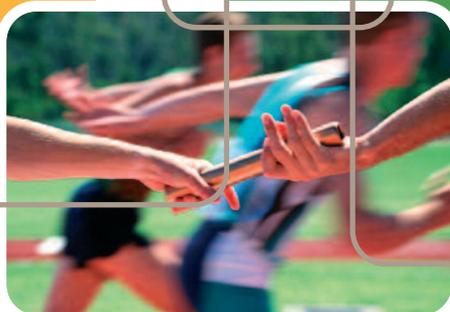
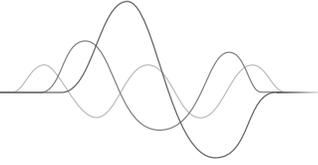


# Sport and the Law Journal



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# Contents

## EDITORIAL

- 2 Simon Gardiner

## OPINION AND PRACTICE

- 6 **A warning to disciplinary panels of regulatory bodies: The impact of “Bloodgate” goes beyond sport**  
Chris Connolly
- 9 **Financial fair play is on the way**  
Gerry Boon
- 15 **Football playing contracts: The consequences for termination without just cause**  
Simon Pentol
- 23 **The Bribery Act 2010: Application to sport**  
Susannah Cogman, Rob Hunt and Neil Blake

## ANALYSIS

- 28 **Match fixing in sport: Recent developments**  
Simon Gardiner
- 39 **When lawful sport become unlawful: A case study into doping within the professional ranks of golf**  
Robert McTernaghan

## REVIEWS AND REPORTS

- 56 **European Union Sports Policy Update**  
Katarina Pijetlovic
- 61 **Sports Law Foreign Update**  
Walter Cairns
- 74 **Book Review**  
David Dovey
- 76 **Sport and the Law Journal Reports**

# Editorial

BY SIMON GARDINER, EDITOR

**This issue concerns a number of on-going and current topics. The Opinion and Practice section provides comment on four topical issues. First, Chris Connolly's 'Warning to disciplinary panels of regulatory bodies: the impact of "Bloodgate" goes beyond sport' evaluates the most recent fall-out from the 'Bloodgate' incident. Second, Gerry Boon's 'Financial fair play is on the way' focuses on attempts of UEFA to require professional football clubs to operate within prescribed financial restraints. Third, Simon Pentol's 'Football playing contracts: The consequences for termination without just cause', discusses the on-going issue of what are the circumstances footballers can unilaterally terminate their playing contracts. Fourthly, Susannah Cogman, Rob Hunt and Neil Blake's, 'The Bribery Act 2010: Application to sport' considers the impact that this new legislation will have on the sporting world.**

The Analysis section has two articles. Simon Gardiner's 'Match fixing in sport: recent developments' provides an overview of developments over the last years concerning legal and sports policy interventions to combat match fixing. Robert McTernaghan's 'When lawful sport become unlawful: a case study into doping within the professional ranks of golf', examines the adoption of the WADA Code by professional golf and the attitudes of players to the anti-doping requirements within this sport.

The Reviews section has the usual items, the Book Reviews and the Sport and the Law Journal Reports, which are augmented by the new feature of a regular EU Law Sports Policy update. The International Sports Law update will regularly be a shortened version of what has been produced in the past, with a focus on a specific issue or developments in a given country. Additional materials from Walter Cairns will also be available on the BASL web site.

## Child Protection

The recent well-publicised incident in Preston, where a fight between two boys watched by adults at a cage-fighting event was filmed and placed on YouTube, led to a significant amount of negative comment. A NSPCC representative stated 'the fight was "disturbing" and warned parents against allowing youngsters to take part in this sort of sport while they were developing'. A spokesperson from the British Medical Association (BMA) said sports such as boxing and cage-fighting were "sometimes defended on the grounds that children learn to work through their aggression with discipline and control ... (however) ... many other sports, such as athletics, swimming, judo and football, require discipline but do not pose the same threat of brain injury". The fact that the 'fight' was in a 'caged' location made it look, as the Culture Secretary, Jeremy Hunt, was reported as saying, 'very barbaric'.

The boys, aged eight and nine, were filmed wrestling in a cage at a Labour club in Preston in front of about 250 adults. The father of one of the boys, Nick Hartley, was quoted as commenting that his son had not been at risk, "He loves the sport. It's not one bit dangerous, it's a controlled sport."

The event was a licensed by Preston Council, who reported as stating they would urgently review future granting of licences in such circumstances. The Police have been invited to establish whether there could be any criminal liability for those involved. Could this be seen as an unlawful activity per se and the organisers of the event and those present, potentially liable? What about liability of parents who could be seen as failing to carry out their duty of care towards the children and under legislation such as the Children and Young Persons Act?

The age of the children would make it difficult to argue that they would have the ability to provide informed consent to the inherent dangers in this type of activity under the Gillick

competency test. A key issue would be whether there was any measurable harm caused (both of a physical and psychiatric nature) and/or medical issue such as a wound or need for hospitalisation. Issues of civil liability would revolve around whether there was a failure of duty of care of the organisers.

A counter position is that there is a belief that condemnation of such activities is far too paternalistic in tone and often characterised in the media as symptomatic of the 'nanny state'. A major issue is how we differentiate between the plethora of fighting and martial art activities and those that are acceptable and those that are not. Many children of a similar age (and of both sexes) take part in a range of these types of activities across the country. The organiser of the event argued that it had taken place in a 'safe environment' and under strict conditions. He was reported as stating: "What took place was safer than what happens in judo clubs and rugby training grounds up and down the country ... People are reacting to the negative stereotype around cage-fighting and the setting within a cage, but a cage makes it safer for the participant because it stops them falling from the ring ... The event involving the children was submission wrestling. Contact between the participants was restricted at all times."

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The Police have been invited to establish whether there could be any criminal liability for those involved. Could this be seen as an unlawful activity per se and the organisers of the event and those present are potentially liable

This incident lies within the general discourse concerning the protection of children and their participation in sport. The issue of the treatment of children in sport mirrors increasing awareness of the rights of children generally in society. Although the focus is on participation in sport, there is evidence of considerable exploitation of children within the wider sports industry. Sport provides many positive opportunities for young people to participate individually or more commonly in groups. This is generally at a recreational 'play' level; however, increasingly young people are taking part in highly competitive and sometimes elite level sport. The image of parents shouting at their children and haranguing the officials has become not uncommon at school and Sunday morning football: even at this level winning is all. In sports such as tennis, swimming and gymnastics the age of participants at elite level has become ever younger.

Awareness of the existence and extent of sexual and physical abuse of children has appeared fairly recently in sport as it has generally in society, with realisation that more effective protection from exploitation of children in sport is required. This exploitation ranges from clear acts of sexual and physical abuse at one extreme to oppressive encouragement at the other. Clear acts of abuse are almost inevitably going to be contrary to the criminal law. Oppressive encouragement is much more problematic to regulate. However, detection of all forms of exploitation in sport is difficult.

Of course a counterpoint to the awareness of this problem, at a time of increased levels of obesity, the health benefits of participation are clearly recognised. However the rights of children to have a safe experience and environment during hoer participation in sport both at the elite and recreational level is paramount. A recent Report highlights this continuing debate. Protecting children from violence in sport: a review with a focus on industrialized countries. (Unique 2010) was recently published by the Unicef Innocenti Research Centre. Divided into four chapters, the Review begins with an introduction that sets out the background as to why sport matters to children and a brief history of the intervention of the United Nations (UN) in such issues. Included here are the definitions of sport and

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## The issue of the treatment of children in sport mirrors increasing awareness of the rights of children generally in society

violence that have set the parameters of the review. The definition of violence is the same as that used in Article 19 of the Convention on the Rights of the Child (CRC): “[All] forms of physical or mental violence, injury and abuse, neglect, negligence treatment, maltreatment or exploitation, including sexual abuse while in the care of parents(s), legal guardian(s) or any other person who has the care of the child.” In addition, the definition used by the World Health Association (WHO) is drawn on in order to include a wide range of behaviours and injuries that might occur during a child’s participation in sport: “[The] intentional use of any physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation (WHO 2002).

However as Yvonne Williams, an active researcher in the area notes, ‘[g]ood intentions and written policies mean nothing if they are not translated into action’ and it could be that the actions of individuals will prove to be more important in combating violence in sport than the actions of states (Williams, Y, Protecting children from violence in sport: a Unicef Report ESLJ 9(1) (2011). This Report provides an admirable overview of the issue and provides a very extensive bibliography of literature within the area. The focus on developed industrialised countries, reminds us that the caged fighting incident in Preston and other similar events are ones that we need to examine carefully as far as whether any exploitation of children is taking place.

Finally, the Journal welcomes contributions from all BASL members and other readers in any of the sections of the Journal including reviews of future sports law related publications. Please contact the Editor with any suggested offerings. 



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# Opinion and practice



# A warning to disciplinary panels of regulatory bodies: The impact of “Bloodgate” goes beyond sport

BY CHRIS CONNOLLY, SOLICITOR, A&L GOODBODY

## Introduction

Many people will remember the infamous fake blood incident that tarnished the sport of rugby union which became known as “Bloodgate”. It is interesting to note that while Harlequins Rugby Club recently won the Amlin Challenge Cup and Tom Williams has been playing for the team, the consequences for one off the field participant have been much more severe.

Former Harlequins physiotherapist Stephen Brennan (the **Appellant**) was struck off for his role in the “Bloodgate” scandal by a panel of the Conduct and Competence Committee of the Health Professions Council (the **Panel**). Following a challenge by the Appellant to the decision of the Panel on the basis that inadequate reasoning had been provided by them, the English High Court quashed this decision and remitted it to the same Panel with the direction that it reach a decision and clearly explain the reasons for that decision.

This decision will be of interest to practitioners who advise disciplinary panels of regulatory bodies in both a sporting and non-sporting context as it deals with a key issue of the extent to which such panels should such panels explain the reasons for their decision.

## Background

The disciplinary action stemmed from an incident which occurred during a European Rugby (Heineken) Cup quarter final match between Harlequins and Leinster in April 2009.

The Appellant, who was the Harlequins physiotherapist at the time, was instructed by Dean Richards, the then Harlequins coach, to bring a fake blood capsule onto the pitch and give it to Harlequins player Tom Williams to enable him to fake a blood injury thus permitting a substitution to be made. The Appellant followed the

instruction, the ploy was successful but Harlequins lost the match. Following the incident, there was widespread suspicion that a fake blood injury had occurred and the organisers of the tournament, European Rugby Cup Limited (**ERC**) launched an investigation.

At the initial ERC disciplinary hearing in July 2009, the Appellant along with Tom Williams, Dean Richards and Dr. Wendy Chapman, the Harlequins’ match-day doctor, each produced a false account of events. Despite this, Harlequins and Tom Williams were found guilty of misconduct and the others were cleared.

Tom Williams subsequently decided to tell the truth and an appeal by the ERC followed. At the appeal, the Appellant accepted that he had lied at the initial disciplinary hearing and revealed that he had been involved in four previous fake blood injury incidents. As a result, the Appellant was banned from participating in all rugby activities for two years.

Subsequently, the matter became the subject of a fitness to practice hearing before the Panel, which formed part of the regulator of physiotherapists in the UK. The Panel ruled that the Appellant’s actions were sufficiently serious to justify the imposition of him being struck off its register, which was the highest penalty possible. The Appellant subsequently appealed this decision to the English High Court.

## First Panel Hearing

The Panel had the power to impose sanctions on the Appellant under Article 29(5) of the Health Professions Order 2001 ranging from a caution up to strike off.

The imposition of sanctions was guided by the Health Professions Council’s Indicative Sanctions Policy. Importantly for the Appellant, it stated that fitness to practice proceedings are not intended to be punitive, rather the focus for the Panel

A WARNING TO DISCIPLINARY PANELS OF  
REGULATORY BODIES: THE IMPACT OF  
“BLOODGATE” GOES BEYOND SPORT

should be to take the most appropriate steps to protect the public from any future risk.

The Panel, in choosing the option of strike off, stated that it arrived at the decision:

*“...not only by a process of elimination but also because it is the sanction the panel considers to be necessary for the public and other professionals to understand that this sort of behaviour is unacceptable.”*

### **Appeal**

The Appellant challenged the decision of the Panel on the basis that inadequate reasoning had been provided by them. He did not appeal against the findings of misconduct, nor against the conclusion that his actions impaired his fitness to practice as a physiotherapist.

The Court ruled that the Panel “...had gone to the ultimate sanction, without explaining why in light of the evidence, a lesser sanction was not appropriate...It’s reasoning is not legally adequate; it does not enable the informed reader to know what view it took of the important planks in Mr Brennan’s case.”

Essentially, Mr. Justice Ouseley was of the view that it was not sufficiently clear from the Panel’s decision why it believed that it was proportionate to impose the sanction of strike off rather than a lesser sanction.

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At the appeal, the Appellant accepted that he had lied at the initial disciplinary hearing and revealed that he had been involved in four previous fake blood injury incidents

It was stated that while the Indicative Sanctions Policy stated that striking off should only be imposed where there is no other way to protect the public, he noted that due to the unique circumstances of the case, no need to protect the public existed.

After all, the Panel had acknowledged that the Appellant was still recognised as being an excellent physiotherapist and the misconduct had not occurred in the course of treating a patient nor was the dishonesty alleged against a patient, nor were his actions against a patient’s interests. Rather the Appellant was instructed to engage in the deceptive act by Dean Richards, the Harlequins Coach.

Rather than imposing the sanction of strike off on the basis of a need to protect the public, the Panel imposed the sanction in order to deter others from engaging in similar behaviour and also to protect and maintain confidence in the profession of physiotherapy. However, what the Panel didn’t do was assess the Appellant’s case in detail, or assess whether another sanction would have been a more proportionate way to achieve the same aim. As a result of the Panel’s failure to take these steps, their decision was quashed.

The decision does not represent a departure from the law in England or Ireland in this area. The current law in both jurisdictions is that the reasons given for a decision must be intelligible and adequate and that a challenge based on a failure to provide reasons will only succeed if the party challenging the decision can satisfy a court that he has been substantially prejudiced by the failure to give reasons.

The High Court recognised the substantial prejudice and serious consequences of the Panel’s decision for the Appellant, who had lost the position he had been due to take up as physiotherapist with the English national rugby team and whose private clinic had closed, causing a loss of 75% of his income, and this justified the Panel’s decision being quashed.

It is interesting that the Mr Justice Ouseley then chose to remit the matter to the Panel with the direction that it reach

## A WARNING TO DISCIPLINARY PANELS OF REGULATORY BODIES: THE IMPACT OF “BLOODGATE” GOES BEYOND SPORT

a reasoned decision on the chosen sanction and avoided usurping the function of the Panel.

It was stated that remitting the matter to the Panel was appropriate because it had heard all the evidence in the initial hearing and it was recognised that the Panel was best qualified to judge what the best interests of the profession of physiotherapy were and how these could be best protected. The court also ruled that the second hearing would be in front of the same panel that had made the original ruling.

### **Second Panel Hearing**

On Thursday 19 May 2011, following a two day hearing, the Panel ruled that the decision to strike off the Appellant would be replaced with a caution order to be noted on the register of physiotherapists for the maximum period of five years.

The Panel stated that its decision stemmed from the belief that the Appellant had shown genuine remorse for his actions, which it acknowledged was in contrast to the position adopted by the Panel at the first hearing.

The Panel also acknowledged that the Appellant had both professionally and personally suffered a great deal from the incident for the reasons outlined above. It was also significant that the Appellant had taken steps towards remediating his actions including giving a series of lectures to other physiotherapists and health professionals about professional standards and medical ethics in the context of his unique experience. As a result of all these factors, it was believed that there was a very low risk of such conduct being repeated in the future.

### **Implications for Regulatory Bodies**

It is worth noting that in Ireland there have been very few cases where the decision of a regulatory body has been struck down for a failure to give sufficient reasons. The current position in Irish law is that the decision of a disciplinary panel of a regulatory body should be intelligible and adequate and that a challenge based on a failure to provide reasons will only succeed if the party challenging the decision can satisfy a court that he has been substantially prejudiced by the failure to give reasons.

Practitioners should be aware that this case demonstrates that where a disciplinary panel of sporting or non-sporting regulatory bodies does not give adequate reasons for a decision which has seriously detrimental consequences for the person before it, that decision may be open to legal challenge.

In order to avoid such a challenge, such a panel should give detailed reasons for its decision including a clear assessment of the merits or otherwise of the case before it. It should also clearly state the aim of any sanction and why the particular sanction chosen is believed to be the most proportionate way to achieve that aim. If necessary, legal advice should be taken before its reasons are formulated. Legal advice may also be appropriate when drafting or amending rules of procedure or policies applicable to disciplinary bodies. **BASL**

# Financial fair play is on the way

BY GERRY BOON

The financial fair play requirements start to apply in summer 2011. UEFA has successfully travelled a long way in developing these new rules, and on the road ahead there will be some significant challenges to address to achieve robust and consistent implementation across Europe.

## The solid foundation of club licensing

I know, from personal experience, that some initial doubts were expressed in a number of quarters a decade or so ago about the potential effectiveness and longevity of UEFA's club licensing system; however, 2010/11 was the seventh season that clubs have required a licence to enter UEFA competitions. This relatively low profile regime, requiring clubs to exhibit minimum quality levels across a range of criteria (sporting, infrastructure, personnel and administrative, legal and financial matters), has been receiving increasing recognition - amongst the football family, within the media, and politically - and its success has provided a solid foundation on which to build the new 'financial fair play' requirements.

According to the Independent European Sport Review 2006, *"the introduction of the club licensing system by UEFA in 2004/05 represents a quantum step forward in terms of improving transparency and the overall running of football clubs and goes some way to promote standardisation of the regulatory requirements in football across Europe."*<sup>1</sup>

The European Commission has used more politically-measured tones, in the 2007 White Paper on Sport they *"acknowledged the usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport"*<sup>2</sup>

and more recently (January 2011) in the Communication on Sport commented that

*"Club licensing systems offer a valuable tool to ensure the integrity of competitions. The Commission welcomes the adoption of measures aimed at enhancing financial fair play in European football."*<sup>3</sup>

Whilst UEFA centrally sets the minimum requirements for entry to its competitions, club licensing is actually implemented and operated by each of the 53 national associations that are responsible for licensing decisions in respect of their clubs. 611 top division clubs had applied for a licence to enter UEFA competitions for the 2010/11 season. Of these, 123 clubs fell short of the minimum licensing standards, the most common reason being failure to meet the financial criteria. For the seven seasons to 2010/11 there has been a total of 27 clubs who had 'qualified' for either UEFA Champions League or UEFA Europa League on sporting merit that have been prevented from participating on licensing grounds. And UEFA has also played a firm hand with regard to cases such as FC PAOK Salonika<sup>4</sup> and RCD Mallorca<sup>5</sup>, both refused admission to UEFA competitions after initially being granted a licence by their respective national association. To be fair, this is a system with teeth.

## The financial fair play concept

I wrote in August 1995 that '... controlling the wage bill is, long term, football's greatest challenge'.<sup>6</sup> That was nearly 16 years ago and I believe that issue has long been clear for all to see. However, in an international player market, regulatory intervention is only capable of being addressed effectively if it is led at a pan-European level. UEFA's approach has placed particular emphasis on the view that UEFA has a duty to consider the systemic environment of European club football, in particular the wider inflationary impact of clubs' spending on salaries and player transfer fees and increasing levels of debt. Conflating factors in 2008/09 provided impetus for

## FINANCIAL FAIR PLAY IS ON THE WAY

change, given the economic downturn across Europe, the somewhat alarming picture of European club football finance (as set out in UEFA's Benchmarking Report - 1st edition compiled in 2008), bolder leadership from UEFA's new president, and a growing consensus for action amongst the football family.

Some additional groundwork had already been laid in March 2009 when UEFA created the new quasi-independent Club Financial Control Panel ("the CFCP"), chaired by Jean-Luc Dehaene (a former Prime Minister of Belgium). Initially the CFCP has been given some responsibilities in respect of monitoring the correct application of club licensing systems across Europe. Going forward, the CFCP's prominence will increase significantly, as it will govern the financial fair play requirements. In contrast to club licensing, the national associations will have only a limited role in respect of financial fair play and I am not aware that there is currently any plan to roll-out the requirements to domestic competitions.

In September 2009 UEFA's Executive Committee approved the financial fair play concept for the well-being of European club football. This followed recommendations made by the Professional Football Strategy Council, unanimous support by the UEFA Club Competitions Committee and approval by the European Club Association Board.<sup>7</sup>

### From initial concept to full regulations

At the outset there was some doubt about whether or not it would be possible to translate the briefly defined concept (of 'financial fair play') into a workable pan-European solution, as the Devil would be in the detail. However, with the momentum of widespread stakeholder support and a growing urgency for action, UEFA displayed dynamic leadership to forge ahead and turn the initial concept into a full set of regulations within a nine month period.

Various stakeholders have complimented UEFA's leadership and their consultative approach during what was, for football, a remarkably rapid regulatory development process. Stakeholder management is crucial for any sports body seeking to achieve change, and UEFA's goal was aided by the formal consultative structures they have installed in recent years and their ongoing dialogue with Brussels. Behind the scenes, Deloitte's Sports Business Group assisted UEFA in

developing these new regulations, using their wealth of experience in respect of football's financial reporting and regulatory matters in sport as well as their direct experience from working with UEFA on the design and implementation of the original club licensing regime.

On 27 May 2010, UEFA's Executive Committee approved the UEFA Club Licensing and Financial Fair Play Regulations<sup>8</sup> ("the Regulations"); 85 pages that incorporate both the updated club licensing requirements and now also the club monitoring requirements (most commonly referred to as the "financial fair play requirements"). The objectives are clear, succinct and, in my view, unarguable:

#### Article 2(2) – Objectives

These Regulations aim to achieve financial fair play in UEFA club competitions and in particular:

- a) to improve the economic and financial capability of the clubs, increasing their transparency and credibility;
- b) to place the necessary importance on the protection of creditors by ensuring that clubs settle their liabilities with players, social/tax authorities and other clubs punctually;
- c) to introduce more discipline and rationality in club football finances;
- d) to encourage clubs to operate on the basis of their own revenues;
- e) to encourage responsible spending for the long-term benefit of football;
- f) to protect the long-term viability and sustainability of European club football.

### New requirements being implemented from the 2011/12 licence season

All clubs that have qualified for a UEFA club competition must comply with the financial fair play requirements i.e. a population of 235 clubs each season, being a subset of the circa 600 top division clubs that will have gone through the club licensing process.

The financial fair play requirements supplement the existing financial criteria of club licensing. Club licensing includes,

## FINANCIAL FAIR PLAY IS ON THE WAY

inter alia, a requirement for each club to submit audited annual financial statements (in respect of the latest statutory financial closing date prior to the licensing decision); and a requirement to prove that as at 31 March it has no overdue payables; and, for clubs in breach of defined indicators, a requirement to prepare and submit future financial information (i.e. a budget for a defined future period including a description of the underlying key assumptions).

Whilst discussion of the more noteworthy break-even requirement follows later, some of the financial fair play requirements will apply for the first time from 1 June 2011 for the 2011/12 licence season:

- Reporting requirements in respect of no overdue payables (towards football clubs and towards employees and/or social/tax authorities) as at 30 June. If a club has overdue payables, it will additionally be assessed at 30 September;
- For those clubs in breach of defined indicators, a requirement to prepare and submit updated/new future financial information; and
- A duty for a club to report any significant changes since the time of the licensing decision including, but not limited to, events of major economic importance.

As set out in the Regulations, the break-even requirement “will enter into force for the financial statements for the reporting period ending in 2012”. For a club with a financial reporting period ending 30 June, this means its financial results (shown by audited accounts) for the year from 1 July 2011 to 30 June 2012 will be the first to be assessed, and assessed for the 2013/14 licence season.

In an international player market, regulatory intervention is only capable of being addressed effectively if it is led at a pan-European level

Smaller clubs will be exempt from the break-even requirement, being those clubs with income and expenses below €5 million. Based on a simulation exercise set out in UEFA's latest Benchmarking Report (2009), the break-even requirement would have applied to 54% of clubs entering the UEFA competitions for 2010/11, and to almost all clubs that reached the group stage (76 out of 80 clubs).

### Summary of the break-even requirement

Whilst the basic premise of the break-even requirement is that clubs should ‘live within their means’, the Regulations are inevitably more complex.

The break-even result for a reporting period is calculated as “the difference between relevant income and relevant expenses”. A club's management must prepare the calculation based on, and reconciled to, their club's audited annual financial statements and underlying accounting records.

The break-even requirement uses a multi-year approach. The aggregate break-even result is the sum of the break-even results of three reporting periods, the latest being the reporting period ending in the calendar year that the UEFA competitions commence (referred to as reporting period T), the reporting period ending in the calendar year before commencement of the relevant UEFA competitions (T-1), and the preceding reporting period (T-2). To explain this I reproduce an example from UEFA's Regulations.

#### UEFA Competitions for the 2015/16 season

T = Financial Report for year ending in 2015

T-1 = Financial Report for year ending in 2014

T-2 = Financial Report for year ending in 2013

The eagle-eyed amongst you will have noted that most English/Scottish clubs have year-ends of June or July; also that it usually takes a number of months after that year-end before the accounts are audited, signed-off and filed; and, furthermore, that UEFA's competitions (or the qualifying stages thereof) start in July/August. In practice, therefore, I suspect the 2015 (period T in the above example) financial reporting would likely be of unaudited information and possibly (some clubs in Europe have December year-ends) a combination of actual and budget unaudited information.

## FINANCIAL FAIR PLAY IS ON THE WAY

Back to the assessment itself - if the aggregate break-even result is negative, then the club may demonstrate that the aggregate deficit is reduced by a surplus (if any) resulting from the sum of the preceding two reporting periods (i.e. reporting periods T-3 and T-4).

The Regulations define a tolerable level of aggregate deficit for a club. The acceptable deviation is an aggregate break-even deficit of €5 million (C. £4.45 million at 30 April exchange rates). However, taking note of stakeholder representations to allow some level of owner funding, the Regulations permit a club to have an aggregate break-even deficit greater than €5 million, but only if such excess is entirely 'covered' by unconditional (and non-repayable) contributions - for example additional share capital or contributions by way of donation or income to the club from related parties<sup>9</sup>. For the licence seasons 2013/14 and 2014/15 an aggregate break-even deficit of up to €45 million (c. £40m at 30 April 2011 exchange rates), if covered as above, is allowed. For the licence seasons 2015/16, 2016/17 and 2017/18, the 'permitted' aggregate break-even deficit reduces to a figure of up to €30 million (c. £26m), if covered as above. For licence seasons 2018/19 and onwards, a lower level will be set by UEFA in due course.

### Calculating the break-even result

Relevant income and relevant expenses are defined in some detail in the Regulations. For the vast majority of clubs, it should be a relatively straightforward calculation.

In summary, relevant income includes all conventional revenue streams for a football club and also surpluses on player transfer disposals. Relevant expenses include all conventional types of expenditure by a football club, the cost of player transfer acquisitions and finance costs; but excludes depreciation of tangible fixed assets (e.g. the Stadium), amortisation of intangible fixed assets (other than in respect of player transfer costs which are relevant expenses), expenditure on youth and community development activities, and tax expenses.

In calculating the break-even result, player trading transactions must be treated comparably to the club's audited annual financial statements, so should not be subject to inappropriate manipulation.

Both relevant income and expenses do include the results of non-football operations, unless these are obviously not related to the club (which circumstances are expected to be rare).

The Regulations are also alive to the issue of the 'careful selection' of the reporting entity (for example any attempt to separate income and costs between separate subsidiaries of a 'group' and so 'massage the break even figure'), so that all relevant income and expenses in respect of a club's operations must be included in the break-even calculation.

For any club lucky enough to have an owner with very deep pockets willing to provide financial support, the new rules do not limit investment in any of stadium and training facilities, youth development activities and community activities. Such spending, for the long term benefit of a club, is encouraged by UEFA. Together with the tolerable level of deficit that can be covered by an owner's unconditional contributions, the new rules do therefore allow an owner to provide significant financial support, but seek to limit excessive cases if such a club/owner wishes to compete in UEFA competitions. I am 100% in favour of the small push this may give to improve long-term competitive balance (or should I say the curb on extreme spending leading to competitive imbalance)!

Inevitably, commentators have tended to focus on possible circumvention of the Regulations by what they speculate might be unusually high income injections for shirt/stadium sponsorship arrangements (or similar) from wealthy owners and/or related parties, which might then be spent on player transfer fees and/or salaries. However, the Regulations prevent such activity, by requiring relevant income and expenses from related parties to be adjusted to reflect the 'fair value' of any such transactions. This will be one of the more challenging aspects of the break-even requirements, requiring both transparency of related party relationships (which is actually already a disclosure requirement set out in both accounting standards, and in the existing club licensing requirements) and an assessment of the fair value of a related party transaction (being a new requirement for which, in due course, we can expect UEFA to provide more guidance on evidential standards).

To dispel another myth, the new rules do not directly attack debt; there is no absolute cap on debt. "Debt" has become a dirty-word in football, quite fairly in some cases albeit much

FINANCIAL FAIR PLAY IS ON THE WAY

of the media commentary on the subject is usually plagued with alarming inaccuracies. Indirectly, the new rules do discourage debt funding, both because finance costs are part of the break-even calculation and, also, the CFCP is empowered proactively to delve further into the debt situation of a club.

**Illustrative example: Assessment of FairPlay FC for the licence season 2016/17.**

I set out below an illustrative calculation of the break-even result for FairPlay FC, based on the audited annual financial statements and underlying accounting records for the year ended 30 June 2015 (being reporting period T-1). Note the figures themselves are of no particular significance, the illustrations are included to show the process of the calculation methodology.

	€m
Total revenue	100
Profit on disposal of player registrations	5
Finance income	-
Less: Adjustment for income transaction with related party above fair value	(10)
<b>Relevant income</b>	<b>95</b>
Total expenses	85
Amortisation of player registrations and loss on disposal of player registrations	20
Finance costs and dividends	5
Less: Depreciation of tangible fixed assets	(3)
Less: Expenditure on youth development activities	(2)
Less: Expenditure on community development activities	(1)
Add: Expense transactions with related party below fair value	-
<b>Relevant expenses</b>	<b>104</b>
<b>Break-event result - surplus/(deficit)</b>	<b>(9)</b>

Illustrative calculation of the aggregate break-even result for FairPlay FC for assessment for licence season 2016/17:

	Reporting period			Aggregate result (€m)
	T-2 y/e 30.6.14	T-1 y/e 30.6.15	T y/e 30.6.16	
Break even result (€m)	(3)	(9)	(6)	(18)
Amount of surplus (if any) from T-3 and T-4				3
Adjusted aggregate break-even result				(15)
Break-even result in excess of acceptable deviation of €5m				(10)
Excess amount covered by unconditional contributions?				Yes
<b>Conclusion</b>				<b>OK, fulfilled</b>

Notes – in the above illustration I have assumed that unconditional contributions from owners or others ‘covered’ the amount of the break-even deficit beyond the acceptable tolerance (€10 million). The figures for Year T may well be unaudited given the proximity of the year-end to the assessment date.

**The implications of breaching the break-even requirement**

If a club has not fulfilled the break-even requirement, the Regulations empower the CFCP to refer the club to UEFA’s Organs for Administration of Justice. In making their decision, the CFCP will also consider some other factors<sup>10</sup> as described in Annex XI to the Regulations. It remains to be seen how these “other factors” may influence both the CFCP’s decision making and the selection of a disciplinary sanction. Compared to the nature of disciplinary cases normally tackled by UEFA, these cases will present the decision-makers with high profile and potentially more complex challenges. This will be an interesting area of case-law in due course.

Commenting on the implications for a club being in breach of the break-even requirement, UEFA has been talking tough. Whilst repeatedly emphasising that the new requirements have widespread support and aim to help clubs, rather than punish them, UEFA have also warned that clubs that do not comply will have to “face the music”. That’s a tune that could involve warnings, fines and, ultimately, exclusion from future UEFA competitions. Club licensing has already pointed the way.

Based on a simulation exercise set out in UEFA’s latest Benchmarking Report <sup>11</sup>, relating to the clubs in UEFA competitions in 2010/11, around 30 clubs (c.13% of

## FINANCIAL FAIR PLAY IS ON THE WAY

entrants) exhibited an aggregate break-even deficit in excess of €5m, of which 20 clubs were amongst the 80 clubs participating in the group stages. UEFA set out various caveats to the simulation exercise, including that the aggregate break-even deficit of some of these clubs may have been within the acceptable deviation if covered by unconditional contributions, but it at least provides an indication that a significant number of clubs around Europe may well need to change their business model to comply with the new requirements.

### Final remarks

So, will the financial fair play requirements make a difference to the future of European club football? I think so, and hope so. But what do others say?

Albeit it has sometimes been difficult to reconcile some clubs' public utterances of support for, and intent to comply with, the break-even requirement, with their actual financial results and player transfer activity, the clubs themselves are certainly talking a good game.

Karl-Heinz Rummenigge (European Club Association Chairman) welcomed the new rules<sup>12</sup> saying "This is a really huge achievement...to set measures that will shape the future of European club football into a more responsible business and ultimately a more sustainable one. As clubs, by fully supporting these financial fair play regulations, we have agreed to change the way we operate and that is a substantial step forward." Manchester City CEO Garry Cook reportedly<sup>13</sup> commented "Financial fair play is on our conscience. We talk about it at every board meeting, and its part of our long-term plan. Clearly our intention is to comply." Less warmly, AC Milan CEO Adriano Galliani recently commented<sup>14</sup> that "Financial fair play hurts Italy. There will no longer be the patrons who can intervene."

Much has already been written – speculatively - about the potential implications of the new requirements, and clearly there remains a significant challenge for those implementing the regime to avoid false perceptions developing amongst supporters and commentators (and perhaps even the legal profession?). UEFA has laid strong foundations and will need to continue to build more guidance and education on the road towards their first assessment of break-even results in the summer of 2013.

The culture of business compliance in countries like England and Scotland does not prevail in many other parts of Europe. To be fair, and be seen to be fair, UEFA and the CFCP must ensure that the new rules are implemented consistently on a pan-European basis. The increasing financial and on-pitch power of clubs in Eastern Europe will, I think, present a particular challenge for UEFA and CFCP.

We'll have to wait a few more years before a certain body of precedent is accumulated, in terms of understanding how UEFA's disciplinary organs will translate a quantum of non-compliance into proportionate and consistent sanctioning.

Financial fair play is on its way and there will be plenty more to journal. ■ **BSL**

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- 1 See *Independent European Sport Review 2006* at paragraph 5.23
- 2 See *European Commission, White Paper on Sport* (Brussels, 11.7.2007)
- 3 See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Developing the European Dimension in Sport* (Brussels, 18.1.2011, COM(2011) 12 final)
- 4 See CAS 2006/A/1110
- 5 *UEFA's Appeals Body decision* 30.7.2010
- 6 See *Deloitte (then Touche Ross) Annual Review of Football Finance (then Survey of Football Club Accounts) 1995* at page 21
- 7 See <http://www.eceurope.com/Default.aspx?id=1082771>. The European Club Association Board now represents 197 clubs drawn from every one of the 53 National Associations within UEFA and it replaced the G14 Group and European Club Forum, both dissolved at the beginning of 2008.
- 8 For the full text of the Regulations see or download from [http://en.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912\\_DOWNLOAD.pdf](http://en.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912_DOWNLOAD.pdf)
- 9 See Part D of Annex 10 *UEFA Club Licensing and Financial Fair Play Regulations, 2010* at page 80
- 10 For example - the quantum and trend of the result, projected future results, historical budgeting accuracy, debt levels and so on
- 11 See *Club Licensing Benchmarking Report Financial Year 2009 - The European Club Footballing Landscape* (www.uefa.com- 12.1.2011)
- 12 See [www.eceurope.com](http://www.eceurope.com) (27.5.2010)
- 13 See [www.telegraph.co.uk](http://www.telegraph.co.uk) (26.10.2010)
- 14 See [www.goal.com](http://www.goal.com) (14.4.2011)/Sky Sport Italia

# Football playing contracts: The consequences for termination without just cause

BY SIMON PENTOL, BARRISTER, 25 BEDFORD ROW

## Preface

The recent and much publicized purported threats by Carlos Tevez to walk out on Man City with three and a half years remaining on his contract have brought back in to focus the repercussions for unilateral breach of contract by a player and the compensation to be paid as a result thereof, in accordance with Article 17 of the FIFA Regulations for the Transfer and Status of Players (supra).

The pendulum that had seemingly swung strongly towards 'player power' following the decision of the CAS in the case of Webster [2008] (unilateral breach of contract by Player outside the Protected Period) has since swung back strongly in favour of the clubs, in line with the subsequent decisions of the CAS in the cases of:

- **Matuzalem** [2009] (unilateral breach of contract by Player outside the Protected Period);
- **Mutu** [2009] (termination by Club of Player's contract as a result of Player testing positive for cocaine);
- **El-Hadary** [2010] (unilateral breach of contract by Player inside the Protected Period); and
- **Appiah** [2010] (unilateral breach of contract by Player in unique circumstances).

Albeit the issues of liability and damages/compensation remain strictly separate, the complex factual nature of the cases invariably result in a high degree of overlap, whereupon the circumstances giving rise to the breach of contract will often be taken into account in the computation of damages in respect of both cause and effect.

The cases however make it difficult to establish a clear set of principles to be followed when assessing damage for breach of contract because:

- The (latter) cases by their nature are often complex and conflicting factually;
- They are often historic by virtue of the passage of time between the date of the (alleged) breach of contract and the date of final determination; and
- They can be distinguished both on their facts and by the relevant national law.

Careful analysis of the cases allows however, for the distillation of the following principles:

- In applying the Article 17 criteria, the CAS shall be diligent;
- The CAS will strongly assert the need for contractual stability;
- In applying the Article 17 criteria, the CAS has a considerable discretion;
- The nature of the hearing is adversarial (cf. inquisitorial);
- There is a duty upon the parties to produce solid evidence in support of the contentions upon which each relies;
- Each case is to be decided upon its own facts; and
- In its analysis of the amount of compensation to be paid, the CAS has chosen to follow the Swiss-law objective of **positive interest**, namely the determination of an amount of damages that would put the injured party in the position it would have been, had no breach of contract occurred – an approach that is compatible with English law in consideration of damages for breach of contract.

Simon Pentol (Barrister) examines both the historical context of the Article 17 criteria together with its application in the

## FOOTBALL PLAYING CONTRACTS: THE CONSEQUENCES FOR TERMINATION WITHOUT JUST CAUSE

leading cases, to both analyze the current legal position concerning compensation for breach of contract and consider the ramifications thereof.

### The History

The football transfer system has come into conflict with EU law in principle because on its face, it restricts the right to freedom of movement of workers within Europe.

In the oft-cited case of **Jean-Marc Bosman** (1995) the ECJ held among other things, that transfer fees for out of contract players (such as J-M B) were contrary to EU law for players moving between one EU nation and another.

As a result, clubs started signing players to longer contracts for fear of losing their players on free transfers.

The plot thickened in 2000 when the European Commission announced that it was considering taking legal action against the football authorities because the international transfer system then in place breached the right of freedom of movement of workers between EU states under the Treaty of Amsterdam, even for players still under contract. The argument ran, that footballers who wished to unilaterally break their contracts of employment should be able to leave their clubs with a term of notice as employees in other sectors are entitled so to do, with only a relatively small amount of compensation due in return.

To avoid both a collapse of the transfer system and legal action, a compromise was reached between the football authorities and the Commission that was ratified by the executive of FIFA in 2001 whereby for international transfers for players who signed a contract after 1st September 2001, there would be:

- Training Compensation for players under 23 years of age;
- Protection of contracts for the first 2-3 years (the Protected Period) by a sporting sanction of a four month suspension for a player who unilaterally breaches his contract within the Protected Period plus compensation for which the player (and a new club that induced the breach) would be jointly and severally liable. This was originally enshrined in Article 22 of the 2001 Regulations but is now set out fully at Article 17 of the current

Regulations (below) as the subject matter considered herein;

- Movement for players only in two 'transfer windows' per season; and
- The creation of an independent and objective disciplinary and arbitration system dealing with contractual disputes and compensation.

### Article 17 – “Consequences of Terminating a Contract Without Just Cause”

- 1) In all cases, the party in breach **shall** pay compensation. Subject to the provisions of Art. 20 re Training Compensation [namely, up to the end of the season of the player's 23rd birthday] **and unless otherwise provided for in the contract**, the compensation shall be calculated with due consideration for [1] the law of the country concerned, [2] the specificity of sport and [3] any other objective criteria. These criteria shall include: the remuneration etc due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to five years, the fees paid by the former club (amortised over the term of the contract) and whether the contractual breach falls within a **Protected Period** [namely three seasons/years following the entry into force of the contract where it is concluded prior to the 28th birthday of the player, or two seasons/years following the entry into force of the contract where it is concluded after the 28th birthday of the player].
- 2) Entitlement to compensation cannot be assigned. The Professional **and his New Club shall be jointly and severally liable for its payment.**
- 3) In addition to paying compensation, **sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period...** Unilateral breach without just cause or sporting just cause **after the Protected Period will not result in sporting sanctions.** Disciplinary measures may be imposed outside of the Protected Period for failure to give due notice of termination [ie within 15 days following the last official match of the season of the club with which he is registered].

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

- 4) In addition to paying compensation, **sporting sanctions shall be imposed on any club found to be inducing a breach of contract during the Protected Period.** It shall be **presumed** unless established to the contrary that any club signing a Professional who has terminated his contract without just cause has induced the Professional to commit a breach.
- 5) Any person subject to FIFA rules (club officials, players' agents, players etc) who induces a breach of contract to facilitate the transfer of the player shall be sanctioned.

These rules were put in place to deal essentially with players who choose to terminate their contracts prematurely in order to join another club on preferential terms in circumstances where that club might expect to avoid the need for paying a transfer fee to the original club.

Such is the nature of professional football however, the jurisprudence demonstrates not only the application of the criteria to a much wider set of circumstances but also, the range of circumstances where players by their actions effect a premature termination of their contracts without just cause.

### The CAS Application of the Article 17 Criteria

In *Heart of Midlothian v Webster and Wigan Athletic* (2008) the CAS appeared to rule that Article 17 effectively abolished transfer fees in the case of players who were outside the Protected Period

The Player signed for Hearts in 2001 from Arbroath for a fee of £75,000 and (significantly) re-signed with them in 2003 for four years until 2007. In May 2006, he effectively handed in his notice and shortly thereafter, signed for Wigan Athletic (absent a transfer fee). He had served three years of a 4-year contract. The Scottish FA's attempt to prevent the

release of the Player's ITC was blocked by the FIFA Player Status Committee that ruled the Player's actions followed the new rules because his actions fell outside the Protected Period. Hearts claimed compensation in the region of £5m, comprising £4m as the value of the lost transfer fee, £70,000 as reimbursement for the original transfer fee, £330,00 as remuneration due to the Player under his new contract (with Wigan) and £70,000 for commercial losses incurred by his move away from Hearts.

The CAS rejected Hearts' claim under all these heads on the basis that the sum equivalent to the transfer fee was not specified in the criteria established by Article 17 and would be punitive against the Player whilst unfairly enriching the Club especially as his market value owed as much to the Player as it did to anything done by the Club, the original transfer fee paid by the Club had been amortized over the term of his original contract, the value of his new contract was irrelevant as the breach occurred outside the Protected Period and the Club failed to establish the commercial losses allegedly suffered. In all the circumstances, the CAS fixed the level of compensation commensurate with the residual value of the Player's contract with the Hearts, namely £150,000 in respect of which, both the Player and Wigan were jointly liable even though there was no evidence that Wigan did anything to induce the breach of contract.

Notwithstanding the CAS reiterated that Article 17 is not intended to allow a player (or club) to unilaterally terminate a contract of employment without just cause and dismissed the claim to base compensation upon the purported value of a lost transfer fee by reason both that £4m had not been offered for him and even if it had, the player was at liberty not to move to the offering club choosing instead to remain at Hearts and 'sit out' the remaining year of his contract, many commentators nonetheless considered the decision as authority for the principle that players who were outside the Protected Period were free to resign and move to a new club of their choice without that club having to pay a transfer fee. The notion of a player being able to 'buy-out' the remainder of his contract for no more its residual value, had been born.

The wide interpretation given to the decision in **Webster** has since been given a more (accurate and) narrow expression by subsequent decisions of the CAS that both (re) establish the existence of the transfer (fee) system and emphasize the need for contractual stability whereby players (and clubs who may

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The football transfer system has come into conflict with EU law in principle because on its face, it restricts the right to freedom of movement

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

wish to acquire their services) should be left in no doubt that unilateral breach of contract without just cause will not be tolerated and compensation based on 'actual loss' will be the guiding principle.

In *FC Shakhtar Donetsk v Francelino Matuzalem, Real Zaragoza and FIFA (May 2009)* the CAS reasserted the need for contractual stability in football and effectively quashed the idea that Article 17 can be used as a simple buy-out clause by players for a predetermined amount of compensation.

The Player signed a 5-year contract with Shakhtar in July 2004 for a transfer fee of €8m and three years later (and therefore outside the Protected Period) notified the Club that he was unilaterally terminating his contract with immediate effect. The Club responded to the Player's notification by informing him (in writing) that his contract remained in force and that he was expected to report for pre-season duty. However and two days after having given his notice, the Player signed a three-year contract with Real Zaragoza. In response, Shakhtar initiated proceedings before the FIFA DRC claiming compensation of €25m from the Player and Zaragoza jointly and severally in accordance with the minimum release clause in the Player's contract. The DRC awarded Shakhtar €6.8m (€3.2m as the unamortized value of the original transfer fee paid by the Club plus €2.4m as the residual value of his playing contract, plus €1.2m under the heading of specificity of sport with reference to the unsatisfactory manner in which the Player departed the Club, with the result that all parties appealed to the CAS.

In July 2008, the Player was loaned to SS Lazio with an Option for a permanent transfer at a fee between €13-€14m.

It was not disputed that the Player breached his contract unilaterally, prematurely and without just cause. What was very much in dispute however, was the amount of compensation to be awarded.

The Player and Zaragoza argued that compensation should be limited to €3.2m in accordance with a clause in his contract to that effect in the event he should leave the Club before the expiration of his contract.

The Club argued that compensation should be €25m in accordance with the release clause in the Player's contract.

The CAS in rejecting both claims and fixing compensation at €11.85m (plus interest) against the Player and Zaragoza jointly and severally, emphasized that:

- Article 17 exists to reinforce contractual stability and does not provide a legal basis for a party to freely terminate an existing contract at any time without just cause;
- Even if termination takes place outside the Protected Period, it remains a serious violation of the existing contract;
- In determining the level of compensation, each case must be judged on its own facts and with regard to all the evidence presented; and
- Regard must be had to the *specificity of sport* and in fixing compensation, particular regard must be had to an amount that would put the injured party in the position it would have been had the contract been properly performed.

Accordingly the CAS dismissed the Player's (and Zaragoza's) principal contentions on the basis that it is not possible to evaluate in advance and thereby limit, the level of compensation due in the event of the Player leaving before the expiration of his contract. The damage so occasioned must be assessed with regard to the facts of the case, the timing of the termination, the value of the lost services of the Player to the Club and the ability of the club to replace the Player.

In similar terms, the CAS rejected the Club's principal claim because the clause upon which it relied could not be said to be referable to a unilateral and premature breach of contract – it was simply, a (notional) release clause triggered by payment of a specified sum.

In calculating the €11.85m to be paid, the CAS essentially sought to arrive at a figure of actual loss to the Club. Accordingly it fixed that figure by reference to the transfer fee that Lazio agreed to pay to Zaragoza (in the event it exercised its Option) less the amount of salary expenses over the remainder of the contract that the Club no longer had to pay (€2.4m) aggregated at €11.258m, plus €600,00 referable to

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

six months of the Player's salary to mark both the enhanced status of the Player and the circumstances of his departure under the heading of Specificity of Sport.

Significantly the CAS rejected the arguments on behalf of the Player (and Zaragoza) that sought to limit the damages, by disregarding the market value of a player as 'lost profit' (following the decision in Webster) and choosing instead to rely upon the concept of 'actual loss' by reference to the market value of the Player established in fact the value of the Option agreed by SS Lazio as the basis for calculating the figure that would return the Club to the position it would have enjoyed had the contract been performed properly.

Whereas the decisions in **Webster** and **Matuzalem** appear to be irreconcilable, the cases are so distinguishable on their facts to allow for a commonality of approach based upon the identifiable calculation of loss (as demonstrated in the latter case). Particular regard should be had to the fact that in Webster, there were no unamortized acquisition costs since the Player had remained with the Club for a period longer than the initially agreed contractual term and thereby, the acquisition cost had already been amortized over the initial term of the contract.

The development in the CAS approach is best illustrated in *Mutu v Chelsea FC (July 2009)* when Club's complaint for breach of contract was upheld and an award was made of €17.174m by reference predominantly to the unamortized acquisition costs in acquiring the Player from Parma for €22.5m.

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The FAPL Appeal Committee upheld Chelsea's termination of the playing contract as the Player's behaviour constituted a unilateral breach of contract

Having signed a five-year contract with Chelsea in August 2003, the Player tested positive for cocaine during a drugs test in September 2004 as a result of which, Chelsea terminated his employment contract for gross misconduct and the FA imposed upon him a seven-month ban. Having served his ban, the Player was signed by Juventus and later bought by Fiorentina.

The FAPL Appeal Committee upheld Chelsea's termination of the playing contract as the Player's behaviour constituted a unilateral breach of contract. The Committee permitted Chelsea to bring a claim for damages before the FIFA DRC. Mutu appealed his sacking to the CAS and lost. The DRC initially refused jurisdiction to hear Chelsea's claim but jurisdiction was confirmed after a further appeal to the CAS which sent the case back to the DRC which as a result, awarded Chelsea €17,173,990.00 referable predominantly to the unamortized value of the transfer fee.

**Both parties appealed to the CAS.**

Chelsea argued for compensation in at least the sum awarded by the CAS and an increased amount to compensate it for the cost of replacing the Player and for the damage his behaviour caused its brand.

Mutu sought to have the termination set aside and in the alternative, argued that the Article 17 criteria (enshrined then in Article 22 of the 2001 Regulations) are contrary to EU law to the extent that no compensation should be awarded.

The CAS found little difficulty in rejecting the Player's arguments on the basis of *res judicata* in respect of upholding the earlier finding of the CAS for breach of contract and that no anti-competitive element was invoked by application of the criteria for the award of damages for breach of contract. Moreover, the Player cannot invoke EU rules on the freedom of movement within the EC as (a Romanian) he was not an EU citizen at the time of the breach.

The CAS found that the determination of the amount of compensation based upon unamortized acquisition costs to be fully consistent both with the Article 17 criteria and English law principles of returning the injured party to the position it would have enjoyed but for the breach. Accordingly, the award of the DRC was upheld even if slightly revised comprising €16.923m as the unamortized

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

portion of the transfer fee plus, €150,436 as the unamortized portion of the fees paid to the Agent plus, €99,264 as the unamortized portion of the Player's signing-on fee. Accordingly, the award of €17,174m was confirmed together with an award of costs to the Club.

The award of compensation on the basis of unamortized acquisition costs is both explicitly provided for in Article 17 and has been upheld in the CAS jurisprudence of **Matuzalem** and **Mutu**.

The principle of awarding compensation for actual loss was reaffirmed in *FC Sion v FIFA & Al-Ahly Sporting Club; Essam El-Hadary v FIFA & Al-Ahly SC (2010)*.

On 1st January 2007 El-Hadary (the Player) signed a four-year contract with Al-Ahly (the Club). The Player terminated his contract on 25th February 2008 and shortly thereafter joined FC Sion.

The Club referred the matter to the FIFA DRC that (in April 2009) found the Player to have unilaterally terminated his contract without just cause within the Protected Period and accordingly awarded the Club €900,000 (on the basis of €300,000 as the combined value of the residual on the Player's contract with Al-Ahly and his contract with FC Sion over the same period, plus €600,000 as a sanction for the nature and timing of the breach) payable jointly and severally by the Player and FC Sion. A four-month ban was also imposed upon the Player. All parties appealed to the CAS.

The CAS upheld both the finding as to breach of contract and the four month sanction against the Player but interestingly reduced the amount of compensation to \$796,500 USD in accordance with Article 17 by essentially applying the **Matuzalem** principle of 'positive interest' to put the injured party in the position it would have been if no breach of contract had been occasioned so that the figure reached reflects 'actual loss' namely, the lost service of the Player (transfer value plus salary agreed by FC Sion over the remainder of contract period with Al-Ahly) less savings referable to the residual value of the original playing contract. The CAS calculated the residual on the playing contract with Al-Ahly at \$292,000 and the value on the contract with FC Sion over the same period at approx \$490,000. It was found that a transfer fee of \$600,000 would have been offered and accepted. Accordingly the value of the lost services was

calculated as the salary paid by FC Sion plus the transfer fee otherwise unattained (\$490,000 plus \$600,000) less the salary no longer due from Al-Ahly (\$292,000).

The CAS emphasized the wide discretion available to it when applying the different Article 17 criteria in making an award and the adversarial (cf. inquisitorial) nature of the proceedings.

It is of interest to note the extent of the departure in juridical analysis between the DRC and the CAS, especially since the finding of the former was given only four weeks before the published decision in *Matuzalem*.

Restorative justice now seems to be the guiding principle by which the CAS will apply the Article 17 criteria to bring about an award that amounts to actual loss as it did in the case of Stephen Appiah in *Club X v A; A v Club X (June 2010)*.

Albeit a highly unusual case in which the Player having signed a four-year contract with Fenerbache in July 2005 for €8m, was ultimately found by the FIFA DRC to have terminated his contract without just cause in January 2008 as result of failing to attend the Mayo Clinic as required by the Club at the conclusion of a long-running saga concerning the treatment (or lack thereof) for an injury he sustained many months earlier, the way in which the CAS reached its decision demonstrates its desire to base any award on actual loss. The DRC awarded the Club €2.281m in compensation. Both parties appealed to the CAS.

The Club sought compensation of €12.131m in account of the salary and benefits paid to the Player during his period of non-service, its inability to amortize its investment in the Player, the cost of buying a replacement and the loss of sales/merchandising revenue incurred.

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Restorative justice now seems to be the guiding principle by which the CAS will apply the Article 17 criteria

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

The Player asked the CAS *inter alia*, to set-aside the decision that he had terminated without just cause and in the alternative, to award zero compensation in all the circumstances of the case.

The CAS found that the Player was not entitled to be absent from the Club for an indefinite period of time (due to injury), the instructions given by the Club for him to join its medical facilities were legitimate and justified and that, the Club could not be held liable for any medical malpractice/misdiagnosis that would justify the Player not attending the Mayo Clinic as arranged. Accordingly, the Player was in breach without just cause.

However and following the guidance in *Matuzalem* to give effect to the principle of 'positive interest', the CAS rejected the arguments put forward by the Club to calculate that it had in fact saved more money than it lost as a result of the Player's breach of contract and the surrounding circumstances of his long-term injury. It was calculated that by not having to pay the residual value of his contract, the Club saved €2.633m as against the unamortized value of his transfer fee which amounted to €2.445m. Moreover, the CAS decided that the Club would have had to replace the Player in any event (owing to his injury) and as a consequence, the costs of replacing him (with another player) and the attendant (if any) loss of revenue occasioned by his departure were not referable to his breach of contract. Accordingly and under the specificity of sport heading, the Club saved more than it lost and no award was made against the Player.

### **So where do we go from here?**

The cases albeit different in nature, restate the sanctity of playing contracts and the unsympathetic attitude of the CAS towards players who prematurely terminate their contracts or allow situations to manifest whereby the clubs are effectively forced to terminate even if the player does not.

The onus remains on the party in breach (usually the player) to satisfy the tribunal (on the balance of probabilities) that either it did not breach the contract or it terminated for just cause.

In awarding damages, the CAS will follow the Article 17 criteria diligently. In the absence of a contract term specifying

compensation for breach that is applicable to the circumstances of the given case, the CAS will address all the Article 17 criteria but with a wide discretion as to the weight it gives each criterion. Even if the contract includes a premature termination clause setting out the applicable compensation, unless it can be applied to the timing and facts of the given case it will be given short shrift and at best, have indicative value only (*Matuzalem*).

In applying the criteria, the CAS will give effect to the national law only if it is provided for in the contract under consideration (*Mutu*) and if specifically pleaded by either party (*El-Hadary*) otherwise, Swiss law (if relevant) will take precedence (*Matuzalem*).

In accordance both with the doctrine of specificity of sport (undefined but understood to mean the workings and commonly held principles applicable to professional football) and the objective criteria set out in Article 17, the CAS will examine all the facts and give weight to the idiosyncrasies of football in order to reach a determination that will give effect to actual loss or positive interest (*Matuzalem*, *Mutu* and *Appiah*).

Above all, unless provided with evidence (cf. mere assertion), the CAS will not give effect to the contentions put forward by the parties.

Unless a player can prematurely terminate his contract on mutually beneficial terms or rely upon a clause in his contract that allows him to do so for an agreed price that equates to compensation (at least) equivalent to the unamortized value of the transfer fee paid and or will cover the club for the loss it calculates has been occasioned by all the circumstances of the case, he runs the risk of the CAS making an award against him (and the club he might join) that is much larger than he bargained for. Before a player decides to prematurely terminate his contract without just cause (outside the Protected Period), he should be prepared for an award being made against him that will (at least) reflect the unamortized value of the transfer fee paid for him less the residual value of his playing contract.

The corollary is that in fixing an award commensurate to actual loss, the CAS will reject notional claims of loss made the clubs and discount the award otherwise made by fixing an amount governed by the actualité (*El-Hadary* and *Appiah*).

FOOTBALL PLAYING CONTRACTS:  
THE CONSEQUENCES FOR TERMINATION  
WITHOUT JUST CAUSE

Caution however should be exercised if seeking to apply widely the decision in Appiah – this was a very special case. Normally players breach their contracts in order to join other clubs. Here, the Player had no alternative club in his sights. He breached his contract for personal reasons and at a time when he was not fit. He could have remained with Fenerbache and drawn his wages whilst retaining his fitness rather than terminating his contract and thereby exposing himself both to a claim for compensation and reducing his prospects of finding a new club. The principle of positive interest or actual loss nonetheless does appear to be of general application, especially in the light of the decisions in Matuzalem and El-Hadary.

Of greatest intrigue, remains the position created in Mutu whereby the Player was ordered to pay (huge) compensation referable to the value of a transfer fee that he himself had no part in fixing. Whereas he might only have himself to blame and was doubtless handsomely rewarded playing for Chelsea, he had not earned €17m and the enforcement of the award may well render him bankrupt. Having failed in his attempt before the Swiss Federal Court to overturn the decision of the CAS, his best option may be to retire which in turn will further test the jurisdiction of FIFA.

One implication of the case is that we can expect clubs to follow the trend set by Chelsea and attempt to recover the unamortized costs expended on the acquisition of players who go on to breach their contracts.

What is clear however, is that before a player chooses to terminate his contract prematurely and another club think of signing him, careful consideration should be given to the ability to pay an award comprising of at least, the unamortized value of the transfer fee less the residual value of his contract. ■ **BASL**

# The Bribery Act 2010: Application to sport

BY SUSANNAH COGMAN, ROB HUNT AND NEIL BLAKE OF HERBERT SMITH LLP

## Introduction

The Bribery Act 2010 (the “Act”) came into force on 1 July 2011 and marks a significant change in the law of the UK on bribery.

The previous law was widely recognised as being fragmented, outdated, complex and uncertain in its application. The criminal law of bribery consisted of one general common law offence and various statutory offences, contained in legislation of some antiquity<sup>1</sup> which struggled to grapple with the complexities of the modern commercial sphere.

The Act aims to address these issues and, as the Secretary of State for Justice explains in the foreword to the Ministry of Justice guidance on the Act:

*“In updating our rules, I say to our international partners that the UK wants to play a leading role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That’s because it creates clarity and a level playing field, helping to align trading nations around decent standards.”*

Among the other motivations of the government in reforming the law of bribery is ensuring that the UK complies with its international obligations under the OECD Anti-Bribery Convention – the OECD has long been critical of the law of bribery in the UK and its enforcement record.

The introduction of the Act comes at a time when corruption in sport is a hot topic. Many of our major sports – including football, cricket, horseracing and snooker - have been rocked by high profile allegations of corruption over recent months.

It has long been noted that many international sports governing bodies lack transparency and accountability. Historically, this has been tolerated to some extent. This is

most likely because, in the past, the economic consequences of the decisions made by sports governing bodies were relatively limited. However, now that the sums of money involved in sport – in terms of player wages, media rights and the economic benefits accruing from being awarded the right to host a major international competition – have increased exponentially, there is much greater demand for transparency and accountability concerning how decisions relating to these issues are made. It will be interesting to see if the Bribery Act will be an effective tool to help achieve this.

## The Act – key provisions<sup>2</sup>

The Act repeals existing bribery-related legislation and creates four new offences:

- Active bribery – i.e. giving, promising or offering a bribe<sup>3</sup>;
- Passive bribery – i.e. requesting, agreeing to receive or accepting a bribe<sup>4</sup>;
- Bribery of a foreign public official<sup>5</sup>; and
- Corporate failure to prevent bribery<sup>6</sup>.

## Active bribery

Under section 1 of the Act, a person (“P”) is guilty of bribery where he offers, promises or gives a financial advantage to another person in two cases:

- Case 1: P intends the advantage to induce a person to perform improperly a relevant function or activity or to reward a person for the improper performance of such a function or activity<sup>7</sup>.
- Case 2: P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity<sup>8</sup>.

THE BRIBERY ACT 2010:  
APPLICATION TO SPORT

In Case 1, the person to whom the advantage is offered, promised or given and the person who is to perform the relevant function or activity need not be the same person<sup>9</sup> and, in both Cases, it is immaterial whether the advantage is offered, promised or given directly or through a third party.

### Passive bribery

Section 2 of the Act makes provision for offences of being bribed (the recipient being referred to as “R”), which arise in 4 further cases:

- Case 3: R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person)<sup>10</sup>;
- Case 4: R requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity<sup>11</sup>;
- Case 5: R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity<sup>12</sup>.
- Case 6: where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R’s request or with R’s assent or acquiescence<sup>13</sup>.

In each case, it is immaterial whether the advantage is requested (etc.) directly or through a third party or whether the advantage is for the benefit of R or another person<sup>14</sup>. Furthermore, it is immaterial in Case 6, where a person other than R is performing the relevant function or activity, whether that person knows or believes the performance of that function or activity is improper.

### Relevant functions and activities, improper performance and expectation

Sections 3 to 5 of the Act clarify the active and passive bribery offences and provide definitions of a “relevant function or activity”<sup>15</sup> and “improper performance”<sup>16</sup> for the purposes of these offences. The detailed provisions of these sections are not considered here.

### Bribery of foreign public officials

The active and passive bribery offences apply in both the public and private sectors. By contrast, section 6 of the Act makes provision for an offence of bribing a foreign public official (“F”). An individual is guilty of an offence if and only if, directly or through a third party, P offers, promises or gives any financial or other advantage to F, or to another person at F’s request or with F’s assent or acquiescence, and F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift<sup>17</sup>. To commit the offence, P must intend to influence F in the performance of F’s functions as a public official (including any omission to exercise those functions and any use of F’s official position<sup>18</sup>) and must intend to obtain or retain a business advantage.

There is a substantial overlap between this offence and the active bribery offence. The foreign public officials offence is narrower in respect of the recipient of bribes to which it applies, but more draconian in the test applied: it is sufficient to intend to influence the official and thereby gain an advantage and, by contrast to the active bribery offence, there is no express requirement that the foreign official be intended/influenced to act “improperly”<sup>19</sup>.

### Failure of commercial organisations to prevent bribery

Section 7 of the Act provides for a strict liability offence for commercial organisations whereby a relevant commercial organisation (“C”) is guilty of an offence if a person associated with C bribes (within the meaning of the Act) another person intending to obtain or retain a business advantage for C<sup>20</sup>.

The offence is very wide in its application. The definition of “relevant commercial organisation” includes not only companies and partnerships incorporated / formed under the

THE BRIBERY ACT 2010:  
APPLICATION TO SPORT

law of the UK, but also any other companies and partnerships, wherever incorporated / formed, which carry on a business, or part of a business, in any part of the UK, and thus the offence could potentially catch multinational businesses that have a presence in the UK. Equally, UK businesses may find themselves liable as a result of the acts / omissions of an associated person committed overseas.

However, section 7(2) provides for a defence if C can prove that it had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct. Pursuant to section 9 of the Act, the Ministry of Justice has published guidance concerning such procedures, which sets out 6 principles that it considers should inform a company's anti-corruption programme:

1. Proportionate procedures – a commercial organisation's anti-bribery procedures must be proportionate to the risks it faces and must be clear, practical and accessible;
2. Top-level commitment – the top-level management of a commercial organisation must be committed to preventing bribery by associated persons and must foster a culture in which bribery is not acceptable;
3. Risk assessment – a commercial organisation must carry out a periodic, informed and documented assessment of the nature and extent of its exposure to the risk of bribery;
4. Due diligence – a commercial organisation must carry out proportionate and risk-based due diligence in respect of persons who are to perform services on its behalf;
5. Communication – a commercial organisation must ensure that its anti-bribery procedures are effectively communicated throughout the organisation;

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Many of our major sports – including football, cricket, horseracing and snooker – have been rocked by high profile allegations of corruption

6. Monitoring and review – a commercial organisation must keep its anti-bribery procedures under review and make improvements where required.

### Territorial application

Section 12(1) provides that the active, passive and bribery of foreign public official offences<sup>21</sup> are committed if any act or omission which forms part of the offence takes place in the UK. If the act or omission does not take place in the UK, but the person's act or omission would constitute an offence if carried out there and the person has a close connection with the UK (the test for a "close connection" being, in summary, citizenship, residency or incorporation<sup>22</sup>) an offence will still have been committed. As such, the Act retains the current law's broad extra-territorial scope.

As noted above, section 7 has even broader extra-territorial application, in that it can apply to non-UK incorporated companies (provided they 'carry on part of a business in the UK'), regardless of where the underlying bribery offence takes place or whether it has any UK connection.

### Discussion

The Act is likely to impact the sporting industry in a number of ways, including the following:

**Player Conduct** – players of all nationalities competing in the UK and players with close connections with the UK competing abroad will all be subject to the Act and are likely to be liable to prosecution by the British authorities if they accept or offer to accept money or gifts to influence their performance;

**Clubs employing players involved in paying bribes** – in the case of player bribery, if it can be shown that the bribe was paid in order to benefit the player's employer, the employer may also be liable unless it can show that it has "adequate procedures" designed to prevent its players from engaging in such conduct. Importantly, however, the s.7 offence applies where a company fails to prevent its employees/associated persons paying bribes, rather than failing to prevent them accepting bribes;

**Sports agents paying bribes** – an agent will be an 'associated person' for the purposes of the Act, and if they make an

THE BRIBERY ACT 2010:  
APPLICATION TO SPORT

inappropriate payment for the benefit of a principal which is a relevant commercial organisation within the scope of the Act (e.g. by securing a player transfer), then the offence of failure to prevent bribery may be committed – subject, again, to the principal being able to show that it had adequate procedures to prevent such bribery;

**Bids to host major sporting events and for sports media rights** – where bribery takes place in this context, the Act is likely to apply to offending UK individuals and employers (and those from outside the UK where the offending conduct has taken place within the UK) involved on the bidding side and in deciding the outcome of such bids;

**Hospitality** – Concern had initially been expressed that, due to the very broad provisions in the Act, providing and accepting any form of corporate hospitality at sporting events could potentially fall within the scope of an offence under the Act. However, following further guidance from the Government on this issue, it seems that the threshold required before the SFO might consider prosecuting individuals or companies under the Act for providing hospitality is a high one and it is unlikely that, for example, taking clients to Wimbledon would be an offence. Recent questions in Parliament have reiterated that the Act is not intended to criminalise normal commercial hospitality – albeit that there are circumstances in which the hospitality is sufficiently lavish/inappropriate that it might be construed as having been given with an improper intent.

As far as sporting bodies are concerned, it appears that the Bribery Act is more far reaching than similar legislation in other jurisdictions. For example, current Swiss anti-corruption legislation does not encompass the activities of officials from international sports governing bodies (though it is reported that reform is being considered by the Swiss authorities) and even the U.S. Foreign and Corrupt Practices Act (the “FCPA”), which has considerable extra-territorial reach, would not apply to sports federations as they are, for the purposes of the FCPA, a non-US non-governmental organisations, save perhaps where the conduct can be brought within the FCPA’s territorial scope<sup>23</sup>.

There is a concern that implementing such onerous legislation will damage the UK’s competitive advantage in seeking to secure hosting rights of major competitions, in circumstances where other bid teams are not subject to

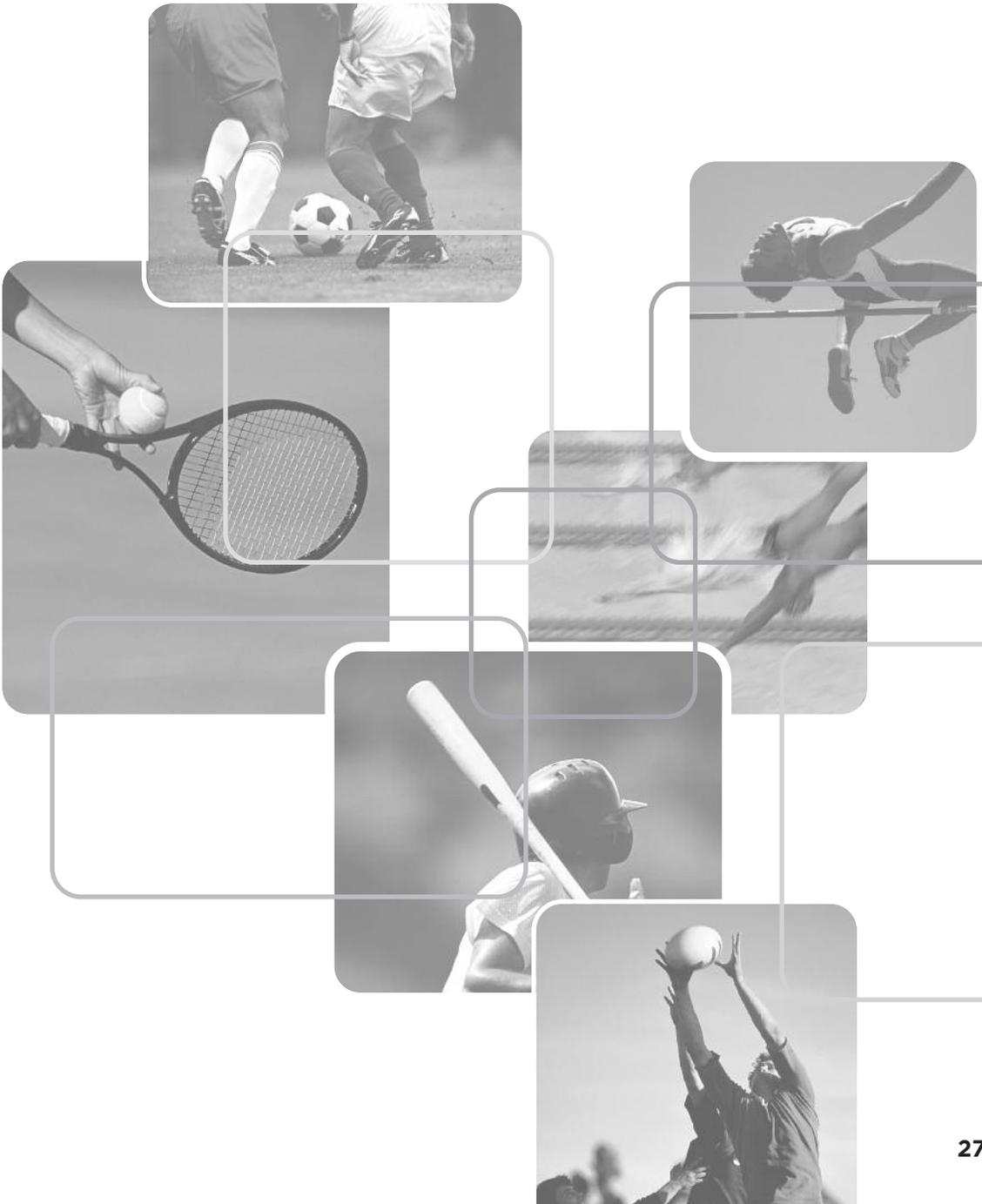
onerous legislation. This concern is made more acute by some of the more hysterical UK press comment on the Act, which has suggested, for example, that all corporate hospitality is now prohibited – whilst that is not the result of the Act, the impression the coverage has left may take some time to dispel. Further, the Act looks likely to make the UK’s national sports associations still more remote from international federations, absent greater international consensus on anti-bribery issues.

On the other hand, those behind the reforms will no doubt point out that having this modern, consolidated and broad legislation will be another useful weapon in the fight against corruption in sport, and that the UK’s competitiveness is not worth protecting if it is dependent on the payment of bribes. **BASL**

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1 *The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916*  
2 *This section is not comprehensive summary of the Act*  
3 *Section 1*  
4 *Section 2*  
5 *Section 6*  
6 *Section 7*  
7 *Section 1(2)*  
8 *Section 1(3)*  
9 *Section 1(4)*  
10 *Section 2(2)*  
11 *Section 2(3)*  
12 *Section 2(4)*  
13 *Section 2(5)*  
14 *Section 2(6)*  
15 *Section 3*  
16 *Section 4*  
17 *Section 6(3)*  
18 *Section 6(4)*  
19 *The Government Guidance in relation to ‘Adequate Procedures’ suggests, however, that the intention of the offence is to target situations where officials do act in this way*  
20 *Section 7(1)*  
21 *Section 1, 2 and 6*  
22 *Section 12(4)*  
23 *Some settled FCPA cases suggest that the US authorities may, for example, seek to assert jurisdiction in relation to non-US parties if corrupt payments are made in US Dollars (as they would therefore clear through the US payment system)*

# Analysis



# Match fixing in sport: Recent developments

BY SIMON GARDINER

**There have been incidents of match fixing in sport over many years. The true extent of the problem however remains unknown. Using terminology developed in criminology, there is an unknown 'dark figure' of match fixing based on suspicions, allegations and undetected incidents. There are reasonably few official determinations of match fixing, those that there are come from official investigations by sporting authorities and/or by law enforcement agencies. One of the most notorious incidents was the fixing of the 1919 baseball World Series. In English football, although this was certainly not the first instance, the scandal involving Peter Swan, David Layne and Tony Kay in 1964 led to prison sentences.<sup>1</sup>**

Fast forward to the 1990s and criminal prosecutions based on allegations of match fixing were brought against Premier League goalkeepers, Bruce Grobbelaar and Hans Segers and the footballer, John Fashanu.<sup>2</sup> At their first trial, the prosecution allegations were that Grobbelaar whilst playing for Liverpool FC, and Segers for Wimbledon FC, let in goals to try to achieve certain results and thereby fix matches in Premier League games during the 1993–94 season. In addition it was alleged that there was a conspiracy involving Fashanu acting as a middle-man in the payment of sums to the two goalkeepers for a Malaysian businessman, Heng Suam Lim. At their first trial, lasting 34 days, the jury could not reach a verdict.<sup>3</sup> At their second trial, with the prosecution only relying on the conspiracy to defraud charges, the four were acquitted. It has been estimated that the two trials cost more than £10 million.<sup>4</sup> Rather than relying on the vagaries of criminal prosecutions and trials, the football authorities have introduced investigative and improved disciplinary mechanisms concerning match-fixing allegations. For example, in 2008, five Accrington Stanley

players received eight-month bans for placing bets on opponents Bury in a League Two match.<sup>5</sup>

Football has faced similar problems in other countries. A twenty six year old German football referee, Robert Hoyzer was sentenced in 2005 to two years and five months in prison and banned for life by the German Football Association for his role in match fixing after having been found to have accepted payment by a Croatian syndicate to influence the outcomes of six matches. In 2006, the Italian football authorities punished a number of Serie A clubs for collusion and match fixing. Additionally, in 2009 UEFA announced that 40 Champions League and UEFA Cup fixtures were to be investigated. The fixtures involved predominately eastern European teams in early qualifying rounds.<sup>6</sup>

This spectre of match fixing has been identified along with drug use in sport as a major threat to the integrity of sport and in need of rigorous scrutiny and control. But Football is not the only game to have allegations raised as far as match fixing is concerned. The truth is that all sports are vulnerable to corruption. Horse and greyhound racing, two sports whose raison d'être is to provide a forum for gambling, periodically are particularly subject to such scandals.<sup>7</sup> There have been allegations in sports as diverse as boxing<sup>8</sup> and snooker.<sup>9</sup> The common theme is sports where gambling and betting are common. International cricket has been identified as having a major problem with the fall out from the Cronje affair in 2000. More recently, the Metropolitan police investigated three Pakistani players for concerning alleged behaviour during the fourth test with England in 2010. This followed a News of the World newspaper investigation where it was claimed that, in exchange for £150,000, a middleman gave the paper details of the three no-balls which players later bowled at the predicted times. The allegation was that three Pakistani players, Mohammad Amir, Salman Butt and Mohammad Asif, were secretly paid to deliberately bowl them in order to allow gambling syndicates to make

money from betting on them. The players were also charged under Article 2 of the ICC Anti-Corruption Code for Players and Player Support Personnel.<sup>10</sup> After disciplinary hearings in February 2011, Butt received a 10-year ban, five suspended, Asif seven years – two suspended – and Amir five years.<sup>11</sup> There is a right of appeal to CAS. Additionally, the three players have been charged with conspiracy to obtain and accept corrupt payments and also conspiracy to cheat and this trial is imminent.<sup>12</sup> International tennis has also come under the spotlight of allegations concerning match fixing and the response of the international tennis authorities will be the focus of this commentary.

What is true is that the opportunities for gambling around sporting events in the UK, has become generally easier and accessible, culturally more acceptable and certainly more sophisticated in the products that are available such as spread betting and on-line betting exchanges, which facilitate person-to-person betting with no traditional bookmaker taking a profit and also allowing the gambler to be the bookmaker and 'lay' bets. In this form of betting, not only the bet itself but also the size of the stake won or lost are determined by events during the sports event. For example in a cricket match, a bookmaker may make a forecast on the number of runs scored in an over and gamblers bet on whether that prediction is too high or low. Their winnings or losses will correspond with the difference between the runs actually scored and the bookmakers' forecast. This form of gambling also known as 'spot-fixing' or 'spot-betting' has increased, and is a type of gambling on markets that are effectively 'games within games'. Although there are different cultural and jurisdictional controls on gambling in countries around the world, these are increasingly difficult to enforce due to the technological nature of gambling, primarily via the internet.

### International Tennis

Over the last few years it has become evident that international tennis has a problem with potential match fixing. This came to public attention in 2007, when betting exchange, Betfair, voided all bets placed on a match involving then world number five Nikolay Davydenko.

Davydenko was a heavy pre-match favourite against his 87th-ranked opponent Martin Vassallo-Arguello but retired due to injury when trailing in the third set. Despite winning the first set 6-2 the Russian's odds lengthened dramatically. The volume of money wagered on the market and the size of individual bets placed suggested a number of people were certain Davydenko would lose. The bulk of the winnings were traced to three accounts in Russia. One punter had wagered \$590,000 dollars on the underdog before the match while another had bet \$368,000 on Vassallo-Arguello when he was a set down. The Association of Tennis Professionals (ATP) launched an official investigation, but Davydenko was eventually cleared.

The ATP and ultimately the International Tennis Federation (ITF) became aware of a significant problem within its sport. In 2008, a report was commissioned to be written by two ex-police officers, Ben Gunn and Jeff Rees (who had previously worked at the ICC's anti-corruption and Security Unit) entitled 'Environmental Review Of Integrity In Professional Tennis'.<sup>13</sup> The Report is far-ranging in its scope and focuses on a number of investigations carried out by the ITF, evaluates the risks that tennis has as far as potential match fixing and proposes future actions.

In a separate Report commissioned for the CCPR (now the Sport and Recreation Alliance) it was claimed that 'tennis meets many of the criteria for a sport at risk of betting related corruption. Contests are one-on-one, so events are easier to fix and the amount available for bribes can be spent on just one individual; pay-offs to fixers can be high because large wagers can be accommodated in a highly liquid market; and betting exchanges provide novel ways of manipulating a match for gain even without necessarily losing it'.<sup>14</sup>

The tennis integrity report highlights the practice of 'tanking' or underperforming in games.

### Environmental Review of Integrity in Professional Tennis

2.38 However, one activity identified as a threat to the integrity of the sport is 'tanking'. This term covers a range of behavior which, at the lower end, is regarded almost as 'part

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

of the game' and at the higher level is a definite threat to the integrity of tennis.

2.39 'Tanking' is a word to approach with caution as it means different things to different people. During the consultation phase we found that players and officials alike used the term to describe different degrees of activity and other stakeholders, including media representatives, were equally imprecise.

2.40 Essentially, 'tanking' involves a player not giving 'best efforts' in a match. However, the reasons for doing so are wide and various, ranging from motivational/tactical issues to action motivated by corruption ...

This continuum is identified as ranging from the 'Player tired, wants out; player does not want to aggravate an injury; player starts with good intentions but loses heart; player tactically cedes point/game/set', through to 'Player prefers to reserve his/her best efforts for a more lucrative tournament elsewhere', and on to 'opponents agree outcome in advance for mutually beneficial reasons, e.g. ranking points in exchange for share of prize money' and at its most extreme and corrupt activity when the 'player deliberately loses a match to facilitate corrupt betting activity'. Interestingly the report finds that the general view amongst both players and officials was that tanking in its mildest form was "all part of the game" even though all recognized that failing to provide 'best efforts' is a breach of the rules'. This is another example of the notion of a playing culture that clearly is outside the rules but can be seen as normative behavior.

The ITF and other tennis organizations have adopted similar policies to those of cricket and horse racing that have been discussed above so as to secure the working environment of sports participants and limit opportunities for criminals to have contact. In addition, the disciplinary structures have been reformed.<sup>15</sup> And also, again along with other sports federations, an emphasis has been placed on player education, particularly with younger players starting their careers, on issues such as the inappropriateness of tanking.<sup>16</sup> This education has also come from some interesting sources.<sup>17</sup>

## Gambling and sport

Gambling has been indentured as being at the root of match fixing. The ethics of sports athletes gambling on games and events they participate in have also been increasingly addressed. The days when international cricketers could openly bet against their team winning as Dennis Lillee and Rod Marsh did in the famous 1981 Headingley Test Match between England and Australia (at massive odds of 500 to 1) are long gone. Sports governing bodies are required to have specific rules prohibiting players betting on matches to protect the integrity of the game, and which provide for effective investigation and policing of such actions. The regulatory approach to gambling in the UK is now considered. Gambling and sport have almost been inseparable and gambling has been subject to considerable regulation by the State. Gambling has close links with the general commercialisation of sport and with corrupt practices in sport. An extended extract on gambling follows, again looking at its historical context, with an aim to understanding its vast significance within modern sport:

### Mason, T, *Sport in Britain*

*Gambling has always been a part of the modern sporting world, although the public response to it has varied from one period to another. Gambling was endemic in 18th century Britain, but before 1850 a puritanical reaction had begun, aimed particularly at working class betting. The greatest achievement of the anti-gambling lobby was probably the Street Betting Act 1906, but it remained a powerful and influential opponent certainly up until the second Royal Commission on the subject in 1949. Since then gambling on sport has been increasingly raided by governments to provide income for the State and has also played a crucial role in the financing of the major sports of football and horse racing.*

*Betting had always been a part of rural sports, both those involving animals, such as cock fighting and bear baiting, and those involving contests between men. Pedestrianism, for example, probably began in the 17th and 18th centuries, when aristocrats and gentry promoted races between their footmen. These men had been used as message carriers between town house and country residence, although this function lapsed as roads improved and coaches became speedier and more reliable. Their masters often gambled heavily on the results of such races. Sometimes the young master ran himself. Pedestrianism, like prize-fighting, seems to have enjoyed a fashionable period from about 1790–1810. It could almost be characterised as the*

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

*jogging of the early 19th century. Its most famous gentlemanly practitioner was Captain Barclay, a Scottish landowner whose real name was Robert Barclay Allardice. He was prepared to bet 1,000 guineas in 1801 that he would walk 90 miles in 21 and a half hours. He failed twice and lost his money each time. But on 10 November 1801 he did it, for a stake of 5,000 guineas.*

*Betting on horses was also commonplace, often taking the form of individual challenges between members of the landed classes. In the 18th century it was the usual practice to ride your own horse, but the employment of a professional jockey became increasingly common. Betting added another dimension of excitement to the uncertainty of sport itself and it was excitement, which the leisured rural classes were especially seeking, particularly in a countryside whose range of more conventional pursuits soon began to pall in the eyes of the young, married, leisured, pleasure seeking males.*

*Cricket was another rural pastime that the landed bucks found attractive. By the beginning of the 18th century newspaper advertisements told of forthcoming matches 'between 11 gentlemen of a west part of the county of Kent, against as many of Chatham, for 11 guineas a man'. With money at stake it was important to reduce the chances of disagreement by drawing up a body of rules and regulations by which both sides would abide. In this way gambling made its contribution to the development of the laws of cricket. In fact, in the code of 1774 it was specifically mentioned:*

*If the Notches of one player are laid against another, the Bet depends on both Innings, unless otherwise specified. If one Party beats the other in one Innings, the Notches in the first Innings shall determine the Bet. But if the other Party goes in a Second Time then the Bet must be determined by the numbers on the score.*

*Football was, of course a very attractive proposition both to bookmakers and punters. Before 1900 some newspapers had offered prizes for forecasting the correct scores as well as the results of a small number of matches and early in the 20th century a system of betting on football coupons at fixed odds had developed in the north of England. It has been suggested that the early pools might have been partly emulating the pigeon pools by which a prize fund was collected for a particular pigeon race, with each competitor subscribing. The owner of the winning bird collected.*

*Newspapers began publishing their own pools coupons (until the Courts declared the practice illegal in 1928) and individual bookmakers offered a variety of betting opportunities. By the end*

*of the 1920s, the football pools, and particularly Littlewoods, under the entrepreneurial guidance of the Moores brothers, had begun to thrive. The pool for one week in 1929–30 reached £19,000. By the mid-1930s the firm was sponsoring programmes on Radio Luxembourg which broadcast the results of matches on Saturdays and Sundays. The football coupon asked backers to forecast the results of a given number of matches from a long list or a selected short list. The latter was given attractive names like 'family four' and 'easy six', 'three draws' or 'four aways'. In January 1935 the penny points was introduced and soon became the favourite pool with the largest dividends, consisting of fourteen matches chosen for their special degree of difficulty. The eight draw treble chance replaced it as the most popular pool after 1945. By 1935 estimates put the number of punters at between five and seven million and it was 10 million by the time war broke out. In 1934 those companies founding the Pools Promoters' Association had a turnover of about £8 million which had increased by 1938 to £22 million of which the promoters retained a little over 20%. This is not the place to animadvert on the place of the pools in British society.*

*By the mid-19th century, therefore, betting and sport were firmly established as the closest of associates. But the middle class evangelicalism of the new urban industrial Britain was already beginning to take steps against what was increasingly characterised as a social evil. Gambling was typical of a corrupt aristocracy and it served them right if it led to the sale of their estates and the impoverishment of ancient families. But when the poor were led to emulate those who should have set a better example then something had to be done. By 1850 the State was being pressurised into doing it. The arguments used by the opponents of working class betting remained more or less unchanged for the next 100 years. Betting by the poor led to debt, which led to crime. Even where crime was avoided, deterioration of character was not, especially among the young and women. Spending sums on betting which could not be afforded weakened the material basis of family life thereby making a major contribution to poverty. Finally gambling undermined proper attitudes to work. As *The Times* so succinctly put it in the 1890s, it 'eats the heart out of honest labour. It produces an impression that life is governed by chance and not by laws'. These arguments carried most days until the Royal Commission of 1949–51.*

*The anti-gamblers' first legislative success was an Act of 1853 to suppress betting houses and betting shops, which had been springing up in many places, very often inside public houses. In*

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

*future, bookmakers operating from such places, exhibiting lists or in any way informing the public that they were prepared to take bets were liable to a fine of £100 and a six month prison sentence. The Bill went through both Houses without a debate. Betting shops may have found difficulty in surviving: betting itself moved outside to the streets and places of employment. The expansion of horse racing in particular, with after 1870, the electric telegraph and a cheap press providing tips and results, provoked the opposition to organise itself, which eventually resulted in the formation of the National Anti-Gambling League. It was in its heyday in the two decades or so before 1914. Sociologists such as BS Rowntree, the economist JA Hobson and radical politicians like J Ramsay MacDonald contributed to its publications. They saw the working class gambler exploited by the bookmaker and those upper class sportsmen who supported him. After failing with the law the League turned to Parliament with the clear aim of eradicating street betting. It was this off-course variety which was responsible for the bulk of working class gambling. A House of Lords Select Committee first examined the matter in 1901–02. In 1906 came the legislation.*

*The Street Betting Act of 1906 has gained some notoriety as an example of class biased legislation. It was not aimed at all off-course betting. A person who could afford an account with a bookmaker who knew his financial circumstances well enough to allow him to bet on credit did not have a problem. This ruled out many working men and women. It was ready money betting of the sort they went in for that was to be prosecuted. In future it was to be an offence for any person to frequent or loiter in a street or public place on behalf of himself or any other person for the purpose of bookmaking or betting or wagering or agreeing to bet or wager or paying or receiving or settling bets.*

Football was, of course a very attractive proposition both to bookmakers and punters. Before 1900 some newspapers had offered prizes for forecasting the correct scores as well as the results

*It is unlikely that the Act did much to diminish the amount of betting. It did of course enhance the excitement of it all, especially at those times and in those places where local magistrates decided that the full rigour of the law must be enforced. Moreover it placed the police in an increasingly difficult position trying to enforce a law for which there was little popular support. Allegations that they frequently looked the other way or had an agreement with local bookmakers to prosecute a runner from each of them in turn were commonplace. By 1929 the police were very critical of both the law and their role in enforcing it and said so before the Royal Commission which was examining the police service in that year. It took the liberalising impact of the Second World War and the relatively buoyant economic circumstances which eventually succeeded it to bring about a more relaxed attitude to gambling. This was also facilitated by the Royal Commission of 1949–51 having relatively sophisticated economic and statistical apparatus which enabled it to show that personal expenditure on gambling was only about 1% of total personal expenditure, that gambling was then absorbing only about 0.5% of the total resources of the country and that it was by then rare for it to be a cause of poverty in individual households. They still regarded gambling as a fairly low level activity and were not impressed by the amount of intellectual effort some enthusiasts brought to it. But they were in favour of the provision of legal facilities for betting off the course and the licensed betting shop reappeared in 1960, 107 years after it had first been made illegal. Six years later the government's betting duty reappeared too.*

*Gambling's relationship with sport has been significant in two other respects: as a motive for malpractice and corruption and as a source of finance for sporting activities. The latter is closely connected to the growth of football pools of which more in a moment. Not all sports lend themselves to result fixing with equal facility. The team games should, in theory, prove the most difficult, because there are so many more players who would have to be 'squared' if an agreed result was to be secured. In the early 19th century the relatively small number of professionals could exert a disproportionate influence on some cricket matches and they were occasionally bribed or removed from the game by false reports of sickness in the family. One professional was banned from Lord's in 1817 for allegedly 'selling' the match between England and Nottingham. The gradual assumption of authority by the MCC and the county clubs, the improvement in the material rewards of the average professional cricketer and the increasing opportunities to bet on other sports – notably horse racing and, after 1926, greyhound racing – probably killed off*

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

*gambling on cricket by cricketers. Today the Test and County Cricket Board (TCCB) has a regulation forbidding players to gamble on matches in which they take part. It was thought to be overly cynical even by late 20th century standards when Dennis Lillee and Rodney Marsh won £5,000 and £2,500 respectively by betting against their own team, Australia, in the Leeds Test of 1981. By then, of course, betting by spectators could be encouraged because it brought in revenue. Ladbrokes had been allowed to pitch their tent at Lord's since 1973.*

*Football has occasionally been shaken by allegations that matches have been thrown, usually in the context of championship, promotion or relegation struggles. Attempts to fix the results of matches in order to bring off betting coups appear to have been very rare but in 1964, 10 players received prison sentences for their part in a so-called betting ring. Three of the players were prominent English internationals and they were banned from football playing and management for life. Two, Peter Swan and David Layne, were later re-instated on appeal but by then were too old to take up where they had left off. Certainly the FA and the Football League were anxious to keep betting and football apart. When coupon betting first appeared in the North of England, before 1914, the FA Council threatened to suspend permanently any player or official who could be proved to have taken part in it. In 1913 they failed, but in 1920 succeeded in getting Parliament to push through a Bill forbidding ready money betting on football matches.*

*Football itself had not profited from the growth of pools. But it seems clear that early in 1935 discussions were taking place between the League's Management Committee and representatives of the Pools Promoters' Association about the possibility of the pools making a payment to the League for the use of their fixtures. But the public attitude of many of the leaders of League football was that the pools constituted a menace to the game and should be suppressed either by the action of the football authorities or by State intervention via an Act of Parliament. The negotiations broke down, perhaps because the pools promoters did not wish to pay what was being asked so long as there was some doubt about whether the fixtures were copyright. All out war was declared and an attempt made to damage the pools by secretly changing the fixtures on two consecutive Saturdays at the end of February and the beginning of March 1936. Unfortunately for the Football League, dissent in the ranks led to the plans being leaked and the scheme sank. They had no better luck with a Private Members' Bill to abolish the pools, which was easily defeated in the Commons in the same year. Moreover, the League felt it did*

*not need tainted money from the pools, whose promoters therefore kept their hands in their pockets. They did not take them out again until 1959 (although they offered to, briefly, at the end of the war).*

*It is hard to escape the feeling that not only football but sport in Britain missed a real financial opportunity, although it is clear that it would have required government help to have realised it. In the 1930s the private firms running British football pools set up offices and agencies in several European countries. In Sweden, for example, where betting on pools was illegal, around 200,000 people were completing coupons every week, the stake money swelling the profits of Littlewoods and Vernons among others. The Swedish government acted to stop it in 1934 by establishing the Swedish Betting Corporation to run a State owned pool. Switzerland and Finland soon followed and by 1950 similar State run pools had begun in Norway, Spain, Italy, West Germany, Denmark and Austria. Later Poland, Czechoslovakia, Belgium and Holland adopted similar schemes. After administration and prize money had been found, much of what remained was channelled into the support not merely of football but of sport and physical recreation in general. For example £8 million had been so raised by the Swedish government over a three year period at the end of the 1930s. There were three moments when a similar scheme might have been set up in this country.*

*The first was early in the Second World War when it was clear that some rationalisation of existing commercial institutions in a range of fields would have to take place. The Secretary of the Football Association, Stanley Rous, together with Sir Arthur Elvin, who ran Wembley Stadium, proposed the creation of an independent pools company, half of whose profits would go to football. Nothing came of it. Instead the government agreed to an amalgamation of the existing companies for the duration. It was known as Unity Pools.*

*Rous returned to the problem with even more radical proposals in 1943. Reconstruction was in the air and he had been finding out about Sweden in particular. Rous proposed that appropriate government departments should be approached with the suggestion that part of the proceeds from the pools should go into a centrally administered fund, out of which would come money for sports grounds, gymnasias, recreation rooms and sports centres. Again nothing came of it.*

*The subject was raised for a third time during the sitting of the Royal Commission on Betting Lotteries and Gaming 1949–51.*

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

*The English, Scottish and Welsh Football Associations all supported the idea of a non-profit-making football pool under government control. But the Commission disagreed, partly because they felt a considerable body of public opinion would not like it, partly because of practical difficulties and partly because of the loss of revenue to the government. If there had been a moment for such radical change, it must have been during those reforming years of the third Labour government. By 1951, its legs were very shaky indeed. Moreover it had been the Labour government that had instituted a 10% tax on the pools in 1947 and increased it to 30% in 1949. Football, of course, could always do its own deal with the pools and in the summer of 1959 it did. In the previous October the Football League had issued a writ against Littlewoods claiming that the League fixtures for the following season were its copyright. In May 1959 a judge agreed. By July an agreement had been signed, to last for 10 years, by which the Pools Promoters' Association was to pay the Football League and the Scottish League a royalty of 0.5% on total stake money, which would not be less than £245,000 a year. There have been several subsequent agreements, the latest a 12 year one signed in December 1984 which ensures the Football League £5 million per year. This, though, is but a small proportion of the income of the pools companies, three of whom – Littlewoods, Vernons and Zettlers – paid the government £220 million in tax in 1984–95 but still made a profit of £17 million.*

*The treatment of football was different to that of horse racing. The government did not introduce a tax on gambling on horse racing until 1966. In 1985 it was still being levied at only 8%. As we saw above, the tax on pools betting came much earlier and was much higher: 42% in 1985. When betting shops were legalised the government established a Horserace Betting Levy Board, allegedly to compensate racecourses for the fall in attendance that would ensue. Its role was to assess and collect a levy from bookmakers and the tote and use the money for the benefit of racing. According to the leading authority on the subject, the Levy Board saved racing in this country. Perhaps there should be a Football Betting Levy Board. It is not clear why there has not been. British sport has had to get on terms with gambling in the 20th century; it seems that the terms could have been better.<sup>18</sup>*

Betting on sport is growing in popularity, with many new forms such as spread betting.<sup>19</sup> Specialist companies now operate to give advice and odds.<sup>20</sup> The current law on betting is to be found in the Betting, Gaming and Lotteries Act 1963, which, despite its title, no longer deals with gaming and lotteries. Betting is not defined by statute, but is

generally regarded as entering into a contract by which each party undertakes to forfeit to the other, money or money's worth if an issue, in doubt at the time of the contract, is determined in accordance with that other party's forecast. Unlike a lottery, a bet may involve skill or judgment. No person may act as a bookmaker without the authority of a permit issued by the licensing justices. The essential test applied by the licensing justices in considering an application is whether or not the applicant is a fit and proper person. A bookmaker operating from a betting office requires a licence for the premises issued by the licensing justices. From 1 September 1997 the duration of betting permits and licences has been extended from one to three years. A licence may be refused on the grounds that there are already sufficient licensed betting offices in the locality to meet the demand for betting. No person under 18 years may be admitted to a betting office.

The regulatory framework of the British betting industry was liberalised during the first half of the 1990s. The advertising of individual betting offices and their facilities was originally prohibited under the 1963 Act but since 1997 the ban has been relaxed to allow advertisements in material form, for example, in newspapers, journals and posters. The ban remains on broadcast advertising of betting offices.

### The Principles of Gambling Legislation in the UK

The government set up a Gambling Review Body in 1999 under the chairmanship of Sir Alan Budd.<sup>21</sup> A wide-ranging review of the legislation on gambling in Britain, it submitted its report in June 2001. New legislation was introduced in autumn 2004 to liberalise the regulatory framework in the UK. It has three main objectives:

- gambling remains crime-free;
- players know what to expect and are not exploited; and
- there is protection for children and vulnerable people

A continued worry in horse racing has been the relationship between gambling and organised crime. The Jockey Club in its submission to the Gambling Review Body stated:

*The Jockey Club is concerned about the vulnerability of horseracing to criminal behaviour and other undesirable*

*activity as a consequence of betting, and the submission to the Gambling Review Body makes the case for greater regulation of betting and changes to the criminal law so as to maintain the public's confidence in the integrity of the sport. Principal concerns stem from the fact that, by comparison with other forms of gaming and gambling, the business of bookmaking (including spread betting) is under-regulated and lacks the necessary measures to deter corruption and thus renders racing vulnerable to malpractice. There is evidence that betting and racing are being used for money laundering purposes. The Police have indicated that there is some corruption within racing by criminals and that illegal betting, to the detriment of both government and racing revenues, is being carried out on a large scale.<sup>22</sup>*

Sports related gambling has exploited new technologies with internet betting exchanges having proliferated together with the opportunities provided by interactive services via digital television. A number of betting exchanges have signed contractual agreements with specific sports bodies designed to provide more effective monitoring of betting irregularities and transfer of information.

The match fixing scandal in cricket shows that there is a need for an effective regulatory framework concerning gambling and sport. In some countries around the world, gambling is essentially prohibited. It of course flourishes as an 'illegal underground activity'. It is prohibited in some areas and regulated in others through strong and enforceable government legislation. In the United States, there are many instances of specific sports gambling legislation to govern the behaviour of people within and outside sports. In a third grouping of countries a liberal regulatory framework exists. In Britain, over the last few years an increasingly liberal approach has been adopted as far as permissible gambling activities are concerned together with the establishment of a unified regulatory body in the form of the Gambling Commission.<sup>23</sup>

At a time when the administration of sport has become more complex than ever before, and vast amounts of new money are flowing into sport, it is essential that more effective regulatory frameworks are developed in the sporting world to counter the impact of gambling on particular sports and players. It is also vital that there is effective policing of these new regulatory frameworks.

### **Developments in fighting match fixing and sports-related gambling**

A number of specific measures have been introduced and proposed to engage with illegal gambling and match fixing.

#### **Memoranda of Understanding**

The fight against match fixing has involved ISFs and NGBs developing networks with governments, police forces, betting exchanges, gambling boards, other sports and all other relevant entities. Over the last few years, sports bodies have signed a number of agreements with betting companies and Internet betting exchanges, including Industry leader, Betfair, in the UK. Information, which they supply, can assist in identifying unusual betting activities and patterns, which may be cause for concern. Betfair has signed a 'Memorandum of Understanding' with several sport governing bodies in addition to the ICC. This has included the Jockey Club and the Association of Tennis Professionals (ATP), whose security departments will have access to individual identities and betting records of Betfair gamblers when a race or match produces unusual betting patterns or competition results. Betfair points out that by developing internal policing relationships with relevant sport governing bodies, sports corruption will be deterred because electronic transactional records will help investigators catch any wrongdoers, and, therefore create 'safe' Internet gambling sites. The downside is that if an exclusive commission is paid to sport governing bodies when they recommend that gamblers deal with 'official' or 'approved' betting exchanges, a conflict of interest can be created where sports contest integrity is sacrificed in order to maximise sports related gambling revenues.

As these Memoranda of Understanding play a pivotal role in the investigation of corruption in sport, it is inevitable that at some point in time they will be scrutinised by a criminal or civil court, whether in the UK or abroad. Under many jurisdictions there may be privacy issues relating to exchange of data. For example, in the UK, the Data Protection Act 1998 provides the regulatory framework over the transfer of data (for example unusual patterns of betting on a particular match including information on who made certain bets) that would be provided by Betfair to a sports governing body such as the ICC. Currently, the transfer works on the basis that 'the data subject has given his explicit consent to the processing of the personal data'. The legal arguments behind this approach are strong, resting on the fact that Betfair's

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

website terms and conditions extract explicit consent for the transfer. However, It may be that what is essentially a private form of regulation involving commercial bodies, such as bookmakers and sports bodies, requires a new and clear statutory gateway to be created to permit these data transfers. Such a gateway would make lawful the transfer of personal data from any organisations concerned with gambling to any licensed organisation concerned with the investigation of corruption in sport. This may be an appropriate development especially on reinforcing the reliability of this data as formal evidence, particularly where there is increased criminalisation in the area (see below).<sup>24</sup>

#### Increased Criminalisation

Past prosecutions, discussed above in this Chapter, have generally involved the common law offence of conspiracy to defraud and have resulted in acquittals. A new development has been the introduction of a new offence of 'cheating' whilst gambling under the Gambling Act 2005.<sup>25</sup> A person commits a crime if he or she 'cheats at gambling' or 'does anything for the purpose of enabling or assisting another person to cheat at gambling' and, on conviction, he or she may receive up to a two-year custodial sentence. In the context of sport, s.42 introduced a specific offence to punish those who do anything to enable another to cheat at gambling; this would include under performing in sport.

#### Gambling Act 2005 Section 42: Cheating

1. A person commits an offence if he: (a) cheats at gambling, or (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.
2. For the purposes of subsection (1) it is immaterial whether a person who cheats – (a) improves his chances of winning anything, or (b) wins anything.
3. Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with: (a) the process by which gambling is conducted, or (b) a real or virtual game, race or other event or process to which gambling relates.”

The word 'cheating' under the Act is not defined but has its normal, everyday meaning. The offence is committed by both cheating directly or by doing something for the purpose of assisting or enabling another person to cheat. Lord Condon felt that the introduction of this legislation was a

major step for the ICC although the ICC had sought tougher penalties to help protect the integrity of sport. He stated: 'I am of the view that legislation and, therefore, regulation of betting on sport provides a more effective framework for dealing with the total criminalisation of the activity. If betting is effectively regulated by governments then effective penalties can be introduced to deal with corruption.'<sup>26</sup>

In comparison, in South Africa similar provisions of sports specific criminalisation can be found in the Prevention and Combating of Corrupt Activities Act [No. 12 of 2004]. Whether criminalisation is the answer is a moot point. They may of course merely have a symbolic value backing up other quasi and non-legal measures. However at the time of writing in early 2011, there have been no sports-related prosecutions under GA s.42, although the three Pakistani cricketers, involved with match fixing during the Test Match between England and Pakistan in August 2010, have been charged with conspiracy to cheat.<sup>27</sup> One incident, where a prosecution might have been brought if the sportsman had actually put in to effect a plan he was alleged to have been implicated in, was where the News of the World made recordings of snooker player, John Higgins, allegedly accepting bribes from a 'Russian businessman', who was actually an undercover journalist, to throw single frames in four future unspecified events for a sum of £261,000. It has been argued that if there might have been grounds for a prosecution under s.42, Higgins would have possibly had a defence of duress.<sup>28</sup>

Another legislative development has been the broadening of the scope of the Fraud Act 2006 to criminalise conduct amounting to match fixing which had not been previously caught by the Theft Acts of 1968 and 1978. A person is guilty of match fixing under Section 2 if he dishonestly makes a false representation and intends - by making the false representation - to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. Provisions in the Gambling Act also criminalise the misuse of inside information.<sup>29</sup>

#### Sports Betting Integrity Unit

In 2009, Government commissioned a report to be compiled by a committee of sports betting experts under the chair of Rick Parry, ex- Chief Executive of Liverpool F.C., entitled, 'Report of the Sports Betting Integrity Panel'.<sup>30</sup> The Report's

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

key proposal was the setting up of a Sports Betting Intelligence Unit within the Gambling Commission. Other proposals include:

- Sports governing bodies will be required to improve education programmes to warn players against illicit gambling run with the help of sports governing bodies and players associations;
- advice, assistance and counseling to those sportspeople which have identified themselves as having problems with gambling;
- a 'dedicated whistleblowing line' should be established;
- A new code of conduct on sports betting integrity for all sports governing bodies to adhere to;
- The setting up of a Sports Betting Group, made up of individuals from the world of sport that will assess sports compliance with the code of conduct;
- Every sport to have a system for capturing intelligence and report regularly to the SBIU;
- A review of the definition of 'cheating' in the Gambling Act 2005 to see if it needs greater clarity.

The terms of reference for the SBIU are:

- The SBIU will produce intelligence products to inform investigative decision making on the prosecution or disruption of criminal offences (e.g. cheating) or regulatory action under the Gambling Act. Where relevant and appropriate, these intelligence products may be made available to third parties to assist disciplinary action.<sup>2</sup> The intelligence products will also inform strategic analysis on Sports Betting Integrity issues.
- The SBIU will focus upon collecting and analysing information and intelligence relating to potentially criminal activity in respect of sports betting, where that activity:
  - relates to a sporting event that occurred in Great Britain, and/ or
  - involves parties based within Great Britain, and/ or
  - occurred with a Gambling Commission licensed operator.

- The SBIU will undertake targeted monitoring of betting on specific events and by specific individuals. It will not undertake general, pre-emptive monitoring of betting markets or sporting events. This remains the role of betting operators and sports governing bodies respectively.<sup>31</sup>

The SBIU will act as the Commission's gateway for sports betting intelligence matters by establishing national and international channels of communication for the receipt and dissemination of information and intelligence with relevant partners. Further clarification of the role of the SBIU and the Gambling Commission was publicised in December 2010.<sup>32</sup>

### **World Anti-Corruption Agency**

A proposal that has been centrally discussed within the regulatory debate, there has been growing support for the creation of an equivalent body to the World Anti-Doping Agency to engage in a similar way to the financial corruption of sport.<sup>33</sup> Such a body, it is argued, would be able to adopt a more coherent and wide-ranging approach to this problem and, as with WADA, would be able to be part of a multi-agency approach together with law enforcement bodies such as Interpol. There would also be the opportunity to pool resources and allow the type of forensic investigation that is required to unravel the financial complexities inherent in corrupt financial dealings. Such a body, if it came to fruition, would clearly be able to adopt the good exemplars, which have been developed within specific sports such as international cricket and tennis to fight corruption and match fixing. However, unlike WADA, which was very much a creation of the IOC, it is hard to see where the specific political impetus will come from. In addition it is realistic that such a body could adequately respond to money laundering and other activities of criminal gangs. Similarly, as with a central evaluation of WADA, such a move runs the risk of primarily adopting a self-regulatory approach to this issue. It is probably true that law enforcement bodies must have the central role in this regard. **[PAW]**

**This is a modified extract from Gardiner, S, Boyes, S, O'Leary, J, Naidoo, U and Welch, R, Sports Law 4th edition Routledge (to be published early 2012).**

MATCH FIXING IN SPORT:  
RECENT DEVELOPMENTS

- 1 See Tongue, S, 'Bribery and corruption: English football's biggest ever match fixing scandal' *Total Sport*, March 1997, p 52.
- 2 Also note conviction of the former president of Olympic de Marseille, Bernard Tapie for match fixing, 'Tapie just a scapegoat for Paris' *The Guardian*, 16 May 1995, p 22.
- 3 See Gardiner et al, *Sports Law*, 2nd ed (2001), pp 359-362, for further analysis.
- 4 See *Grobbelaar v News Group Newspapers Ltd* [2002] 4 All ER 732 - in November 1994 *The Sun* newspaper published a series of very prominent articles charging Grobbelaar with corruption. He promptly issued writs claiming damages for libel. After some delay caused by the intervening criminal prosecution of the appellant and others, these libel proceedings came before Gray J and a jury. The jury found in favour of the appellant and awarded him compensatory damages of £85,000. On the newspaper's appeal against this decision the Court of Appeal (Simon Brown, Thorpe and Jonathan Parker LJJ) set it aside as perverse in November 1994. The House of Lords allowed an appeal against the Court of Appeal but awarded Grobbelaar nominal damages of only £1.
- 5 'FA rejects appeals from banned Accrington Stanley and Bury players', 1 October 2009, <http://news.bbc.co.uk/sport1/hi/football/europe/8379251.stm> [www.guardian.co.uk/football/2009/oct/01/fa-rejects-appeals-accrington-stanley](http://www.guardian.co.uk/football/2009/oct/01/fa-rejects-appeals-accrington-stanley)
- 6 'Uefa name clubs in match-fixing investigation', 25 November 2009, <http://news.bbc.co.uk/sport2/hi/football/europe/8379251.stm>
- 7 See 'Racing' and 'New arrests in Hong Kong race fixing scandal' (1998) 1(6) SLB; 'Sports corruption: floodlight failures and betting scandal' (1999) 3(1) SLB 3.
- 8 See 'ABA concerned about referee cash allegation' *The Daily Telegraph*, 3 December 1996.
- 9 See 'Scan: bunged out' *The Guardian*, 28 April 1995, p 4, concerning a match between Jimmy White and Peter Francisco, prompted by what were officiously described as 'irregular betting patterns'.
- 10 Current details can be found at [http://static.icc-cricket.yahoo.net/ugc/documents/DOC\\_C26C9D9E63C44CBA392505B49890B5AF\\_1285831667097\\_391.pdf](http://static.icc-cricket.yahoo.net/ugc/documents/DOC_C26C9D9E63C44CBA392505B49890B5AF_1285831667097_391.pdf)
- 11 'ICC bans Salman Butt, Mohammad Asif & Mohammad Amir', 5 February, 201, [http://news.bbc.co.uk/sport1/hi/cricket/other\\_international/pakistan/9388422.stm](http://news.bbc.co.uk/sport1/hi/cricket/other_international/pakistan/9388422.stm)
- 12 See later p \*\* for further analysis on the offence of cheating under the Gambling Act 2005. International tennis has also come under the spotlight of allegations concerning match fixing and the response of the international tennis authorities will be the focus of this commentary.
- 13 'Environmental Review Of Integrity In Professional Tennis', May 2008, [www.itftennis.com/shared/medialibrary/pdf/original/IO\\_32705\\_original.PDF](http://www.itftennis.com/shared/medialibrary/pdf/original/IO_32705_original.PDF)
- 14 *Risks To The Integrity Of Sport From Betting Corruption*, University of Salford, February 2008, ; also see *Why Sport Is Not Immune To Corruption* (2008), [www.coe.int/t/dg4/epas/Source/Ressources/EPAS\\_INFO\\_Bures\\_e\\_n.pdf](http://www.coe.int/t/dg4/epas/Source/Ressources/EPAS_INFO_Bures_e_n.pdf)
- 15 'Alessio Di Mauro says 9-month ban for betting on tennis is too severe', 11 November 2007, [www.usatoday.com/sports/tennis/2007-11-11-226904025\\_x.htm](http://www.usatoday.com/sports/tennis/2007-11-11-226904025_x.htm)
- 16 'Walter Palmer Opinion: Education: something we can all bet on' (2010) 8(7) WSLR.
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# When lawful sport become unlawful: A case study into doping within the professional ranks of golf

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## Introduction

The Royal & Ancient (“The R&A”) has stipulated that anti-doping is now part of the law that governs the game of golf. This was introduced so golf could be reinstated to the 2016 Olympic Games after being on the sideline for 112 years. The R&A, who signed up to the World Anti-Doping Code, has given the International Golf Federation (“the IGF”) the role of dealing with doping in golf. The IGF set out the doping policy that came into effect on the 1st January 2010. The purpose of this study is to use a qualitative methodology to explore the attitudes to performance enhancing drugs of elite local PGA Professional golfers who conform to the “elite level” criteria.

Results showed that PGA golfers as a whole welcomed the PGA European Tours and The R&A’s anti-doping policy and testing. The most interesting analysis from the data was the how “the spirit of the game” and the issue of “honour” played so1 heavy on the Professionals minds. There was a majority who stated that cheating in golf was worse than using performance drugs. The data also set out that the sport needs drug testing as “there are huge amounts of money” involved in today’s game.

## The Royal & Ancient (The R&A)

According to The R&A, golf was played at St Andrews with the earliest written evidence dating to 1552 in a document that stipulates that there was public ownership of the links, which were commonly used for “playing at golf, football, schuting, at all gamis...” It is likely that these games, including golf, had been regular pastimes for some years prior to the deed.<sup>2</sup>

The Royal and Ancient Golf Club of St Andrews were founded on 14th May 1754, with the first Challenge for the Silver Club. This has developed, according to the R&A, over 250 colourful years of history, “it has grown from a small

society of no fixed abode into a club whose membership of around 2,500 extends worldwide”.<sup>3</sup>

From the late 19th century the Royal and Ancient Golf Club of St Andrews increasingly came to be regarded as a governing authority, both in the United Kingdom and abroad. Between the years of 1897 and 2003 it developed three distinct areas of responsibility, namely the administration of the Rules of Golf in conjunction with the United States Golf Association (“the USGA”), the running of The Open Championship and other key golfing events, and the development of the game in existing and emerging golfing nations.<sup>4</sup> A major reorganisation in 2004, however, saw the Club devolve responsibility for these functions to a newly-formed group of companies, known as The R&A.<sup>5</sup>

## The Move towards the Olympics’ in 2016

The R&A organises The Open Championship, golf’s oldest Major, along with a number of other professional, amateur and junior events, some of which are sanctioned by other golfing bodies. The R&A assumes responsibility for the administration of the Rules of Golf with the consent of 143 organisations from the amateur and professional game, and on behalf of over 30 million golfers in 128 countries throughout Europe, Africa, Asia-Pacific and the Americas. For the USA and Mexico,<sup>6</sup> the USGA is the governing body, an organisation with whom The R&A has jointly issued the Rules of Golf since 1952.

The R&A has recognised in the last number of decades that the Olympic Games are fundamental in developing the game of golf. In 2008, the IGF created a new Olympic Committee to coordinate the worldwide efforts to push for golf’s inclusion in the 2016 Olympics. The IGF is made up of representatives from golf’s governing bodies and golf tours around the world, including The R&A, USGA, European Tour and PGA Tour, and has long been recognised by the

## WHEN LAWFUL SPORT BECOME UNLAWFUL: A CASE STUDY INTO DOPING WITHIN THE PROFESSIONAL RANKS OF GOLF

International Olympic Committee (“the IOC”) as the global voice of golf. Ty Votaw of the PGA Tour is the Executive Director of the new Committee that pushed for golf’s inclusion before the IOC’s October 2009 decision about any new sports to be included for 2016.

The R&A and one of the members of the IGF Olympic committee, explained that there are “two vacant slots for new sports in 2016, but that competition will be tough: rugby sevens, squash, karate, roller sports, softball and baseball are all also putting their hats into the ring for one of the spare slots”.<sup>7</sup>

The issue of doping and the Olympics was to feature in the 2009 - 2010 review document.<sup>8</sup> In early May 2009 over 140 delegates from 60 countries arrived in St Andrews for the Working for Golf Conference to debate the most pressing issues in the game today. Topics discussed over the course of the three-day conference included the anti-doping measures which are currently being taken on professional tours, worldwide golf development and the environmental sustainability of golf in different regions and climates.<sup>9</sup>

It was announced that Golf will be part of the Olympic Games in Rio de Janeiro in 2016, back after an absence of 112 years. The news came through at the close of 121st Session of the IOC in Copenhagen on Friday 9th of October 2009. For the summer Olympics, it’s all just a little bit of history repeating, “...Golf and rugby union have both been in the great five-ringed sporting circus before”.<sup>10</sup> The last winner of the Olympic golf title was a Canadian by the name of George Lyon who triumphed in St Louis in 1904.

### The Spirit of the Game

Golf is played, for the most part, without the supervision of a referee or umpire. The game relies on the integrity of the individual to show consideration for other players and to abide by the Rules. All players should conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be. This is “the spirit of the game” within golf.<sup>11</sup>

This has been a long established rule in golf but if we look back to the introduction of what the World Anti-Doping Agency (“the WADA”) stands for, we must remember that all national bodies that must comply with the first and second element of WADA’s anti doping programme,<sup>12</sup> which talks of

“the spirit of sport”, did they get this from golf? The beliefs of WADA are that: “Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport”, it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind.”<sup>13</sup>

The sport of golf clearly has had this for sometime as it is stated by Grant Moir (Director of Rules, The R&A) in an interview with the author:

*“The R&A takes a positive view on the introduction of anti-doping policies into high level golf as a means of confirming that the use of prohibited substances is not part of the golfing culture and to further demonstrate the honesty and integrity of the game.”*

Under Appendix I, 10, “Anti-Doping The Committee may require, in the conditions of competition, that players comply with an anti-doping policy”.<sup>14</sup>

Grant Moir said, “I would confirm that, at The Open Championship, which is run by The R&A, the conditions of competition state that the European Tour’s anti-doping policy applies to the Championship itself. In this regard, in 2009 and 2010, the European Tour conducted random testing at The Open”.

### International Golf Federation (IGF)

The IGF was founded in 1958, as mentioned above they took over the issue of the doping policy within golf. The anti doping policy within golf became effective on the 1st January, 2010, this collaborates with Grant Moir’s correspondence governing the Professional and Amateur events ran by the R&A.

*“With regards to the amateur events run by The R&A, the International Golf Federation’s (IGF) code applies to The Amateur Championship, The Boys’ Home Internationals and The Boy’s Championship. I can confirm that the IGF conducted random testing at The Amateur Championship in 2010”*

The IGF conforms to the World Anti-Doping Code (“the WADC”). This Anti-Doping Policy is adopted and implemented in conformance with IGF’s responsibilities under the Code, and show the IGF’s continuing efforts to eradicate doping in the sport of golf. “Anti-Doping Rules, like the Rules of Golf, are sport rules governing the conditions under which sport is played.”<sup>15</sup>

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

Players and talented amateurs accept these rules as a condition of participation and shall be bound by them. These sport-specific rules and procedures, aimed at enforcing anti doping principles in a global and harmonized manner, are distinct in nature and therefore, not intended to be subject to, or limited by, any national requirements and legal standards applicable to criminal proceedings or employment matters.

When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the WADC and the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport. They do this under Article 17 of the International Golf Federation Anti Doping Policy (IGFADP), "IGF will report to WADA on IGF's compliance with the Code every second year and shall explain reasons for any noncompliance".

The IGF's Anti Doping policy is set out from Article 1 to Article 19 of the IGFADP. The definition of anti-doping is set out in Article 1 and this is exactly the same as Article 1 of the WADC, with the violations collaborating between both codes from Article 2.1 - 2.8.

The IGF state that in addition to any requirement which may be applicable under Rule 33-1 of the Rules of Golf, in which the R&A deal with the conditions in which the game is to be played, "The Committee must establish the conditions under which a competition is to be played. The Committee has no power to waive a Rule of Golf... The result of a match played in these circumstances is null and void and, in the stroke play competition, the competitors are disqualified in stroke play".<sup>16</sup>

The rule that now cannot be waived is the aforementioned rule in Appendix I, 10, - Anti-Doping - "The Committee may require, in the conditions of competition, that players comply with an anti-doping policy".<sup>17</sup>

The Anti-Doping Policy shall apply to and be adhered to by the IGF, "And each of its member National Unions or Federations. Any Person who fulfils the requirements to be part of the IGF Registered Testing Pool must become a member of the Person's National Union or Federation and must make himself or herself available for Testing at least six months before participating in IGF Events or events of his/her National Union or Federation."<sup>18</sup>

It is the responsibility of each National Union or Federation to ensure that all national-level Testing on the National Union or Federation's Players complies with this Anti-Doping Policy and in Ireland and the UK that body is the PGA of the UK and Ireland. This Anti-Doping Policy shall apply to all Doping Controls over which IGF and it's National Unions or Federations have jurisdiction.<sup>19</sup>

### The History of the PGA of the UK and Ireland

*"Golf professionals needed to band together to protect their interests. In 1901, the world's first ever golf association was formed".<sup>20</sup>*

It was an initial letter from a North Wales Golf Professional in Golf Illustrated on the 12th April 1901, that triggered the idea of a professional golfers association, advocating that professional golfers needed to come together to protect their collective interests throughout the British Isles. This was initiated by JH Taylor with the help of James Braid and Harry Vardon who galvanised enough support to form the London & Counties Golf Professionals' Association on September 9th 1901. This changed at the first AGM on December 2nd 1901 to "The Professional Golfers' Association" and so became the world's first ever golf association.<sup>21</sup>

Membership was reported as 59 professionals with 11 assistants and funds of just over £47.22 The golfing landscape in those early days was very different to the modern game with professionals. The very best like Taylor, Vardon and Braid, had to earn a living from club duties, club and ball-making, green-keeping, teaching and of course competing in tournaments.

The 1920s, 1930s and 1940s saw the growth of the Ryder Cup, with golfing greats such as Walter Hagen, Gene Sarazen and Henry Cotton. These all helped golf's popularity and reinforced the PGA's position as a leading golf organisation. As tournament golf expanded in the late 1960s and 1970s, the PGA Tournament Division went from strength to strength, ultimately going on to form the European Tour in 1984, while the interests of the club professional continued to be represented by the Association at its Belfry headquarters.

"Firmly established as one of golf's major organisations, the PGA has strong links to Europe and beyond and through its 7,000 plus members, is committed to growing the game and helping ordinary golfers enjoy the game to its maximum."<sup>23</sup>

## WHEN LAWFUL SPORT BECOME UNLAWFUL: A CASE STUDY INTO DOPING WITHIN THE PROFESSIONAL RANKS OF GOLF

### The European Tour

The PGA European Tour Policy has been developed in conjunction with other major golf organisations to protect the integrity of the sport of golf and the health and safety of players. Using a performance enhancing drug or method to improve performance is cheating. They have adopted the IGF policy on doping that was specifically set up to look after the issue.

“The Policy is based upon the banning of certain classes of substances and methods which are defined as doping. These substances and methods are prohibited because they meet two of the following three criteria:

- performance enhancing
- a health risk
- a violation of the spirit of golf”.<sup>24</sup>

You can see that this section again shows the special importance the “*Spirit of Golf*” has within the game, some would argue that through all the different organisations and body that it could constitute a religion, with this being the main belief, as when we look back to the very first section in the R&A’s rule book we see the section titled “The Spirit of the Game”.<sup>25</sup>

They go into detail to what constitutes an Anti-Doping Rule Violation under the PGA European Tour Anti-Doping. The tour’s policy is that the presence of a prohibited substance or its metabolites or markers in a player’s bodily specimen breaks anti doping law. It is each player’s personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their samples. Accordingly it is not necessary that intent, fault, negligence or knowing use on the player’s part be demonstrated in order to establish an Anti-Doping Rule Violation (Strict Liability). The use or attempted use by a player of a Prohibited Substance or a Prohibited Method is against the rules. The success or failure of the use of a Prohibited Substance or Prohibited Method is not relevant. It is sufficient that the Prohibited Substance or Prohibited Method was used or attempted to be used for an Anti-Doping Rule Violation to be committed. This collaborates with the already looked at WADA rules under the WADC and the IGF as set out by the R&A above.<sup>26</sup>

The following sanctions may be applied for an Anti-Doping Rule Violation

1. Disqualification, including loss of results, points and prize money from the date the Anti-Doping Rule Violation was found to occur forward.
2. Ineligibility to participate in PGA European Tour competitions and other activities.
  - a. The applicable period of Ineligibility for a first Anti-Doping Rule Violation under the Policy shall be up to one year ineligibility except in cases involving trafficking, administration or aggravating circumstances, where the sanction may be up to permanent ineligibility.
  - b. The applicable period of Ineligibility for a second Anti-Doping Rule Violation under the Policy shall be up to five (5) years ineligibility except in cases involving trafficking, administration or aggravating circumstances, where the sanction may be up to permanent ineligibility.
  - c. The applicable period of Ineligibility for a third Anti-Doping Rule Violation under the Policy shall be up to permanent ineligibility.
3. A player committing an Anti-Doping Rule Violation under the Policy may also be subject to the imposition of a fine in an amount up to £250,000 (sterling).<sup>27</sup>

The guide then goes on to tell the players to what they might expect, “The testing procedure is designed to ensure the confidential and secure collection of a urine (or blood) sample. Once this sample is analysed by an approved laboratory, it determines whether the player who provided the sample has used a doping substance. The following general summary explains the actual testing process. Departures from these procedures will not invalidate the test unless it is determined that the integrity of the sample has been affected”.<sup>28</sup>

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

## The Testing Process

The PGA European Tour has set out 10 key sections on the whole testing process from start to finish.

### 1. Notification

When selected for testing, the golfer will be notified in person and in writing by a Doping Control Officer that they have been notified of their selection for testing. The golfer must present a photo ID (e.g. passport, driver's license or PGA European Tour credential) at the testing station. The Doping Control Officer is not allowed to rely upon the athlete's celebrity status as a means of identification.

### 2. Reporting to the Testing Station

At competitions there will be a designated private and secure area where testing will be conducted. Once notified, the golfer should report there as soon as possible, and no later than 90 minutes after notification. The athlete may be allowed to delay reporting to fulfil media commitments and awards ceremonies, however during this time you may be monitored by the Doping Control Officer. Failure to report to the Doping Control Station within the required time may be considered an Anti-Doping Rule Violation.

### 3. Selecting a Collection Vessel

The golfer will be required to rinse and dry their hands (no soap) prior to the sample collection process. When they are ready to urinate, they will be given a choice of individually sealed collection vessels, and they will select one. The golfer should verify that the seal on the vessel is intact and has not been tampered with. They should maintain control of the collection vessel until the sample is sealed in the A and B bottles.

### 4. Provision of the Sample

Only the athlete and the Doping Control Officer are permitted in the toilet area during the sample collection. If the golfer has a disability, they may also have their representative present; however, any such representative is not permitted to view the sample collection. The Doping Control Officer must ensure that he correctly observes the sample collection process to verify the golfer provided the sample. He will also confirm, in full view of the golfer, that the volume of the urine sample satisfies requirements for analysis. Approximately 90ml is required.

### 5. Selection of the Sample Collection Kit

A choice of individually sealed sample collection kits will be given, and the athlete will choose one. They will open the kit. The golfer should verify that the seal on the kit is intact, the kit and bottle numbers are identical and the seals have not been tampered with.

### 6. Splitting the Sample

The golfer will split the sample by pouring the urine, unless assistance is required due to disability. He will then pour the required volume of urine into the bottle labelled with a B; and pour the required volume of urine into the bottle labelled with an A and will be asked to leave a small amount of urine in the collection vessel.

### 7. Sealing the Samples

The athlete will seal both of the A and B bottles. The athlete and the Doping Control Officer should verify that the bottles are sealed properly.

### 8. Measuring Specific Gravity and/or pH

The Doping Control Officer will measure the suitability of the sample. If the sample does not meet the specific gravity or pH requirements (i.e. density, acidity/alkalinity), the athlete may be asked to provide additional samples. This may include the athlete having to wait in the testing station waiting area until they have provided a sample meeting the specifications.

### 9. Completing the Doping Control Form

The Doping Control Form is checked by the Doping Control Officer and the information that athlete has provided is correct, including the code numbers of the samples. The athletes are not obliged to declare any personal contact information or medications on this form. This is to prevent unauthorised use of this information by third parties. A copy of the form will be given to the athlete who should retain it securely.

### 10. The Laboratory Process

The samples are securely packaged and shipped to an accredited laboratory, which will adhere to the International Standard for Laboratories when processing the golfer's samples, ensuring the chain of custody is maintained at all times. The A sample is analysed first. The B sample is securely stored and may be used to confirm a potential violation if a banned substance or method is detected in the

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

A sample. The laboratory will confidentially report the results of the golfer's sample analysis to the PGA EUROPEAN TOUR Anti-Doping Programme Administrator.<sup>29</sup>

The "Chain of Custody" is where the athlete can challenge the body that their bodily sample was taken properly by the testers in question,<sup>30</sup> whether there was a complete chain of custody of the sample to the laboratory<sup>31</sup> and whether the test on the sample was carried out by a WADA accredited laboratory.<sup>32</sup> Challenges in this nature are quite scientific and have the potential to be very distracting to sports authorities.<sup>33</sup>

The PGA European Tour tell the players that they have a responsibility to familiarise themselves with this policy and its requirements. They say to the golfers to be aware of and take responsibility for all substances in their body, as "You are strictly liable if a test indicates the presence of a prohibited substance in your body, regardless of how the prohibited substance got there. It does not matter whether you unintentionally or unknowingly used a prohibited substance or method. Inform your medical advisers that you are subject to Doping Control testing and have an obligation not to use prohibited substances. Testing and results management processes are designed to ensure your rights to fairness and confidentiality are respected".<sup>34</sup>

The above statement is key and shows that the world of golf under all the aforementioned bodies has adopted WADA's "Strict Liability approach".

### Methodology

One of the main reasons I conducted this research was that it collaborated two issues within my life that I have a great passion for, law and sport, but especially golf. I had great access to Professional golfers through my family and friends and saw a gap in the sports law genre for doping research in the game of golf. I was interested in the history of the game and as a seven handicap golfer myself I wanted to see how cheating under a doping infringement would compare in relation to the older definition of cheating (moving ball etc) within the Professional ranks.

### Participants:

There were eight (8) participants in this survey, seven (7) PGA Professionals and one (1) Tour Caddy. For the purposes of this study N will equal eight (N = 8). The main participants will be P.G.A Professional golfer of elite local level pool, "...conforming to the "elite level" criteria suggested by Mac Intyre & Moran,<sup>35</sup> The age range is from 27 to 55 years of age.

Elite local level will range from:

### Diagram 1



The subjects were selected because they were of the highest standard within the local PGA Professionals. The eighth (8th) participant will be his caddy who is 44 years of age. He was selected as he was the Tour caddy but had also caddied at the highest Professional level in golf (European Tour) including many Major Championships.

### Materials/Apparatus:

All the interviews with the players and the caddy were digitally audio taped. The interviewees were made aware that the information that they provided would only be used within the study and as you can see from the front cover of the questionnaire.

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

**Procedure:**

The interviews were conducted face to face in a closed room for no interference. The questions were constructed so we can meet the key objectives on doping within the sport of golf.

There were 11 main research tools from to obtain a greater knowledge on the Professionals opinion on doping in golf. There were 12 research tools for the caddy most of which were the same as the professionals.

**P.G.A. Professionals Questions**

1. What would you regard as your greatest achievement/highest level you have played within your professional career?
2. What is the highest level of professional golf you have played?
3. What do you think of golfers being subject to drug testing, which is governed by the strict liability approach,<sup>36</sup> under the World Anti Doping Code (WADC)?
4. Do you think golf needs drug testing?
5. Do you think the performance enhancing drugs (PED's) have an advantage within the sport of golf?
6. Do you think that the moral innocence<sup>37</sup> would lead to abuse?
7. What have been your experiences of drug testing either as an amateur or professional?
8. What would your regard within your profession as a greater crime, A person convicted of using performance enhancing drugs or being convicted of cheating i.e. Elliott Saltman case?
9. What emotions would you feel if you found out that one of your fellow professionals was caught using performance enhancing drugs?
10. Have you had to fill in any exempt forms (see separate page below) for medication or for an injury? Was this a simple process or complex process?

**European Tour Caddy's Questions:**

1. What would you regard as your greatest achievement/highest level you have caddied for within your professional career?
2. What is the highest level of professional golf tournament you have caddied at?
3. What do you think of golfers being subject to drug testing, which is governed by the strict liability approach,<sup>38</sup> under the World Anti Doping Code (WADC)?
4. Do you think golf needs drug testing?
5. Do you think caddies need to be drug tested as they work in partnership with professional golfers?
6. Do you think the performance enhancing drugs (PED's) have an advantage within the sport of golf?
7. Do you think that the moral innocence<sup>39</sup> would lead to abuse?
8. What have been your experiences of drug testing when caddying for a professional?
9. What would your regard within your profession as a greater crime, A person convicted of using performance enhancing drugs or being convicted of cheating i.e. Elliott Saltman case?
10. What emotions would you feel if you found out that one of your professional/boss was caught using performance enhancing drugs?
11. Has your professional/boss had to fill in any exempt forms (see separate page below) for medication or for an injury? Was this a simple process or complex process?

## WHEN LAWFUL SPORT BECAME UNLAWFUL: A CASE STUDY INTO DOPING WITHIN THE PROFESSIONAL RANKS OF GOLF

### Qualitative Results & Discussion

As discussed in the methodology, the first area of assessment took the form of multiple semi structured interviews with the subjects.

#### PGA Professionals Backgrounds

The interviewing process was started by gaining some knowledge and briefly getting to know the subject. They were asked what their greatest achievement in the sport of golf was. As shown in diagram 1, this ranged from a normal PGA Professionals to current world ranked European Tour card holders.

The first interview conducted was with Paul Gray, who stated that his highest honour was holding the “course record at Einniscrone Golf Club -8 winning and winning 4 Irish Pro-am’s with one being a Euro pro tour event”. The next Professional stipulated that this was when “[he] shot 61 (11 under) in the first round of the 1996 Irish Assistants Championship”.

Four of the Professionals had said that playing on the PGA European Tour at some stage was their greatest achievement.

Ricky Duckett’s answer was a more down to earth “It’s a non playing achievement, I am the professional at Fortwilliam Golf Club in Belfast, I played here as a kid, I worked here and gained my PGA qualifications and its come full circle, I am very content”.

The eldest participant in the study was Geoff Blakeley. He had many experiences and added a great deal of credibility to what I was doing. “Winning Irish International Matchplay Championship 1989 and becoming the PGA Irish Region Captain in 2010 to the present day. I am also the Chairman of The Northern Branch of The PGA”.

The youngest member Paul Vaughan also came from fine playing pedagogy, and was the “2010 PGA Assistants Champion, Royal County Down”, but after the interview he was selected as Head Professional at Ardglass Golf Club, one of the finest links on the Island which is also a fine achievement for someone as young as him.

The last subject was Simon Thornton (see information below). He stated that “Gaining European tour card in 2010 and playing in the last group in BMW Munich 2010” were

his greatest golfing achievements. At the BMW International Open in June 2010, Simon finished 9th and won €42,400.

Simon is a current PGA European Tour Professional. He spends 38 weeks away on tour per year, so his background has been gone into with the greatest detail.

**Table 1: Current PGA European Tour Facts**

Residence	Newcastle, Northern Ireland
Attachment	Team Ireland
Date of Birth:	18/03/1977
Place of Birth	Bradford, England
Height & amp;	188cm 73kgs
Weight	(6ft 11st 6lb)
Family	Wife: Ciara (2004)
Interests	Cars, all sports
Turned Pro	2005
Qualifying School	(2005), (06), (07), 08, 09*
World Ranking	634 <sup>40</sup>

**Table 2: Simons Current PGA European Tour Statistic’s for 2010-2011**

Category	2010	2011 <sup>41</sup>
Stroke Average	71.74	71.5
Driving Accuracy (%)	63.26	69.68
Driving Distance (Yards)	274.02	289.89
Greens In Regulation (%)	64.6	62.3
Average Putts Per Round	29.57	29.64
Putts Per Gir	1.8	1.8
Sand Saves (% Total save attempts)	28.57/56	36.36/11

Simon’s elevation to The European Tour completed a remarkable rise through the professional ranks. He was born in Yorkshire, UK but now an Irish passport holder after moving to Newcastle, in County Down, he was playing off a handicap of seven just a decade or so ago. “When I first went over to work as an assistant in the pro shop at Royal County Down, I could barely hit it out of my own shadow,” he admitted.

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
 A CASE STUDY INTO DOPING WITHIN THE  
 PROFESSIONAL RANKS OF GOLF

But his hard work and perseverance paid off as he progressed firstly through the Irish PGA regional circuit, before moving onto the Euro Pro Tour and then graduating to the Challenge Tour last year (2009). He posted two top ten finishes en route to 51st place in the Rankings, but later earned a European Tour card for the first time after successfully negotiating his way through the Second and Final Stages of the Qualifying School. Despite a potentially costly bogey on the last hole at PGA Catalunya Resort in Girona, Spain, a closing round of 71 was good enough to see him finish inside the ten under par cut-off and he took the 29th card. This season as mentioned above he finished 9th in the BMW International open in Munich.<sup>42</sup>

**The PGA European Tour Caddy**

The European Tour caddy is the experienced Garry Currie. He tells me, “I have got to a high level, I have actually won a few tournaments I have caddied for the likes of Paul Lawrie that has won the Open. I have caddied for Ronan Rafferty, Peter Ousterhaus and Thomas Levet”. He has caddied in 6 majors including the British Open (Open Championship) of 1995 & 1996.

**Responses to Questions**

- Q1. *What would you regard as your greatest achievement/highest level you have played within your professional career?*  
 Q2. *What is the highest level of professional golf you have played?*

**Table 3: Information in Regards to all the Participants in the Study.**

Name	Age	Current Position	Highest Level
Paul Gray (Golfers)	42	Head Professional at Hollywood Golf Club. Hollywood. (Home club of Rory Mac Ilroy)	Euro Pro Tour, Holding the course record at Einniscrone Golf Club - 8 and winning 4 Irish Pro-am's with one being a Euro pro tour event.
Paul Russell	43	Professional at Scrabo Golf Club, Newtonards.	4 European Tour events.
Peter Martin	44	Playing Professional, Euro Pro Tour, challenge Tour and 1 European Tour event, The Irish open 2011.	European Tour
Ricky Duckett	41	Head Professional Fortwilliam Golf Club, Belfast.	Irish region events, pro only, pro am. Irish championship field including, Paul McGinley, Padraig Harrington, Damien McGrane. Played in overseas tournaments in Thailand, Egypt, Caribbean and the Middle East.
Geoff Blakeley	55	Head Professional at Balmoral Golf Club, Belfast & Chairman of the PGA Northern Branch, Ireland.	European Tour I had my card for 6 years and played in the 1989 British Open
Paul Vaughan	29	Head Professional at Ardglass Golf Club, Co Down.	PGA Powerade Assistants Championship UK wide.
Simon Thornton	33	European Tour Professional from The Royal County Down Golf Club	See Section above
Garry Currie (Caddy)	46	European Tour	European Tour, 6 majors including the British Open (Open Championship) 1995&96

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

**Mean Age**

The mean age (M) of all the participants is forty one (41) years and six (6) months, this was calculated by adding all the ages together, this gave the total sum of three hundred and thirty three years (333) which was then divided by the number of subjects 8 giving the aforementioned answer.

**Answer: Sum/Total Number of Participants = Mean Age (M)**

**Answer: 333/8 = 41.6 years**

**Diagram 2**



*Q3. What do you think of golfers being subject to drug testing, which is governed by the strict liability approach,<sup>43</sup> under the World Anti Doping Code (WADC)?*

This Question it would be though would be a foregone conclusion but it proved otherwise, six of the answers were a pretty straight forward yes, but Paul Vaughan's answer left me a bit perplex that it came from such a young professional, especially in relation to this study.

Paul Russell conveyed this message with the strongest vigour, "No drug testing in golf. Golf is a game on honesty and integrity and should remain that way as much as entirely possible but at the same time if somebody becomes suspicious then obviously then people need to act".

Paul stated that, "I agree with testing for drugs which can calm the nerves but don't think performance enhancing drugs such as steroids are beneficial to golf. Golf is about flexibility in my view and not sheer muscle."

Which was the closest answer apart from Vaughan's to break the mould. The other answers were pretty simple, "Yes", to "I have been tested as an International, and think random drug testing at events is fair", to the current touring Professional stating "Good, should be tested", to "Fair enough, if it's introduced as a rule, and may prevent a chemical advantage over other competitors it should be adhered to".

To the strongest answer who came from the oldest subject Blakeley, "I agree with it keeping drugs out of any sport is important", this maybe because he was responsible for introducing this into the PGA of Ireland as the Northern Branch Chairman.

The caddy answered the same question and he stated that, "Yes I think this is fair as they are a part of your team and employed by you or your management".

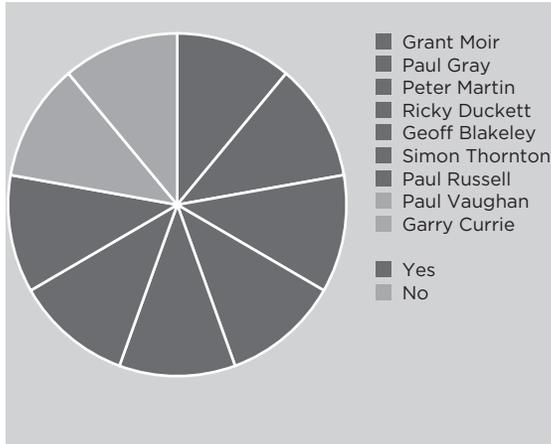
This was interesting as it shows that the caddy believes that it only should be the player that gets tested.

Referring back to Vaughan's statement, it is felt that this is the most interesting. He went against the norm, his beliefs would make him a traditionalist. "No drug testing in golf. Golf is a game on honesty and integrity and should remain that way ...".

This answer would correlate with The Rules of Golf, Section 1 "the spirit of the game" and WADA's spirit of sport, "Golf is played, for the most part, without the supervision of a referee or umpire. The game relies on the integrity of the individual to show consideration for other players and to abide by the Rules. All players should conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be. This is the spirit of the game of golf."<sup>44</sup>

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
 A CASE STUDY INTO DOPING WITHIN THE  
 PROFESSIONAL RANKS OF GOLF

**Diagram 3:** Q4. Do you think Golf needs Drug Testing?



Q5. Do you think that the moral innocence<sup>45</sup> would lead to abuse?

This question was of one of great interest. Did the subjects think that performance enhancing drugs (PED's) have an advantage within the sport of golf? It was thought that this question would deliver the most debate from the subjects.

Paul Gray was adamant that, "Yes, golf today has more emphasis on fitness, mainly golf specific fitness and PEDs can help to improve this by helping the body recover quicker. In the past there was not enough knowledge or technology for players to be specific enough with their training and therefore many players actually made their games worse through the wrong type of training. Today the knowledge and technology makes it possible to train players with the exact outcomes to improve distance, power and accuracy. Golf is a sport of honour and trust it is important that this is upheld in all aspects of the game."

Again we see the "honour and trust" ethos coming through in another Professionals' answer. We see the century's old tradition coming to the forefront throughout this process. It was interesting to see that the new modern perspective had come into Gray's answer it sounded more like a true track and field athlete's perspective, not the stereotypical over weight, old man golfer that people think off.

Paul Russell's answer completely contradicted Grays answer, "No, if golfers were to build up muscle with steroids, then it would be more a hindrance than a benefit," this again collaborated with Martins view, that "Yes, but only mentally".

Duckett, who told me that he was a keen cyclist, stated that, "I am not qualified to answer this question. If the use of PED's in general gives an enhanced performance why hasn't a tour player been caught..... Does EPO have an advantage, cycling up Alpe D'huez , YES . In a European tour event, I don't know, will it improve oxygen flow and aid concentration it should do, but then again do you want to die in your sleep because your blood is like porridge and your heart can't pump it around your system."

This was a very interesting perspective after looking at the previous answers before it. Do you not think a golfer would have tried? Maybe the "spirit of the game" holds strong today throughout the Profession.

The question for the caddy was changed to "Do you think caddies need to be drug tested as they work in partnership with professional golfers?" His answer was clear, "No, definitely not, the caddy does not hit the shots!" and was then asked the same question as Professionals above, "Maybe if they were on drugs that help you relax under pressure." All these perspectives show the different attitudes towards PED's in the game of golf. Some think yes for mental, some think yes for physical others think that it won't help at all. We will just have to wait to see how the situation develops in the future.

The question as discussed above in the WADA section under the aspect of moral innocence leading to abuse was pretty definitive bar Peter Martin who stipulated that he was "Not sure, as mistakes can happen easily". The quote that defined the entire yes answers was Ducketts, "Yes I suppose it would, so guilty is guilty", which would show that he agreed with the others in the long established "strict liability" principle. This answer was collaborated with the caddy's answer who said: "Yes you would need very strict guidelines and I feel that this would lead to abuse because it would be an excuse open to all athletes."

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

Q6. *What have been your experiences of drug testing either as an amateur or professional?*

The only person who was tested was Simon Thornton, who said “I was tested in Holland last year on European Tour (2010) at the KLM Open. They were very professional and it was well done. All supervised by outside people”.

This quote gives a great insight into the testing procedure without invading the athlete’s private life (Article 8 ECHR). If we look at “The Testing Process” section under the PGA European Tour literature we see what happens from start to finish. Thornton gives us an insight to how the process is, “very professional and it was well done” showing that golf has adopted the highest of standards from what we can ascertain.

The caddy was asked if he had caddied for anyone who had been tested, and being a caddy with experience he gave a very insightful answer on the development of the sport and the rewards that are on show today: “Back in the old days this was not an issue but due to so much money involved in the sport this would be a proper procedure, and player X, I caddied for in Europe was tested and it looked relatively straight forward. I expect to see this more vigorously in the future”.

Q7. *What would your regard within your profession as a greater crime, A person convicted of using performance enhancing drugs or being convicted of cheating i.e. Elliott Saltman case?*

This question from my personal perspective was the most interesting. On Wednesday 19th January 2011 at a Disciplinary Hearing of The European Tour Tournament Committee in Abu Dhabi, the Committee unanimously found that Elliot Saltman had committed a serious breach of the 2010 Challenge Tour Members Regulation F 1 (b) 6 (Rules of Golf) during the first round of the M2M Russian Challenge Cup on 16th September 2010 at Tselevo Golf & Polo Club, Moscow, Russia. Saltman is the first professional to be expelled from Europe’s premier events since Johan Tumba was banned for 10 years in 1992, after changing his scorecard at tour school. Saltman was given 28 days to appeal against the decision. His representatives are believed to have spent most of today meeting with lawyers and further meetings are planned with a view to challenging the decision.

The worst-case scenario for the European Tour, which it will do everything it can to avoid, would be a prolonged court

battle focusing on the issue of cheating in golf and on other cases in which rules were allegedly broken.

One such case was the infamous “Jakartagate” affair, in which Colin Montgomerie was accused of incorrectly replacing his ball after a rain delay at the 2005 Indonesian Open. The former Ryder Cup captain was censured by the same tournament players’ committee that delivered today’s verdict.

Saltman was accused of incorrectly marking his ball on the putting green on at least five occasions in the first round of last September’s M2M Russian Challenge Cup in Moscow. After the round his two playing partners, Stuart Davies and Marcus Higley, raised concerns first with Saltman and then with the tournament referee, Gary Butler, indicating that they would not sign the Scotsman’s scorecard because they believed he had broken the rules. All four held a private meeting, after which Saltman was disqualified.

*“It was the finding of the Tournament Committee that Elliot Saltman, who was disqualified from the M2M Russian Challenge Cup, was suspended from participating in all European Tour and Challenge Tour sanctioned tournaments for three months that started on January 19, 2011”*<sup>46</sup>

*“... Under Challenge Tour regulations Elliot Saltman, who attended the Disciplinary Hearing in Abu Dhabi, has the right to lodge an appeal before the Board of The European Tour. This appeal must be lodged within 28 days.”*<sup>47</sup>

This was huge in the golfing community. Everybody was talking about it, players, coaches and caddys. The great and the good of the game had an opinion on the issue which was exacerbated by the media coverage. You could sense that the aforementioned “spirit of golf” and WADA’s “spirit of the game” were severely compromised.

Martin Kaymer hits out at Elliot Saltman cheating and saying “I couldn’t live with that...” He would be unable to live with himself if he was in the same position as Saltman, who was found guilty of “a serious breach of the rules” during a Challenge Tour event in Russia last September. Saltman, who won his European Tour card while waiting for a disciplinary hearing, is taking advice from his lawyers, having met with them on a number of occasions since becoming only the third professional to be banned for cheating on the European circuit.<sup>48</sup>

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
 A CASE STUDY INTO DOPING WITHIN THE  
 PROFESSIONAL RANKS OF GOLF

Cheating is and always has been the most serious offence a golfer can be accused of committing. “Any suggestion of its existence at the highest level also undermines golf’s unique selling point of being the most honourable of sports,”<sup>49</sup> Saltman didn’t appeal and served the punishment for his crime.

The Professionals purported a mixed view on this issue; some fell on one side and the other of the continuum, with some varying views in the middle. Paul Gray expressed his opinion with the strongest vigour that “they are both the same”, this collaborated with the opinion of Martin and Thornton that he “would probably treat them equally as both are gaining an unfair advantage”, and “It’s the same thing”. This shows that they believe that any breaches of aforementioned “Rules of Golf” or the “Spirit of the Game” are equally the same, it is interesting to see that the Professionals with these opinions are the Professionals that are playing golf regularly on the top two tours.

On the other end of the spectrum, we have the view point that cheating i.e. the Elliot Saltman case above, is worse. Russell conveyed his point that in his belief “Cheating definitely!”, was a worse crime. Duckett on is view point shows a sway towards PED’s but shows the common belief within the bottom end of the Elite spectrum that cheating prevails, “I suppose if taking PED’s is regarded as cheating i.e. outside the governing rules , then it has to be black and white and they would both be regarded as cheats. However I suspect the guy that is caught physically improving his lie in the rough or simply drops another ball or alters his score card would have the real rough ride”.

Blakeley told me that, “cheating in my book is the worst, taking drugs would be a close second”, this was interesting that as he help bring in the doping regulations into the Northern Branch of the PGA, but he is the oldest subject who would have been regulated for close to 40 years on the “honour” criteria but was adamant in the previous question that golf needed doping.

Vaughan came across with the strongest belief on the issue that “Cheating as this is an act to better your score under false pretences. The same argument could be said for performance enhancing drugs but I believe cheating to be the biggest offence you could commit in golf”. Vaughan seem to be a real traditionalist maybe this was due to his upbringing,

but as shown from his interview, he collaborated with the traditional view point of the “honour code”.

The Tour caddy was asked the same question about the two issues, Currie collaborated with the later view, maybe this was because of his age as an experienced Tour caddy with the “honour” theme coming through again, “This is very hard to distinguish against but I feel that cheating would be a tad more of an issue as golf is a game of honour”.

*Q8. What emotions would you feel if you found out that one of your fellow professionals was caught using performance enhancing drugs?*

**Diagram 4: The Doping/Cheating Continuum**

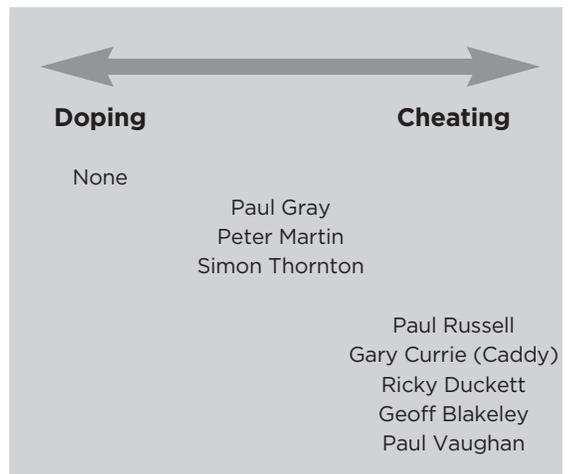


Diagram 4 shows that the “honour” code in golf as well as the “Spirit of the Game”. The spirit of the game is still prevalent even though doping rules are now enforced. Four Professionals and a caddy are willing to state that cheating is a greater crime than doping. None of the athletes said that doping was a greater crime, with 3 touring professionals stating that they had equal weight.

*Q9. What emotions would you feel (A Professional Athlete) if you found out that one of your fellow professionals was caught using performance enhancing drugs?*

This question was to see what reactions the athletes would feel, as this potentially could happen now in golf. As shown here

## WHEN LAWFUL SPORT BECOME UNLAWFUL: A CASE STUDY INTO DOPING WITHIN THE PROFESSIONAL RANKS OF GOLF

and mentioned above, Appendix I, 10, Anti-Doping - "The Committee may require, in the conditions of competition, that players comply with an anti-doping policy"<sup>50</sup>

"Anti-Doping Rules, like the Rules of Golf, are sport rules governing the conditions under which sport is played."

The caddie stipulated that he would have felt "...cheated. I would be competing honestly and giving my best while someone was using drugs playing against me giving them an unfair advantage". It could be said that this would be the most common view among athletes from all sports across the board.

The correlation between cycling and PED's was a recurring theme through some of the interviews this showed what sort of stereotypes the sport had on other athletes in other sports, as shown by Duckett. "I don't know, ask me when it happens. Will PED's make you swing it better, I don't think so. If you gain strength and bulk will you hit further? Possibly. Will you be as flexible? Will it improve concentration? Will professional golf follow into a Tour de France farce where if the rider you're betting on is caught doping you get your money back (Paddy Power). I don't know ... I suppose I'd be well annoyed if my integrity and reputation were in tatters because of this. If a banned substance was in a cold mix or pain relief, well I suppose I could possibly be exonerated even if I had to take a ban and I should have known better than to trust a medic or take something on a banned list or a substance that is not on a clean list. If I tested positive I don't have a leg to stand on regardless if I thought I was innocent, unless my sample was contaminated, then I'd be off scot free".

Russell said, "I would be shocked but unlike cycling for example I wouldn't be that annoyed as I don't see it gaining an advantage," it shows that the Professional would feel that PED's would feel give another golfer "an unfair advantage". The opinion of Martin set the harsh reality of what PED's would do on the profession, from a financial aspect, "Robbed, loss of income from any events he has finished ahead of me, also annoyed".

Geoff Blakeley said "I would feel disappointed and let down",<sup>51</sup> this view point would collaborate possibly with his position as Chairman of the PGA Northern Branch. Thornton who deals with this on Tour for most of the year gave the most robotic answer, "Same as cheating, good he/she was caught".

Paul Vaughan from Ardglass Golf Club gave the most passionate answer, "I would have the opinion of more fool them than get annoyed at someone for doing it. If they feel they need to do that to better themselves then that's up to them. This would be a motivation tool for me to improve and try to beat them".

The issue of doping actually gave him the inspiration as shown by the highlighted quotation above. On another perspective the caddy was asked "what emotions would you feel if you found out that one of your professional/boss was caught using performance enhancing drugs?" He went down the line of "Sadness (and) annoyed as I would now be out of pocket and employment".

*Q10. Have you had to fill in any exempt forms (see separate page below) for medication or for an injury? Was this a simple process or complex process?*

The question was then put to the subjects if they had filled in any exempt forms for medication or for an injury? Was this a simple process or complex process? None of the Professionals had any experience with the exception of the Caddie who started that, "Yes, my boss has asthma, it was very straight forward."

### Conclusion

It is clear from the literature above that golf needs an anti doping policy through the WADC due to the financial rewards involved. The development of the "strict liability" approach, from its rigid harshness to what Anderson calls "modified strict liability" has been an excellent addition to the law that governs sport. The Court of Arbitration for Sport ("CAS") in today's modern society plays a vital and pivotal role in the fight against corrupt sport through its awards.

When looking specifically at the sport of golf we see that the anti doping policy was developed and adopted so that it could enter back into the Olympic Games in 2016 after a 112 year absence. The fact that all of golf's governing bodies has signed up to the WADC in some ways has made the sport stronger.

The Royal & Ancient through Appendix I, 10, stipulated that

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
 A CASE STUDY INTO DOPING WITHIN THE  
 PROFESSIONAL RANKS OF GOLF

anti doping was now part of the law that governs the game of golf. The R&A have sign up to the Article 1 and 2 of the IGFADP which in turn has signed up to the WADA's Code The IGF set out the doping policy that came into effect from the 1st January 2010. The PGA European Tour has developed its own policy that collaborates with the IGFADP as shown in the above literature. The "Spirit/ Honour of Game" that is so prevalent throughout all aspects of the sport, this shows how golf has been a game developed over the century's with all of its players respecting the "Rules of Golf".

The qualitative study explored performance enhancing drugs using elite local PGA Professional golfers conforming to the aforementioned "elite level" criteria. The results showed that PGA golfers as a whole welcomed the PGA European Tours and the IGF's anti doping policy and testing. The most interesting analysis from the data was the how "The spirit of the game" and the issue of "honour" played so heavy on the Professionals minds, with a majority stating that cheating was worse than using performance drugs. (5 = Cheating, 0 = Doping & 3 = they are both the same).

There has been a long established saying within the golfing circles that "golf is a gentle game played by gentlemen" and from this study it is clear that their adaption of anti doping laws into the sport has upheld this long established belief. **BASL**

*\*The Author is an Apprentice Lawyer at Lundy & Co Solicitors in Belfast. He has a First Class Honours Degree from The University of Ulster in Science with Sport Studies and a Masters in Law (Legal Science) from The Queens University Belfast, were he obtained a Pass with Commendation.*

*\*\*All the interviews and correspondences that were used for this article are on file with the author. If anyone would like to see them they can contact the author. They will be released at the author's discretion.*

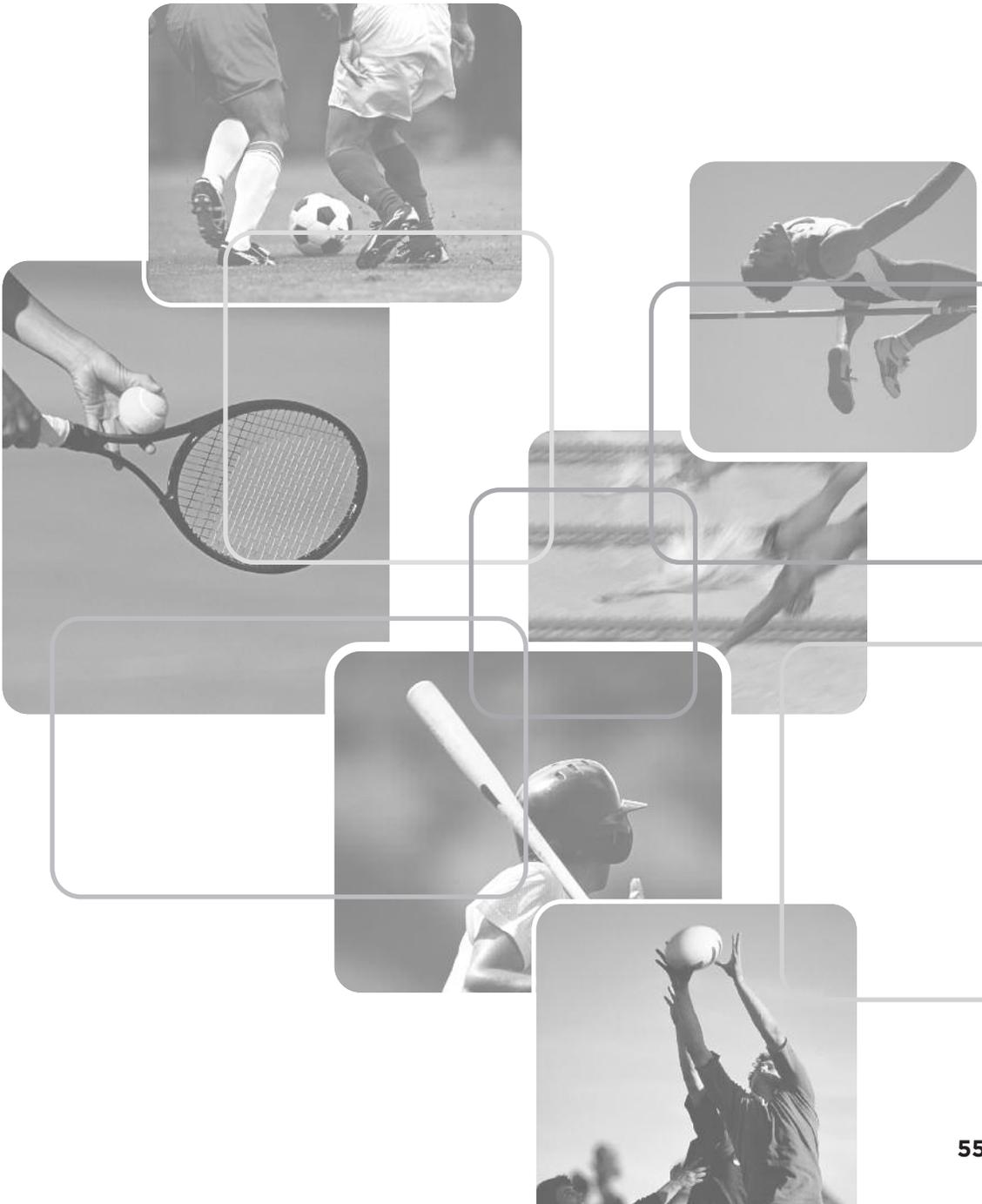
- 1
- 2 <http://www.randa.org/en/Our-Heritage/The-Royal-and-Ancient-Golf-Club/Early-History-of-the-Club.aspx>
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- 5 Price, R. (2002) "Scotland's Golf Courses: History and Landscape" 3rd Edition, Mercat Press UK at 51.
- 6 [www.usga.org](http://www.usga.org)
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- 10 "Golf and rugby turn back clock in re-entering the Olympics" Saturday, 10 October 2009; <http://www.independent.co.uk/sport/olympics/golf-and-rugby-turn-back-clock-in-re-entering-the-olympics-1800485.html>
- 11 (2007) "Rules of Golf 2008-2011" 31st Edition, The R&A Rules Limited, St Andrew's, Fife, at p 26 The Rules of Golf, Section 1 "the spirit of the game"
- 12 These are set out in Article 4.3.2 WADC
- 13 *Ibid* above XIII at p 147
- 14 *Ibid* above at p 147
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- 26 *Ibid* above
- 27 *Ibid* above at xxvi at p 6
- 28 *Ibid* above at p 10
- 29 *Ibid* above at p 10 - 11.
- 30 CAS 98/211 B V FINA
- 31 USA Shooting & Quigley v Union Internationale de Tir (UIT) CAS 94/129 at 39 - 52
- 32 *Modhal v British Athletic Federation Limited* [1999] UKHL 37 per Lord Hoffmann
- 33 The PGA European Tour (2010) "Anti Doping Handbook", PGA European Tour Surry England. At p 5
- 34 *Ibid* above at p 13.
- 35 MacIntyre, T. Moran, P. (2007) "A Qualitative Investigation of Meta 1 Direction among Elite Athletes. Journal of Imagery Research in Sport and Physical Activity", Volume 2, issue 1 at p 3
- 36 Strict Liability is WADA approach that when a athlete has a positive test is banned irrespective of whether they unintentionally or negligently consumed a prohibited substance. Anderson, J. (2011) page 113
- 37 That someone other than the athlete i.e. Doctor or Pharmacist or coach gave it to the athlete and they genuinely believed it was not infringing the WADC.
- 38 Strict Liability is WADA approach that when a athlete has a positive test is banned irrespective of whether they unintentionally or negligently consumed a prohibited substance. Anderson, J. (2011) page 113
- 39 That someone other than the athlete i.e. Doctor or Pharmacist or coach gave it to the athlete and they genuinely believed it was not infringing the WADC.
- 40 <http://www.europeantour.com/europeantour/players/playerid=34062/bio/index.html>
- 41 <http://www.europeantour.com/europeantour/players/playerid=34062/statistics/index.html>
- 42 <http://www.europeantour.com/europeantour/players/>

WHEN LAWFUL SPORT BECOME UNLAWFUL:  
A CASE STUDY INTO DOPING WITHIN THE  
PROFESSIONAL RANKS OF GOLF

*playerid=34062/bio/index.html*

- 43 *Strict Liability is WADA approach that when a athlete has a positive test is banned irrespective of whether they unintentionally or negligently consumed a prohibited substance. Anderson, J. (2011) page 113*
- 44 (2007) "Rules of Golf 2008-2011" 31st Edition, The R&A Rules Limited, St Andrew's, Fife, at p 26 The Rules of Golf, Section 1 "the spirit of the game"
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# Reviews and Reports



# European Union Sports Policy Update

**KATARINA PIJETLOVIC, TALLINN UNIVERSITY OF TECHNOLOGY**

## **Social Dialogue in professional football in Europe**

Articles 154-155 TFEU make the European Commission responsible for promoting and supporting the European social dialogue. One of the main tools in this area is the Commission Decision of 20 May 1998 (98/500/EC) on the establishment of sectoral dialogue committees promoting the dialogue between the social partners at European level, OJ L 225, 12.8.1998, p. 27 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:225:0027:0027:EN:PDF>. Social dialogue should result in collective bargaining agreements entered into by both sides of the industry representatives and it would play a significant role in shaping employment relations and working conditions. The significance of such agreements is, *inter alia*, that they are not caught by the competition provisions in Articles 101-102 TFEU (according to line of cases in Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751, C-115, 116 & 117/97 Brentjens' Handelonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen [1999] ECR I-6025, and C-219/97 Drijvende Bokken [1999] ECR I-6121). In order to participate in social dialogue at European level, the social partner organisations must apply jointly to the European Commission and must meet the cumulative criteria set forth in Article 1 of the Commission Decision 98/500/EC, including the criterion of representativeness. In its 2007 White Paper on Sport the Commission said that it will encourage and welcome 'all efforts leading to the establishment of European Social Dialogue Committees in the sport sector. It will continue to give support to both employers and employees and it will pursue its open dialogue with all sport organisations on this issue'.

Social partner organizations on a European level in professional football are the International Federation of Professional Footballers' Associations (FIFPro) – Division Europe, on the side of employees, and the Association of

European Professional Football Leagues (EPFL) complemented by the European Club Association (ECA) on the side on employers. EPFL and FIFPro submitted a joint request to the European Commission on 10 December 2007, which recognised the representativeness of these bodies, including ECA, in March 2008. A European social dialogue committee for professional football was officially launched on 1 July 2008 (see European Commission Press Release IP/08/1064, 'Footballers and employers launch new EU forum for social dialogue' Brussels 1 July 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1064&type=HTML>). The committee has been working towards the conclusion of an autonomous European agreement on minimum requirements for contracts of professional football players, such as in fields of health and safety at work, health insurance, education for young players, obligations and rights of players, conflict resolution and image rights. The social partners have invited UEFA as an associate member and to chair their dialogue. Article 2 of the rules on procedure provide that items should be first submitted to the Professional Football Strategy Council, before being put on the agenda of the committee (The Rules on Procedure for the European Sectoral Social Dialogue Committee in the Professional Football Sector are available at <http://tinyurl.com/6b6ar2x>). So far, no agreement has been concluded between the social partners. FIFPro reported being 'bitterly disappointed' after the plenary session of the committee on 28th February 2011 in Brussels did not result in much anticipated signing of the autonomous agreement on minimum requirements for standard player contracts. The ECA and EPFL said they still were 'not ready to sign the agreement' and they 'needed more time to study its legal consequences' (see 'Only FIFPro is Ready to Sign Minimum Requirements' 10 March 2011, [http://www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469)).

**For further reading on this topic see:**

R. Parrish, 'Social Dialogue in European Football' (*European Law Journal*, volume 17, issue 2, 2011).

R.B.Martins, 'Agenda for a Social Dialogue in the European Professional Football Sector' in S.Gardiner, R.Parrish and R.Siekman, *EU, Sport, Law and Policy* (T.M.C. Asser Press, 2009).

Universite Catholique de Louvain, *Study on the Representativeness of the Social Partner Organisations in the Professional Football Players Sector (Report for the European Commission, Project No VC/2004/0547, 2006).*

**European Commission Communication on Sport**

After the comprehensive and high profile policy document White Paper on Sport and accompanying Commission Staff Working Document in 2007 (available at [http://ec.europa.eu/sport/white-paper/index\\_en.htm](http://ec.europa.eu/sport/white-paper/index_en.htm)), the Commission has taken another important step in defining the sports policy. The Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Developing European Dimension in Sport' (available at [http://ec.europa.eu/sport/news/doc/communication/communication\\_en.pdf](http://ec.europa.eu/sport/news/doc/communication/communication_en.pdf)) follows the general outline of the White Paper on Sport and is divided into three broad thematic chapters: The Societal Role of Sport, The Economic Dimension of Sport, and the Organisation of Sport (including social dialogue). The Communication 'does not replace the White Paper but builds on its achievements.'

**For accompanying document see**

*Commission Staff Working Document SPORT AND FREE MOVEMENT Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Developing European Dimension in Sport' COM(2011) 12 final SEC(2011) 67 final SEC(2011) 68 final*  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0066:FIN:EN:PDF>

**For impact assessment see**

*Commission Staff Working Document IMPACT ASSESSMENT Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Developing European Dimension in Sport' {COM(2011) 12 final} {SEC(2011) 66 final} {SEC(2011) 68 final}*  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0067:FIN:EN:PDF>

**European Parliament Resolution on the White Paper on Sport**

The European Parliament welcomed and in general supported the approach in the White Paper on Sport. It called on Member States and the Commission to undertake further actions in certain sport-related subjects. Furthermore, it asked the Commission to 'have due respect for the specificity of sports, by not taking a case-by-case approach and to provide more legal certainty by creating clear guidelines on the applicability of European law to sports in Europe [...]'. This is on contrast to the view in the White Paper expressed by the study group on Lisbon Treaty and the European Union sports policy that considered it unnecessary for the Commission to issue any additional guidelines. The resolution of the European Parliament is available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0198&language=EN>

**See also impact assessment accompanying the White Paper**

*Commission Staff Working Document IMPACT ASSESSMENT Accompanying the White Paper on Sport {COM(2007) 391 final} {SEC(2007)934} {SEC(2007)935} {SEC(2007)936}*  
[http://ec.europa.eu/sport/white-paper/doc/dts\\_analyse\\_impact932\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/dts_analyse_impact932_en.pdf)

## **EU Sport Forum 2011**

The third EU Sport Forum took place in Budapest on 21-22 February 2011. This is the annual event as foreseen in the White Paper. Themes included the reflections on the Commission Communication 'Developing European Dimension in Sport', developments in sport at EU level since the last EU sport forum in Madrid 2010, and presentation of results of 18 projects in the field of sport supported through Preparatory Action 2009. Speeches, report, presentation and videos from the forum are available at [http://ec.europa.eu/sport/news/news1006\\_en.htm](http://ec.europa.eu/sport/news/news1006_en.htm)

## **Bernard case (C-325/08 Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC)**

In 1997, the French football club Olympique Lyonnais (Lyon) and the 17-year old Olivier Bernard entered into a training contract for three seasons with effect from 1 July that year. The legal dispute between the parties arose three seasons later when Bernard refused to accept a one year professional contract offered to him by Lyon, which was to take effect as of 1 July 2000. Instead, in August 2000, he signed a professional contract with Newcastle United FC and moved to England.

Lyon then brought an action for 'damages corresponding to the loss suffered' against Bernard and his new club for breach of contractual obligations flowing from French Charte du Football Professionnel (the Charter) that regulated terms of employment of professional footballers. According to the Charter the club is entitled to require a trainee to sign a contract as a professional player on the expiry of the training contract. Should the player refuse, he was prohibited from signing with another French club for a period of three years without the written agreement of the club in which he was a *joueur espoir*. If the club did not offer him a professional contract, he was free to sign with a club of his choice without any compensation being due to the club that trained him.

Despite the fact that Newcastle was not a French club, Lyon sought an award of EUR 53 357 in damages, the amount corresponding to the remuneration Bernard would have received over the period of one year under the professional contract with Lyon which he had refused to sign.

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The legal dispute between the parties arose three seasons later when Bernard refused to accept a one year professional contract offered to him by Lyon, which was to take effect as of 1 July 2000.

In July 2008 the Cour de cassation made a reference for a preliminary ruling under ex Article 234 EC (now Article 267 TFEU) to the Court, essentially asking i) whether Article 39 EC (now Article 45 TFEU) precludes the provision of a national law requiring *joueurs espoir* to pay damages in the described context, and ii) if so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective capable of justifying such a restriction.

On 16 March 2010 the Court of Justice passed a judgment. Without much hesitation it held that the rules such as contained in the Charter are restrictive of the freedom of movement for workers under Article 45 TFEU, and that 'in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate'. However, the rules pursuing legitimate objective must be proportionate and the Court's reasoning under that analytical point is the most interesting part of the judgment. In this context in terms of standard of application of proportionality principle the Court made a first reference to the Treaty Article 165 and said that: 'account must be taken [...] of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU'. Applying this standard the Court found the scheme suitable to achieve the said objective (in contrast to its previous opinion in paragraph 109 in *Bosman*). However, the scheme was held to go further than necessary in requiring the payment of damages to the club which provided training calculated on

the basis of total loss for breach of contractual obligations by the player (the amount of which was unrelated to the 'real training costs'), went beyond what was necessary to encourage recruitment and training of young players and to fund those activities. What constitutes 'real training costs' and how to calculate them is the issue left open.

Article 20 and Annex 4 of the FIFA Regulations set out the rules for training compensation. Accordingly, training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional, and (2) on each transfer of a professional until the end of the season of his 23rd birthday. Thus, the Court's judgment in Bernard has in general approved of this system, however, it will not be clear whether the rules are disproportionate until someone actually challenges the FIFA rules and the flat rate system used to calculate the amount of compensation.

**For full text of the judgment see**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0325:EN:HTML>

*For the Opinion of Advocate General see*

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0325:EN:HTML>

**For detailed analysis of the judgment see:**

*Pijetlovic, K., 'Another classic of EU sports jurisprudence: Legal implications of Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC (C-325/08)' (European Law Review, 35, 2010).*

*Carr, A., 'Player Contracts: Training compensation: ECJ ruling in Olivier Bernard case' (8(4) WSLR 2010).*

*Weatherill, S., 'The Olivier Bernard case: how, if at all, to fix compensation for training young players?' (International Sports Law Journal 1-2, 2010).*

*Lindholm, J., 'Case C-325/08, Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United UFC, Judgment of the Court of Justice (Grand Chamber) of 16 March 2010, not yet reported' (Common Market Law Review 47, 2010).*

**General Court judgments in Cases T-385/07, T-55/08 and T-68/08: FIFA and UEFA v Commission**

On 17 February the General Court of the European Union (formerly the Court of First Instance) delivered three separate but closely related judgments in FIFA and UEFA v Commission cases.

Paragraph 1 of Article 3a of Council Directive 89/552/EEC provides a possibility for the Member States to draw up the list of events which it considers to be of major importance for society to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. In accordance with paragraph 2 of Article 3a, Member State exercising this possibility is to send the list of 'designated events' to the Commission for confirmation that they are compatible with the EU law.

Commission approved the lists notified to it via this procedure by Belgian federal authorities, and the UK. The list included, among other events, all matches of World Cup and the EURO. The applicants, FIFA and UEFA, argued that all such matches cannot be regarded as events of major importance for the public of those States. However, the General Court found that they are to be regarded as single events rather than as a series of individual events divided into 'prime' and 'non-prime' matches (the semi-finals, the final and the matches involving the relevant national team of the country in question are considered as 'prime') or into 'gala' and 'non-gala' (opening match and final match are 'gala') matches. The General Court further noted that it cannot be specified in advance, at the time when the national lists are drawn up or broadcasting rights acquired, which matches will be decisive for the subsequent stages of those competitions or which ones may affect the fate of a given national team. For that reason, the Court held that the fact that certain 'non-prime' or 'non-gala' matches may affect whether a team advances to the 'prime' or 'gala' matches may justify a Member State's decision to consider that all of the matches of those competitions are of major importance for society.

The restrictions on freedom to provide services and freedom of establishment were therefore found compatible with EU law. This judgment is bound to decrease the value of the

commercial rights for the listed events held by UEFA and FIFA, but in the decision of the General Court that fact does not destroy the commercial value of those rights because it does not oblige FIFA and UEFA to sell them on whatever conditions they can obtain.

**Full text of the judgments available at:**

- T-385/07 <http://tinyurl.com/6g7c4en>
- T-55/08 <http://tinyurl.com/3dsvkyz>
- T-68/08 <http://tinyurl.com/6fuqdpv>

**For press release see**

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cp110009en.pdf>

For texts concerning the cases see ISLJ news item by I. Blackshaw 'Landmark ECJ rulings in FIFA & UEFA 'crown jewels' cases' at [http://www.asser.nl/Default.aspx?site\\_id=11&level1=13914&level2=13931&rextid=39299](http://www.asser.nl/Default.aspx?site_id=11&level1=13914&level2=13931&rextid=39299)

**Recent publications in EU sports law and policy**

R. Parrish, and S. Miettinen, *The Sporting Exception in European Union Law*, (T.M.C. Asser Press, 2008).

R. Blainpain, ed. *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper*, (Kluwer Law International, 2008).

Steve J. Cornelius, Ian S. Blackshaw, Robert C.R. Siekmann *TV Rights and Sport: Legal Aspects* (T.M.C. Asser Press 2009).

A chapter on EU competition law and sport can be found in Van Bael, and Bellis *Competition Law in European Community* (Kluwer Law International, 2009) pp.1484-1511.

**Upcoming**

European Commission to study transfers

Michael Krejza, Head of the Sports Unit at the European Commission said in his speech on EU Sport Forum 2011 that the Commission will analyse 'more in-depth the situation concerning transfers in team sports[...]' and that it 'will therefore launch a study on transfers, as soon as possible in the second half of this year'. See his speech at [http://ec.europa.eu/sport/library/doc/b1/budapest\\_krejza.pdf](http://ec.europa.eu/sport/library/doc/b1/budapest_krejza.pdf)

Call for proposals: 2011 Preparatory Action in the field of sport (Open call EAC/18/2011)  
The Sport Unit of the Directorate-General for Education and

Culture announced a call for proposals to implement the Preparatory Action in the field of sport. This call for proposals will support transnational projects put forward by public bodies or not-for-profit organisations in order to identify and test suitable networks and good practices in the field of sport, in the areas of (a) Prevention of and fight against violence and intolerance in sport, and (b) Promoting innovative approaches to strengthen the organisation of sport in Europe. The budget is EUR 2 million, deadline 29 July 2011. More details can be found at [http://ec.europa.eu/sport/preparatory\\_actions/doc1009\\_en.htm](http://ec.europa.eu/sport/preparatory_actions/doc1009_en.htm) 

# Sports Law Foreign Update

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## CORRUPTION IN FOOTBALL: THE SAGA CONTINUES

### German authorities take action against match-fixing practices

Ever since the German refereeing scandal broke three years ago, as reported in these columns and elsewhere, it has been evident that, even in a country as relatively untainted by corruption as the Federal Republic, the shadow of match-fixing is as potential a threat to the integrity of the game as has been the case in countries more renowned for the practice. So preoccupied by the problem have the German authorities become that the national Football League (Bundesliga) has enlisted the services of Transparency International to serve as an invigilator of match-fixing. This arrangement with one of the “big four” European leagues represented the most candid admission yet that football has just as much to fear from the scandals which, as detailed above, have engulfed cricket and tennis, as any other sport. Transparency International is a global anti-corruption organisation which has struck several significant blows against corruption within governments and corporations, but has hitherto never been involved in the invigilation of sport (*The Guardian of 8/9/2010, p. S4*).

Even more decisive action, in the form of judicial proceedings, followed the next month, when it was learned that four alleged ringleaders of the most sizeable match-fixing scandal to affect the sport in Europe went on trial in the Northern mining city of Bochum, being accused of bribing players and officials in six countries. The gang was said to have made profits of £1.4 million from bets on 36 fixtures, principally in the lower divisions of Germany, Belgium, Slovenia, Hungary, Croatia and Switzerland. The trial, which was still proceeding at the time of writing, was naturally closely monitored by European governing body UEFA, amid claims that this merely represented the tip of the proverbial sea-mount. It was also reported that an even wider investigation, involving some 250 suspects in 15 countries, was still in progress. Away from the astronomical salaries of the top leagues, the gang allegedly found it less difficult to tempt modestly-paid strikers and referees with a total of €370,000 in bribes (*The Times of 7/10/2010, p. 30*).

The charge sheet read out in court featured a match played in November 2009 in the Europa league between FC Basel (Switzerland) and CSKA Sofia (Bulgaria). The four defendants include a former professional, Christian S, who

played for FC Schweinfurt 05 in the German second division during the 2001-2 season. The men face up to 10 years’ imprisonment if convicted (*Ibid*). The latest information before going to press was that one of the key witnesses at the trial, himself a convicted match fixer, had testified on the manner in which he had bribed a Bosnian referee to manipulate a World Cup qualifying fixture between Liechtenstein and Finland. He claimed to have met the referee in the parking lot of a Sarajevo hotel in order to discuss fixing the game, which took place in September 2009. The match ended in a 1-1 draw, with both goals coming in the second half, as allegedly requested by the match fixer. Neither team qualified for the World Cup finals in South Africa the following year. The referee in question was later banned for life for his links with the match-fixing ring (Associated Press, [www.findlaw.com](http://www.findlaw.com) of 5/1/2011). Later still, the European Champions League also became involved in the case, after a Group B match between Hungarian side Debrecen and Italian team Fiorentina, played in October 2009, and which finished in a 4-3 win for the Italians, was named during the trial (*The Daily Telegraph of 15/1/2011, p. S9*). The present writer will naturally follow the outcome of this trial with great interest.

### **Was 2010 World Cup tainted by corruption? Contradictory signs emerge**

With the praise being heaped upon the quality on display at the World Cup in South Africa last year, both as to its organisation and the football (with one possible notable exception!), it almost appears unseemly to suggest that anything untoward may have occurred as regards the probity of the fixtures played. Yet even amidst the euphoria which has surrounded the tournament ever since the final whistle was sounded, the evidence to the contrary is far from convincing.

No sooner had the dust settled on the kikuyu grass of the Soccer City stadium in Johannesburg, where the notorious Final was held, than the leading European betting operators hastened to assure the world that they found “no evidence” of any suspicious betting made on any of the tournament fixtures. The European Sports Security Association (ESSA), which is the bookmakers’ monitoring system, claimed to have investigated bets made before and during the month-long event for any possible links to attempts at match corruption. ESSA is part of the network of early warning systems alerting world governing body FIFA and other sports federations to any betting-related corruption. The previous week, FIFA itself had claimed to have found “no indication” of attempts to fix any of the 64 Cup fixtures. During the tournament, it had operated a telephone “hotline” in South Africa for players, referees and other officials to report any approaches made by match-fixers (*Associated Press, www.findlaw.com of 20/7/2010*).

Less reassuring, however, was the news

that international police co-operation body Interpol had refused to rule out the possibility that its trawl through computer and mobile telephone equipment seized in co-ordinated raids in the Far East during the final week of the tournament could yield evidence of matches having been fixed at the World Cup. A month-long operation covering Malaysia, Macau, Hong Kong, mainland China, Singapore and Thailand had led to the seizure of £6.6 million and the arrests of no fewer than 5,000 people allegedly involved in criminal gambling syndicates. It is a fact that illegal betting in the Far East has been linked to several incidents of football corruption in the past, and the large amounts of cash involved in wagering on World Cup fixtures would have made certainty of outcome particularly lucrative (*The Guardian of 20/7/2011, p. 38*). At the time of writing, however, no further indication of World Cup match-fixing arising from this action has materialised.

There have also been serious accusations in the international press concerning the allegedly corrupt activities of a FIFA Executive Committee member over ticketing at the World Cup. When a British newspaper attempted to elicit from the world governing body confirmation that there had been any attempt at substantiating these claims, or whether there was any intention so to do, an unnamed spokesman for the organisation merely replied that as a general principle, FIFA did not “comment on media allegations” (*The Guardian of 27/8/2010, p. S2*). This apparent reluctance to tackle allegations which did not appear to be merely the product of media invention once again cast doubts on the organisation’s

seriousness of intent in rooting out any possibility of corruption within its ranks.

### **Kenya leads way in removing corruption from African football**

One of the most crucial days for African football came in mid-July 2010 – and it had nothing to do with the World Cup. It came on the day when representatives from the Kenyan Premier League (KPL) signed an improved television rights deal with satellite broadcaster SuperSport. This represented a major landmark in the struggle between the top Kenyan teams and the nation’s official football federation, the KFF. The latter seemed to incarnate the ills which have beset the African game for far too long, and which, indirectly, are responsible for the relatively poor showing at international tournaments by the national sides from that continent, in spite of the overwhelming popularity of the sport there. Too often, the national associations seem to have been dominated by people who, according to the General Secretary of the Council of East and Central African Football Federations, “get involved for politics or money, not for football”. This was confirmed in Kenya’s case by an investigation into corruption in the KFF in 2005, which found that, from the first eight matches played by the national team following the arrival of a new president, “there was not a single penny banked by the treasurer as proceeds from gate receipts”. There were also reports of top KFF officials acting as unregistered agents to sell players abroad and embezzling funds emanating from the world governing body, FIFA. Even 30 computers

donated by the latter seem to have disappeared (*The Observer of* 11/7/2011, p. S7).

Accordingly, the Kenyan teams started to agitate for reform and, in the face of sabotage and even intimidation on the part of their federation, eventually assumed the management of the domestic league, forming, in 2008, the nation's first professional league – the KPL – and only the second such formation on the continent. The significant progress that this represents is explained by Bob Munro, one of the League's top officials:

*“When you have a company that owns the league and the 16 clubs are equal shareholders and equal decision-makers, then you automatically have three things. First, you have complete accountability, because you basically have 16 auditors as every shilling that comes in belongs to the clubs together and they sit and decide how best to allocate it – how much goes to the clubs, how much to a common pool for staff, referees, marketing and so on. Secondly, you have complete transparency because there are no secrets when there are 16 owners. And, thirdly, you automatically have fair play – if any official or referee tries to favour one club, the 15 others will fire them. Fair play, financial accountability and democratic transparency, that's all you need to have good football management” (Ibid).*

This improved management has resulted in a competition with renewed integrity which, in turn, has stimulated interest from supporters and, crucially, sponsors and television. SuperSport started broadcasting its

fixtures from the League's inception and has been so impressed that it called the clubs concerned to South Africa in order to offer an improvement on the existing \$5.5 million four-year agreement, which still had almost half a term to run.

It would appear that things are moving in the right direction in the Western part of the continent as well. A few years ago, Senegalese football was almost in a state of collapse under the weight of corruption, as opportunistic officials attempted to profit from the success earned by the national team during the 2002 World Cup. The resulting fiasco prompted 12 of the country's leading sides to withdraw from the domestic league in protest and establishing a “parallel tournament”. Their concerted display of power eventually forced changes, as well as a purge of inept or corrupt officials, with 29 being ousted from the national football federation in 2008. Since that year, the country possesses a professional league which, although owned by the federation rather than the clubs, has restored optimism to the Senegalese football community (Ibid).

However, several developments have emerged recently which indicate how difficult and perilous is the fight to rid African football of corruption. And it would appear that the world governing body in the sport is not making the task of those engaged in this campaign any easier by its lax attitude towards such practices. In fact, there are many exasperated players, coaches and officials throughout the continent who feel FIFA, far from doing all in their power to exorcise them, actually encourage them. While the votes-for-sale scandal – examined in detail below,

p. 000 – has attracted headlines globally, other tales of corruption are arguably just as mind-boggling. A sensational case of match-fixing was revealed to a judge in a hearing in Zimbabwe in late October 2010, and multiple tales of bribes, bungs and bottomless pockets in eight countries are featured in a special report just published by the Forum for African Investigative Reporters (FAIR). One of Zimbabwe's top coaches claimed that “nobody dares touch these looters (i.e. corrupt football executives) because of the FIFA policy of “non-interference”, adding that the football community “will never get to the bottom of the rot” (*The Observer of* 24/10/1020, p. S12).

In so saying, the coach is referring to the strictly regulated policy of suspending national federations who are subject to “government interference”. In essence this may sound sensible, as corruption is rife in political life as well, but it gives the executives on national federations limitless power. No government wants to alienate its public by being held responsible for a country's exile from world football. If they suspect corruption or mismanagement within football, they investigate under threat of expulsion from the world game. Thus the corruption festers. The match-fixing story emerged at a tribunal hearing in Harare. A club side, Monomatapa, made a brief tour of Asia in the guise of the Warriors, Zimbabwe's national XI, in December 2009. FIFA officials are investigating this, as two games are listed as full internationals. Criminal proceedings are likely to follow. A judge heard that two officials from national body ZIFA – the chief executive, Henrietta Rushwaya, and the programmes officer, Jonathan

Musavengana – acted without the sanction of the ZIFA board and sent the club players out as Zimbabwe. On arrival in Bangkok the team were instructed to lose 1-0 to Thailand by “an Asian gentleman” according to evidence from a coach. This “gentleman”, named as Raja Raj, a Malaysian gambler, sat on the team bench during the game, talking to a fellow member of his gambling syndicate. He became increasingly agitated as the tourists, having travelled at short notice and being short of match practice, lost 3-0.

After that match the Asians are said to have confronted players, claiming they were in the books of another betting syndicate. According to the official ZIFA report, “Raja Raj threatened our players for having cost him more than \$1m (£640,000) by not losing according to instructions”. The coach, Joey Antipas, claims that, in order to recover his money he (Raj) “arranged two games”. They were both in Malaysia: the first against a club side, the second against Syria, who are ranked a few places higher than Zimbabwe. He continues:

*“The condition was to lose 6-0 (to Syria). We disagreed but we were afraid because the guy wanted to recover his money. Jonathan Musavengana was directing operations from the bench while receiving calls from the Asian syndicate. Whenever he received a call, he would stand up from the bench and dish out instructions to concede goals, and that game was duly lost 6-0. At the airport the players were paid \$1,000 each after they had met one member of the syndicate. A bunch of US dollars was also given to Musavengana as*

*Zifa’s share. To conclude, I would say my hands received dirty money due to being forced into these games of illegal betting by Jonathan Musavengana” (Ibid).*

One player was so disgusted by the fixing that he asked to be substituted. Another claimed to fear for his life. The paper trail recording what happened, who picked the team, who sanctioned the trip and so on has been lost or destroyed, and the dates of emails have been doctored, according to investigators. ZIFA are also investigating club matches under suspicion, as well as the Zimbabwe team’s results in the Merdeka Cup, a tournament in Malaysia, in 2007. In their first 34 minutes of that competition, the Warriors conceded four goals. Ms. Rushwaya, who did not attend the tribunal, faces dismissal after being found guilty of a number of charges, including securing a \$103,000 loan without authorisation. The money cannot be traced. A further hearing is to be held into the match-fixing scam, and inquiries are ongoing into the missing \$640,000 gate money from a pre-World Cup match between Zimbabwe and Brazil. A former ZIFA president is also allegedly implicated.

However, it would appear that Zimbabwe is far from being an isolated case. Missing money, flawed or non-existent accounts, forged transfer and registration documents, and fixed elections feature throughout the FAIR report. When the Nigerian president, Goodluck Jonathan, suspended the national team after their flop at the World Cup and ordered an audit into allegations of fraud, FIFA moved against him. They called for advice on the state of football governance in

Nigeria from none other than Amos Adamu, the man at the centre of the World Cup votes scandal who has been provisionally suspended (see below). Adamu had already been dismissed as director general of Nigeria’s National Sports Commission. After taking advice from their own man, FIFA gave the Nigerian government three days to withdraw their decision or face a ban covering the men’s and women’s national teams, club sides in African competitions and Nigerian referees. Fifa would also withhold \$8m due to Nigeria for participating in the World Cup. The politicians backed down.

In Zambia, four football association executive members resigned in disgust at the reign of Kalusha Bwalya, a former African footballer of the year, then coach of the national team and now president of the FA. Mr. Bwalya is also an agent and is married to a marketing executive who worked for the 2010 World Cup organising committee. Allegations of corruption focus on the transfer of a young player to Israel, and nearly 100 clubs – including those backed by the police, army and air force – have signed a petition against what they now see as an unconstitutional Zambian Football Association (ZFA). But FIFA are supporting Bwalya and say any objections will have to wait until the next ZFA elections in 2012.

The governing body’s “stick to your statutes” attitude had not been evident in the case of Kenya. As is mentioned above, it was action by disgruntled clubs that led to a breakaway league being formed in Kenya. It is now thriving, competitive and well-run, and brings in more than \$1m a year in TV money, although there was a terrible

incident in which seven fans were killed in a stampede before a match in Nairobi. Despite the success of the new league, however, the Kenyan Football Federation are still headed by people who have been accused of, and in two cases charged with, corruption. According to Bob Munro, the Kenyan Professional league vice-chairman:

*“In many cases, ‘government interference’ is because of gross mismanagement and/or corruption in the national football association. But who suffers most when FIFA impose a ban? Sadly, it is the innocent clubs, coaches, players and referees. What judicial or other regulatory process in the world punishes the innocent victims?”*  
(Ibid).

More than a dozen countries have been suspended in the past five years under FIFA’s “no interference” rules, including Nigeria, Kenya, Chad, Madagascar and Ethiopia, with Togo (who were also involved in “fake” international matches) and Botswana under threat of suspension. Botswana could apparently be banned because the government has set up a youth football league which is not run by its national football association.

In 2004, FIFA banned Kenya for “government interference”. In a case that is fully documented, it was shown that: officials repeatedly ignored or broke 12 of the 21 articles in the KFF constitution; they repeatedly failed to produce annual audited accounts for four years, refused to allow member clubs to inspect the accounts, and, as is mentioned above, officials allegedly stole more than \$700,000 from their own body’s and FIFA’s funds. Kenyan clubs sent detailed evidence, and wrote

30 letters and appeals to the world governing body between 2002 and 2004 requesting them to intervene, which were ignored. Kenya’s High Court confirmed in April 2004 that the KFF officials were no longer legally in office because they failed to hold elections – FIFA still insisted that the government must ignore the high court ruling and reinstate the KFF officials. An incredulous Mr. Munro asked  
*“How can FIFA demand that a sovereign government break its own constitution by ignoring a ruling of its highest court or be banned? Would the British or American governments consider that a reasonable demand by FIFA?”*  
(Ibid)

Munro went on to explain how corruption works from the bottom level up. Elections for office in the national FA start at sub-branch level. In the last KFF elections, six years ago, the Thika sub-branch had nine registered clubs eligible to vote. An additional 70 ineligible clubs were allowed to vote. In Zimbabwe it appears to be simpler. Three ZIFA councillors admitted to FAIR that they were paid \$2,000 for their votes in the last election for ZIFA president. “It was no big deal, because we were voting for the better of the two candidates anyway” one of them said.

The African media appear to be tainted, too, with examples cited in the Zimbabwe hearing and the FAIR report of journalists taking payments, or asking for them. Mr. Munro concedes that FIFA have a very difficult task governing more than 200 member federations – they deserve credit for implementing important reforms such as setting up the ethics code, launching new youth programmes and grassroots

development projects in Africa. However, he adds that further reforms are needed, especially on ensuring good governance in FIFA’s regional and national associations, on improving its relations and cooperation with governments, and on applying more effective sanctions and targeted bans which punish corrupt officials instead of innocent clubs, coaches, players and referees. The International Olympic Committee appear to be well ahead in this respect, and this week officials from more than 200 nations will gather at a conference in Mexico to work out how to improve relations between sport and government.

FIFA, in the meantime, stand by their policy. A spokesman said:

*“FIFA shares the goal of ridding football of corruption, and is willing to act, as demonstrated earlier this week. However allegations of false corruption are also often used by governments as an excuse to try to remove football officials from an association. They cannot remove football officials and put their friends at the top”* (Ibid)

FIFA president Sepp Blatter has also attempted to reassure the world about its role in maintaining the integrity of the game by insisting that his organisation has to “fight for fair play. Trust us and you will see confidence will be restored” However, the preceding commentary suggests that if you are so impertinent as to ask any questions, you will find yourself suspended.

### **Russia wins 2018 World Cup bid amid a tide of acrimony and corruption allegations**

The present author is not known for entertaining the highest regard for the costly, vainglorious and unseemly bilefest which passes for the process of bidding for the organisation of the world's leading tournaments. It gives him little pleasure to have received ample confirmation of this view when reviewing the events and developments which attended the procedure for appointing the host for the 2018 and 2022 World Cup in the sport of football – a process so denatured and lacking in elementary standards of civility, dignity and integrity as to cast doubt not only on the future of the event itself, but also on the body which is in charge of its organisation. Even now that the proverbial powder-like material has settled on the contest and its result, the reverberations continue to act as a malignant counterpoint of festering discontent and barely-concealed contempt to the manner in which the sport appears to be heading – with ominous overtones for its future.

The theme running throughout the seamier side of the latest World Cup bidding process has a familiar ring to all those who have been following the trials and tribulations of the world governing body FIFA in recent years, i.e. allegations of corruption. This aspect had already reared its head indirectly during the early stages of the process, albeit in a manner which had nothing directly to do with FIFA. It will be recalled from the previous issue of this Journal that the Chairman of the English Football Association, Lord Triesman, was compelled to resign after having been secretly tape-recorded by a tabloid newspaper suggesting that

Russia was prepared to assist Spain in bribing World Cup referees during the 2010 tournament in return for the latter's support in the race to host the 2018 tournament. FIFA subsequently ruled these allegations as groundless, and the Russian team predictably enough rejected any suggestion that they had been operating outside the rules. Nevertheless, the corruption factor kept hanging over the process like a murky rain cloud, particularly in relation to the Russian bid. This was especially the case when various unfortunate developments were surrounding the preparations for the 2014 Winter Olympics, which had been awarded to the Russian resort of Sochi. Towards the end of July 2010, President Medvedev ordered a government inquiry into allegations of kickbacks connected to various multi-billion-dollar construction contracts. The head of the Sochi construction project, who made the allegations, has since fled to London. This naturally raised concerns that similar developments could occur if Russia were to be successful in its World Cup bid (*The Daily Telegraph of 18/8/2010, p. S9*).

Initially, it seemed that these allegations and rumours would not have much impact on the bidding race – although this did not make the entire process any less controversial. One of the factors which have placed Russian football in a very poor light in recent years is the racism which has been on display at several of its leading clubs. Thus an insulting banner brandished by Lokomotiv Moscow fans following the sale of Peter Odemwingie to English Premier League side West Bromwich Albion at the start of the 2010-11 season focused attention on the attitude

shown by a certain type of Russian spectator. Naturally, Alexei Sorokin, the official in charge of the Russian bid, attempted to reassure the world by refuting suggestions that the problem was endemic, claiming that racism and its manifestations were “a universal problem” (*The Daily Telegraph of 7/10/2010, p. S7*). However, the world was well aware that this was far from being an isolated incident in the Russian stadiums, and that at least a certain degree of concern at this aspect of the game in the country was perfectly justified. Mr. Sorokin also dismissed allegations that the Russian bid was behind recent allegations about the private life of top England footballer David Beckham, and asserted that his bid team had been “observing the rules very strictly” and was “focused on the benefits” of their bid (*Ibid*).

As the date of the final decision drew nearer, it seemed that the England bid was pulling ahead, having received a number of welcome boosts. The first came with the intervention of the splendidly-named Chuck Blazer, the US official representing one of the 24 members of FIFA's executive committee who were to vote to determine the destination of the tournament. By stating that in casting his vote he was looking for qualities which would maintain “the pre-eminence of the sport in the world which it already has” and that the tournament had to be a “very viable commercial project”, he appeared to give great comfort to the England bid, which had pledged 82 team camps, 400,000 hotel rooms for fans and a projected profit for FIFA of at least £16 million, as well as free public transport for match-ticket holders between cities (*The Guardian of 7/10/2010, p. 4*). This was all the more

so because Russia, by contrast, appeared to be evasive on the question of a possible profit, and were in fact understood to be anticipating a financial loss (*Ibid.*, p. S7). There was further good news for England when FIFA president Sepp Blatter praised the nation for its facilities and the successful way in which it had tackled hooliganism (*The Daily Telegraph of 14/10/2010*, p. S9). And when the US finally withdrew its bid for the tournament, this was also perceived as a positive development for England. Not only did this mean that the event was sure to be staged in Europe – the significance for England of the US move also lay in the impact which it potentially had on the voting configuration. The English FA had targeted the three votes held by the Concacaf (American continent and the Caribbean) members of the FIFA Executive Committee. There were serious grounds for England to expect this block to vote for it, knowing that Concacaf would do so only after the US had been eliminated (*The Independent of 16/10/2010*, p. S10).

However, the spectre of corruption returned to the bidding process with a vengeance the very day after the announcement of the US pull-out, when FIFA confirmed that it was to investigate allegations that two members of the Executive Committee had offered to sell their votes for the tournament. This came after a leading British newspaper had reported that Amos Adamu, a Committee member from Nigeria, had been filmed negotiating a deal with an undercover reporter under which he would be paid £500,000 for his vote. Mr. Adamu had requested that the money in question, which would be used to build four

artificial football pitches in his home country, be paid to him personally. The deal had been allegedly finalised the previous month in Cairo, when Adamu confirmed that he would vote for the US to host the 2018 Cup. It was also claimed that the president of the Oceania Football Confederation, Reynald Temarii, requested £1.5 million in order to fund a sports academy in exchange for his vote. In his meeting with an undercover reporter in Auckland, New Zealand, Mr. Temarii claimed that Oceania had been offered sums between £6 million and £7.5 million for their vote by supporters from two rival bid committees (*The Observer of 17/10/2010*, p. S1). In both cases, the undercover reporters were posing as representing an American company, soliciting votes for the US bid. There was, however, no suggestion of any wrongdoing on the part of the US bid team (*The Sunday Telegraph of 17/10/2010*, p. S1).

This development not only cast a shadow over the bidding process itself – it added further fuel to the acrimony between the Russian and English bids. Although the revelations made by the British newspaper in question had tainted every bidding country by association, Russia was the only nation named. The newspaper had reported that Mr. Adamu had claimed to have visited Moscow and that supporters of the Russian bid had offered “co-operation” with the construction of sports facilities (*The Times of 18/10/2010*, p. S8). Following the Triesman affair cited above, this report made it the second occasion within a few months on which allegations of corruption emanating from a British source had been levelled at Russia. The chief executive for the Russian bid, the

forementioned Alexei Sorokin, did not rise to the bait – insisting that his bid team were “calm because we could not be involved”. He admitted not being “particularly happy” about these stories in the British media, but confirmed his belief in the FIFA Executive Committee being “professional enough to discern”. In spite of the said announcement of an investigation by FIFA, Mr. Sorokin was confident that the entire story would soon become yesterday’s news and that it would not affect the outcome of the bidding process (*Ibid.*). But a few days later such apparent equanimity seems to have evaporated, since Mr. Sorokin delivered himself of a bitter attack on England, accusing the British media of organising a campaign of criticism against the Russian bid. He also made accusations of racism against English football, and alleged that Peter Odemwingie, the Lokomotiv Moscow player referred to earlier, had used the banner incident referred to for publicity purposes. He went on to say that the burning of a US flag at Manchester United’s ground on the same day as the Lokomotiv fans displayed the said banner as “inciting ethnic hatred” (*The Daily Telegraph of 19/10/2010*, p. S6).

Meanwhile, the FIFA investigation into the alleged corruption in its ranks was gathering pace – in fact, within a few days it announced that it was widening its inquiry and had begun investigating at least two countries’ national associations for alleged collusion. Messrs Amaru and Temarii were summoned to the governing body’s Ethics Committee, which was also to investigate whether at least two nations involved in the bidding process had infringed the relevant rules by making a voting arrangement between themselves (*The*

*Independent of 19/10/2010, p. 55*). As a result of the hearing, both Adamu and Temarii were provisionally suspended from “all football-related activities”, adding, however, that it would take a month to reach a final decision. This potentially left the bidding nations in limbo over their strategy until two weeks before the vote, due to be taken on 2 December. Four FIFA officials who appeared in the undercover footage – Slim Aloulou, Amadou Diakite, Ahongalu Fusimalohi and Ismael Bhamjee – were also suspended on the same terms. It was made clear that the decision to suspend the six for 30 days did not imply guilt but would allow the committee to complete a full investigation (*The Guardian of 20/10/2010, p. 55*). The Committee also decided to investigate over the coming month the separate allegation that Spain and Qatar had been trading votes between their 2018 and 2022 campaigns (*Daily Mail of 21/10/2010, p. 95*). The next day, Mr. Adamu made a formal statement firmly rejecting the accusations made against him (*The Guardian of 22/10/2010, p. 55*).

Two days later, the “votes for hire” crisis experienced a further twist with fresh allegations being made against Michel Zen-Ruffinen, the former FIFA general secretary, who had been filmed allegedly offering his services as a fixer for the sum of £210,000. He allegedly went on to suggest that some members of the Executive Committee could be influenced by money, another by “ladies”, whilst another was “the biggest gangster you will find on earth” (*The Daily Telegraph of 24/10/2010, p. 58*).

FIFA later announced that it would investigate these reports concerning its former secretary-general. The latter, in

the meantime, Zen-Ruffinen attempted to repair some of the damage and informed the Sunday Times that many of his comments were simply “impressions” of the goings-on inside FIFA circles and that he had “exaggerated” comments to keep the businessmen interested. He said he was totally opposed to bribery and offered only to make introductions. In the meantime, details were emerging on Mr. Adamu’s background, some details of which give an indication as to why suspicions about his probity began to grow in media circles. In 2002, the Nigerian reporter Olukayode Thomas began investigating this background, and travelled across the country to interview senior figures in sport. Among his questions were – how had Adamu, a civil servant, become so wealthy? How had he built up a portfolio of hotels, private companies and properties across Nigeria? And why had he changed his name – with documents showing him as Babatunde Aremu? According to Mr. Thomas, Adamu’s answers were all “yes”, “no” or “no comment”, with the parting shot that he would not attempt to stop the story, but “remember, I have the best lawyers in Nigeria”. The reporter claims that what followed was a series of remarkable attempts to kill the story, including a visit by Adamu and 20 aides to the offices of Thomas’s newspaper, the Guardian, in Lagos. The Guardian published regardless (*The Observer of 24/10/2010, p. 58*).

The story sparked several new, related allegations about Adamu’s conduct from within sport, all of which he denied. There was a claim by the head of the Nigeria Football League that Mr. Adamu had sought to have sponsorship money diverted directly to him.

Officials from the athletics federation made similar allegations. The Guardian ran a new story in September 2007, and this time he decided to sue. Adamu, by now on FIFA’s executive committee, launched one claim against the newspaper, and another against Thomas, claiming £2m in damages from the journalist. He claimed the story impugned his character “by portraying me as an unreliable, dishonest and unstable character who is corrupt and financially indisiplined”. What followed was unpredictable, even by Nigerian legal standards. First, word reached Thomas via an intermediary that Adamu had backed down and withdrawn the case. Checks appeared to confirm it, and Thomas stopped preparing his defence. But then, in the summer of 2008, came news that Adamu’s legal team had, in fact, been working on the case throughout, and a judge in the capital, Abuja, was ready to issue his verdict. A shocked Thomas made his way to the hearing. He said:

*“When I arrived at the court I was met by a lawyer. He told me he had been on the case for a while, and that he had prepared a statement of defence for me. All I had to do was to tell the judge that the statement was mine. It looked like a set-up. I had never met this guy in my life. I said to him: ‘If you are representing me, shouldn’t you at least have spoken to me before drawing up my statement?’ Then I noticed that the document already contained a signature next to my name.” (Ibid)*

When Thomas told the judge what had happened, the case was adjourned until March 2008, allowing Thomas time to assemble a public interest defence, helped by a lawyer working for a nominal fee. He had further help in the

form of investigations into Adamu's background by the English journalist Andrew Jennings. When the verdict was finally returned last March, it was blunt: Adamu's cases against The Guardian, and against Thomas, were dismissed. Mr. Thomas confessed to being "still in debt as a result of all this", but added that "the joy that truth prevailed is compensation for the loss and the emotional trauma". He is now working as an adviser to the new Minister of Sports, Alhaji Ibrahim Isa Bio, who has stated his aim to be rooting out corruption. He says that defeating Mr. Adamu "opened a lot of doors" for him, in that he is regularly invited to talk about the problems with Nigerian sport, and currently he is working with the new minister to help change this situation. He added that pulling down Mr. Adamu's hegemony in Nigerian sport had not been easy, but "thank God for the British press. They have made our job much easier." (*Ibid.*)

Yet another dimension was added to the seamy atmosphere surrounding the bidding process when FIFA opened an investigation into claims of collusion and vote-swapping between the Spain/Portugal and Qatar bids for the 2022 tournament. This accusation was vehemently refuted by the Iberian bid chief Miguel Angel Lopez, who added that his bid team with co-operate fully with the inquiry. There was also an aura of unseemliness about the allegations of manipulation by FIFA president Sepp Blatter, in that he was criticised for holding the contests for the 2018 and 2022 tournaments simultaneously. Even though the official reason given was that this was done in order to maximize sponsorship income, it had the beneficial side effect for the

President of giving him maximum leverage for his re-election campaign several months hence. The aura of corruption surrounding the process became so intense that, in late October, a meeting was called of the FUFU high command in order to decide whether in fact the process should be postponed (*Associated Press, www.findlaw.com of 28/10/2010*). In the event, the meeting decided that the vote should continue without any concessions, although Mr. Blatter did admit that perhaps his bundling of the two bids was "not the right thing to do" (*The Guardian of 30/10/2010, p. 37*). However, this did not call a halt to the various claims and accusations of impropriety – within days, the aforementioned Mr. Lopez accused the England team of colluding with the US (*Daily Mail of 30/10/2010, p. 90*). The governing body's reputation was not exactly enhanced either when one of its senior officials, Danny Jordaan, admitted to having colluded with rivals when he led South Africa's bid team for the 2006 World Cup – more particularly that he tried, but failed, to persuade England to withdraw from the race by offering then president Mandela's support for the 2010 bid (*The Daily Telegraph of 4/11/2010, p. S7*).

However, mutual accusations of corruption were not the only element of unpleasantness to overshadow the entire process. Bad blood had already been stoked up between the Russian and English bid teams because of the corruption allegations involving the former which had been made in the British press (see above). This and the aggressive "win at all costs" attitude adopted by both camps made for an ungentle approach towards obtaining victory. With a few weeks to go before

the final vote, the leader of the Russian bid launched an outspoken attack on England, criticising high crime rates in London and the drinking habits of young people. Alexei Sorokin (for it is he) also waxed indignant about the British media, accusing the latter of operating a campaign of criticism against the Russian bid. He also added to his charge list the allegation that English football had a problem with racialism. He even succeeded in using a claim of racism made against Russian football to substantiate his theories, albeit indirectly, when he alleged that Peter Odemwingie, the former Lokomotiv Moscow player who was the subject-matter of a poster featuring a banana and the message "Thanks West Bromwich Albion" when the Nigerian international left Russia for the English Midlands, was using the incident for publicity purposes – in the process accusing the British media of focusing on this story in order to deflect attention away from the Lord Triesman affair cited earlier (*The Daily Telegraph of 19/10/2010, p. S6*). When it occurred to the fractious Russian official that these remarks risked punitive action by FIFA, he seemed to retract in the time-honoured fashion, with a spokesman later stating that he regretted if his observations "led to such an erroneous interpretation and understanding" (*The Independent of 20/10/2010, p. 51*).

However, this explanation failed to pacify the England camp, which made an official complaint to the world governing body over Sorokin's remarks and demanded an official apology from him. This was particularly the case because the English side claimed that this was not the first occasion on which a member of the Russian team had

spoken about them in negative terms – in contravention of FIFA rules, which prohibit derogatory comments about other bidders for tournaments (*The Guardian* of 27/10/2010, p. S1). The Russians were quick to respond by accusing the English side of being “absolutely primitive” over the affair, and refusing to apologise. In an extraordinary attack on the rival bid, the honorary President of the Russian football union, Viacheslav Koloskov, delivered himself of the following tirade:

*“English journalists are provoking members of the [FIFA executive] Committee, and they now say one of the members of our bidding team has spoken about England in an inappropriate manner. I think it’s a raising of tensions, and also an attempt to influence the work of our bidding team. These acts have little chance of success. Russia should not be afraid of sanctions. There won’t even be an investigation. The behaviour of the English is absolutely primitive. Instead of talking about their own merits, they try to put off their opponents”* (*The Independent* of 28/10/2010, p. 53).

However, the next day, Vitaly Mutko, the Chair of the Russian bid (once again mindful of possible FIFA sanctions mayhap) apologised in public for the various derogatory remarks made against England in a bid to defuse the acrimonious stand-off between the rivals. Mr. Mutko, who is also the Minister for Sport in his country as well as a member of the FIFA executive, approached his opposite number on the bid, Geoff Thompson, and England 2018 chief executive Andy Anson over breakfast in order to draw a line under the dispute.

The England camp accepted this attempt at peacemaking – believing that it vindicated their decision to make a formal complaint to FIFA, despite the furore this caused (*The Guardian* of 29/10/2010, p. S1). However, all this rather unreal war of words was as nothing compared to the storm that was to envelop the England bid during the immediate run-up to the decisive vote. Once again, the factor at its root was the British media, but this time related to the eternally recurring question of alleged corruption within FIFA.

The development which simultaneously renewed doubts about probity within the world governing body and appeared to endanger the England bid was an investigation by the distinguished current affairs programme Panorama. For the purposes of this programme, a number of FIFA executive were confronted by Panorama investigators in Zürich, causing annoyance among its officials (*The Independent* of 5/11/2011, p. 71). The programme focused on allegations of bribery stemming from the 2001 collapse of sports marketing firm ISL. It alleged that a previously unpublished list of payments made by ISL revealed that companies linked to Ricardo Teixeira, a Brazilian FIFA Executive Committee member, received tens of millions of dollars by way of inducements. The programme also repeated claims that Nicolas Leoz, of Paraguay, was a recipient of bribes, but added new details regarding the manner in which he was paid. It also named the President of the Confederation of African Football, Issa Hayatou, as having received a FF 100,000 bribe in 1995, being the first occasion on which the Cameroonian

had been linked to the case. It will be recalled from previous issues of this Journal that the Swiss courts heard allegations in 2008 that ISL had paid bribes to FIFA officials in order to secure broadcasting rights contracts. Six ISL company managers were tried for misuse of company funds, but not for bribery, since this was not an offence under Swiss law at the time. The case was closed last summer with prosecutors confirming that, whilst FIFA officials had received inducements, there was no evidence against any Swiss nationals. Panorama claimed that its new information derived from a list of payments to 175 companies and individuals totalling more than \$100 million, made by ISL between 1989 and 1999. The programme claimed that the Liechtenstein-based company, Sanud, received 21 payments totalling \$9.5 million, and there was “compelling evidence” that the money had been channelled to Mr. Teixeira. Mr. Leoz, for his part, was said to have received up to \$730,000. Panorama also repeated allegations first aired in the Norwegian media which linked Caribbean football supreme Jack Warner (of whom more below) to an attempt to buy more than \$80,000 of tickets for the 2010 World Cup in an alleged black market operation. In 2006, Mr. Warner had been found to have channelled Trinidad’s official ticket allocation for the 2006 World Cup through his family travel business at a potential profit of \$1 million, but received a mere reprimand from FIFA and remains a key figure (*The Daily Telegraph* of 30/11/2010, p. S10).

The prospect of this documentary being aired shortly before the crucial vote so alarmed the leaders of the

England bid that the latter were widely reported to have visited the BBC Director-general Mark Thompson to express their fears. These appeared to be vindicated when Mohamed Bin Hammam, the president of the Asian confederation and one of the Executive Committee members who were to vote on the bid, condemned the Sunday Times investigation which had sparked off the corruption allegations as “unethical”. The timing could not have been more crucial, since England had high hopes that, in objective terms, their bid would emerge as the strongest when the FIFA technical inspectors’ report was published (*The Daily Telegraph of 5/11/2010, p. S3*). The England team attempted to limit the damage by holding a face-to-face meeting with President Blatter a few days later (*The Daily Telegraph of 12/11/2010, p. S5*). They also took the unusual step of writing at length to each member of the FIFA Executive in an attempt to distance the bid from the allegations made in the British media, even going so far as to express their “solidarity and support” for FIFA’s response to the newspaper allegations made and to highlight the representations they had made to Mr. Thompson earlier (*The Guardian of 15/11/2011, p. S2*).

England’s hopes received a boost two days later, when the much-awaited report by the technical inspectors was said to have ranked its bid joint top of the candidates alongside the Spain/Portugal bid. Russia’s bid, on the other hand, was rated “medium risk” overall, alongside outsiders Belgium and Holland. This was never officially confirmed, since the report in question was circulated only to the members of the Executive Committee (*The Daily*

*Telegraph of 17/11/2010, p. S5*). Nevertheless, the Panorama feature continued to gnaw at the minds of the England bid team, to the point where their concerns reached the uppermost levels of the country’s political hierarchy when it was revealed that senior members of the Government were reported to be urging the BBC to consider cancelling the documentary for the sake of protecting the England bid. The opposition from Downing Street was based on the belief that the Panorama investigation had failed to uncover any fresh evidence of corruption in relation to the 2018-2022 bids, but would instead concentrate on well-documented claims which could merely antagonise potential supporters of the England bid. This concern came as Prime Minister David Cameron prepared to lend his personal support to the bid by being part of the final presentation team which was to address FIFA in Zürich just before the vote was taken (*The Daily Telegraph of 17/11/2010, p. S5*).

The next few days were considered to bode ominous for the bidding process. On the one hand, the UEFA President Michel Platini seemed to assuage English fears when he refuted the notion that the media coverage of the FIFA allegations had damaged this nation’s bid – only to concede in the very next breath that long-term criticism of the world governing body in the British media could “be a problem” when the vote took place in early December. In an interview with a leading British newspaper he stated that it was the many years of attacking FIFA in the media that was more likely to impair the England bid than the investigations into the suspended due

referred to earlier (*The Independent of 19/11/2010, p. 74*). However, another power broker in the game – with an infinitely more controversial following than that of the former European Footballer of the Year – was less ambiguous in his assessment of the impact produced by the contentious BBC documentary. Enter Jack Warner, the president of the Concacaf confederation who has not infrequently been featured in this column – and not invariably in the most favourable light. He was apparently one of the FIFA personalities who had been contacted by Panorama for the programme in question. However, he was a crucial figure in the bidding process, so when he described the feature in question as a “personal vendetta” this was taken as an ominous sign for the England bid – even though he added the assurance that this would not affect the manner in which he or any other FIFA Executive member would vote (*The Daily Telegraph of 23/11/2010, p. S3*).

As the date of the vote approached, Prime Minister David Cameron then travelled to Zurich for three days of lobbying, convinced that the Panorama programme, due to be shown that weekend, would not damage the bid – apparently contrary to the belief of a number of bid insiders. Indeed, bid president David Dein insisted that a letter sent to FIFA’s 22-man executive, distancing the bid from the contentious television programme, was “well received by everyone” (*Daily Mail of 28/11/2010, p. 67*). UEFA president Michel Platini, for his part, commented that “people have already made up their mind” and that the Panorama feature was therefore unimportant. In the event, as everyone now knows, all these efforts on England’s part were in vain,

with the 2018 bid being won by Russia and, even more controversially, the 2022 tournament being allocated to Qatar. The England bid was even eliminated at the first round stage, garnering a mere two votes. There was general agreement among observers that Russia “had the best story” – one which concerned coming to terms with its own history, a story about the emergence from Communism and the Cold War – a theme advanced to its limits by Vitaly Mutko, the nation’s FIFA Executive member. One controversial aspect of the Russian win was the nation’s dubious record in racial issues surrounding sport, as witness the many black players who have reported vile abuse being cast in their direction at Russian grounds. This image has not been helped by incidents such as the brutal murder of African students by far-Right gangs, especially in St Petersburg (*The Daily Telegraph of 3/12/2010, p. S6*).

Disappointment and recrimination were, unsurprisingly, the main sentiments to be volubly expressed in the England camp in the wake of this humiliating result. The Acting Chairman of the English Football Association (FA), Roger Burden, declared the world governing body to be untrustworthy and that he was therefore not prepared to have any further dealings with it. He added that, in the light of England’s bid being rated at the top of FIFA’s independent assessment of the economic and technical merits of the various bids, he struggled to understand how the English bid merely attracted two votes (*The Independent of 4/12/2010, p. S6*). Mr. Blatter responded by ascribing these sentiments to England being “bad losers” and continuing to deny the

presence of any corruption amongst the ranks of his organisation (*The Independent of 9/12/2010, p. 55*). Yet no sooner had the Russian celebrations died down than new allegations were being made which questioned the governing body’s claims to probity.

The very next day, The Sunday Times called for an investigation after it received allegations by a “whistleblower” that two members of the FIFA executive had agreed deals worth \$1.5 million for their votes ahead of the World Cup vote. The source in question, a former employee of the bid teams, was present at meetings at which offers of cash for votes were allegedly made. In a series of conversations with the British national newspaper, the former employee gave dates, locations and names of those present at the meeting, including the FIFA executive committee members involved. The whistleblower went so far as to describe the process as “basically money for their votes” (*The Sunday Times of 5/12/2010, p. 1*). It was not known at the time of writing whether FIFA intended to launch an investigation into these latest allegations. Whether this was the decisive factor in motivating the Swiss authorities to act is not certain; however, a few days later the government of the FIFA host nation decided to start an inquiry – regarded by many as long overdue – into various claims of corruption among the 50-odd international sports bodies based in the country, of which FIFA is one of the largest. Whatever the outcome, the probe is expected to cause a change in Swiss law, which has hitherto prevented any sporting body based in the country from facing corruption charges (*Daily Mail of 8/12/2010, p. 83*).

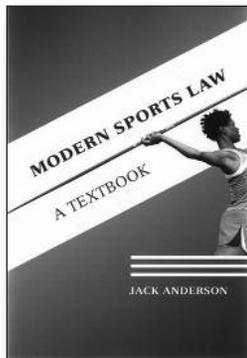
Another development which called into question the world governing body’s seriousness of intent in this regard came the following month, when it was learned that FIFA had withdrawn an offer of employment to Interpol’s corruption detective. A leading British newspaper had discovered that Frederick Lord, the director of Interpol’s Anti-Corruption Office, had been offered a position in FIFA’s integrity unit, only for the offer to be withdrawn shortly before the end of December 2010. According to security sources, Mr. Lord, one of the leading experts on anti-corruption measures in global policing, received a “letter of intent” from FIFA and assured that he would be issued with a contract. On the basis of this assurance he resigned his position at Interpol, and sources suggested that he had started to seek accommodation in Zurich. However, shortly afterwards he was informed that the post, in which he would, according to FIFA, have been involved in the monitoring of illegal betting on international football fixtures and other integrity issues, was being withdrawn. This development prompted security sources to suggest that the organisation lacks the will to tackle the reputational issues it faces. One source even suggested that FIFA executive committee members had objected to the appointment because they feared that Mr. Lord would conduct internal investigations. However, a FIFA spokesman later denied this (*The Daily Telegraph of 7/1/2011, p. S14*). In a further blow to the organisation’s flagging reputation, a German lawyer resigned from FIFA’s ethics commission in protest at what he regarded as the body’s failure to tackle alleged corruption in its ranks. In a letter to the Ethics Commission

President, Claudio Sulser, the lawyer, Günter Hirsch, wrote:

*“The events of the past few weeks have raised and strengthened the impression that responsible persons in FIFA have no real interest in playing an active role in resolving, punishing and avoiding violations against ethic regulations” (The Guardian of 10/1/2011, p. S12).*

Clearly, the question of FIFA's reputation for integrity, which has yet again been called seriously into question by the manner in which the World Cup bids were handled, is an issue which will not be easily ignored or sidelined. Watch this space for further developments. ■ **BAL**

# Reviews



## **MODERN SPORTS LAW by Anderson.**

Published by Hart Publishing, Oxford 2010.

This recently published book provides a welcome addition for those engaged in the study of legal aspects of sport.

Anderson sets the scene by stating that the text is primarily written for final year sports law students but is also intended to be an up to date source of introductory material for any person engaged in issues concerning sports law.

This book is divided into eight chapters, covering such matters as the operation and administration of the major sports at both national and international levels.

Each chapter delves into the historical background of individual sports and deals with the current law and practice in relation to sporting disputes and jurisprudence. Additional information is provided through the extensive use of footnotes and referencing as well as suggestions for further discussion and reading on the main points at issue.

Anderson emphasises the importance of contractual relationships in chapter seven. Reflection is undertaken regarding the contractual obligations of sports participants both on and off the field of play

Chapter one introduces the subject matter by posing the question “What is sports law?”. Here Anderson comments briefly on the gradual development of the legal aspects of sport and identifies the importance of the growth of commercialisation in sport. Crucially the author, even at this early stage, compares the growth of sporting matters in North America with those relevant in the UK. He also recognises the importance of EU law in fashioning this discipline known as sports law.

The second chapter covers the major role of sports’ governing bodies (SGBs) and the ways in which their decisions may be challenged by those affected by such issues. SGBs often have to defend their decisions in the courts although there is a marked reluctance for the courts to interfere in sporting matters. However, Anderson rightly makes the point that the courts will intervene should an SGB make a decision which is manifestly unfair or unreasonable. He also gives examples of the major case law in this area and emphasises the fact that the courts’ attitude towards sporting bodies is that they are to be regarded as private bodies rather than public bodies and as such are not amenable to judicial review. Therefore, such challenges are to be regarded as private law matters. In this connection Anderson provides some incisive analysis of the *Aga Khan* and *Mullins* decisions. It is submitted that this chapter provides a natural introduction to methods of alternative dispute resolution (ADR) which has become more popular with those who wish to challenge the decisions of SGBs.

In chapter three the author brings together the many aspects of ADR in sport. He examines the advantages and disadvantages of ADR in comparison with those of ordinary litigation. Importantly, however, this chapter contains a detailed exposition of the influences of the Court of Arbitration for Sport (CAS) in relation to settling sporting disputes. Additionally, Anderson comments upon the services provided by Sports Resolutions UK as an independent source of arbitration, mediation and advice which he suggests provides a UK branch of the CAS.

The contentious issue of regulating the use/misuse of drugs and doping in sport is discussed in chapter four. This includes a detailed examination of the role of the World Anti-Doping Agency (WADA) as well as a philosophical analysis of the moral issues concerning cheating and integrity in sport. The chapter contains useful commentaries and references to the major case law on this subject, which will prove helpful to those readers who have a keen interest in this area of sports law.

Criminal liability arising within the context of the major contact sports is covered in chapter five. Here Anderson provides an important perception on such matters as “implied sporting consent” and the ramifications of the decision in *R v Barnes* which includes an excellent discussion on the major overseas cases relating to sporting violence. The chapter concludes with a section relating to the legality of boxing which will provide readers with a valuable insight into the development of boxing becoming a recognised sport.

Chapter six concerns the civil liability in connection with on the field issues in sport. The emphasis of the chapter is on the litigation surrounding negligence and the duties of care relating to sporting participants. The main elements of the leading case of *Caldwell v Maguire* are very much to the fore, including a discussion on the question of reasonableness and reckless disregard which have been the subject of many sports law commentators both past and present. Needless to say, this area is well referenced by the author.

Anderson emphasises the importance of contractual relationships in chapter seven. Reflection is undertaken regarding the contractual obligations of sports participants both on and off the field of play. Further attention is given to the influences of commercialisation in sport with its reliance upon well negotiated contracts. The current media activity relating to sporting minors’ contracts and premature termination of contracts is given much prominence; as are issues concerning “image rights” and “privacy”. Once again the author provides one chapter as a prelude to the next; in this instance the commentary on the *Matuzalem* case with its European emphasis enables the reader to look at future developments in sports law.

The concluding chapter of this text looks at the impact of EU law and the general specificity of sport. However, Anderson, as in his preceding chapters, again stresses the importance of the experiences and decisions of the USA and Canadian courts regarding the future development of sports law. The relevance of the Lisbon Treaty, together with conflicts between the American and European ‘models of sport’ in relation to modern attitudes to sport are well documented by the author. Anderson’s concluding remarks are particularly pertinent as he calls for consistency and fair play as being the essence of sports law’s future.

In concluding this review it is suggested that Anderson achieves the aims put forward in his book’s preface. He has provided careful analysis of many major features of modern sports law. One of the strengths of his work is the way in which he draws useful comparisons between the experience and decisions of the English courts with those of other common law jurisdictions. In addition, the ultimate readers are helped in their understanding by the reasoned and helpful referencing throughout the book. One must also add congratulations to Hart Publishing for their provision of an easy to follow structure and indexing of the text. Finally, it is suggested that Anderson’s book will no doubt be a popular purchase by those who wish to enhance their study and interest in sports, whether as practitioners, students or general readers. **■ BASL**

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**April 2011**

# Sport and the Law

## Journal Reports

### (2010) SLJR 4

Constructive dismissal - Contracts of employment - Implied terms - Mutual trust and confidence - Repudiation - Unfair dismissal

#### MCBRIDE V FALKIRK FOOTBALL AND ATHLETIC CLUB

Employment Appeal Tribunal (Scotland) 17 June 2011

##### Facts

The appellant former employee (B) appealed against the dismissal of his claim for unfair constructive dismissal against the respondent former employer (F). B was employed as a football coach. He was subsequently appointed manager of the under-19 team and was told that he was in charge of that team “without interference”. At the time of B’s appointment, F was recruiting a Youth Academy Director. The new director (P) took over the responsibility of picking the under-19 team. B resigned, claiming that he had been unfairly constructively dismissed. The tribunal found that F was not in breach of contract by removing B’s responsibility for team selection on the basis that it had been the real intention of the parties, at the time of B’s appointment, that his responsibility for team selection would be subject to P’s discretion following his appointment. The tribunal found that B had been involved in previous youth academies and would have known that the Youth Academy Director had the final say on team selection. The tribunal also held that the lack of prior consultation with B did not amount to a breach of the implied term of trust and confidence in the football industry, where such an autocratic style of management was the norm. Finally, the tribunal concluded that even if it had found a repudiatory breach of contract, B had resigned not in response to that breach, but because he was not willing to continue working in circumstances where P retained the final say on team selection. B contended that (1) there was no proper basis on which to imply a term in his employment contract that he understood his responsibility in relation to the under-19 team to be temporary; (2) the tribunal had erred in law in failing to find that there was no breach of the obligation of mutual trust and confidence, in response to which he had resigned.

##### Held (allowing appeal)

1. The tribunal had no proper basis for implying a term that B would relinquish responsibility for team selection once P had been appointed. Apart from such a term being too imprecise to be enforceable, there had been nothing said to that effect when B was appointed to the under-19 team; on the contrary, B was told that his appointment would be “without interference”. There was nothing to indicate any subsequent variation or qualification of that term by agreement with B. Moreover, the tribunal had drawn inferences which did not lead to the conclusions it had reached on the basis of very general evidence about Youth Academy Directors in other clubs, without specific evidence pertaining to the contractual arrangements involved or to any directly comparable circumstances. Given that the express term concerning B’s unqualified control of the team without interference was contrary to the term implied by the tribunal, and that there was no necessity or justification for implying such a term, the tribunal had clearly erred in law in failing to find that F was in breach of contract by imposing a unilateral variation. The change of role imposed on B was plainly a matter of substance and the tribunal had accepted that it was causative of his resignation, applied. Since the tribunal ought also to have found that the imposition of that change of role was a fundamental breach of contract, it should have held that he was unfairly constructively dismissed (see paras 48-50, 54, 56-57, 59 of judgment).
2. Given its acceptance that the communication had been badly handled and that B should have been consulted, the tribunal had erred in finding that there was no breach of the term of mutual trust and confidence. A finding that an autocratic style of management was the norm in football was no justification for such a conclusion. Employers had a duty not, without reasonable and proper cause, to conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, such conduct being subject to an objective test, followed, applied. Nor did the tribunal’s findings of fact provide it with a basis for its conclusion that any such breach of

duty was, in any event, not a factor in B's resignation. In fact, the evidence showed that B had resigned not only because he had been deprived of the right to select the team, but also because that decision had been taken without consultation (paras 60-61, 65).

### **Commentary**

This case highlights the point that it is only appropriate to imply a term into a contract where, considering what has been expressly agreed, the implied term is necessary, obvious and precise and reflects the understanding of both parties. The case also highlights the importance of well-drafted contracts. The breach of contract in this case consisted not only removing important aspects of McBride's managerial role, but also the manner in which this was done. The EAT found that the club manager who made the decision should have met with Mr McBride himself, and sought his views on how the arrangement was going to work in practice.

*Reporter (SG)*

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### **(2010) SLJR 5**

Broadcasting - Disciplinary tribunals - Horse racing - Libel - Qualified privilege - Television

### **MCKEOWN V ATHERACES LTD**

**Queen's Bench Division, Tugendhat, J 07 February 2011, [2011] EWHC 179**

### **Facts**

The applicant television channel operator (T) made an application to strike out or dismiss a defamation claim which had been brought against it by the respondent jockey (M) or alternatively, for summary judgment or a stay pending the outcome of further proceedings before the British Horseracing Authority (BHA). Over twelve years previously, a disciplinary panel appointed by the BHA had found M guilty of various breaches of the rules of racing such as deliberately failing to ride a horse on its merits and had disqualified him from riding horses for four years. M had

unsuccessfully appealed against that decision and had unsuccessfully applied to the High Court for a declaration that the BHA had acted unlawfully and an injunction restraining it from continuing the penalty. Before the disqualification took effect, M took part in another race and the stewards held an inquiry and issued a document concluding that he had intentionally failed to ride his horse on its merits. Afterwards, M was interviewed by a presenter (B) on T's television channel. M claimed that questions asked by B during that interview were libellous. T submitted that (1) it was bound to succeed on one or both of its defences of qualified privilege under the and honest comment on true facts; (2) the action was an abuse of process because M was seeking to relitigate issues that had already been finally determined during the disciplinary proceedings and before the High Court.

### **Held (applications refused)**

1. The question was whether a jury would be perverse if it found that B had adopted the findings of the stewards as his own or had reported them unfairly. There might be more scope for a difference of view as to how a reasonable viewer would understand a television broadcast because it was necessary to interpret not just the words spoken but the tone of voice and body language of the speaker. B had made statements which meant that M had a real prospect of persuading the jury that he had adopted the findings of the disciplinary panel and of the stewards so as to lose the benefit of statutory privilege, considered (see paras 19, 21-22, 30-31 of judgment). Further, T's defence of honest comment was not bound to succeed (paras 34-35).
2. The relevant proceedings were the non-statutory proceedings before the BHA and the challenge to them in the High Court. However, the court proceedings had been by way of review and had not involved a consideration of the merits. Court procedure was also different from the procedure before the BHA tribunal and there was a real risk of inconsistent decisions. Parliament had intervened on the topic on a number of occasions and had not adopted a policy that relitigation, and so inconsistent decisions, were to be avoided. It was only the

SPORT AND THE LAW  
JOURNAL REPORTS

that made a previous finding conclusive in defamation proceedings but that and applied only to convictions before a court and therefore did not apply to findings by disciplinary tribunals such as that of the BHA. In any event, the previous finding created only a rebuttable presumption. Moreover, the statutory privilege upon which it had been decided that the case had to go to trial derived from the 1996 Act which post-dated the decision in . The effect of holding that the previous proceedings should be considered as equivalent to proceedings before a court would be to give T something close to a defence of absolute privilege. The case did not turn solely on the findings upheld in the High Court because the particulars of claim embraced other matters such as dishonesty and motive. It could not be said that the proceedings were an abuse of process of the court on the basis that the identical question sought to be raised had already been decided by a competent court, Hunter considered (paras 43, 47-56).

**Commentary**

McKeown v Atheraces exposes a tension between two important principles. On the one side, there is the general role of libel law as a mechanism for vindicating reputations that have been damaged by unfounded allegations. On the other, there is the need to prevent defamation actions becoming a back door means of upsetting earlier judgments reached by other tribunals. Since all disciplinary findings are expressed in some form of words, the scope for collateral challenges via the libel courts is potentially very wide. Whilst Tugendhat J did not need to decide several of the questions that arose on the re-litigation point, the discussion of those issues in his judgment is nonetheless persuasive. The Defendant's approach would indeed have yielded peculiar results. The Defamation Act 1996 draws a conscious distinction between publications protected by absolute privilege and publications that are only protected by qualified privilege. The Defendant's argument threatened to emasculate this distinction insofar as it applies to findings of disciplinary tribunals such as the BHA. It would also have created what was in effect an irrebuttable evidential presumption, which would have sat uneasily with the regime established by the statutes governing the admission of evidence in civil and criminal cases. There are therefore powerful statutory pointers against that course.

The ability to strike out for abuse of process is a powerful and potentially malleable tool in the court's case management armoury. On the unusual facts of McKeown, Tugendhat J sensibly refrained from exercising that power. However it remains to be seen how the Claimant will fare at the final hearing. After managing to avoid falling at the first, he still faces an uphill struggle to clear his name.

*Reporter: Edward Craven, Matrix Chambers*

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**(2010) SLJR 6**

Criminal law - Jurisdiction - Football - Football banning order - Defendants being convicted of football related offence - Whether football banning order inevitable consequence of football related offence - Whether judge erring in failing to impose football banning order

**PROSECUTION APPEAL; R V BOGGILD AND OTHERS**

**Court of Appeal, Criminal Division Hughes LJ, Bean and Blake JJ (judgment delivered extempore) 19 July 2011[2011] EWCA Crim 1928**

**Facts**

The defendants, aged between 16 and 23 at the time of the offence, were supporters of Everton football club. In March 2010, they travelled from Liverpool to Wolverhampton to see a match between Everton and Wolverhampton Wanderers. The match was a 'regulated match' for the purposes of the Football Spectators Act 1989 (the 1989 Act). Some 15 minutes prior to the end of the match, the defendants were walking in search of their coach to return to Liverpool. They walked past a public house near the football stadium where a large number of Wolverhampton supporters were gathered. The defendant, B, was seen on CCTV to move towards the Wolverhampton supporters and to shout at them while waving his arms. A fracas ensued in which the Wolverhampton fans threw glasses at the defendants and both groups threw traffic cones and exchanged punches and kicks. The skirmish lasted about one minute. The defendants, who were outnumbered, made off, found their coach and returned to Liverpool. In due course, seven defendants pleaded guilty to affray. The judge referred to the 'scourge of football violence' in the United Kingdom but he

found that the defendants had not been looking for trouble and had simply been passing a group of Wolverhampton supporters whilst looking for their coach. He found that they had responded to the disturbance begun by the home supporters. The judge concluded that the defendants were either of good character or of few or minor previous convictions. None of the defendants had previous convictions relating to football, nor was there any football intelligence evidence. The judge therefore found that there was no future risk of football related violence in respect of the defendants. He sentenced them either to suspended sentences, community orders, or, where they were youths, to youth rehabilitation orders. Those were imposed for 18 months. Orders were also made requiring the defendants to complete unpaid work and, in some cases, to pay prosecution costs. The judge imposed an order forbidding the defendants from attending any football matches domestically or internationally, except for certain home games, for two years. He did not impose a football banning order, pursuant to s 14 of the 1989 Act and, at the time of sentencing, he did not state his reasons for not imposing the order. Subsequently, the judge refused an application by the prosecution for leave to appeal against his decision not to impose a football banning order. In giving his reasons, the judge gave a short summary of the facts and stated that he had had ample opportunity to immerse himself into the facts having presided over the trial of an eighth co-defendant. The prosecution appealed, under s 145A of the 1989 Act, to the Court Appeal, Criminal Division. The defendants appealed against sentence.

An issue arose as to whether the Court of Appeal, Criminal Division, had jurisdiction to hear a prosecution appeal following a judge's refusal to impose a football banning order. The second issue was whether the 1989 Act had to be construed to mean that a football banning order was an inevitable consequence of a football related conviction. The prosecution submitted that it did and that that had to have been Parliament's intention. Accordingly, it contended that the judge had erred in failing to make the football banning order. The third issue was whether the judge had erred in imposing the prohibition for two years where he had imposed community or suspended sentences of 18 months duration on the defendants. The Court of Appeal, Criminal Division considered the question of jurisdiction. The court then reconstituted to the Court of Appeal, Civil Division to consider the prosecution appeal on the issue of the football

banning order, and again reconstituted to the Court of Appeal, Criminal Division, to consider the defendants' appeal against sentence. Consideration was given to the (the 1981 Act).

**Held (dismissing the prosecution appeal, allowing the defendants' appeals)**

1. (Sitting as the Court of Appeal, Criminal Division) The Court of Appeal, Criminal Division, had no jurisdiction to hear an appeal against a refusal to impose a football banning order. Section 14A(5A), (5B) and (5C) of the 1989 Act did not confer such power on the Court of Appeal, Criminal Division. No such power existed under the 1981 Act. Under s 53(3) of the 1981 Act, the Court of Appeal, Civil Division, had jurisdiction as a whole, which was not exercisable by the Court of Appeal, Criminal Division. Under s 15(3) of the 1981 Act, it had all the power of the Crown Court, from which an appeal had been brought, to make ancillary orders, which included the power to make a football banning order. It followed that there was no provision for the prosecution to appeal against the judge's failure to impose the football banning order.
2. (Sitting as the Court of Appeal, Civil Division) It was palpably not the scheme of the 1989 Act to make a football banning order an inevitable consequence of a football related conviction. That Act imposed a test for the judge to apply and required an order only if the test was met. General deterrence was a legitimate factor for the court to consider. However, it did not follow that it was a determinative factor or that the football banning order had to follow. Individual consideration was needed and it was a matter for the judge to make, in each case, a decision of whether or not to impose an order.

In the instant case, the judge's decision not to impose a football banning order was unassailable and one to which he had been entitled. He had been aware of his powers to make such an order and of the fact that the prosecution had applied for one to be made. It was clear that the judge had considered making a football banning order but that he had decided against it. However, it was a requirement of s 14A(3) of the 1989 Act that reasons for not imposing a football banning order had to be clearly stated. Accordingly, the judge had erred in not expressly saying, at the time of passing sentence, why he had not made the order. However, he had

SPORT AND THE LAW  
JOURNAL REPORTS

repaired that error a few days later when an application had been made for leave to appeal against his decision not to impose the order in question. It was important to note that the incident had been recorded on CCTV and the judge had been able to see everything that had happened. On the facts of the case and given the judge's findings, he had been entitled to reach the conclusion that a football banning order was not necessary to prevent future violence.

**Commentary**

The official Home Office figures show the increased use of domestic and international football banning orders (FBO), has successfully excluded and limited the movement of those convicted of football-related offences from stadiums and surrounding areas. Introduced by the Football Spectators Act 1989, the subsequent Football (Offences and Disorder) Act 1999, Football Disorder Act 2000 and the Violent Crime Reduction Act 2006 have amended and strengthened many of the original provisions.

It is important to note that they are essentially civil orders, but as with Anti-Social Behaviour Orders (ASBO), their breach is a criminal offence. This ruling highlights that it is palpably not the scheme of the 1989 Act to make a Football Banning Order the inevitable consequence of a football-related conviction. Further, deterrence is not the determinative factor when deciding whether the test for imposing an order has been met. The Judge was entitled to reach the conclusion that the test wasn't satisfied. The appeal was dismissed.

Additionally it is established that the Court of Appeal Criminal Division has no jurisdiction to hear an appeal by the prosecution against the failure to make a Football Banning Order, Senior Courts Act 1981 s 53(2). The Court of Appeal Civil Division does have jurisdiction to hear such an appeal, by virtue of Senior Courts Act 1981s 53(3).

*Reporter: SG* ■ **BASL**

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**(2010) SLJR 1-3 are reported in the Sport and the Law Journal, Volume 18 Issue 1**

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**(2010) SLJR 1**

Breach of contract - Compensation -  
Constructive dismissal - Football managers

**KEVIN KEEGAN V NEWCASTLE UNITED  
FOOTBALL CLUB LTD**

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**(2010) SLJR 2**

Sport - Intellectual property - Copyright -  
Database right - Football - Infringement -  
Preliminary issues - References to European  
Court

**FOOTBALL DATACO LTD V BRITTENS POOLS LTD;  
FOOTBALL DATACO LTD V STAN JAMES  
(ABINGDON) LTD; FOOTBALL DATACO LTD V  
YAHOO! UK LTD**

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**(2010) SLJR 3**

Games - Personal injury - Negligence -  
Reasonable care - Risk

**SCOUT ASSOCIATION V BARNES**

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