003] 3 Sport and the Law Journal p. 126.  
866 The Guardian of 27/11/2003, p. 31.  
867 Ibid.  
868 The Times of 28/1/2004, p. 29.  
869 The Independent of 21/1/2004, p. 76.  
870 The Times of 23/10/2003, p. 45.  
871 The Mail on Sunday of 26/10/2003, p. 113.  
872 The Guardian of 1/11/2003, p. S19.  
873 [2003] 3 Sport and the Law Journal p. 128.  
874 The Guardian of 19/11/2003, p. 35.  
875 The Independent of 24/11/2003, p. 70.  
876 The Guardian of 17/1/2004, p. S15.  
877 The Guardian of 11/11/2003, p. 31.  
878 The Guardian of 11/3/2004, p. 35.  
879 The Times of 12/12/2003, p. 55.

# National Sports Law Conference 2004

Hosted by Harper Macleod in Association with the British Association  
for Sport and the Law  
Friday 20th February 2004  
Celtic Park Glasgow

On Friday 20th February 2004 speakers and delegates from the four home nations and the Republic of Ireland gathered in Celtic Park, the home of Celtic Football Club, for Scotland's first National Sports Law Conference. Being the first time that the British Association for Sport and the Law had staged a conference in Scotland, it was very pleasing to see many delegates travel from the South of England to attend. Delegates included representatives of an incredibly wide range of sports, from soccer to small-bore rifle shooting and at all levels, from international governing body to regional amateur federation. The intention of Harper Macleod, as principal hosts, was to ensure as best as possible, that the programme and speaker list was varied and of interest to all.

## Chaos Theory?

Following a very warm welcome from Professor Lorne D Crerar, Managing Partner of Harper Macleod and a senior Partner in the Harper Macleod's Sports Practice Group, Rod McKenzie, also a senior Partner in the Harper Macleod Sports Practice Group, gave the first presentation of the day with a talk entitled "Sports Regulation and the Chaos Theory". Harper Macleod act for the Scottish Premier League ("SPL"), with Rod being the principal Solicitor to the SPL and having surveyed the recent changes in the environment of Scottish football at first hand, the speaker questioned whether the calls for a radical shake up of the various governing and constitutional bodies involved in Scottish football, were calls with substance and of foundation.

Despite the speaker's own admission that he was initially unsure as to how this related to the chaos theory (!), the speaker dismissed the recent calls for a "shake up" of the regulation of the game in Scotland. His opinion was that the current economic and sporting climate in Scottish football had not suffered at the behest of the structure of the game's regulators. Rather, it has been affected by many different factors, some common to all European football like Bosman I and II, but some more peculiar to the Scottish game, such as the worrying continuing fall in attendance levels. Additionally, a quick fix would not be found by simply replacing the various governing and constitutional bodies

- that actually mirror the tried and tested model duplicated in many nations throughout European football - with one single regulatory body. Red tape and administrative operations are not to blame, unlike over spending, long-term expensive contracts and a fall in television monies. To end on a positive note, the speaker pointed out that not all is bad in the domestic game, with the European coefficient of Scottish Clubs at an all time high and two clubs participating in the Champions League for the first time in history.

## Insolvency - the inside view, salary capping and maximising exposure

Continuing in the context of football, but with reference to rugby also, Bryan Jackson presented his talk on "Insolvency, Administration and Protective Measures; the Inside View". The speaker was at the time of the Conference and until only recently, the interim administrator of Motherwell Football and Athletic Club, the first Scottish club to take measures under the Insolvency Act 1986 and enter into insolvency proceedings. He explained that getting to know the culture and nuances of a football club and the football world was very interesting; to then apply the strict rules and practices of accounting and insolvency in this context was very challenging. Of particular interest was the speaker's experience of dealing with the thorny issue of "football debt". Despite there being no provision in the rules of the Scottish Premier League or Scottish Football Association providing for "football debt", obligating the football club to pay football debt as if it were a "preferred" and not "ordinary" debt, the Scottish Professional Football Association pursued full payment with vigour. As with many of the issues he faced, it would seem, the trick was in handling these with firm diplomacy in the eye of the media.

Continuing in the context of football but with equal references to rugby and American sports also, Nick Bitel of Max Bitel Greene asked and answered the question of whether salary caps were "lawful, workable and imminent?". The speaker's paper is reproduced in this edition of the Journal.

Jon Doig, the Chief Executive Officer the Commonwealth Games Council for Scotland gave an

## By Bruce A. Caldow, Harper Macleod

insight into the operations of the Commonwealth Games and explained how, against the background of many inhibiting factors, the Commonwealth Games Council for Scotland maximise exposure to the public and attract commercial sponsorship. Again, to be provided with a first hand account of the commercial and sporting experience and pressures faced by one of Scotland's leading sporting bodies was very worthwhile.

### Current issues, WADA and Human Rights

Darren Bailey, Legal Counsel to the International Rugby Board, followed by providing an overview of the many current issues affecting governing bodies, from player migration, to the WADA Code, to issues such as what may come as a result of the Gender Recognition Bill currently going through Parliament. As he travelled from Dublin to speak at the Conference, he will be forgiven for "treating" the audience to a video clip of last year's Rugby World Cup Finals that, by no small coincidence, finished with that kick!

In the afternoon, Gary Rice of Beauchamps Solicitors, a sister firm with Harper Macleod in the European League Alliance, provided his first hand account of the inaugural Irish Anti-Doping Programme. Similar to the Canadian system, all Irish sports have one set of anti-doping rules, with a centralised disciplinary process. To hear of the successful implementation of such a scheme, incorporating the provisions of the WADA Code, was of particular interest to the proportion of the audience from Scotland, given the comparable population and sporting population, between Scotland the Republic of Ireland. Indeed, discussion of the centralised disciplinary process and standardised sanction will hopefully have been of interest to all.

Matthew Lohn, a Partner in Field Fisher Waterhouse, also a sister firm of Harper Macleod in the European Law Alliance, gave an overview of how he saw the Human Rights Act 1998 build on changing judicial attitude in the context of sport and where the boundaries of civil rights now lie. With Matthew's background in professional regulatory expertise, his comments and observations on the development of the various rights in a disciplinary procedure in the context

of professions other than professional sport, with examples of case law involving the General Medical Council and Metropolitan Police Authority, provided a new take on this familiar, but important, subject.

### Mock Discipline Hearing

In a departure from the standard presentation format, perhaps the highlight of the day was when Professor Crerar was joined by former Scotland rugby captain Peter Brown and current SRU referees manager Iain Goodall, to sit as a Disciplinary Committee to consider a rugby player's fate, in a mock Disciplinary Hearing. Special thanks go to Paul Minto, of Selkirk RFC, who stood in as "the accused" due to the late call-off of former British Lion, John Beattie. With video evidence, oral testimony and no small amount of legal jousting, the Disciplinary Committee assisted by the delegates (who had been themselves organised into individual committees for the purpose of deliberation and consideration) concluded that the player was, despite Rod McKenzie's valiant pleadings in defence, guilty as charged and fit for suspension from the game - at an average of 19½ weeks.

### Court of Arbitration

Prior to closing questions and answers and closing remarks, Michael Nicholson, a Partner in Harper Macleod, provided a first hand account of his experiences before the Court of Arbitration for Sport. Highlighting his involvement in cases such as Alain Baxter -v- Federation International de Ski, the speaker concluded with thoughts that forums such as CAS and the Sports Dispute Resolution Panel are only destined to become ever-busier.

### Feedback

The comments we received from the delegate feedback questionnaires were all very positive and lead us to the conclusion that the day was a success. Hopefully the conference will be repeated, if not many times, and more BASAL events be staged in Scotland. Unfortunately, the same cannot be said of the result in the following day's sporting encounter, despite Peter Brown's optimism expressed at his entertaining after lunch speech!

# Salary Caps: Lawful, Workable and Imminent

By Nick Bitel

When you look at the question that I was invited to speak on and the wonderful surroundings we find ourselves in today it seems fairly obvious that we are being invited to consider what is said to be the radical solution to the woes of Football, namely the introduction of a salary cap. And how appropriate that is at a time when clubs as diverse as Livingstone and Leeds find themselves on the brink of bankruptcy.

But of course ask this question in say Wigan, where I used to own the football club, and you will get a very different perspective. Rugby League has had a salary cap for many years and Rugby Union has also introduced their version. In a variety of sports across the world from Basketball to Baseball and Australia to America, salary caps have been in place for years. So what you may feel is the legal controversy.

Well to consider this you first have to understand why it is that some believe that a salary cap is not only feasible and necessary but the only solution for football's financial woes. Last year the association of elite European Soccer Clubs, G14, announced it was considering seeking a pan-European salary cap based on clubs having to limit their wages bill to 70% of turnover.

Not a particularly radical suggestion you may have thought but as the Deloitte & Touche survey shows many clubs struggle to achieve even this limited amount of balance. In 2001/2 the average wage against turnover in Scotland was 66% but elsewhere was far worse. Italy was 75%, Portugal 90% and in Division One of the Football League a staggering 101%. And that was the average. One club that year had a salary bill which was 195% of its turnover!!

You see football, like Politicians, has not yet discovered the fairly basic economic lesson that you cannot indefinitely spend more money than you have. There does seem to be an obvious solution which is perfectly legal and that is that Clubs should just spend less on wages. Yet we are told that this is completely impractical without a workable league enforced salary cap. Football Club Chairmen it seems are not willing to incur the wrath of the fans and agents by voluntarily limiting their wages to

sensible levels. Like cold war diplomats they refuse to give up their arsenal until the other side does even though they know that it could ultimately blow up in their own faces destroying everything.

Whether or not there is another practical alternative is an important factor when considering if salary caps are lawful and I will return to that a little later on.

## Enforcement

Before I consider the legal framework, I just want to touch on the topic of enforcement. One of the questions posed by the title is whether or not a salary cap is workable and I suppose to a large extent this depends on the collective will of the Clubs.

In the last few years a number of Rugby League clubs including St Helens and Wakefield have been found to have breached the salary cap rules and in each case were deducted 2 points. Not a particularly harsh punishment considering the rule is meant to be so fundamental to the survival of the league. Indeed there is a suspicion that tribunals have deliberately kept punishments low knowing the shaky legal foundation upon which the salary caps are founded and therefore not wanting to risk a challenge to the whole the system that would be triggered by a draconian punishment.

Rugby Union Premiership Clubs pay over £75,000 per annum to audit the club's compliance with the salary cap regulations. In Union the cap extends to virtually all

*You see football, like Politicians, has not yet discovered the fairly basic economic lesson that you cannot indefinitely spend more money than you have.*

types of direct benefits including houses, pensions, cars and relocation allowances. But there are still a multitude of ways around the cap for the determined. For instance some payments for other duties are not caught like payments for coaching services.

And if the cap is introduced into football what about those

payments to off-shore companies for 'image rights'.

Ultimately a salary cap can only be enforced if the rules are extremely tightly drawn, rigorously audited and even then will depend upon clubs being run by pillars of moral rectitude who would not dream of cheating the system.

So that's all right then isn't it?!!

## Legal Framework

The big question mark against any type of salary cap is their questionable legality. In Britain, the Bradford Bulls have recently been threatening legal action to prevent the Rugby League cap being reduced from £1.8m per annum.

In Australia, the National Rugby League which has a long established salary cap is facing challenges from one of its members, Sydney City Roosters, and the Courts have already struck down one element of their system, the Draft (Adamson -v- NSW Rugby League (1991) ATPR 41-141). One Australian sports law expert, Tom Hickie, called the salary cap "morally and legally indefensible" and the Roosters' lawyers have said that the cap is in restraint of trade and in breach of sections 45 & 46 of the Trades Practices Act which is the equivalent to our Competition Act 1998 or Article 81 in European Law.

Salary Caps in America are only protected from anti-trust by specific exemptions, collective bargaining agreements and the fundamental difference is the structure of their leagues.

The question is would a British salary cap system survive a challenge. Advocates for the system point to the fact that in various sports in Britain including Rugby League and Rugby Union, caps have been applied for years without challenge.

But this ignores the fundamental difference between these sports and football. The truth is that despite England's World Cup win, the vast majority of the public could not care less if Rotherham or Bath is relegated from Rugby Union's First Division. Lower division clubs have not got multi-millionaires standing behind them willing to spend whatever it takes to secure success as they have had at say Rushden & Diamonds and many others. There are no public companies in Rugby answerable to shareholders and the stock exchange.

Quite simply there has been no one in whose interest it has been to challenge the status quo but the position in football will be completely different and I predict now that any attempt to introduce salary caps in football will be challenged in the Courts both nationally and internationally.

So for perhaps for the first time a sport will have to justify the introduction and implementation of a salary cap in law. At first sight it is a daunting task. There is absolutely no doubt that prima facie a salary cap is unlawful. It is an agreement (however you frame that limitation) between competitors to limit the amount that they spend on a key element of the production of that industry. In any other industry that would fall foul of Article 81(1) and they would almost certainly be unable to justify the existence of the restriction under Article 81(3).

But sport is not the widget industry and the Court of Justice has shown that it will apply different principles to sport than other industries.

In the ENIC case (Comp/37 806) the Court of Justice quoted the reasoning in Wouters (Case C-309/99) where the Court of Justice said that:

***"not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty....account must first 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."***

This the Court in ENIC said meant that the question to be answered was:

***"...whether the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions."***

Using this reasoning the Court concluded that the UEFA rule which prevented ENIC from owning 2 clubs in the same competition was justified and hence could not be considered as a restriction of competition. This they said was because the rule was necessary as:

***"...the public's perception that the underlying sporting competition is fair and honest is an essential precondition to keep...interest and marketability". If UEFA competitions were not credible and consumers did not have the perception that the games played represent honest sporting competitions between the participants, the competitions would be devalued with the inevitable consequences over time of lower consumer confidence, interest and marketability."***

The argument therefore goes that you do not have to justify the rule under Article 81(3) since through this analysis there is in fact no breach of Article 81(1) to be justified.

I have to say that I do not find this approach particularly helpful or satisfactory. It is a circular argument to say that you do not need to justify a rule if it is not in breach of Article 81(1) but it is only not a breach of that Article because it is justified!

I do not think the semantics of this is important since it comes down to the same question and that is whether or not the introduction of a salary cap is justified so as to ensure the "...very existence of...a credible pan European Competitions".

Before I consider that question I just wanted briefly to consider whether there are any other potential legal pitfalls for salary caps. The most obvious hurdle to be overcome is that of common law restraint of trade. The threshold for whether or not it is a restriction is less onerous since there is no requirement to define the market as in Article 81. According to the famous

# Salary Caps: Lawful, Workable and Imminent

formulation of Lord MacNaughton in *Nordenfelt -v- Maxim Guns and Ammunition Co Ltd* [1894] AC 535 the general rule was that:

***“All interference with individual liberty of action and all restraints of trade of themselves, if there is nothing more, are contrary to public policy”.***

Of course the ‘nothing more’ refers to justification and therefore if salary caps can be justified for the purposes of Article 81 they should have no problem in meeting the doctrine of restraint of trade. It is only if they pass Article 81 because of problems with proving restraints in a particular market that we have to worry about the common law position and I do not think that that is likely at all.

This does not mean to say that domestic competition law is irrelevant. The problem for football unlike Rugby League is the international nature of the sport. A salary cap in Britain cannot work without a simultaneous cap being in place throughout the rest of Europe at least otherwise Spanish and Italian clubs would be free to poach players and British clubs could not compete in the big European club competitions on a level playing field.

Therefore not only must a salary cap work in Britain but it must also pass muster under local competition laws in Europe and here you could well face difficulties in some jurisdictions especially Germany and Spain.

The one final possible legal hurdle to be overcome is the European Law on free movement of persons, the rules under which Bosman succeeded in challenging football’s transfer rules. In almost all works on the subject that I have seen, it is said that a salary cap is not a restriction on the free movement of players but I have to say that I am not as certain. It may depend on the type of cap introduced. For instance, the initial rules of rugby league provided for a maximum number of players in any team with wages of over £20,000 per annum. It seems to me that this type of restriction is in danger of being in breach of these provisions.

Furthermore, I do think that the whole idea of a salary cap is potentially at risk under this doctrine anyway since when you consider what is the effect of the salary cap, it is an agreement by clubs to limit the size of their squads. Imagine the position, all of the clubs in a league have spent up to their limit but one club has a player that it very much wants to sign. The club offers to sign him but then says it cannot because his wages would put the club in breach of the salary cap.

It does seem in such circumstances that it might be argued that the salary cap rules are in breach of the fundamental right under Article 39(3) to accept an offer of employment actually made.

Now I realise that the Advocate General in Bosman accepted that some restrictions on this right were justifiable and so it may be thought that there is no

difference between this and justification under Article 81 but that is not right as justification under Article 39 must be on public policy grounds and this seems to me to be narrower than the grounds identified in ENIC.

## Salary Cap Types

This does then lead to consideration of the two types of salary caps and consider if there is any legal difference between them.

## Revenue Percentage Cap

As I mentioned earlier, this is the type of cap being suggested by G14. The advantage of this type of cap, the so-called ‘soft cap’, it is said is that it rewards efficient and well run clubs and is less restrictive than the absolute ceiling or ‘hard cap’ system.

On the hand in my view the ‘Soft Cap’ is quite unfair to smaller clubs especially those who have big investors. If you think of say Fulham which has an average home crowd of less than a third of that of Manchester United, they can still afford to compete against the bigger income clubs because of the support of their benefactor, in their case of Mohammed Al Fayed. A soft cap would condemn clubs such as Fulham to the lower reaches for ever.

All a soft cap does is to crystallise relative strengths and weaknesses which would otherwise fluctuate. No small club could ever compete on a level playing field again. The whole rationale of the salary cap is supposed to be that it maintains the ‘competitive balance’ but this is precisely the opposite of what would occur if a soft cap were introduced without wholesale other changes such as the introduction of the draft as in American sports.

The soft cap will be a death sentence to smaller clubs. Unable to attract better players what would be the point of an entrepreneur investing in a club? The days of someone like Sir Jack Walker investing millions into a struggling club like Blackburn would be over. There would be no point in investing millions when there was no realistic prospect of that club ever achieving the top rank.

Without the ability to attract and reward new capital any industry is doomed to fail and the football industry is no different. The soft cap will have the inevitable result of causing a contraction in the industry. And you do not have to take my word for it. Rugby League first of all introduced a soft cap but very quickly abandoned this in favour of a hard cap precisely because it was threatening the existence of a number of clubs.

As with any cap the problem of where to set the cap is a major impediment to its introduction. The G14 suggestion of 70% is very unlikely to have much significant effect on the elite clubs. Other than Real Madrid, all of the top European teams are within this

limit. And therein lays the problem with the soft cap. By setting the level here, or indeed wherever it is set, you are preventing smaller clubs from being able to compete with the elite. Doomed to spend less on players' salaries they either have to have fewer players in their squad or have players of lesser quality. In either case they are unable to compete on a level playing field.

Far from ensuring a 'competitive balance' it absolutely ensures there cannot be one. Try telling the fan of say Motherwell or Hibs that they have to spend less on wages than Rangers or Celtic. That may be the practical effect now but to enshrine that in the rules can only serve to lessen the "public's perception that the underlying sporting competition is fair and honest" to use the Court of Justice's formulation.

I have to agree with Stephen Hornsby who advised the English First Division Rugby Union on its salary cap system that a 'soft cap ought not to be permitted under competition law'.

*The soft cap will be a death sentence to smaller clubs. Unable to attract better players what would be the point of an entrepreneur investing in a club?*

#### **Total Wage Ceiling**

If not the soft cap what about the 'hard cap'? The Hard cap is where a total wage ceiling is established fixing an absolute sum per annum for the total wage bill of a club.

Immediately you see the practical difficulties in getting everyone to agree what this level should be and it is perhaps that difficulty that has persuaded G14 to go for

the soft cap option. It will be even more difficult in England and Scotland with their multiple divisions.

Even if you could agree on a pan European level there would be the problem of currency fluctuations. A level fixed in Euros may be very good or very bad for British clubs depending on the relative weakness or strength of sterling. Or what about the effect of varying rates of inflation across Europe.

To have any chance of success there would have to be a complicated system to take account of these problems with perhaps adjustments made at each transfer window. It is however difficult to say how they could in fact iron out all of these difficulties.

Where I differ from Stephen Hornsby is that he believes that a hard cap is more acceptable under competition law than the soft cap. I quite appreciate that it does not have the same inherent unfairness as the soft cap but I cannot agree that it is justified.

Unlike the rule to prevent multiple club ownership,

the salary cap is not there to ensure the integrity of the competition. It is there to maintain the balance sheet not the competitive balance.

Those in favour of the hard cap say that it would introduce a much fairer competition. How would say Rangers and Celtic fare if they were limited to spend the same as Aberdeen or Dundee. Would, the argument goes, this make for a much more balanced competition?

But fairer for whom? The fans here at Celtic would not appreciate it, nor would those investors in public companies that own football clubs. Immediately at a stroke the better run clubs, those with more support, better marketing, larger stadiums are reduced in value and effectiveness.

It is argued that a hard cap has the effect of reducing the upward spiral on wages and hence controls ticket prices and so gives the consumer advantages. Well perhaps, but it also serves as a powerful disincentive to improve stadia. What is the point in improving facilities if you cannot charge more? What is the point in increasing stadium capacity if you cannot spend the extra income on the pitch?

The aim of a salary cap is not to save football from extinction but to save the number of football clubs.

Indeed any salary cap prevents fair competitive advantage. It cannot be compared to rules which say limit a rugby team to 15 players on the pitch at one time, no matter how England tries otherwise.

If a club wants to spend more to push for promotion then why should the rules prevent them from doing so? Just as with the soft cap, a hard cap prevents clubs in the lower divisions from attracting investors to push for promotion. The differential caps between leagues will make it more difficult for lower division clubs to retain young improving players. As their contracts come to an end they are more likely to move up since the lower division club is unable to pay them competitive wages. For the club pushing for promotion this makes it more difficult for them to stay up even if they do achieve promotion.

The problem for me is that the salary cap in Rugby Union and Rugby League was introduced to help in the set up of new leagues and not there to protect a system that has survived through normal economic action for over 100 years.

Ultimately the argument in favour of salary caps is doomed to fail the test of proportionality. It just simply is not necessary to maintain the integrity of the competition. That could be achieved by other means including say by introducing a solvency requirement. But of course that would mean club directors having to put money into clubs as capital rather than loans, or seeking new investors and having to give up control. In short, salary caps would not be necessary at all if clubs were run like any other commercial entity.

Now that would be a radical solution.

# BASL Seminar at King's College London: A harmonised approach to the regulation of drug use in sport

By **Alexandra Kelham**

## **Panellists:**

Jonathan Taylor (JT), KCL and Hammonds  
Richard Pound QC (RP), Chairman, WADA  
Francesco Ricci Bitti (FRB), President, International Tennis Federation.  
David Sparkes (DS), Chief Executive, British Swimming  
Michele Verroken (MV), Director of Drug Free Sport, UK Sport  
Adam Lewis (AL), Blackstone Chambers

The World Anti-Doping Code ("the Code") has provoked a lot of debate since its conception, sparking interest from people throughout the sporting community and beyond. The inclusion by President Bush of the urgent need to crack down on drugs in sport in his State of the Union Address in January, is an obvious indication of the impact the Code has had in raising the profile of the issue.

The interest that the Code has stimulated was further illustrated by the large number of people who attended BASL's Panel Session on the Code in December.

The presence at the session of Dick Pound, Chairman of the World Anti-Doping Agency ("WADA"), and the five other influential panellists, all of whom were approaching the subject from different backgrounds, meant that those attending the session were treated to an insightful and lively discussion. Jonathan Taylor (of Hammonds and King's College London, who generously hosted the evening) opened the session by describing the Code as "dramatic and revolutionary" and then, having given some background about the Code, invited the panellists to put forward their views. The following is a summary of the proceedings:

Dick Pound began by describing the Code as "a miracle of co-operation" between sports federations, sports agencies and public bodies. He explained that, while the implementation of the Code, which is being uniquely funded (50% from sports bodies and 50% from governments), has presented its challenges, he was confident that the Code would be fully adopted by all international sports federations in time for it to be implemented during the Athens Olympic Games. He did

however acknowledge that the process of getting governments to incorporate the Code into their national law was going to be more of a struggle.

Mr Pound said he feared the consequences of governments failing to co-operate, because if they did not get on board, there was a real risk of banned athletes taking the sanctioning bodies to their national court for restraint of trade or human rights infringements. If those courts decide that a lesser sanction should be imposed than was under the Code, there is the potential for federations to incur huge damages bills representing the athletes' salaries for the periods during which it is decided they should not have been banned. This could cripple federations. Mr Pound explained that positive steps were however being taken towards the adoption of the Code by governments: the United Nations Educational Scientific and Cultural Organisation (UNESCO) is due to adopt a convention on the Code in October 2005 and Mr Pound was confident UNESCO would keep to this deadline and would publish an initial report to be distributed to member states, by January 2004.

Mr Pound closed by emphasising the need and desire for consistency in doping sanctions throughout all sports – something which has been lacking in doping control to date. He explained that this had been addressed by giving WADA a unique right to monitor all positive tests, and to appeal to the Court of Arbitration for Sport ("CAS") if it believed the decision on liability or the sanction imposed was wrong. In this way, he hoped the Code would provide accountability and consistency and would achieve its aim of providing 'clean' sport world-wide.

Francesco Ricci Bitti, President of the International Tennis Federation, then spoke, explaining that tennis had pledged its full support to WADA. Although he admitted that there were some inevitable technical and political difficulties which all international federations faced with the implementation of the Code, he was adamant that the sporting community must do everything possible to make the Code work.

Snr Bitti then focused on the difficulties that might

occur as a result of governments and federations approaching doping problems from different perspectives. Federations, as the managers of sport on a day to day basis, he said, need to provide fast, clear-cut responses to doping issues as they arise. In contrast, governments are likely to take a longer view of doping issues. In particular, Snr Bitti was concerned about the consequences of this for national federations, which obviously have allegiances with both their national authorities and their international sporting agencies: his question was, who should they listen to?

David Sparkes, Chief Executive, British Swimming, was charismatic in giving a strong and passionate statement of support for WADA. He warned against

*Mr Pound said he feared the consequences of governments failing to co-operate, there was a real risk of banned athletes taking the sanctioning bodies to their national court for restraint of trade or human rights infringements.*

underestimating the impact of the Code and hoped that the sporting world would not fall at the last hurdle – that organisers would have the “balls” to exclude countries who failed to implement the Code from international competitions.

Mr Sparkes then applauded swimming’s world governing body (FINA), which, although it has had to tackle serious doping problems in the past, now has a completely transparent doping system. He suggested

other sports should follow FINA’s example and make public all details of tests undertaken, including names of athletes tested and the results, which FINA has done by making them available on its website.

The issue of whether the UK needs an independent doping agency was an inevitable topic for discussion at this session, and Mr Sparkes started the debate by

advocating that doping decisions should be totally independent. He was concerned that the role of UK Sport (which is the doping agency in the UK) as the body responsible for sporting success in the UK, directly conflicted with its responsibility for “ratting-out” cheats. He proposed an independent doping agency accountable directly to the Minister for Sport. Following the handling of the Rio Ferdinand case, Mr Sparkes was also keen to ensure that the UK moved toward dealing with positive tests more discreetly, fairly and consistently. He felt that decisions should not be battled out on the back page of the tabloids. He proposed that there be a consistent policy of announcing an athlete’s name as soon as there was a case for the athlete to answer, and then a quick move to a hearing, thereby avoiding all the media speculation that occurs currently.

Mr Sparkes acknowledged that UK Sport had agreed to undertake a review of its role and welcomed this, hoping that it would result in systems and structures being put in place which are robust enough to deal with these sensitive issues.

Finally, Mr Sparkes said that while he had previously been a keen supporter of FINA’s tough four-year ban for a first time doping offence, he was now happy to accept the two year ban which had been introduced by the Code. He explained that he could accept this lighter sanction only because the implementation of the Code was so important to the well being of sport in general, and because unless all sports agree to compromise by adopting consistent sanctions, WADA’s objectives would fail. He did however then point out, and applaud, the fact that the Code allowed the international federations some flexibility. FINA, for example, is able to keep its policy of preventing all athletes from a national federation from competing in the world championships if the national federation has had three positive tests from any of its athletes in that year.

The next speaker was Michele Verroken, who at the time was Director of Drug Free Sport for UK Sport. She started by saying that the misuse of drugs by athletes should be recognised as professional misconduct, not a criminal offence. She was therefore disappointed that

## A harmonised approach to the regulation of drug use in sport

the Code was not a document that athletes would be able to read, suggesting that it should have been drafted with the athletes more in mind.

Ms Verroken then stated her belief that the Code should reflect more clearly athletes' strong anti-doping opinions. She cited the fact that, although it has come under much criticism, the British Olympic Association's life ban from the Olympic Team for British athletes caught doping, was in fact recommended by the

*Ms Verroken cited the fact that, although it has come under much criticism, the British Olympic Association's life ban from the Olympic Team for British athletes caught doping, was in fact recommended by the athletes' commission.*

athletes' commission. She said athletes were the strongest promoters of a strict approach to doping and this must be upheld – the Code must not become a soft touch.

Ms Verroken also had concerns about WADA's two tier appeal process (which distinguishes between international and national-level athletes, permitting only the former to appeal to CAS): if CAS is good enough for the likes of Paula Radcliffe, she asked, why is it not be good enough for

athletes who are not of an international standard?

Another concern of hers related to the Code's treatment of athletes who miss tests. She said that UK Sport were seriously considering providing their testers with technology which would record their location at a certain time, in order that they may be able to prove, without doubt, that they were, for example, knocking on an athlete's front door at a certain time.

Agreeing with Mr Sparkes, Ms Verroken felt that in the past, doping decisions had been vested in the wrong people. She also addressed the potential for

arguments between the various stakeholders over jurisdictional issues (for example, which would be the agency responsible for testing at Wimbledon?). However, Ms Verroken welcomed the accountability that she hoped the Code would bring with it, and urged people to ensure that pettiness is not allowed to ruin what, to date, is an incredible partnership. She reminded everyone that the key aim of the partnership is to get cheats out of sport.

Adam Lewis of Blackstone Chambers, provided a view of the Code from a legal perspective. His starting point was to point out that, as well as aiming to catch cheats, it is implicit that WADA does not want to catch athletes who are not cheats. He felt that the Code had neglected this and that the rules of the Code were administratively convenient, leading to the potential for an injustice to be done. There was therefore a real risk, he said, that the Code might be brought into disrepute, damaging sport generally.

Mr Lewis then said that while he was not worried about the principle of strict liability per se, he had identified four fundamental flaws in the Code. Namely that:

- the presence of any quantity of a banned substance amounted to an offence;
- many substances are banned as a result of merely being in the same class as, related to, or similar in structure to, a substance on the prohibited list;
- there is no need to establish that performance was in fact enhanced; and
- automatic sanctions are imposed.

Mr Lewis proposed that it was viable instead to have a presumption of enhanced performance that could then be rebutted by athletes. He conceded however, that the standard of evidence required to rebut that presumption would necessarily have to be high.

An opportunity for athletes to show that WADA had incorrectly included a substance on the banned list, if it was not actually performance enhancing, was also proposed by Mr Lewis. In addition, he felt there was no justification for having automatic sanctions. Sanctions

such as disqualification from events and forfeiture of medals, points and prizes, were not justified, he said, if it was possible for the athlete to show that there was in fact no enhancement of performance on the day.

Mr Lewis felt that the Code should have built-in safeguards to guard against these problems and was clearly keen to protect those athletes who in the past may have been perceived to have been sanctioned unfairly: those "incautious" athletes who accidentally

*The purpose of the Code is to protect athletes who do not cheat and that it is a welcome move away from previous systems which appeared to do everything to allow cheaters to keep cheating.*

take insignificant quantities of a banned substance.

Dick Pound was then asked to reply. He began passionately by saying that the World Anti-Doping Code was "not the Lawyers Relief Act!". He said the purpose of the Code is to protect athletes who do not cheat and that it is a welcome move away from previous systems which appeared to do everything to allow

cheaters to keep cheating. He added that strict liability was essential and further, if every single banned substance was included in the prohibited substances list by name, the list would be five inches thick.

Mr Pound further disputed that fixed sentences were a problem. He explained that the first offence two-year ban was merely the norm, and that it can be reduced in deserving circumstances. With regard to the criticism that there should be evidence that a substance is performing enhancing on a particular day, he simply said that athletes know that, if a substance is on the banned list, they must not take it. As such, Mr Pound said that there should be no need for an athlete to rely on the argument that the substance did not make any difference to his or her performance. He or she should

not have taken it in the first place – it is just a rule that must be obeyed.

Finally, in reply to Ms Verroken, Mr Pound explained that there had in fact been very intensive consultation of athletes and that the Code was not designed for athletes to read but designed to protect their interests. As such, it needed to be appropriately drafted. He explained that there were processes for amendment written into the Code, and that ongoing consultations with athletes and the stakeholders would ensure that the interests of clean athletes would be kept at the heart of the Code.

The discussions were then opened up to the floor, and spirited debates on a variety of issues followed. For example, the recent massive increase in the sensitivity of dope tests, and the worrying disparity in this regard between the capabilities of different official testing laboratories, were raised. It was suggested that Alan Baxter, for example, may not have tested positive had his samples been analysed in a different accredited lab.

The discussion on the right to appeal was also reopened, and the need for greater public funding of independent appeal bodies in the UK, such as the Sports Dispute Resolution Panel, was addressed.

Finally, when challenged on the justification behind anti-doping, and asked whether it might not be more acceptable to the public at large to justify anti-doping on the grounds of protection of health than on cheating, Dick Pound was very clear in his response. He replied that, while the protection of health was certainly an important purpose of anti-doping, we could not simply abandon the principle of catching cheats which had been embraced by athletes and is the embodiment of the WADA code.

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**Alexandra Kelham is a trainee solicitor at Farrer & Co and is currently on secondment to the British Olympic Association.**

# Sport and the Law Journal Reports 2004

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**Football – insolvency – company voluntary arrangement – unfair prejudice**

The law reports in the Sport and the Law Journal are compiled by barristers at 11 Stone Buildings, Lincoln's Inn, under the editorship of Alan Gourgey QC. The individual reporters (indicated by their initials after the date of the judgment) are Tim Penny, Nick Parfitt, Jamie Riley, Iain Pester, Damian Murphy, Martin Ouwehand and Reuben Comiskey. The Reports are published in chronological order and should be cited by their "SLJR" number.

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**(2004) SLJR 1**

**Personal injury – assessment of damages – adverse effects on sporting career**

RAIT v LUNN

*Court of Appeal (Civil Division), Potter, Rix and Carnwath LJJ [2003] EWCA Civ 1449*

*22 October 2003 (Reporter: JR)*

**Facts**

1. The claimant ("R") was a professional golfer. R claimed that the injury he sustained as a result of being bitten by a dog had seriously affected his career as a professional golfer. At first instance on 6th December 2002 Sir Ian Kennedy in the High Court awarded damages including interest of £6,023.39. This figure incorporated general damages, special damages and damages for loss of earnings.

2. R suffered the injury when he attempted to separate two dogs fighting. Unfortunately one of the dogs bit through the terminal phalanx of R's left little finger so that the fingertip was hanging on by its skin. Fortunately the finger recovered well although it was left an eighth of an inch shorter than R's right little finger. Apart from the shortening, the only permanent effect was a

numbness left in the tip despite which the pulp of the finger remained sensitive to pressure.

3. The accident happened at a critical point in R's career as he had only recently turned professional at the age of 25 and was on the verge of entering a full season in an effort to qualify for the PGA European Tour ("the Tour"). R had reached this stage having shown great promise at schoolboy level before attending university in the USA in order to develop his golfing skills where he enjoyed success on the American College circuit. R returned to the UK in 1992 and played as an amateur in 1993 and 1994, becoming Surrey amateur champion in 1993. However, in 1993 and 1994 R failed to pre-qualify for the Tour Qualifying School. Despite the injury which he suffered in 1995, R did pre-qualify but failed to obtain a card to make him eligible to take part in the Tour. After several further failed attempts R finally gained a Tour card for the 1999 Tour in which he competed in 23 events and achieved a rank of 124th in the Tour standings.

4. Following the injury in 1995, R was concerned that his grip would be affected and that any adjustments would hinder the development of his game. Prior to the accident R adopted a classic orthodox grip but after the injury he constantly felt that the club was slipping from his grasp. Consequently R used his index finger more and grasped the club handle more tightly to compensate. R also claimed that the feeling of letting go the club caused him to turn his hand clockwise from the optimum position undermining his confidence.

5. At trial R relied upon the earnings of other players as comparators in order to quantify actual and future loss of earnings. In so doing R acknowledged the difficulty in drawing comparison between the careers of two professional golfers and so the comparators' earnings were used as the basis for a "loss of a chance" assessment. In the alternative R argued that because there was an inevitable loss of earning capacity, this should be compensated by a *Smith v Manchester* award.

6. In seeking to succeed on these arguments R had to overcome the factual difficulties of his success in the aftermath of the injury and an intervening injury which R suffered in a road traffic accident in 1996 and which caused him variable discomfort for the next four years.

7. The Judge found there was no basis for the allegation that R's play had been adversely affected, principally because of the evidence of a PGA professional and coach that R had not failed to achieve a level in the game which he was reasonably expected to attain.

8. R applied to the Court of Appeal for permission to appeal the order on the grounds that:

a. the Judge had wrongly concluded that there was no evidence demonstrating that R's play had been

adversely affected and that such a conclusion was against the weight of the evidence;

b. the Judge had erred in concluding that R's play had been affected by a subsequent injury in Scotland; and

c. the Judge's findings were manifestly wrong in the light of the evidence.

#### **Held (dismissing the application)**

9. The issue before the Judge was whether R had discharged his burden of proof in showing some adverse long term effect on his golf as a result of the injury. In the absence of an objective assessment by an expert or fellow professional who knew R's game both before and after the accident, the Judge found himself unable to conclude on a balance of probabilities that the dog bite had led to an adverse effect. Without evidence supportive of R's claim the Judge clearly preferred the opinion of the Defendant's expert that there was no pattern in R's subsequent career to show that he failed to attain a level in the game which he might reasonably have been expected to have achieved but for the accident. It was not a case that the Judge had misunderstood the issues or the evidence in reaching his decision or that he was bound on the evidence before him to have found that the injury had any significant effect on R's game. Therefore the Judge's conclusion to the contrary could not be faulted. Accordingly the issue as to the appropriate basis upon which to make a consequential award did not arise.

#### **Commentary**

10. This decision highlights the difficulty of proving the cause of loss of form and the nature of risks associated with a career in professional sport. In particular the Court of Appeal emphasised the enormous practical difficulty in the path of a claim for an award of damages based upon a "loss of a chance" calculation which requires application of a percentage assessment to a particular level of future earnings. This decision confirms that in view of the huge spread of earnings in sport even among those who compete consistently within the same competitions and bearing in mind the fine margin between success and failure as a result of the character and personal qualities of competitors as well as their playing sporting abilities, it is difficult to envisage how any particular level of earnings can realistically be taken as a baseline for calculating an award of damages. Furthermore, the selection of a percentage figure to represent the "loss of a chance" can be no more than a speculative exercise in view of the ups and downs of sporting competition.

# Sport and the Law Journal Reports

## **(2004) SLJR 2 Motor Racing – duty of care to competitors – tort**

ELIZABETH WATTLEWORTH (AND ON BEHALF OF THE ESTATE OF SIMON WATTLEWORTH) v (1) GOODWOOD ROAD RACING COMPANY LTD (2) ROYAL AUTOMOBILE CLUB MOTOR SPORTS ASSOCIATION LTD (3) FEDERATION INTERNATIONALE DE L'AUTOMOBILE

*High Court, Queen's Bench Division, Davis J  
4 February 2004 [Reporter NP]*

### **Facts**

1. Simon Wattleworth was killed when he lost control of his Austin Healey car coming out of the Lavant bend at the Goodwood race track on 5 November 1998. His car hit the tyre fronted earth bank at the side of the track. This action concerned the liability of those alleged to be responsible for the design or selection of the tyre structure.

2. The first defendant ("Goodwood") owned and were responsible for the track and the event at which the accident occurred. The event itself was a private "Goodwood Day". The second defendant ("MSA") is the national governing body for motor sports in the UK and most domestic events are operated under licence from the MSA. The MSA is one of 118 domestic motoring organisations that together form the third defendant ("FIA"). FIA, a non-profit making organisation, was formed in Paris in 1904. It had responsibility for competitive international motor sport events. A race event appearing in the International Racing Calendar required FIA authorisation, one such event was to be held at Goodwood. Both MSA and FIA were involved in giving advice and recommendations as to safety and related features at the track.

3. The relevant legal issues were (a) whether Goodwood was in breach of its admitted duty of care to Mr Wattleworth, (b) whether MSA and FIA owed duties of care to Mr Wattleworth and if so (c) whether either were in breach of those duties.

4. It was apparent from the facts that Goodwood was concerned to ensure that it got the best expert advice so far as safety aspects of running a motor racing circuit were concerned. It consulted MSA with that in mind and from at least December 1996 until up to the date of the accident was substantially involved in advising Goodwood as to the nature and type of safety features that should be employed at the circuit.

5. Goodwood's duty was the common duty of care under the Occupiers' Liability Act 1957 (as amended). It was argued by the claimant that Goodwood had failed to discharge this duty because (a) it hadn't done enough and should have considered the proposals with more care or carried out risk assessments and (b) it hadn't discussed non-racing events sufficiently. The claimant also argued that Goodwood was liable because the barrier was unsafe and negligently designed. This latter cause of action was one of strict liability. Reliance was placed on *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, Scrutton LJ at 215 who stated that an occupier warranted that independent contractors will have used all due care.

6. The arguments as to whether MSA owed a duty of care were about the extent to which a body overseeing a sport might owe duties to the participant in that sport. The defendants sought to draw comparison with the "economic loss" line of cases. The claimant relied on specific sport cases relating to personal injury such as *Perrett v Collins* [1998] 2 Lloyd's Rep 255 and *Watson v British Boxing Board of Control* [2001] QB 1134. The defendants submitted (among other points) there was no evidence of Mr Wattleworth having relied on MSA licence or approval; any duty would extend to an indeterminate class; the class of people in MSA's contemplation were those participating in MSA events, the Goodwood day was not such an event, so MSA did not exercise control over that specific event, and where MSA did exercise control over an event there were a large number of checks and safety measures it would insist on.

7. The arguments in respect of FIA included many advanced by MSA but there were also other features, including: FIA's involvement in inspecting and recommending had been a lot less than MSA; FIA's involvement was more specifically focused on the FIA authorised event; FIA (unlike MSA) did not itself issue a licence to Goodwood; the structure of FIA showed that the primary responsibility for licensing and safety rested with the relevant national organisation; FIA charged the MSA for its inspection not Goodwood. In summary FIA's involvement had been limited to whether FIA would authorise a particular event at Goodwood to be included in the International Racing Calendar.

8. The issue of breach depended on whether or not the tyre design was appropriate. The relevant area of the curve was the inside of the second curve on that particular bend. It was assessed to be an area of low impact risk. Nevertheless the question was whether what was recommended by MSA for that area of the track was reasonable in the circumstances: was the barrier unsafe in that it exposed a driver to an

unnecessary risk of injury (a question derived from *Smith v Flintrace Ltd* (CA unrep: 27/3/1998)).

9. There were also issues raised as to (i) causation: did the alleged negligence cause Mr Wattleworth's death, (ii) a defence of *volenti fit injuria* and (iii) contributory negligence.

### Held

10. The court held that there had been no breach of duty on the part of Goodwood because it had taken reasonable steps to engage competent experts (ie MSA) and to follow their advice and recommendations. The court held that the Occupier's Liability Act 1957 overtook the common law and relieved an occupier of absolute liability of the type described in *Hall v Brooklands*.

11. MSA did owe a duty of care because their involvement went well beyond licensing or authorising events and extended to making detailed and specific recommendations and suggestions for all parts of the track. MSA held themselves out as experts in this area and advised extensively over a long period of time. It was just and reasonable for a duty of care to be owed. The court followed *Perrett and Watson* but also that the three-fold *Caparo* test was met. Reference was also made to *Stratton v Hughes* (CA unrep: 17th March 1998) where Thomas LJ said, "Those who organise and control sports such as these must take reasonable care in relation to the layout and the organisation...."

12. FIA did not owe a duty of care. Although it was foreseeable to FIA that any recommendations it made for tyre structures would also be present during non-International circuit use that wasn't sufficient of itself to impose a duty of care. FIA's role was relatively limited and did not amount to an assumption of responsibility to all users of the circuit. This was consistent with *Goodwood* itself looking to MSA and the court's own holding that MSA did owe a duty of care. MSA was proximate to this national race circuit whereas FSA was far less so.

13. The court held on the expert evidence that the type of barrier chosen was reasonable. It was a legitimate compromise between a possible head-on collision and a possible glancing collision.

14. The court went on to deal with the issue of causation and held on the expert evidence that it was not proven on a balance of probabilities that the cause of Mr Wattleworth's death was the allegedly negligent design of the tyre barrier. The court also held that there was no defence of *volenti* as Mr Wattleworth's

assumption of the risk inherent in race track driving was on the basis that all reasonable care was taken over circuit safety and that had negligence been responsible for Mr Wattleworth's death then he was contributory negligent to 20 per cent (because of trying to drive out of trouble rather than applying his brakes).

### Commentary

15. It is notable that MSA didn't make any attempt to limit or negate any potential duty of care by a suitably worded disclaimer or qualification to the advice being given. It is clear from paragraph 125 of the judgment that had such qualification been present then it might have changed (a) whether or not *Goodwood* had sufficiently discharged the common duty of care because it might not have been reasonable to rely on MSA's advice in those circumstances and (b) whether MSA itself owed a general duty to all users of the circuit.

16. It may be that the lesson for governing bodies is that disclaimers should be used but on the other hand as the judge touched on at a couple of points in the judgment: isn't that just what governing bodies who hold themselves out as being able to provide expert advice and assistance are there for. Circuit owners can reasonably rely on that expert advice – otherwise where else do they go for such advice – and should that advice be wrong there is no reason why governing bodies should not bear the consequence. The insurance costs (also a point referred to in the judgment) will most likely be shared among those who participate in the activity concerned.

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### (2004) SLJR 3 Insurance – football – knee injury – whether disablement occasioned solely and independently of any cause other than the knee injury

SOUTHAMPTON LEISURE HOLDINGS PLC  
v AVON INSURANCE PLC & OTHERS

*High Court of Justice, Queen's Bench Division, Curtis J.*  
19 February 2004 (Reporter: DM)

### Facts

1. David Howells was a footballer for Tottenham Hotspur F.C. until his transfer to Southampton F.C. on 1 July 1998. As a result of the transfer he became included in a Policy of Insurance taken out by Southampton with a group of insurance companies (the Defendants).

2. On 24 October 1998, whilst playing against Coventry City, Howells attempted to block a shot with his right

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leg. The impact of the ball injured his right knee and he was eventually substituted. He had four subsequent operations on his right knee but never fully recovered. He was forced to retire from football.

3. The medical evidence showed Howells had suffered a sharp blow on the medial side of the knee, the effect of which was to open the knee joint on that side but to close it on the other lateral side. As a result, the knee joint impacted on the remnant of his lateral meniscus. Within the meaning of the Policy he was permanently and totally disabled from engaging in his usual occupation as a football player, playing for a Premier League club and was beyond hope of improvement.

4. The insurance companies refused to pay out under the Policy on the grounds that the knee injury in 1998 was not an injury which solely and independently of any other cause occasioned the disablement. They relied upon Howells' previous problems with his knee including a partial meniscectomy (i.e. removal of cartilage) in 1991. In the alternative, they relied upon an exclusion clause within the Policy.

### **Held**

5. Howells had suffered persistent problems with his right knee of a serious nature between 1988 and 1998. His medical history during that period included a report of early osteo-arthritic changes in June 1991; an operation in 1993 on the knee joint and a specialist's conclusion that chronic trouble with Howells' medial ligaments was certain; fluid on the knee in 1995 and 1997; the identification in 1998 of osteo-arthritis of the knee joint and a narrowing of the notch of the knee; MRI scans in 1997 and 1998 which showed primarily degenerative changes and that there had not been any recent bone injury; videos showing the tibial surface worn down to the bone.

6. He was able to maintain a good playing record during this time thanks to his own application and courage supported the excellent medical treatment and physiotherapy he received as a top footballer.

7. The expert medical evidence on behalf of the Defendants was to be preferred. The injury of 24 October 1998 was not the sole and independent cause of Howells' disablement. On that basis the defence based on the exclusion clause did not need to be considered. There was judgment for the Defendants.

### **Commentary**

8. Howells' right knee had caused him problems since he was 23 and his medical records just in relation to his right knee filled a table extending over 4 pages of the judgment. The records do not reveal any Gazza-like trauma to the knee before the accident but they are testimony to the harsh demands placed on the bodies of professional footballers.

9. The matter turned on the respective expert evidence of the parties with the Judge preferring the evidence on behalf of the Defendants supported by the undisputed medical evidence in relation to the knee. The court concluded that as he lunged to try and block the shot against Coventry, his right knee was already in such a state that the undoubted trauma caused by the impact of the ball could not be said to have been the sole cause of his retirement from the game.

10. The case does not create a precedent since it is too closely tied to its facts. Nevertheless, it might trigger alarms in the boardroom and the changing room. At the time Southampton signed Howells, his knee was already in such a state that any further injury to it was unlikely to be the sole and independent cause of any resulting disablement. How many other players' key joints are in a similar state of wear and tear?

11. Owners know that of their many employees, there will be few without some form of history in relation to key muscles and joints. Clubs might need to consider becoming stricter in relation to transfer medicals. The problem with being stricter is that they might find themselves unable to sign experienced players. Alternatively, clubs might need to revisit their insurance policies and take on higher premiums to protect their financial position.

12. For the players and their legal advisors, there is the depressing prospect that the provision they have made for the future in the event of injury might prove to be no provision at all.

**(2004) SLJR 4**  
**Australia – elite netball player prevented from playing in interstate competition by competition rule as to state of residency – whether rule was void as an unreasonable restraint of trade**

AVELLINO v ALL AUSTRALIA NETBALL ASSOCIATION LTD

[2004] SASC 56

*The Honourable Justice Bleby, Supreme Court of South Australia*  
 26 February 2004 (Reporter:MO)

**Facts**

1. The plaintiff is a professional netball player who during her career had played for various teams at the National competition level. The defendant is the governing body of national netball in Australia. It is a not-for-profit organisation with principal objects relating to the promotion of netball and the conduct and regulation of competition between Member Organisations, the bodies governing netball in each of the States.

2. The most significant national netball competition administered and promoted by the defendant is the Commonwealth Bank Trophy Competition ("the Competition"). The Competition is one between eight specially created teams, two each from South Australia, New South Wales and Victoria and one from each of the next two strongest netball States.

3. The Member Organisations organise the selection and nomination of the teams within each State but the defendant controls and subsidises the Competition through sponsorship, membership fees, government grants and gate takings. The Competition is governed by Regulations established by the defendant which are incorporated into a deed of participation with each Member Organisation. There is no contract between a player and the defendant however the Member Organisation is required to ensure that player's contracts with the Member Organisation incorporate the Regulations.

4. Regulation 2.2 provides that "Unless otherwise approved by [the defendant], a Player must be a resident of the home State/Territory of the Member Organisation for which she is to play for four (4) weeks prior to commencement of the Competition through to completion of the Competition" ("the Residency Requirement")

5. Most elite players have to maintain employment outside of netball; however the sport is professional in the sense that accomplished players at Competition

level are able to earn significant benefits through match fees and other activities, such as sponsorship, related to their playing abilities.

6. By 2002 the plaintiff had lived in Sydney and played for a number of years in the Competition teams fielded by New South Wales. During this time she had obtained a job as a corporate suite and sales co-ordinator for Sydney SuperDome. Having suffered injuries in 2002 the plaintiff was unable to gain selection for the New South Wales teams and sought a playing contract from teams in other States. The Adelaide "Thunderbirds", a South Australian team, agreed to offer her a contract which included the travel costs between Sydney and Adelaide for the purposes of training and playing.

7. Upon registering the plaintiff to play with the Thunderbirds, the South Australian Member Organisation wrote on the plaintiff's behalf seeking an exemption from the Residency Requirement to allow the plaintiff to live in Sydney but commute to Adelaide to play netball. The defendant refused and despite the plaintiff later making arrangements to live and work in Adelaide for part of the week, the defendant threatened to deduct points from the Thunderbirds if the plaintiff played.

8. The plaintiff commenced proceedings against the defendant claiming, among other things, that the Residency Requirement was a void restraint of trade.

**Held (Judgment for the plaintiff)**

9. There were no contractual remedies available to the plaintiff against the defendant but there was jurisdiction to declare the Residency Requirement as a void restraint of trade.

10. The plaintiff was a professional, and therefore had her interests in relation to trade affected, because of the commercial rights and obligations in her player contract. This was despite her main source of income being outside of netball.

11. In order to be reasonable, a restraint must be reasonably related to the objects of a sporting body. A restraint which strikes at the essential interest of a player's freedom to play with a team of her choice is void unless it no more than adequately protects the interests of the sporting body.

12. The Residency Requirement was void because it could not be shown that it protected the defendant's interests by promoting netball competition.

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## Commentary

13. The Court started by finding that there was no enforceable contractual remedy between the plaintiff and the defendant but relied on authority for the principle that the ability to strike down a restraint of trade does not depend on the restraint being embodied in a contract: *Buckley v Tutty* (1971) 125 CLR 353.

14. The Court found that the Residency Requirement operates in three ways. First, it prevents a New South Wales resident, who is not selected for the New South Wales teams in the Competition, from earning netball income at Competition level unless she takes up residency in another State. Secondly, the Residency Requirement, by preventing the membership of a Competition team, deprives a player from earning coaching and endorsement fees from other bodies that would otherwise be available. Thirdly, it effectively requires a player to terminate civilian employment in New South Wales if she wishes to exploit her abilities with another State team.

15. The Court relied on the common law rule stated by Lord MacNaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 565: "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 void...It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable-reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed..."

16. As to the question whether the Residency Requirement affected the plaintiff's trade, the Court said that the doctrine applied so long as the person whose rights or interests are said to be affected is a professional; it is not essential that a player derive her entire or even substantial part of her income from playing netball. The Court found, given the commercial rights and obligations imposed by the player's contract with the Thunderbirds, that whilst the plaintiff's netball activities did not provide her with her main source of income, they were sufficiently significant for her to be regarded as a professional player.

17. The restraint was therefore one to which the common law doctrine applied and the plaintiff had a sufficient interest to obtain a declaration of invalidity. The Court then went on to consider whether the Residency Requirement was reasonable. The restraint must be reasonably related to the objects of a sporting body. The

Court took the approach that a restraint which strikes at the essential interest of a player's freedom to play with a team of her choice is void unless it no more than adequately protects the interests of the sporting body.

18. The Court said that the question is one of examining the nature of the sport, how it is organized, the principal threats to its continued success and the nature of the economic forces at work. One of the arguments for the defendant was that the Residency Requirement developed tribal loyalty for local teams and community involvement; this, it was argued encouraged young local players. The Court, however, found that the Residency Requirement would not necessarily have this effect because it only forced Competition players to reside in a State for the length of the season. In any event, the Competition teams were not territorially based and the Competition involved the best eight teams in the country rather than a competition between teams representing each State.

19. The Court also dismissed an argument that the Residency Requirement protected teams from States with smaller populations from dominance by teams from the larger wealthier States. The Court said that there was no evidence that this would otherwise occur and, indeed, the absence of the restraint would probably assist the competitiveness of teams from the smaller States by giving them access to talent from the other States. The Court also dismissed an argument that the Residency Requirement ensured ongoing training because the requirement to train could be determined regardless of residence.

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## (2004) SLJR 5 Football – training compensation on transfer – FIFA Regulations – quantification

HAMBURGER SPORT-VEREIN E.V – V –  
ODENSE BOLDKLUB

*CAS 2003/O/527, Court of Arbitration for Sport, (Stephan Netzle (P), Goetz Eilers and Johan Evensen)*

*21 April 2004 (Reporter: RC)*

### Facts

1. Lars Jacobsen ("the Player") was born on 20 September 1979, and was registered with Odense from 1991 to 30 June 2002. His first professional contract with Odense was made on 1 October 1996. A subsequent professional contract was made on 18 November 1998. This was to expire on 30 June 2002.

2. The second contract contained the following clause: "If the player, after expiry of the contract, commences an engagement as a player in a new club, the following applies:

a) If the new club is domiciled in the EU, Norway, Iceland or Liechtenstein, the club may not claim payment of an amount from the new club in connection with change of club (hereinafter referred to as "transfer fee")."

3. The Player played for Odense's first team 5 times in the 1996-7 season, 15 times in the 1997-8 season, and then every game in subsequent seasons.

4. On 10 June 2002 the Player signed a contract with Hamburg. It was effective from 1 July 2002, the day after the expiration of his second contract with Odense. At that date he was 22.

5. FIFA Regulations state that a player's training takes place between the ages of 12 and 23. They further state that if a player moves clubs before he reaches 23, then Training Compensation will be payable for training incurred up to the age of 21, or the age at which the player actually completed his training, if it is earlier.

6. Odense claimed Training Compensation in the sum of €555,000. This was calculated as €10,000 per year for the first three years (in accordance with Art.7(2) of the FIFA Regulations), together with €75,000 per year for the remainder up to the Player's 21st birthday. This was reduced by 50% by the FIFA Dispute Resolution Chamber of the Players' Status Committee, to stand at €277,500.

7. Hamburg appealed against this assessment on two bases. It claimed, first, that the clause in the Player's contract set out at paragraph 2 operated to prevent Odense from claiming Training Compensation at all. Alternatively it claimed that the cost of training the Player had not been €277,500 and should be reduced accordingly. Odense cross-appealed contending that the whole €555,000 should be paid.

#### **Held (allowing in part the appeal and dismissing the cross-appeal)**

8. The Court referred to the ECJ Bosman ruling, which stated that national associations' rules contravened Art.48 of the EEC Treaty (as it then was) to the extent that they prevented football players from changing club on the expiry of their contracts unless the new club paid a transfer, training or development fee.

9. It also referred to the European Commission's subsequent guidance as to the effect of the Bosman ruling, in particular the fact that the ruling affected all transfers between clubs in Member States of the EU and also extended to transfers to clubs in member states of the EEA, namely Iceland, Liechtenstein and Norway.

10. It ruled that the clause in the Player's second contract did no more than to reflect and recite the effect of the Bosman ruling. In coming to this conclusion it placed weight on the following three factors:

- a) that the contract was a standard form contract as recommended by the Danish FA, and it is unlikely that the Danish FA would recommend to its members that they give up any of their rights;
- b) that the wording of the clause in question reflected the European Commission's guidance, in particular in the way in which it referred to the EU and to the member states of the EEA; and
- c) that the clause referred only to a "transfer fee", which is a distinct issue from Training Compensation.

11. Accordingly the Court held that Odense was entitled to Training Compensation.

12. As to the assessment of the Training Compensation fee payable, the Court disagreed with the approach of the Dispute Resolution Chamber. It held that the first step was to decide at what point the Player had ceased his training. This was a question of fact to be decided from all the circumstances of the case.

13. The mere fact that the Player had first signed a professional contract for the 1996-7 season did not, of course, have the result that his training had ended at that stage. However, the Court found relevant that in the 1997-8 season, he played in 15 first team games, he had already spent some time with Odense, and he had been noted as having good speed and technical skills. On that basis it was found that he had completed his training before the start of the 1997-8 season. Accordingly the appropriate Training Compensation was €255,000.

14. In addition the Court rejected Hamburg's contention that the Training Compensation should be reduced as being disproportionate to the actual cost of the Player's training. It stated that it had not been supplied with any evidence to back up this assertion. Neither, conversely, had it been supplied with any evidence by Odense to support its claim that it was entitled to Training Compensation of €555,000.

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## Commentary

15. On the question of when the period of a player's training comes to an end, the Court gave some useful guidance in this case as to the factors that will be applied to reach a decision. In particular, it does not only look at the number of first team games a player has played.

16. It also indicated that it looks at the quality of those games. Combined with the way in which the Court chose to highlight the fact that the Player had been noted for having good speed and technical skill (the obvious comparison being with a player who is included only to cover injuries), this appears to show the Court looking deeper into the reasons for a player's inclusion in the first team.

17. The Court's decision on reduction of the Training Compensation was straightforward. Hamburg's main argument was that because the transfer had occurred just before the Player's 23rd birthday, the Training Compensation should be adjusted accordingly. The only basis for this was that this meant that Odense had enjoyed the benefit of the Player's training to some extent also. However, given that this does not appear anywhere in the Regulations as a factor to be taken into account when fixing the level of Compensation, it is not surprising that this argument was dismissed.

18. Of more importance was the discussion of the evidence it would have required in order to consider whether or not to reduce the Training Compensation. The necessity for "concrete evidentiary documents" was emphasised, items such as invoices, budgets, and documents showing the cost of training centres. It was also pointed out that the FIFA Dispute Resolution Chamber has the power to demand such documents.

19. One final note ought to be sounded, however. The Regulations dealing with a reduction in Training Compensation show that, to some extent, the term "compensation" is misleading. For the test for reduction is not whether or not the amount fixed under the Regulations actually exceeds the amount of expenditure. Rather it is whether or not that amount is clearly disproportionate. Even then the Chamber has a discretion whether to adjust the level of Compensation. No guidance was given as to how this should be done.

## (2004) SLJR 6

### Football – Insolvency – Company voluntary arrangement – Unfair prejudice

IN THE MATTER OF THE WIMBLEDON FOOTBALL CLUB LIMITED (in administration)

*Lightman J, 11 May 2004*

*Court of Appeal (the Lord Chief Justice of England and Wales (Lord Woolf of Barnes), Mance LJ, Neuberger LJ) 28 May 2004 (Reporter: IP)*

## Facts

1. This was an application by the Inland Revenue ("the Revenue") pursuant to the Insolvency Act 1986 ("the IA 1986") for an order revoking or alternatively suspending a company voluntary arrangement ("the CVA") into which the Respondent football club ("the Club") had entered with its creditors.

2. The Club is hopelessly insolvent. The Club is the holder of a share in the Football League Limited ("the League") and is a member of the League. Under the Articles of Association of the League ("the Articles") the Club is only permitted to sell the share if under the terms of the sale agreement the purchaser agrees to pay certain creditors ("Priority Creditors") in full. The Priority Creditors consist of so called football creditors, which include sums outstanding to other football clubs, players and former players.

3. On 5 June 2003 the Club went into administration. This triggered a right of the League pursuant to the Articles to require the Club to transfer the share to a person nominated by the League for a nominal consideration. However, the League was prepared to suspend the notice requiring transfer of the share while the administrators sought to find a purchaser for the Club. A third party who was interested in buying the Club advanced £1.5million to the Club to enable it to continue trading until the end of the regular football season on 9 May 2004. The administrators entered into negotiations with the potential purchaser, and these negotiations culminated in a Sale Agreement. The Sale Agreement reflected the requirement, pursuant to the Articles, that Priority Creditors would be paid in full. The sums received by the administrators were then to be divided among the creditors through a company voluntary arrangement ("the CVA"). It was vital that the Club avoid liquidation, for on liquidation the Club's valuable player contracts would terminate, and on liquidation the share held by the Club, which enables it to be a member of the League, would automatically be transferred.

4. The terms of the proposed CVA were that the sums received by the Club under the Sale Agreement, after payment of the costs and expenses of the administration, would be applied in paying a dividend of 30p in the pound to preferential creditors, with non-preferential creditors receiving nothing. The debts of the non-preferential creditors exceeded £23million. On 18 March 2004 the Club's creditors approved the terms of the CVA.

5. However, one of the preferential creditors, the Revenue, was unhappy with the CVA. The Revenue challenged the CVA on the grounds that it unfairly prejudiced the interests of the Revenue as creditor, pursuant to s. 6 of the IA 1986, and that there were material irregularities at or in relation to the creditors' meeting, namely non-compliance with s. 4(4)(a) of the IA 1986.

#### **Held (dismissing the application)**

6. The Revenue was plainly unhappy with the CVA because the Sale Agreement proposed to pay the Priority Creditors, who were unsecured creditors, in full while under the CVA the Revenue, a preferential creditor, was only receiving 30p in the pound. Lightman J was troubled that the real objection of the Revenue was not to the CVA as such, but to the terms of the Sale Agreement.

7. S. 4(4)(a) of the IA 1986 provides that a meeting summoned to approve a CVA shall not approve it if "any preferential debt of the company is to be paid otherwise than in priority to such of its debts as are not preferential debts". However, Lightman J held that this did not preclude the payment of non-preferential creditors by third parties, and so there could be no objection to a buyer of a football club paying Priority Creditors in full directly. S. 4(4)(a) was limited to payments made out of a company's own assets.

8. S. 6 of the IA 1986 provides that a Court may revoke or suspend the approval of a CVA on the ground that the CVA "unfairly prejudices the interests of [the] creditor". Lightman J derived the following principles on unfair prejudice from the authorities.

- (1) To constitute a good ground of challenge the unfair prejudice complained of must be caused by the terms of the arrangement itself.
- (2) The existence of unequal or differential treatment of creditors of the same class will not of itself constitute unfairness, but may give cause to inquire and require an explanation.
- (3) In determining whether or not there is unfairness, it is necessary to consider all the circumstances including, as alternatives to the arrangement proposed, not only liquidation but the possibility of a different fairer scheme.

(4) Depending on the circumstances, differential treatment may be necessary to ensure fairness.

9. It was clear that unless the Priority Creditors were fully paid, or agreed to accept less than what they were entitled to, the Club would have to go into liquidation. Creditors, even unsecured creditors, could legitimately use their bargaining power to obtain more than they were entitled to in a winding up: see *Leyland DAF v Automotive Products* [1994] 1 BCLC 245. Lightman J could not accept that "the imposition on the buyer of an obligation to do what commercially the buyer has to do in any event can imbue the [CVA] with any unfairness: it merely confers on the Club and its creditors the right to require the buyer to pay and satisfy the Priority Debts and thereby to reduce the body of debtors of the Club entitled to prove under the [CVA] and accordingly to compete for a dividend if further funds become available to the Club."

10. Lightman J therefore concluded that the real ground of complaint was the power of the League to require payment of creditors of its choice in full. However, given the existence of this power, the Club and the buyer were compelled to reach an agreement which acknowledged this requirement imposed by the League.

11. The Inland Revenue obtained leave to appeal the decision at first instance on the s. 4 of the IA 1986 ground alone.

#### **Held (dismissing the appeal)**

12. The Inland Revenue's case on appeal was that the CVA as put forward to and implemented by the creditors' meeting, infringed the requirement of s. 4(4)(a), and consequently the CVA should not be implemented. Neuberger LJ, who delivered the only reasoned judgment, reasoned that the argument potentially raised two issues. The first was whether the CVA infringed s. 4(4)(a), and the second, which only arose if there was such an infringement, was whether the proposal must automatically fail. Neuberger LJ dealt with the second issue first, and quickly came to the conclusion that if it could be shown that a CVA proposal did infringe s. 4(4)(a), then the court would have "no real alternative but to stay its implementation".

13. Neuberger LJ then went to consider the first of the two issues raised by the appeal. His Lordship pointed out that it was important to look at the commercial realities of "this rather unusual case". It was important to bear in mind, when considering the proper interpretation of s. 4(4)(a), that in the present case the administrators had entered into a contract for the sale

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of the undertaking of a company to a prospective purchaser who, while he was agreeing to repay certain creditors, was not thereby accorded any reduction in the sum which he was prepared to pay for purchasing the undertaking of the company.

14. Neuberger LJ stressed his agreement with Counsel for the administrators to the effect that the "proposal" in the present case was limited to how the cash realised by the proposed disposal of the business and assets of the Club were disposed of, and that it did not extend to the terms of the Sale Agreement itself. In the present case, third party assets, namely the Buyer's monies, were to be used to pay the Priority Creditors.

***"It would be unfortunate, indeed, surprising, if those monies, which do not, and never did, belong to the Company legally or beneficially, and have in no way been contributed to by the Company, should nonetheless be caught by s. 4(4)(a). Such a result would seriously hamper a regime which is intended to be flexible, and would render it much less likely that third parties would be prepared to provide assets to assist in the achievement of a voluntary arrangement. It would also be surprising if those monies which do not fall within the direct ambit of the Proposal, and are not reflected in the price paid to the Company, should fall within the ambit of s. 4(4)(a)."***

15. Having reached this conclusion, Neuberger LJ concluded that s. 4(4)(a) was not infringed in the present case. But his Lordship went on to consider the policy argument raised by the Inland Revenue that if s. 4(4)(a) did not apply to an arrangement such as the Sale Agreement, because it is not part of a "proposal", then it would follow that s. 4(4)(a) could be easily avoided by the company concerned entering into an agreement with a third party whereby the third party agreed to pay non-preferential creditors. His Lordship did not accept this conclusion, pointing out that the preferential creditor could certainly apply to Court for relief, by relying potentially on a number of provisions of the IA 1986, including those allowing a challenge based on unfair prejudice, and that if the proposal truly was improper or unfair, the court would no doubt deal with it accordingly.

### Commentary

16. This is an important decision for all insolvency and sports lawyers. As an increasing number of football clubs experience financial difficulty, whether as a result of inflated wage bills, declining television revenues, relegation, or a combination of those factors, the legal mechanisms which enable financial restructurings assume ever greater importance.

17. As the United Kingdom's insolvency laws move ever further towards promoting a "rescue culture", there is an increasing move away from fixed rules towards a more flexible process focussed on bargaining, a move which creates opportunities for certain creditors to demand more from the process. Company voluntary arrangements are designed to be a particularly flexible option in the case of corporate insolvency, in addition to liquidation, administration and administrative receivership. The Inland Revenue's position in this particular instance was always an unattractive one, as it actually did rather well out of the proposed CVA, as all the judges who heard this case acknowledged. The decision is to be welcomed for refusing to reward a particular creditor, the Inland Revenue, which was threatening to delay or frustrate, in the hopes of receiving a higher dividend as a "sweetener", what was the only commercial option open to the Club.

18. The real anomaly in the present case is the privileged position of the "football creditors" under the Articles of Association of the League. Lightman J pointed out that the power of the League, because of its commercial clout over football clubs, to ensure that one particular group of unsecured creditors are paid in full "may be objectionable". But, it is submitted that this is not a question which can be dealt with by the insolvency legislation. It is to be noted that the All Party Parliamentary Group in its First Inquiry Report has indeed found this power objectionable and called for its abolition. On 24 May 2004, the question was raised in Parliament as to "whether it was appropriate in cases where football clubs go into administration for football creditors to take precedence over the claims of the Inland Revenue". Cases such as the present may yet lead to legislative change. Watch this space.

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