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Sports Law Current Survey - Issue No.2 - 2001

Walter Cairns

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

1. General
2. Criminal law
3. Contracts (including employment law)
4. Torts and insurance
5. Public law
6. Administrative law
7. Property law (including intellectual property law)
8. Competition law
9. EU law (excluding competition law)
10. Company law (including sports associations)
11. Procedural law and Evidence
12. International private law
13. Fiscal law
14. Human rights/Civil liberties (including race and gender issues)
15. Drugs legislation and related issues
16. Issues specific to individual sports (including disciplinary proceedings)

1. GENERAL

Olympic rider expelled by RSPCA (UK)[1]

Richard Meade is the only British equestrian event rider ever to win a hat-trick of Olympic titles, and was awarded the OBE for his services to showjumping in 1974. More recently, he has championed the cause of those opposing attempts to legislate fox-hunting out of existence in Britain, more particularly by chairing the Countryside Animal Welfare Group (CAWG), which claims to have a membership of over 5,000.

In the course of 2000, the Royal Society for the Protection and Care of Animals (RSPCA) had obtained a High Court ruling giving the Society the right to veto applications for membership which it believed to be part of a campaign of infiltration by the CAWG. This enabled the ruling council of the RSPCA to reject 500 membership applications, many of which were from members, or people suspected of being associated with the Group.

In addition, since Mr. Meade was alleged to be one of the ringleaders of the campaign, he was expelled from the RSPCA in June 2001. At the hearing before the RSPCA ruling council, Mr. Meade was represented by Sir John Mortimer QC. After the hearing, Sir John described the decision as

"yet another example of the surrender of the Royal Society to the animal rights movement."

Tennis ace Hingis falls for court lawyer[2]

As is reported elsewhere in this survey (see below, p.12) the life of Swiss tennis ace Martina Hingis was made extremely difficult for a considerable period on account of the unwelcome attentions of a stalker, who was jailed for this offence. However, this case also appears to have produced some beneficial effects in that it prompted Ms. Hingis to find romance with the lawyer who prosecuted the offender, 31-year-old Chris Calkin.

Becker's private legal troubles continue

The legal fortunes of another German-speaking tennis star, former Wimbledon champion Boris Becker, have taken on a less happy turn. It will be recalled from the previous issue[3] that the acrimonious termination of his marriage had produced all manner of financial and legal implications.

In addition to the unseemly tussle over custody of the Becker children and the financial settlement resulting from the separation, Becker also faced claims by Russian model Angela Ermakova that, as a result of a bout of passion in a Japanese restaurant in Park Lane, London, she had borne him a child for whom she demanded maintenance.

As a result, the High Court (UK) announced in July 2001 that a "reasonable and indeed generous" deal had been offered by Becker in this regard.[4] Initially, Becker had denied paternity, but admitted to being the father of Mr. Ermakova's child following DNA tests.[5]

In a further twist in this affair, Becker placed the racehorse which he gave to his wife Barbara as a present in 1995 on the market. The horse in question, a pure-bred Andalusian black stallion rejoicing in the name of Zeus VII, is said to be worth at least £33,000.[6]

Leading British law firm scores advertising first[7]

Law firm Rowe & Maw created a breakthrough in the manner in which the world of legal practice advertises itself in early 2001, when its name was flashed up on perimeter screens in the course of England's soccer World Cup qualifying tie against Greece. The firm was reported to have paid £33,000 for this six-minute advertisement, which took the form of the slogan "Rowe & Maw - lawyers for business".

Chris Pullen, the firm's head of marketing, said that the decision to advertise at a prominent football match was part of a brand-building exercise. The firm continued to publicise itself in the sporting arena by advertising on the hoardings during the Fifth Test (cricket) against Australia at The Oval. It is also looking at further opportunities in this field.

Football League appoints its first in-house lawyer (UK)[8]

In July 2001, the English Football League made history by recruiting its first in-house lawyer in the shape of Nicholas Craig. Mr. Craig joined the League at its Preston offices following a six-year period with Manchester firm Widdows Pilling. He will be responsible for co-ordinating the provision of external advice following an assessment made by the firms previously employed by the League.

Mr. Craig will bring to the League such experience as he has gleaned from his work for sporting clients at his previous law firm, which not only acted for rugby clubs in the North West, but also advised clients on employment matters in the world of sport.

Concern expressed at "arms race" for sporting facilities at US colleges[9]

That US institutions of higher education are extremely generous in the provision of sporting facilities for the benefit of their students is a proposition which hardly needs elaborating. However, American colleges appear to be experiencing a boom, unprecedented even by their own standards, in the creation of new, and the renovation of old, sports facilities - to the point where this process has been referred to as an "athletics arms race". That not everyone is happy at this development is evident from an article published on this topic in a leading US sports law journal.

It appears from this feature that concern has more particularly been expressed at the level of college administrators, who have urged colleges to halt this explosive growth which would inevitably lead to a "financial fall" in college sports. This is in spite of the fact that the higher revenue from new stadia and arenas assists in increasing the profile of the colleges concerned - which is quite clearly the factor which sparked off this "arms race" in the first place.

Lawyers actually win legal football tournament (UK)[10]

In spite of its name, the Leeds Law Shield Cup had not been won by any law firm for a decade. This sorry state of affairs, however, came to an end when law firm McCormicks fielded a triumphant five-a-side team for this tournament. This firm acts as solicitors to leading soccer club Leeds United, but rumours that the team sheet read "Martyn, Ferdinand, Viduka, Kewell and Smith (Alan)" have been entirely disproved.

Sports law specialists announce increased profits[11]

McCormicks, the law firm involved in the sporting feat referred to in the previous section, have announced a 35% rise in profit and 20% rise in turnover, but are refusing to disclose the actual figures on which these results are based. However, the firm claims to have been involved in 35 corporate and commercial deals worth £400,000.

Triple Olympic winner sues for divorce[12]

Athlete Marion Jones, Britain's triple Olympic gold medallist, announced in June 2001 that she is seeking a divorce from her husband, world shot put champion C. J. Hunter. Ms. Jones retired from the sport this year after having been found positive for the banned drug nandrolone last year (see below, p.81).

C.J. Hunter has also faced legal problems of a different nature recently (see below, p.81).

What is sports law? Article in US journal[13]

One particular feature of sports lawyers - assuming that there are such creatures - is their propensity towards existentialist soul-searching which is hardly ever displayed in the context of other legal disciplines. The differences of opinion on this subject between Messrs. Grayson and Woodhouse on the one hand, Beloff and Kerr on the other hand, are well documented in this organ,[14] and are also reflected in the wider context of policy-making.[15] It is only to be expected, then, that this question has also attracted the attention of scholars world-wide - including the author of the article under review.

The author essentially seeks to answer two questions: (a) does sports law constitute an independent body of law, and (b) is this issue merely a matter of academic curiosity or does it have wider implications? On the first issue, the author inevitably places before us the choice between the terms "sports law" and "sport and the law". Few would question the existence of the latter, but is there such a thing as the former? He identifies a number of schools of thought on this issue: (a) the traditional

view that "sports law does not exist" as articulated by the aforementioned Woodhouse *et al.*; (b) the moderate position that "sports law may develop into a legal field", as advocated by Kenneth Shropshire and Burlette Carter, and (c) the radical stance according to which sports law definitely constitutes a separate branch of the law, of which Simon Gardiner[16] is a prominent representative. He then identifies a number of tests which may serve to decide what constitutes a field of law in its own right, but arrives at no particular conclusion on whether this settles the debate one way or another.

The author then proceeds to examine the question whether this debate has any wider implications than the purely academic. For this purpose, he examines the widest possible range of legal areas in which sporting issues have regularly given rise to litigation, and seeks to establish whether a distinctive jurisprudence has developed for such litigation. He succeeds in identifying a number of areas in which this is indeed the case, but stops well short of the conclusion that this settles the debate in favour of the separate nature of sports law. His general conclusion is a diplomatic one, in that the answer could be that

> *"the significance of whether sports law is a field of practice may lie in the perceptions of those of us who practice, study or write in this area. Do we perceive ourselves as engaged in an important, rigorous, intellectually stimulating area of practice and study? Moreover, do we view our endeavours as worthy of the respect of our colleagues who are engaged in other fields of practice? In short, perhaps the relevance of the question resides in whether we feel that we can take pride in working in an area that is respected as having substantive value and is considered a vital part of the legal community."*

Final warning for unsporting parents (Australia)[17]

Normally one would expect the public authorities of such a successful sporting nation as Australia to be extremely chary of curbing the competitive instincts of its population. However, the problem presented by what has come to be called "ugly parent syndrome" have become so acute that tough new guidelines have been issued in order to curb the worst excesses of this phenomenon.

Both the New South Wales government and the Australian Sports Commission have reacted to a series of incidents in which over-emotional parents have attacked referees, tussled with fellow spectators or vociferously castigated children. They have accordingly issued a number of guidelines on the subject to all schools and junior sporting organisations for distribution to parents. More particularly the publication in question contains a "parents' charter" which invites mothers and fathers to respond to a series of pledges.

NSLI annual awards banquet held. Other NSLI events (US)[18]

National Sports Law Institute (Marquette University) held its annual awards banquet on 20/4/2001. In the course of this event, the NSLI traditionally honours students in the Marquette University Sports Law Programme and presents the Joseph E. O'Neill award. This year, the award winners were Charles W. Mentkowski, Professor Emeritus and NSLI Board member, and Martin J. Greenberg, Adjunct Professor and Chair of the NSLI Board of Advisors.

The Institute also held a number of workshops. On 4/102001, the topic was "Insights on breaking into the sports industry", and featured John Cooper, Team Counsel for the Atlanta Braves, Atlanta Hawks and Atlanta Thrashers as well as Assistant General Counsel to Turner Sports Inc., and Greg Heller, Assistant Team Counsel and Counsel to Turner Sports Inc., Atlanta, Georgia. On 5/10/2001, the subject-matter under discussion was "Intellectual property issues in sports: trademarks, unfair competition and athletes' publicity rights", sponsored by the NSLI and Foley & Lardner (see below, p.55).

Legal expenses insurance offered to soccer season-ticket holders[19]

Soccer club Kidderminster Harriers has offered free legal expenses insurance to those season-ticket holders, as well as their spouses and children aged 21 or under, who have signed up for the forthcoming 2001-2002 season. This move is believed to be the first of its kind, for which the soccer club linked up with Worcestershire law firm Morton Fisher and Legal Insurance Management.

2. CRIMINAL LAW

GENERAL ISSUES

Computer hackers stole our engine secrets, claim Benetton[20]

French car manufacturers Renault, who recently purchased Jenson Button's Benetton Formula One motor racing team, recently alleged that spies - who were probably former members of the East German secret police Stasi - hacked their way into its computing system in order to purloin the secrets of its radical new engines.

According to Renault's technical director, Jean-Jacques His, data from the engine design were removed as a result of someone getting into the system.

Robbers prey on Tour de France following[21]

It would appear that members of the criminal fraternity have picked on the Tour de France, particularly its followers, as a potential hunting ground. During this year's Tour, they seem to have targeted particularly the mobile homes of Tour followers. Belgian rider Rik Verbrugghe announced on 23 July that his parents were asleep when thieves broke into their home, making off with all the unfortunate couple's money. He also suspected that the victims had been drugged during that raid. During the stage from Sëte to Perpignan in the South, the driver of Tour team Telekom was robbed whilst asleep. Also, the car door of SEM manager Paul De Geyter was forced.

Former Hampshire captain and cricket commentator Nicholas assaulted (UK)[22]

Cricket enthusiasts noticed little amiss when presenter Mark Nicholas, of Channel Four, appeared on television for the first day of the England v. Pakistan Test. However, heavy make-up had been used to dissimulate a gash in the face which had required 11 stitches, which Mr. Nicholas had sustained as a result of an attack in which a dog chain was used as a weapon.

The former first-class cricketer had been visiting his brother in Shepherd's Bush, West London, when he heard a car burglar alarm being set off. Running out of the house, Nicholas noticed that his brother's car had been broken into and that a mobile telephone was missing. Having chased the youth whom he believed to be responsible for the offence, he became subject to an assault by the youth in question and two other persons.

"Toon" ace banned from driving (UK)[23]

In July 2001, Kieron Dyer, the Newcastle United and England footballer, was banned from driving for two months and fined £1,000 by Chester-le-Street magistrates after having admitted speeding at 100mph whilst listening to the radio commentary on Tiger Woods's win in the Augusta Masters tournament.

Taxi driver jailed over Olympic medal theft (UK)[24]

In May 2001, taxi driver Terry Sandford was given a four-month jail sentence for having attempted to steal a briefcase which contained the gold medal won by British oarsman Matthew Pinsent. Sandford had grabbed the rowing champion's leather case when he saw it lying on a car roof at Heathrow Airport the previous October. He then placed it in the boot of his black cab before driving off to meet a customer. When challenged by a police officer about the disappearance of the case, he had denied any involvement. However, when questioned in court he maintained that he had intended to return the case, but that he was loath to lose the next customer's fare by taking the necessary steps to register it.

The jury at Isleworth Crown Court had cleared Sandford of theft, but found him guilty of attempted theft. Sentencing Sandford, Judge Hezlett informed Sandford that his attempted theft constituted a breach of trust placed in British taxi drivers by the general public.

Amateur golfers withdraw from tournament following street attacks (UK)[25]

In June 2001, two golfers withdrew from the British Amateur Championships in Prestwick, Scotland, after they had been subjected to street attacks. Andrew Buckle, the Australian amateur champion, had his jaw broken following an assault in Glasgow. English player Steve Vinnicombe had been punched and kicked a few days before the tournament when two men attacked him.

Former Welsh rugby star given drink-drive ban (UK)[26]

Former Wales and British Lions fly-half Barry John was banned from driving for three years in May 2001, having admitted to drink-driving offence for the second time. He had been found slumped over his steering wheel on the hard shoulder of the M4 motorway in April.

Soccer star acquitted of speeding charge on technicality (UK)[27]

In July 2001, Bradford City soccer player Ashley Ward was spared a sentence on a speeding charge - because he failed to attend the hearing. On his lawyer's advice, Ward failed to appear before the court, thus making it impossible for the police officer in question to identify him in the dock. This left open the possibility that the officer had apprehended someone passing himself off as Ward. As a result, the judge was compelled to acquit the former Blackburn Rovers striker and award him costs.

The lawyer in question, Nicholas Freeman, appears to be specialising in defending soccer personalities. It was he who succeeded in persuading the court to rescind the driving ban imposed on Manchester United star David Beckham two years ago, arguing that the latter was compelled to infringe the speed limit in order to evade a paparazzi photographer. He also defended United manager Sir Alex Ferguson against a similar charge on the grounds that his diarrhoea required him to drive home as fast as possible.[28]

Former ice-skating star suspended after charity funds go missing (UK)[29]

In August 2001, Gary Irvin, a former champion ice dancer, was suspended from his post as director of social policy with a Post Office charity after it was discovered that at least £1.1 million could not be accounted for. In this capacity, he had built up a portfolio of a dozen properties, including some located in Central London which are rented out. Concern was aroused when a new secretary to the unit queried two cheques which she had been instructed to despatch to the same address. The Post Office Investigations Department has initiated an inquiry, and community groups and charities throughout Britain have been contacted in this connection.

Mr. Irvin came fifth at the 1989 World Ice Dance Championships with partner Lisa Gold. Recently, he had also acted as an Olympic judge.

FA crackdown on child abuse of young footballers initiated (UK)[30]

In recent months, a set of disturbing statistics has revealed that the English Football Association has been investigating over 100 cases of child abuse over the past 18 months. Even more disturbingly, almost one third of these offences actually took place in a football setting such as training sessions. Nearly half of these incidents have involved individuals working in football who had committed offences outside the sport.

This has prompted the FA to issue a code of conduct in this matter as part of a multi-million pound crackdown on abusers and bullies at every level of the English game. These new guidelines mean that people such as Portsmouth manager Graham Rix, who was jailed two years ago for sex offences committed outside football but nevertheless kept his post, could be barred from resuming their career.

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Becker may face prosecution over tax irregularities (Germany)[31]

Former Wimbledon champion Boris Becker seems unable to remain free from legal controversy at the present time. In addition to the legal consequences of his marital problems (see above, p.5), he now faces the possibility of a jail sentence following a five-year investigation by tax officials in Bavaria, Germany. Becker's lawyers failed to obtain an agreement from the officials in question that any fine would automatically rule out a jail sentence.

Becker had been investigated for claiming that tax-free Monte Carlo was his principal residence in the course of his successful tennis career, whereas it is being alleged that in fact he spent most of this time in Germany.

In 1997, Peter Graf, the father of Becker's compatriot and fellow-Wimbledon champion Steffi Graf, was given a three-year jail sentence for tax evasion.

Celtic fan shot in Amsterdam bar following Champions League fixture[32]

Following the qualifying match for the European Champions League between Scottish champions Celtic and Ajax Amsterdam in August 2001, a Scottish fan sustained serious injuries in a bar located in the city centre after a lone gunman entered the premises and shot him once in the chest at point-blank range. Earlier, fans of both clubs had mixed in the city centre without causing any trouble. Police confirmed that the incident did not appear to be football-related.

Former Liverpool FC star jailed for drink-driving (UK)[33]

In June 2001, one of the members of the highly successful Liverpool FC side of the 1960s, flying winger Peter Thompson, was given a one-month jail sentence for drink-driving. Thompson was more than four times over the limit when he was apprehended in Harrogate, North Yorkshire, with three children in his car.

Former shot-put champion acquitted of assault (US)[34]

In April 2001, C.J. Hunter, the former world shot put champion, was acquitted on a charge of having assaulted a man in the course of an argument over the use of the track at North Carolina State. Hunter, who volunteers as a coach at a local school, admitted shoving American footballer Garfield Ellenwood, but claimed that he did so in order to prevent the latter from throwing a punch. The judge concurred with this defence.

Sentence imposed on former boxer for assault quashed on appeal (UK)[35]

In the previous issue of this organ,[36] it was reported that former British boxer Herbie Hide was ordered by a judge to be electronically tagged after having been convicted of assaulting a civil servant in Norwich.

In May 2001, this sentence was quashed on appeal, with the judge opining that the evidence against Mr. Hide fell well short of the criminal standard.

Woman detained under Mental Health Act following Beckham break-in (UK)[37]

In July 2001, a woman was detained under the Mental Health Act after she had broken into the hallway of Manchester United star David Beckham's penthouse and stolen some private letters. The woman in question had hired a taxi to convey her from her Scottish home to Alderley Edge, Cheshire, and having purloined the letters in question, asked the driver to return her to Scotland. However, the driver alerted the police, and the woman was later arrested.

Northern Irish and Welsh footballers involved in incidents abroad

It is rare for players, rather than their supporters, to attract the attention of the criminal authorities when they travel abroad, but this is precisely what has happened in recent months in a number of unrelated incidents.

In June 2001, five Northern Ireland international players were held in custody in Prague following a flare-up in a nightclub. The fracas came in the wake of the side's 3-1 defeat by the Czech Republic in a World Cup qualifying match. The players were subsequently released after the charges brought by the nightclub doorman were dropped.[38] As a result of this incident, Northern Ireland FA officials are reviewing their liberal approach towards players' off-field behaviour.[39]

On the same night, the Wales team were confronted at Kiev Airport by disgruntled officials from the Ukraine football association, who accused them of stealing several practice balls following their stormy 1-1 draw earlier.[40] They demanded that luggage belonging to the Welsh squad be opened in order to investigate this matter further, but were refused permission to do so.

Welsh football was embroiled in further controversy when international Karl Ready admitted in court to having broken the nose of a taxi driver in Barbados. The driver had allegedly seen Ready kissing a man outside a nightclub and remonstrated with him over this behaviour, after which Ready lost his temper and punched him in the face.

Footballers penalised in France for playing under false passports[41]

In the previous issue,[42] attention was drawn to the false passport scandal which was beginning to affect the world of football at various levels. In April 2001, Faryd Mondragon, a Colombian goalkeeper playing for top French team Metz, former Monaco defender Pablo Contreras, from Chile, and Argentinian Emiliano Romay, a former Nice footballer, were fined and banned from France for two years for having played under false passports.

(On this issue, see also below under Section 16 "Issues specific to individual sports", p.85)

Prince Charles's polo team mate fined for animal cruelty (UK)[43]

In April 2001, Wing Commander Mohammad Ashraf, a polo team-mate of the Prince of Wales, was ordered to pay £9,000 by way of fines and costs for having caused unnecessary suffering to two ponies. Cheltenham magistrates were informed that Ashraf had left the two Argentinian-bred ponies to starve in a waterlogged field for six days. Alerted by neighbours, RSPCA officials visited the field and were so concerned at the ponies' emaciated condition that they seized them both.

Ashraf is one of Britain's leading polo players and a member of the Guards Polo Club. He has played alongside Prince Charles and is a member of both the Combined Services polo team and the Great Britain side.

Duncan Ferguson burglars jailed (UK)[44]

In the previous issue, it was reported how Everton footballer and Scotland international Duncan Ferguson earned the plaudits of the criminal authorities after having tackled burglars at his Lancashire home.[45] The prosecution which followed this incident resulted in a custodial sentence of 15 months for both offenders involved, which was imposed by Preston Crown Court.

Darren Gough has cricket gear stolen (UK)[46]

The England cricketing side's only win in the home series against Pakistan at Lord's in May 2001 was marred for fast bowler Darren Gough when he was robbed of his cricket gear. The kit, which included the special cap commemorating his participation in his 50th Test Match, was taken from the player's Range Rover.

Former Rugby League star murdered (UK)

In July 2001, David Nelson, a former Rugby League professional, was shot and killed in the Wilson's Arms pub in Seacroft, Leeds. A friend who tried to intervene was also shot and later died from his injuries.[47] Three men and three women were later arrested.[48] This resulted in a murder charge being brought against Paul Bryan before Leeds magistrates.[49]

Mr. Nelson, a winger, played for Castleford, Sheffield and Leeds. He appeared in the Challenge Cup Final at Wembley in 1992.

Comments on the outcome of the "Battle of Beverwijk" (The Netherlands)

Recent issues of this column have documented the various legal consequences of a pitched battle fought in Beverwijk between supporters of Dutch football clubs Ajax and Feijenoord[50] which resulted in the death of a man. More particularly attention was focused on a decision by the Supreme Court (*Hoge Raad*) which held that one of the accused was deemed to have taken part in the fight by physically taking sides during the run-up to the battle. Because this appeared to broaden the scope of the legislation under which the prosecution was brought, it was perhaps inevitable that this verdict should give rise to some concern amongst a number of commentators.

The author C.P.M Cleiren[51] has a number of reservations about this interpretation. In his view, the Supreme Court had based its approach on a general criterion - the fact that the accused must have been aware of his involvement - and on certain individual conditions which concern a number of statements made by the accused and the manner in which he took sides in the battle. Accordingly, both objective and subjective criteria played a part. He expresses the view that the objective criteria cannot be regarded as very strict, and could lead to people such as journalists and innocent passers-by being caught by this legislation. This aspect removes a great deal of the significance of the subjective criteria taken into account by the Court. In addition, it fails to take into account the possibility that certain parties may have physically lined up with one of the sides, but subsequently sought to withdraw or merely to help those in difficulty. To this end he cites a decision by the Amsterdam Court of Appeal of 18/11/1999 which did take into account such possibilities, in that it stated that proceeding towards the battlefield as a group was insufficient evidence to be regarded as a participant in the fight, since it must remain a possibility that those involved will withdraw, for whatever reason, before any acts of violence took place.

This view is not shared by J. de Hullu, writing in *Nederlandse Jurisprudentie*.[52] He considers that the Court's interpretation does not present any risk for those who were innocently present at the battle, since the requirement that there must have been an "actual contribution" (*daadwerkelijke bijdrage*) towards the fight will obviate such risks. As evidence of this he cites the very decision by the Amsterdam Court of Appeal relied upon by Cleiren, under which an Ajax supporter who was present but at a certain point took fright at the way in which the event was developing was actually acquitted.

New rape claim against Tyson dismissed

It will be recalled that heavyweight champion Mike Tyson was jailed in 1992 after having been convicted of raping Desiree Washington. Six years after his release, accusations were once again made against him under this heading. An unnamed woman had informed the police that Tyson raped her at her home in Big Bear, California.[53] However, following the submission of a police report on this matter, prosecutors in San Bernardino, California, considered that they lacked the necessary evidence against the former world champion and failed to file any charges.[54]

Martina Hingis stalker jailed

Various personalities in the world of sport have recently found themselves undergoing the unwelcome attentions of obsessive stalkers. One such victim has been Swiss tennis star Martina Hingis. Since 1999, an Australian naval architect who claimed to be in love with her and had followed her from tournament to tournament, waited outside her house and frightened her to the point where she felt compelled to employ a bodyguard.[55]

This behaviour attracted the interest of the criminal authorities, and in April 2001, the stalker concerned, one Dubravko Rajcevic, was found guilty of stalking by Judge Kevin Emas of Miami-Dade County court. He was later sentenced to two years' imprisonment.[56]

"Dark Destroyer" Benn apprehends bag thief (UK)

When a thief tried to make off with an unattended bag at Gatwick Airport in August 2001, he could not have chosen a worse possible victim. This turned out to be Nigel Benn, the former boxing world champion otherwise known as the "Dark Destroyer", who chased the man through the arrivals lounge, pinned him to the ground and held him in a headlock until the police arrived.[57]

Later, Mid Sussex magistrates fined Marco Garcia, from Chile £150 and ordered that he be deported for this offence.[58]

Repercussions of collapsed case against Leeds United players

The saga which led to the prosecution and subsequent collapse of the accusations of assault made against, amongst others, Leeds United footballers Lee Bowyer and Jonathan Woodgate has been extensively reported in the previous issue.[59] Because of certain views expressed by the victim's father in a Sunday newspaper whilst the jury were still deliberating the case, the trial judge discharged the jury and discontinued proceedings. This debacle has subsequently produced a number of repercussions, both for the players concerned and for those said to be responsible for the failed prosecution.

It was soon made clear to the accused that they would face a retrial on the charges originally brought against them, which should take place in the course of October at Hull Crown Court.[60] At the same time, the trial judge concerned, Mr. Justice Pooley, exonerated the father of the victim of any responsibility for the collapse of the case. However, several criticisms have been made of the judge for his decision, some even going as far as accusing him of insulting the intelligence of the jury members.[61]

Two days later, Colin Myler resigned as Editor of the *Sunday Mirror*, being the newspaper responsible for Judge Pooley's decision. This followed an internal inquiry into the circumstances in which the offending article came to be published.[62] In May 2001, Lord Williams of Mostyn QC, the Attorney General, gave consent to the initiation of contempt of court proceedings against the *Sunday Mirror*.[63]

Olympic athlete's former lover jailed over faked race hate attack (UK)[64]

In June 2001, the former lover of Olympic athlete Ashia Hansen was jailed for two years for having staged a race-hate attack on himself in order to reclaim her affections. Chris Cotter had claimed to have been slashed with a knife by a gang which objected to a black woman being dated by a white man.

In order to lend credibility to these claims, the men involved sent race-hate letters to Ms. Hansen as well as to other black athletes. Judge Robert Orme, of Birmingham Crown Court, stated that Cotter and his associates, Surjit Singh Clair and Craig Wynn, had played the race card in order to make the bogus attack look convincing. Clair and Wynn also received jail sentences.

CORRUPTION IN SPORT

Cricket corruption scandal - an update

Condon Unit submits report, faces criticism, then "throws in towel"

In May 2001, Sir Paul Condon, who heads the Anti-Corruption Unit, submitted his initial report to the International Cricket Council.[65] It will be recalled from the previous issue that Sir Paul, a former Metropolitan Police commissioner, had been appointed to take charge of the investigation into cricket corruption, which appeared to be veering out of control towards the end of the last year.[66] Shortly

afterwards, the ICC released the report on its website (www.icc.cricket.org).[67] It paints a devastating picture of a sport poorly led by its governing body and riddled with accusations of corruption, drug-taking and violence. All this takes place in a climate of "silence, apathy, ignorance and fear."[68]

The report confirmed that match-fixing is flourishing at all levels of the game, and that vast amounts of money are involved across a wide network of countries. Its 75-odd pages deal extensively with the mechanics of the corruption; however, since this is a public report, no individuals were named and no specific allegations dealt with. The report describes players as being somewhat naive in dealing with any approaches made to them, and states that they remain too accessible to would-be fixers. Particularly the Dubai resort of Sharjah is featured prominently in the report, as it is seen as a magnet for match-fixers, since the ICC has little control over the event and the players heavily exposed to betting syndicates. It also highlights the failings on the part of the ICC in confronting this issue, and makes uncomfortable reading for the game's governing body. For years allegations of various types had been roundly ignored - in fact, exposure of the Cronje affair which brought the whole issue into focus happened by pure chance.

The recommendations made in the report include measures for the tightening of surveillance, as well as binding agreements with players which would open up personal records to investigators. It also recommends outlawing mobile telephones from dressing rooms, anti-corruption training for young cricketers, as well as higher pay and larger prize money for players in order to remove the temptations of bribery. Sir Paul also recommends a Stalinist-style revision of cricket records to erase the names of players involved in match-fixing.[69]

Reactions to the report were mixed. Some welcomed the recommendations, whereas others accused it of merely scratching the surface and of falling short of the measures required to deal adequately with the problem. Thus Scyld Berry, writing in *The Sunday Times*,[70] rues the fact that the Report does not name and shame anyone, and blames this partly on the English libel laws, which would not allow for a hard-hitting report such as that produced by the Indian Bureau of Investigation. He considers that the main object of the exercise is to reassure sponsors and spectators that the game is clean, without engaging in too much digging and naming the major figures behind these practices. In fact he opines that the ICC would never have allowed the Unit to be established in the first place if they had not been sure that they could keep it at legal arm's length. Similar critical noises were made by former Pakistan cricketer Imran Khan.[71] England Test player Michael Atherton sums up his feelings in the following words:

> *"After many months of inquiry, we don't know much more than we already know and cricketers still have suspicions hanging over them with nobody any the clearer as to their innocence or otherwise. The best hope is that Cronje's shaming and life bans will be enough to bring an end to this sorry affair"*[72]

Michael Henderson writing in the *Daily Telegraph*,[73] is of the opinion that the the Anti-Corruption Unit has the manpower to perform the task which Condon was appointed to undertake. There also appears to be a genuine will to carry its work through. However, it may not become easier to pin specific charges to individual players, since this is a

> *"covert business conducted in hotel lobbies and in a hundred cryptic telephone calls."*

The Unit subsequently continued to act in attempts to clear the sport of corruption. In June 2001, it arranged for photographs to be shown to the England players of a man suspected of being at the centre of a plot to fix the two-Test series against Pakistan. The team were told that the suspected fixer was known to be in England at the time and that he could well approach them in the guise of a bat manufacturer offering lucrative deals for the use of his equipment.[74]

However, in August 2001 it was reported that the ACU had "thrown in the towel" over prosecuting past wrongdoers.[75] Nevertheless, a few days later the ACU investigators claimed to be closing in on several new suspects who were not in any way linked to the Indian Bureau of Investigation report.[76]

The Alec Stewart affair

As a microcosm of the confusion, prevarication and intractable nature of the corruption which threatens to tear the world of cricket apart, the Alec Stewart saga can surely have few equals.

It will be recalled from the previous issue[77] that the distinguished Surrey and England wicketkeeper/batsman had been the latest leading cricketer to be the subject-matter of speculation as to his involvement in the type of racketeering described above, particularly after allegations made by Indian bookmaker Mukesh Gupta that Stewart had been paid the sum of £5,000 for match-sensitive information during England's 1992-3 tour of India. Initially, the Unit was optimistic that it could force an issue in this matter with Gupta's co-operation. Two meetings were held in March between the Condon team and Gupta, accompanied by his lawyers, in a Delhi hotel. This appeared to be something of a breakthrough, since Gupta had earlier refused to meet Shamila Batohi, chief prosecutor in South Africa's equivalent of the ACU, i.e. the King commission, in its investigations of accusations against former Test captain Hansie Cronje.[78]

However, the ACU subsequently ran into difficulties as it experienced increasing problems in making contact with the main accuser. These difficulties were compounded in late May 2001 when India's federal criminal investigators declared that they were in no position to compel Gupta to give evidence to foreign investigators.[79]

This was all the more regrettable because Gupta could not simply be dismissed as an attention-seeking and grasping opportunist. As was mentioned earlier, he had already been interviewed twice by the ACU during the investigations which led to Lord Condon's interim report, described above, and had in addition been a pivotal figure in the Indian investigation authorities' inquiry which resulted in bans imposed on four senior Indian players. Since then, however, he had become increasingly difficult to trace, and any move to question him was likely to involve a prohibitively lengthy extradition process. Condon's team were keen to repeat the successful tactics of the Indian federal investigators, which was to interrogate accused and accuser separately and then confronting each party with the evidence obtained from the other interviews.[80]

Inevitably, the point was reached where the Unit would be compelled to "put up or shut up" in relation to Stewart. Accordingly, in mid-June Lord Condon issued a deadline of 1 July for Gupta to agree to supply formal evidence against Stewart and other players. This could take the form of oral testimony or at least a written deposition on the matter.[81] In the meantime, Stewart was formally interviewed by the Unit - seven months after the first allegations had been made against him - during an hour-long meeting in London. This meeting was itself not free from controversy, in that the ACU had complained of being stalled by Stewart - whom they accused of "doing a Gupta" because of the difficulties experienced in locating him[82] - and his lawyers, who responded by demanding a preview of the allegations made against their client.[83]

The ACU investigators made a desperate attempt to obtain a statement from Gupta by travelling to India in late June. They visited his jeweller's shop in New Delhi, only to be told by his father, Kishan Mohan Lal, that he was away on tour. Earlier, Gupta's lawyers had flatly refused representations from the Unit for a meeting. The Indian criminal authorities' hands were tied because match-fixing does not constitute a crime in India.[84] Thus the 1 July deadline set by the Unit came and went without Gupta giving any sign of life, which left the investigators with little option but to make a statement to the effect that there existed "no substantive evidence" justifying proceedings against Stewart.[85]

Although Stewart was obviously relieved at this outcome, it became clear that this was not the last of his travails in this affair. Soon after the ACU statement, the England and Wales Cricket Board (ECB) made it clear, through their spokesman Andrew Walpole, that Stewart could expect no assistance from them in meeting the cost of the legal fees which he had incurred as a result of the investigation.[86]

Gerard Tyrell, Stewart's lawyer, has urged the cricketing authorities to review the entire process whereby allegations of corruption made against players are dealt with, adding that the perception throughout the affair had been that his client was guilty until proved innocent.[87]

Hansie Cronje: the saga lingers on

Legal controversy continues to surround the player whose involvement in match-fixing served to open cricket's can of worms, to wit former South African skipper Hansie Cronje. At the time of writing, it remains unclear whether he could face criminal charges in South Africa over his participation in this matter. In late June 2001, Cronje's lawyers claimed that he had accepted the offer made by the government of South Africa, under which he would be given indemnity from prosecution on condition

that he revealed the entire truth before the King Commission (see above).[88] This indemnity would have to be lifted if Cronje were to face charges. However, this was disputed by the Prosecutions Director, Bulelani Ngcuka, who stated that the inability of Edwin King, who headed the inquiry, to decide whether or not Cronje had revealed all meant that the offer no longer was valid. South Africa's chief prosecutor subsequently appointed a senior lawyer to investigate whether in fact Cronje has satisfied the conditions for indemnity from prosecution.[89]

Since then, however, the public authorities seem to have stalled any further attempts to bring this matter before the criminal courts. This would mean, *inter alia*, that Cronje would be allowed to retain the small fortune - estimated at around $1 million - of the media deals under which he has told his story of what happened when he became involved with the cricketing underworld.[90]

Matters looked even better for Cronje when his lawyers prepared what appeared to be a legally sound case for having his life ban from cricket overturned before the High Court in Pretoria.[91] The case was about to commence as this issue goes to press. Percy Sonn, President of the United Cricket Board of South Africa (UCB), had imposed the ban without allowing a hearing, thus breaching the natural justice requirement of *audi alteram partem* (allow the other party to state his/her case). In so doing, Cronje's legal team are employing the same man who subpoenaed former President Nelson Mandela to appear in court in a dispute involving Louis Luyt, ex-President of the South African Rugby Football Union (SARFU).[92]

The outcome of this case could determine whether or not Cronje could realise his ambition to act as coach to his country's national side.[93] In this ambition he has been supported by a number of prominent figures in the game, notably Bob Woolmer, the man who made Cronje captain when he himself coached South Africa in the late 1990s.[94] If Cronje is cleared, he could be free to play for, or even captain, the Orange Free State team a few days later.[95]

Since then, however, Australia - amongst other cricketing nations - have indicated that they are likely to renounce any Test cricket with South Africa should the ban on Cronje be lifted.[96]

Mark Waugh cleared of allegations

In the previous issue, it was reported that Mark Waugh, one of the many players against whom accusations had been levelled by Mukesh Gupta (see above), had finally agreed to co-operate with the inquiry organised to investigate these claims.[97] The accusation made against Waugh was that he had received $6,500 for information about pitches, team and strategy during a Hong Kong six-a-side tournament in 1993.

The outcome of the eight-month investigation by the Australian Cricket Board (ACB) in this affair ended in early August 2001, when ACB investigator Greg Melick concluded that there was no evidence substantiating these allegations, and that there was therefore no case for Waugh to answer.[98]

Cricket corruption - a cancer stretching back as far as the 1970s?

One of the claims made in the aforementioned Condon Report is that the seeds of corruption may already have been sown in England in the 1970s, when county matches were fixed, even if the bribery which occurred then has since been eclipsed by a more insidious and corrosive form of fixing leading to threats of violence and even murder (see below).[99]

These allegations appeared to receive some support when, a few days after the issuing of the Condon Report, John Shepherd, the former West indies and Kent all-rounder, claimed to have been involved in deliberately losing a county match in the 1970s. More particularly, he claimed to have been part of an arrangement under which Kent would lose a Sunday League fixture with Hampshire 23 years ago, in return for which Hampshire would lose the County Championship match between the two sides in August 1978.[100] Shepherd's own part in the arrangement was to run himself out in order to enable Hampshire to win the match by 10 runs. And indeed, in the county championship fixture between the two sides, Kent were defeated by seven wickets.

Alan Ealham, who at the time skippered the Kent side, categorically denies having made any such deal with Richard Gilliat of Hampshire. However, he qualified that statement by adding

"What Shep is probably on about is that there was a lot of bartering between teams in those days. There was chat like "we can't win that competition but we do need the points in that other competition". It was talk. I would be a liar to say things didn't happen after some of these discussions. But I never played in a fixed match. No way would Gilliat and I have entertained any suggestion of malpractice."[101]

Exactly what was the difference between "match fixing" and "bartering between teams" was not made clear by Ealham, and certainly represents an enigma for the present writer. It must also be recalled that, in the previous issue, attention was drawn to the allegations made by former Essex bowler Don Topley that Essex - that county again - and Lancashire deliberately traded results in 1991.[102]

Former Middlesex and England fast bowler Mike Selvey, now a journalist with *The Guardian*, appeared to speak with a similarly forked tongue when commenting on these allegations. He hotly denies that there was any match-fixing bribery in spite of being paid what he describes as "derisory sums" in those days. Yet even he admits that Topley's allegations had a "ring of truth" because it could be regarded as "back-scratching" exercise.[103] Perhaps someone should point out to Messrs. Ealham and Selvey that match-fixing remains match-fixing even if no money changed hands (which remains far from certain).

Condon report highlights growing drug problem

On this topic, see under Section 15 "Drugs legislation and related issues" (below, p.80).

Now umpires come under suspicion

Just when the cricketing world thought that there would little left to shock them as regards the assaults made on the probity of the game, accusations were made which seemed to plumb the depths of corruption even further. In late May 2001, the focus of the investigators' probe into cricket corruption shifted from players to umpires when the ACU started investigations into the one-day internationals at Sharjah, already identified by the Condon Report as a potential breeding ground for corruption (see above).[104]

There had already been plenty of rumours during the 1990s not only of players being offered bribes in their dressing rooms (or even on the pitch in mid-innings), but also of umpires being handed brown envelopes containing sufficient cash to ensure their co-operation. In a separate investigation from that conducted by the ACU, a three-man delegation appointed by Sheik Bukhatir, who started cricket in Sharjah, have been conducting their own inquiry into these allegations. At the same time, the Pakistan Cricket Board announced that Javed Akhtar, who umpired the Test Match between England and South Africa at Headingley in 1998, was to be the subject of a judicial inquiry after allegations by Ali Bacher, the Chief Executive of the South African Board, that the match had been fixed.[105]

Has cricket corruption already claimed a murder?

Although physical violence has always been just below the surface in the various twists and turns of the cricket corruption scandal, there had not hitherto been any evidence or even allegations of a serious crime against the person having taken place in this regard. However, speculation that in fact this may already have been the case arose as a result of the Condon inquiry. In May 2001, a national newspaper reported that in the course of these investigations, it had been alleged that "a murder and a kidnapping" were associated with corruption in cricket.[106]

The man allegedly kidnapped and subsequently murdered was Hanif Cadbury, a Pakistani national residing in South Africa. Cadbury, who was reported to have been a bookmaker, was a well-known figure in betting and cricketing circles in South Africa and assisted in the organisation of the 1994 Pakistani tour to the Republic and to Zimbabwe. He was found dead in the Holiday Inn near Johannesburg airport two days after the start of the 1999 World Cup in England. According to the police, he had been strangled. He had gone missing on his way home from a Johannesburg casino and had been carrying a large amount of money which he had won.

Cadbury operated a number of small businesses in South Africa, and was known as a cricket gambler.

His name was featured in Justice Quayyum's report into match-fixing in Pakistan. He travelled to South Africa during the early 1990s in order to organise cricket tournaments and never returned to Pakistan, informing friends that he had "problems" there.

Before the King Commission (see above), a number of witnesses had affirmed that Cadbury's death was linked to corruption in cricket. However, friends claimed that his abduction and death were linked to a jealous business rival who wanted him eliminated.[107] (In addition, Justice Quayyum's own role in the scandal has now been called into question - see next section.)

Other developments

Pakistan: In early April 2001, Javed Miandad, who had just been dismissed as coach to the Pakistan side, accused his team of deliberately losing a one-day series to New Zealand in February of that year, and demanded an inquiry into the matter.[108] Several days later, he was summoned by a court in Pakistan to clarify these allegations.[109] The outcome of this inquiry was not yet known at the time of going to press.

However, Pakistani cricket served up an even more bizarre twist to the cricket corruption saga when Judge Malik Mohammad Quayyum, who banned two Pakistan players for life for match-fixing, was himself accused of corruption.[110] As well as banning Ata-ur-Rahman and Salim Malik, the judge had fined six players approximately £3,000 for failing to co-operate with his inquiry. They are all appealing against these fines, and the allegations made against Quayyum may mean that these will never be paid. Pakistan High Court judges have called upon Quayyum to resign, claiming that his conviction of former Prime Minister Benazir Bhutto on corruption charges was politically motivated. Mrs. Bhutto's convicton had been set aside on appeal earlier that month.[111]

Sri Lanka: in July 2001, an investigation held into match-fixing allegations made against Sri Lankan internationals Aravinda de Silva and Arjuna Ranatunga cleared both players. Desmond Fernando, a lawyer appointed by the Sri Lankan Cricket Board to investigate the allegations made against these two players, found them not guilty of the charges. The 11-page report had been submitted to the Sri Lankan governing body the previous week, thus signalling the end of a nine-month enquiry prompted by an Indian police report that Ranatunga and De Silva had been accepting bribes from bookmakers in order to throw matches.[112]

Once again, the accusations had been made by bookmaker Gupta, who alleged that the pair had received $15,000 to throw a 1994 Test Match against India at Lucknow.

West Indies: one of the names which had been cited by Hansie Cronje in the course of the inquiry into his part in the scandal is that of Brian Lara, the West Indian Test batsman. Lara denied all allegations, but the West Indies Cricket Board, whilst supporting Lara's denial, appointed Elliott Motley, former Attorney General of Bermuda, to investigate the matter.[113] Lara, in the meantime, displayed his lack of concern at the outcome of the inquiry by having a sports betting company, Intertops. Com, as his bat sponsor.[114]

India: Manoj Prabhakar, the former Indian test player who was banned following an official investigation into match-fixing,[115] is currently the subject-matter of a police investigation into allegations of fraud in relation to a finance company. The company concerned, Apace, collapsed, as a result of which its directors went missing. Prabhakar was alleged to be one of these directors, which he has denied.[116]

England: In June 2001, police investigating allegations made by former England Test player Chris Lewis against Sanjeev Chawla resulted in the latter being released without charge. Chawla was arrested last December following allegations by Lewis that an associate of his had attempted to approach Alec Stewart and Alan Mullally before an England v. New Zealand Test in 1999. However, the police concluded that there was insufficient evidence to bring a prosecution.[117]

Australia: in June 2001, Australian Test players Adam Gilchrist and Colin Miller claimed that they were contacted for information by an anonymous caller during the Third Test against India in March. No bribery offers were made because the Australians terminated the conversation quickly. The Australian Cricket Board have investigated the matter.[118]

Weah rejects allegations of bribery (UK)[119]

In July 2001, George Weah, former Chelsea and Manchester City player, emphatically denied accusations of corruption made against him following Liberia's 2-1 defeat against Ghana in Monrovia. Liberia's former Player of the Year denied charges made by the Ghanaian side that he had attempted to bribe players in order to enable Liberia to win. More particularly coach Fred Osam-Duodu had claimed that Weah offered his players £5,000 if they allowed Liberia to win.

Bankruptcy of ISL accompanied by accusations of bribery[120]

The trials and tribulations of the Swiss-based sports marketing company ISL are documented elsewhere (below, p.62). However, this sad affair may also have implications at the level of the criminal law. Senior staff dismissed from the bankrupted company are claiming that there exists a list of 20 top international sports officials who received bribes in return for granting lucrative marketing contracts. One name reported to be on the list was that of Primo Nebiolo, an Italian who dominated international athletics until his death in 1999.

Candidate for International Olympic Committee presidency accused of offering bribes[121]

Once again, the dark clouds of corruption came to hover over the International Olympic Committee in July 2001 when, on the eve of the election to replace Juan Antonio Samaranch as IOC President, one of the main candidates was accused of having offered a bribe amounting to $6 million to IOC members in return for their vote. South Korean Kim Un-yong, who had already been implicated in the Salt Lake City corruption scandal, as requested by the IOC Ethics Committee refused to confirm reports attributed to him in a newspaper suggesting that he would offer all 122 members, including the Princess Royal, $50,000 per year by way of expenses if he became President.

The Ethics Committee stated that the alleged proposal would be an infringement of the rules, but added that it could do no more than issue a warning. More particularly the Committee could not prevent Kim from standing in the presidential election.

BBC documentary alleges corruption in boxing (UK)[122]

In May 2001, the BBC showed a programmed entitled "Boxing: a Bloody Business". It featured a number of allegations of endemic corruption at the heart of the sport. More particularly it was claimed that

- Riath Hamed was offered money in order to cheat on his own brother, Naseem, whom he manages;
- Promotor Frank Warren knows who shot him in the chest in 1989, but prefers to keep his counsel because in these circles "everybody hates a grass";
- Promotor Don King threatened to "break the legs" of boxer Larry Holmes, who in turn threatened to shoot him, and
- Promotor Cedric Kushner admitted to having handed over $100,000 in bribes to the now discredited International Boxing Federation.

HOOLIGANISM AND RELATED ISSUES

General public measures and initiatives (UK)

Measures announced in Queen's Speech

The Queen's Speech, which sets out the legislation to be proposed during the forthcoming Parliamentary session, this year contained a section devoted to the combating of football

hooliganism.[123] The temporary legislation which enables the police and the courts to suspend football hooligans from travelling to matches overseas[124] is to be made permanent. Without legislation to that effect, these powers to impose orders would have come to an end in August 2002. An indication of the extent to which these orders were being used is the fact out that during the previous month, 454 people had been barred from leaving the country whilst England were engaged in their qualifying match against Greece (see below, p.21).

These measures have been criticised for constituting an attack on civil liberties.[125] However, the Home Office describes them as

> *"an integral part of the Government's determination to tackle English football disorder, particularly when England and English clubs play overseas"*[126]

Criminal monitoring body notes rise in violent hooliganism[127]

The latest figures on football hooliganism released by the National Criminal Intelligence Service (NCIS), which monitors hooliganism in England and Wales, have shown a slight increase in football-related violence for the 1999/2000 season, from 3,138 to 3,391 (i.e a rise of 8.1 per cent). However, the prevailing trend was for the violence to take place well away from the stadium, and more particularly in the city centres and railway stations. This phenomenon is explained at least in part by the increased surveillance, in the shape of police presence and closed-circuit television cameras, in or near the football grounds. This has resulted in a trend towards organising confrontations between rival gangs (over the internet or by mobile telephone) which usually take place well away from the football grounds. Nearly 85 per cent of all football-related violence took place away from the stadium.

It would also appear that football hooliganism has become less frequent, but more violent, the gangs involved being more organised than before and often carrying weapons. Alcohol remained a strong element in football violence. However, there is no sign of any return to the type of wide-scale violence which once affected the game. Hooligan gangs are currently more likely to be smaller than those of the 1970s and 1980s, but more committed to violence. In addition, many hooligans are acting as a front for other types of criminal activity such as credit card fraud and drug-dealing.

Numbers of arrests made have also increased, which is attributed by the Service to improved policing and intelligence rather than a rise in the number of incidents. The banning orders referred to in the previous section have also helped. However, police officials have claimed that the varied kick-off times which are a feature of the current game make it more difficult to police fans.

In the wake of the NCIS report, the police called upon football clubs to use some of the millions they make from lucrative television deals in order to assist in the fight against this new breed of hooligan.[128] Police forces are currently entitled to reimbursement for providing policing within football grounds and, if clubs refuse to pay, they may refuse the safety certificate which is a requirement for a match to take place. However, they are unable to demand fees for policing the streets outside a stadium, nor for their presence on the Underground and train network. This is a particularly acute issue for British Transport Police, which already devotes almost 10 per cent of its £200 million annual budget to the control of travelling football fans.

The Football Association, for its part, has pledged to maintain its efforts to work closely with the police and the Government in order to continue the fight against hooliganism.[129] The setting up of a new England fans' group, to replace the England Members' Club (EMC), was one of the instruments to be used in achieving this objective (see next section below).

Football Association sets up new England fan club

In early April 2001, the FA commissioned a survey of the 32,000 members of the official England Members' Club (EMC). This showed that there existed a hard core of 300 men who were likely to be involved in trouble abroad.[130] Also, 1,300 did not believe that they should behave well whilst following the national team.[131] Overwhelmingly this undesirable contingent were male, aged 25-44, usually childless and often single. Far from being unemployed, they tended to enjoy earnings which were above average. They were largely London-based and tended to follow Tottenham, Arsenal or West Ham.

Although the violent minority only accounted for 4 per cent of the total membership, these findings were sufficient to cause considerable concern among FA officials. They constituted just one of the reasons why the FA has since decided to disband the EMC and replace it with a new organisation, called "englandfans". Racists, violent offenders and arsonists would not be allowed to join this club.[132] Anyone found guilty of a list of offences drawn up by the FA, which includes murder, manslaughter, racist chanting, racially aggravated assault, actual bodily harm, common assault, criminal damage and arson, would be prevented from joining. This ban is automatic for any offence committed within the previous three years; those with earlier convictions will be required to make representations to an appeals panel being established by the FA.

These intentions were first put to the test on the occasions of the run-up to the historic Germany v. England tie in Munich on 1 September. Disturbingly, over 20 per cent of those applying for membership - and therefore also for match tickets - during that period had criminal records, according to a security source.[133] It is generally felt that both the run-up to, and the aftermath of, the tie was relatively peaceful. No members of the official supporters' club appeared to have been involved in the few incidents which occurred.

Incidents at World Cup qualifier against Greece

The raft of anti-hooligan measures recently adopted by the British public authorities, some of which are discussed above (see p.20), received their first true test on the occasion of England's World Cup qualifying match with Greece in Athens. Any England fan found to cause trouble was to be served, on his return, with a banning order preventing him from attending any further international fixtures abroad.[134] Prior to that, police in the UK had already served 454 banning orders under the Football Disorder Act.

Unfortunately, these measures could not prevent trouble. During the game itself, England forward David Beckham was struck on the head by a missile. 80 English fans were detained by Greek police at a station close to the Athens Olympic Stadium, following a number of incidents.[135] Three of these were later given jail sentences of up to 15 months, but were released without a bail requirement and were free to leave. They were liable to be summoned to return to Greece for the relevant court hearing, although whether they would actually appear was open to doubt.[136]

Cricket hooliganism gives cause for concern (UK)

That the atmosphere at our cricket grounds no longer matches up to the Olympian serenity of yesteryear has been quite obvious for some time now. However, the number of violent and criminal incidents at the homes of cricket have imperceptibly increased over the years, and over the past few months have assumed a dimension which has many extremely concerned at the impact this may produce on the game itself.

The race riots in Oldham which took place during the spring of 2001 involved pitched battles between Asian and white youths, and the were fears that this type of scenario might be repeated on the occasion of the Second Test against Pakistan, played at nearby Old Trafford. The Greater Manchester Police were on standby for the entire fixture, which eventually passed off without much trouble.[137]

However, matters took a turn for the worse a few weeks later during the one-day series involving England, Pakistan and Australia. At the England v Pakistan match at Headingley on 17 June, crowd trouble was so bad that it actually affected the outcome of the match. With Pakistan requiring but four runs for victory, hundreds of Pakistan fans swarmed across the pitch, despite increased security measures following a similar invasion by fans at Edgbaston a week earlier.[138] In the process, one of the match stewards was knocked down and kicked in the head and the ribs. In an unprecedented move, England captain Alec Stewart conceded defeat in the interests of safety. The disturbance continued outside the ground, but died down after a few skirmishes. Police afterwards stated that a small number of arrests were made. Stewart called for an urgent review of safety arrangements at future matches.[139]

As well as making arrangements aimed at strengthening security personnel - in the shape of increased police presence and 150 extra stewards - the authorities at Trent Bridge, Nottingham, where the next one-day international was to be staged, also erected a three-foot perimeter fence in order to prevent

another pitch invasion.[140] These measures had but little effect. Once again, trouble flared among Pakistani supporters for the third time in a fortnight, causing the Australian team to leave the field in protest after fast bowler Brett Lee was nearly struck by a firework. The match resumed 20 minutes later, but only after an Australian warning that any further trouble would result in their carrying out their earlier threat to abandon the match if any more trouble occurred.[141]

The final outrage of the series occurred at the final at Lord's a few days later. Australia having won the match, a large crowd gathered on the pitch beneath the pavilion balcony where the presentations were to be held. In the course of this ceremony, a full can of beer was thrown into the balcony, hitting Australian batsman Michael Bevan on the head, risking a serious injury. Fortunately, Bevan merely sustained a bruise on the cheek as a result.[142]

In he wake of these disturbances, Government ministers met officials of the England and Wales Cricket Board (ECWB) in order to discuss ways of avoiding a recurrence of such crowd trouble. This was announced to the House of Lords during question time by Home Office minister Lord Bassam.[143] During that session, Lord Cope (Conservative) had proposed that the fixed-penalty fines which could be imposed for throwing fireworks on the public highway could be extended to cover cricket grounds.

As a result of that meeting, at which the Government was represented by Sports Minister Richard Caborn and Home Office minister John Denham, and which also featured a representation from the Association of Chief Police Officers, a monitoring group was set up in order to review crowd control at cricket matches. The group was to consider crowd management techniques, existing legislation and ground regulations in order to establish how best to avoid a repetition of these ugly scenes.[144]

Other issues

Ghent, Belgium: During the run-up to the Intertoto Cup match (football) between AA Gent and Paris Saint-Germain in July 2001, the authorities of the host city of Ghent prohibited any gathering or assembly of people (*samenscholing*). It was feared that the Paris club would be accompanied by some of its hard-core supporters, who had been known to cause trouble before.[145] The prohibition did not apply in the suburb of Gentbrugge where the AA Gent ground, called the "Ottenstadion", is located. Mayor Frank Beke was concerned mainly to avoid trouble in the city centre.[146]

Rome, Italy: In the course of the match between AS Roma and Parma in June 2001, which enabled the former to clinch their first title since 1983, fans invaded the pitch of the Olympic Stadium in order to rip shirts and shorts from the Rome players. Police, with the assistance of Roma coach Fabio Capello, succeeded in herding the fans back to the stands, and the game resumed after a 15-minute break. A week earlier, Roma fans had been involved in scuffles with Napoli supporters as their team threw away the opportunity of clinching the Italian Serie A title by conceding a late equaliser.[147]

A few weeks before this match, Roma fans had also been involved in trouble during the local derby with Lazio, when a television journalist was stabbed in the leg and a police car set on fire.[148]

In Turin on the same day, Juventus fans also invaded the pitch as news filtered through of Roma's win.[149]

(On racist incidents involving Italian fans, see below p.68)

St. Omer, France: In late May 2001, Markus Warnecke, a German football hooligan who inflicted a near-fatal beating on a policeman during the World Cup finals in 1998, was jailed for five years.[150] He had been one of five Germans who assaulted Daniel Nivel in the northern town of Lens following the Germany v. Yugoslavia tie. M. Nivel went into a six-week coma and is now severely disabled. Warnecke was also banned from entering France for 10 years.[151]

Newcastle, UK: Figures released by the National Criminal Intelligence Service (NCIS) following the 2000-2001 football season in England showed that Newcastle United had the worst record of arrests for football-related offences in or around football grounds, 191 people having been arrested. Around 25 per cent of these arrests were drink-related, whilst other offences included disorderly or threatening behaviour, throwing missiles, running onto the pitch and racial or indecent chanting. The authorities at the club vowed to "declare war" on their hooligan supporters in the wake of this disclosure.[152]

London, UK: The powers of the courts to counter football hooliganism by banning fans from matches, as provided for in the Football Disorder Act (see above, p.20) were upheld in July 2001 by the English High Court. Two Derby County season ticket holders, Carl Gough and Gary Smith, had brought the action as a test case.[153]

Brussels, Belgium: Mark Forrester, the only England football fan to be convicted by a Belgian criminal court for initiating riots and assaulting armed police officers during the Euro 2000 football championships,[154] lost his appeal against this verdict in April 2001. In a decision which came as a surprise to observers, the Brussels Court of Appeal ruled that the eyewitness evidence which led to Forrester's conviction was objective. It dismissed video footage showing the accused apparently minding his own business as inconclusive.[155]

Mr. Forrester, who spent a month in a Belgian jail before being given a one-year suspended sentence, had this punishment reduced to a £50 fine and a six-month suspended sentence. His lawyers immediately indicated that they would make an application for review to the *Cour de Cassation*, being the highest court in Belgium.[156] Predictably, this verdict led to accusations of miscarriage of justice by a number of commentators such as Charlie Whelan[157] - mainly on the grounds that the Belgian riot police had been less than gentle in their response to the hooliganism from British fans. Exactly how this could have affected the court's decision is unclear to the present writer.

Kempton Park, UK: Disturbances took place at the Kempton Park racecourse in May 2001, when police were called and bars shut following a running fight in the Tattersalls Enclosure. Officials blamed the trouble on drunken football fans from Bristol on a trip to the races as the close season for football began.[158]

Blackpool, UK: Football-related violence broke out at the start of the May Bank Holiday weekend at the seaside resort of Blackpool. Two people were stabbed when trouble flared on the South Promenade as fighting broke out between 200 supporters of Midlands football clubs Wolverhampton Wanderers, Birmingham City and West Bromwich Albion. Police made 17 arrests.[159]

Manchester, UK: As Manchester City said goodbye to life in the English Premiership, some of their supporters compounded the agony for their club by causing trouble on the terraces during their last game, with Chelsea. Trouble flared as a number of hooligans attacked Chelsea supporters in the stands and mounted police needed to intervene in order to restore order. Earlier, a supporter had run onto the pitch to confront referee Mike Riley. At the conclusion of the game, hundreds of fans invaded the pitch. Predictably, City manager Joe Royle chose to blame the referee rather than the fans for the trouble.[160]

3. CONTRACTS

GENERAL ISSUES

Leading law firms advise in sporting deals

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

- In July 2001, the Royal Bank of Scotland unveiled a £6 million sponsorship deal with the Scottish Premier League in order to extend its football sponsorship into 2005. The Scottish Premier League was advised by Harper Macleod;[161]

- In June of that year, Memery Crystal represented Wembley and its on-line greyhound racing subsidiary 24dogs in relation to a global tote betting service called 24dogstote. Allen & Overy represented bookmakers William Hill in negotiating a separate deal with 24dogs which related to a fixed-odds betting service;[162]

- During the same month, Hammond Suddards Edge represented Kingsbridge Holdings on its £13.3 million acquisition of sports management group Benson McGarvey, whose 6,000 clients include footballers Steven Gerrard and Dominic Matteo. Benson was represented by Freethcartwright;[163]

- Early this year, Macfarlanes represented the Ford Motor Company's recently created racing division, the Premier Performance, in relation to hiring the services of Formula One legend Niki Lauda as its chief executive officer. Austrian firm Schuppisch Sporn Winischhoffer represented Lauda;[164]

- Sportal is a company which provides live sports coverage on the Internet, as well as offering sports news, chatrooms and other services for sports fans. It has fallen on hard times recently, and is currently using law firm Olswang to negotiate the funds it requires in order to remain in business;[165]

- In July 2001, the firm Denton Wilde Sapte obtained more business from its long-standing client, the FA Premier League, in its latest rights deal. Following the audiovisual agreements which it concluded last year, the FA Premier League has entered into pay-per-view (PPV) rights with BskyB, Telewest, ntl and ITVdigital as regards the broadcasting of Premiership matches. In an unusual twist to standard PPV deals for individual events, this is the first time in the UK for the rights to an entire sporting competition to have been sold on a continuous basis;[166]

- Around the same period, London firm Wallace & Partners represented Enic Gaming in the £6 million sale of online gambling operator ukbetting.com to a newly-created company Ukbetting;[167]

- Also around that time, London firm Teacher Stern Selby advised Watford Leisure, the holding company of Watford Football Club, on the placing and underwriting of its admission to the Alternative Investment Market (AIM). The deal, which was expected to raise £4.7 million, was underwritten by Seymour Pierce, represented by Memery Crystal. The latter also represented Seymour Pierce when it advised on the £4.95 million open offer of shares by AIM-listed Millwall Football Club, which was represented by Richards Butler;[168]

- Michael Kennedy, the London-based lawyer who negotiated Roy Keane's record-breaking deal with Manchester United, is currently acting for Wes Brown in his contractual talks with the Premiership champions.[169]

"Bosman" deal for small football clubs? Football agents seek their share of transfer fee wealth[170]

With transfer fees reaching increasingly stratospheric proportions, it is only to be expected that all those involved in football are seeking ways of tapping into this wealth. In recent months, the first football agents to be listed in the City, Premier Management Holdings, have been mooting an innovative way of achieving this. Premier, who are listed on junior market AIM, have started to invest in young players in return for a share in future transfer fees.

Barry Gold, a licensed agent of FIFA (the world body governing football) who is also the Managing Director of Premier, says that his scheme will assist smaller clubs who cannot afford to retain promising players long enough for their true value to be realised. He explains:

> *"We agree with the club the value of a player we are interested in. We give them 50 per cent of that value up front and then we take 50 per cent of the fee when the player is sold - hopefully for more - the following year"*

Premier approached Nationwide League club Queen's Park Rangers about such a deal for striker Peter Crouch. However, with a £1.2 million offer from Portsmouth FC on the table, the lure of immediate cash was more compelling. Nevertheless, for clubs finding themselves in considerable financial difficulties - and the readership of this organ hardly needs reminding of how long is the list made up of such clubs - the Premier scheme could provide a welcome crutch. Indeed, the same Barry Gold did not hesitate to describe his firm's scheme as "the smaller clubs' answer to Bosman".

In concluding such deals, Premier have remained within FIFA rules, since the players' registrations stay with the club. The firm has already invested in seven players under this scheme. Thus they raised £300,000 of Danny Griffin's move from St. Johnstone (Perth, Scotland) to Dundee United in return for 50 per cent of Griffin's resale value.

Julian White in transfer dispute (Rugby Union - UK)

When England prop Julian White signed a three-year contract with Bristol in May 2000, there was no indication that this deal would give rise to a long-standing and acrimonious legal dispute. The contract was only to take effect from the summer of 2000 in order to enable White to fulfil his contractual obligations towards his previous club, Saracens. However, even before he had started to play for his new club, White received a better offer from Bath. He accordingly took legal action to obtain his release from Bristol, claiming restraint of trade.[171]

The subsequent hearing at the Bristol Mercantile Court failed to settle the dispute, and in August White made another attempt to obtain a judicial solution.[172] This time, the Bristol court gave a ruling against White following a two-day hearing. Judge Havelock-Allan QC held that White did not have an opt-out clause and would therefore have to honour the terms of his contract with Bristol.[173]

Lennox Lewis's contractual tribulations

Britain's most successful heavyweight boxer currently seems to be spending as much time in courtrooms and lawyers' offices as in the ring, judging by the spate of legal actions in which he has become involved of late.

In April 2001, he learned that he was being sued by his estranged promoter Panos Eliades for a considerable amount of his career earnings. More particularly Eliades is suing for breach of contract after having been excluded from the champion's recent promotions. Lewis, for his part, had demanded the right to exercise greater control over his own affairs. Whilst remaining loyal to his boxing manager Frank Maloney, who had himself severed his links with Eliades, Lewis had appointed a new commercial management team whose activities he monitors personally. The writ was served in New York; at the time of writing, the outcome was as yet unknown.[174]

More legal strife awaited Lewis following his defeat by American Hasim Rahman in April. It was generally expected that a rematch would follow as a matter of course. However, the newly-crowned world champion revealed shortly afterwards that former title holder Mike Tyson was a more likely opponent for his first defence. It seemed that this prospect might founder because of the sheer financial attraction which the Lewis fight appeared to offer, in the shape of a £9.7 million offer of the Briton's backers (major broadcaster Home Box Office) as well as the security of four more fights in the event of a revenge win by Lewis. This was rightly seen as more attractive than the one-off deal, even though it was a more lucrative one, proposed by Showtime, Tyson's backers.[175]

Nevertheless, the new champion opted for the Tyson fight, following a proposal made to him by promoter Don King. This prompted a legal challenge for breach of contract from Lewis, based on a rematch clause in the original agreement. This challenge was successful, the Manhattan Federal Court ruling that Rahman had to meet Lewis in a rematch or remain inactive for 18 months.[176] The judge, Miriam Cederbaum, held that if Rahman were to be allowed to breach the contract, Lewis would be irreparably harmed. The rematch was an opportunity which could not be settled by compensation, since Lewis's powers as a boxer would be diminishing over the following two years.

In the meantime, the deal signed between Rahman and Don King was itself the subject-matter of a legal challenge from promoter Cedric Kushner. Rahman claimed that his exclusive contract with Kushner had expired the previous October, thus releasing him to sign with Tyson's promoter Don King. Kushner's rematch deal was therefore invalid, alleged the champion.[177] This dispute was also fought out in the Manhattan courtroom. Judge Cederbaum ruled in the world champion's favour, holding that he was not tied to long-term promoter Kushner - although she also decided that the latter had a valid claim for compensation from King.[178]

As a result, Lewis was compelled to negotiate the terms of the rematch with King. The deal was signed in late July 2001.[179]

Real Madrid defaulted on Anelka transfer payment, claim Arsenal (UK)[180]

The transfer of Nicolas Anelka from Arsenal FC to Real Madrid is still partially unpaid for - at least according to the London club directors. In August 2001, the latter revealed that Real defaulted on the

£4 million annual instalment due on the £22 million transfer deal concluded two years ago. This disclosure was made in the club's annual report.

At the time of the transfer, Arsenal made much of the circumstance that the deal was secured by bank guarantees which they would be able to rely on in the event of Real defaulting on their obligations. However, the fact that the club authorities saw fit to disclose this failure to pay gives a measure of the concern felt by the Highbury club. Real have been known to experience financial difficulties for some time, although these were eased somewhat this year when they sold their training ground in the centre of Madrid for £180 million. However, it appears that this deal, like the Anelka transfer, was also to be paid for in instalments, which may explain their problems in meeting the Anelka deal in full.

First round won by Jaguar in Adrian Newey dispute[181]

For some time now, the world of motor racing has been following the saga of the battle to win the services of McLaren Mercedes Benz technical director Adrian Newey. This saga took a decisive turn in June 2001 when the Jaguar company obtained from the High Court in London an injunction preventing Newey from working for the Anglo-German team beyond 31 July next year. The court decision made clear that, as Jaguar had claimed, the latter had a legally binding contractual claim to his services from August 2002.

However, this is but the first round in what promises to be a lengthy legal battle.

Featherweight title challenge called off over contract dispute (UK)[182]

In April 2001, the challenge of Dean Pithey for the European super-featherweight title in his home city of Coventry (UK) was cancelled following a contractual dispute involving the unbeaten champion, Bulgarian Tontcho Tontchev.

No compensation in Jones-Hughes contract dispute, rules rugby board[183]

The International Rugby Board recently ruled that Australia were not entitled to compensation for Jason Jones-Hughes. Wales had persuaded the successful centre to renege on a contract with New South Wales in order to have him represent his father's native country. However, the IRB legal officer agreed with the Welsh Rugby Union (WRU) that, since Jones-Hughes's contract with New South Wales had not expired, they were not bound to compensate Australia.

Plan to link cricket county scorers to central contracts shelved (UK)[184]

In April 2001, the England and Wales Cricket Board (EWCB) abandoned controversial plans to tie county scorers to the type of central contract currently applicable to international players. The Board had initially proposed the establishment of a new central scoring bureau to be operated by the Press Association, who would have become responsible for appointing the 18 county scorers.

However, the scheme ran into opposition from the Association of County Cricket Scorers as well as a number of county Chief Executives. As a result, the EWCB have decided to allow counties to retain their own scorers for the foreseeable future.

Breach of confidence writ issued to FA supremo Crozier (UK)[185]

Adam Crozier's already controversial career as Football Association (FA) Chief Executive hit fresh turmoil in July 2001 when the FA was issued with a writ for breach of confidence over the use of the "three lions" mascot used by the England national side. Advertising agency Interfocus initiated the legal action, which could cause considerable embarrassment to Crozier in view of his background in the advertising industry.

More particularly the FA is being accused of having launched its own mascots in February 2001, having ignored a proposal made, and work carried out, by Interfocus for the FA since 1996. The

mascots were unveiled at England's fixture with Spain at Villa Park, Birmingham, during that month in an alleged breach of the code of conduct within the advertising industry. Interfocus had initially approached the FA with the idea of bringing alive the three lions crest on England shirts in the form of cartoon characters which could be used on television, competitions and websites to coincide with the Euro 2000 championships.

It is alleged that Phil Carling, who at the time was commercial director of the FA, was so confident about the joint venture in question that he discussed the matter with the then England manager Kevin Keegan, and had arranged for the latter to appear at the launch, for which Interfocus had already booked a venue. Instead, a series of meetings between the FA and Interfocus during the run-up to the Euro 2000 championships failed to reach agreement on appropriate payment for the agency for providing the idea and developing the project.

Because of the breakdown in talks, Interfocus took the idea elsewhere, more particularly to the English and Wales Cricket Board, who launched its "Pride Side" initiative for children, which featured the mascots in question, at Lord's in July. The launch of the FA mascots and the subsequent lack of response from Crozier caused Interfocus to issue the writ and claim compensation for work undertaken on behalf of the FA.

This column will follow developments in this saga with keen interest.

Chesterfield FC ordered to pay transfer compensation (UK)[186]

It will be recalled that, in the previous issue, attention was drawn to the inquiries which the English football authorities had conducted into the financial affairs of, amongst others, Second Division side Chesterfield FC.[187] One of the issues under investigation was the contract irregularities over the transfer of Luke Beckett from Chester, originally set at £150,000. The authorities have now ordered Chesterfield to pay non-League Chester an additional £25,000 for the striker, and the sell-on clause has been doubled from 10 per cent to 20 per cent on any move worth in excess of £175,000.

(See also, on the Chesterfield issue, below, p.83)

Racing gambling debts enforceable, rules South African court[188]

In an important recent judgment,[189] a South African appeal court has ruled that all legally incurred gambling debts are enforceable in a court of law, even if the debt arose within the jurisdiction of another court.

The plaintiff in the original dispute was a Cape Town-based horse racing bookmaker, and the defendant one Mr. Wilkinson, a businessman from Durban. Since the estate of Wilkinson had been sequestrated, the trustee of the estate, Pierre de Villiers Berrange, substituted him on appeal. Sea Point Racing made an application for the recovery of nearly 4 million rand in gambling debts which Wilkinson had accumulated by placing bets with it on races taking place in Cape Town. Wilkinson was accordingly sued in KwaZulu-Natal for the recovery of the outstanding debts.

In South Africa, the 1996 Gambling Act provides guidelines on racing, gambling and wagering issues which are to be regulated in detail by the provinces. To this end, each Province has adopted a provincial Gambling Act which applies to that particular Province. All these Acts contain a rule that any gambling debt, lawfully incurred, is enforceable in a court of law notwithstanding any provisions of the common law to the contrary. The first Court held that, since each provincial Act was only applicable within the territory of that province, a person from KwaZulu-Natal who incurred gambling debts in the Western Cape could not claim these debts in the courts of KwaZulu-Natal. Legislation from the latter state could regulate gambling transactions only within its province and could not purport to regulate gambling transactions elsewhere. As far as gambling debts incurred in other provinces was concerned, the common law rule of unenforceability continued to apply. The Court made no mention of section 18 of the 1996 Act, which specifically made gambling debts enforceable notwithstanding any common law rule to the contrary (see above).

The appeal court did not dispute the fact that the betting transactions which gave rise to Wilkinson's liability had been contracted in accordance with Western cape legislation; nor was it in dispute that

these debts had been lawfully incurred by Wilkinson in the course of his gambling activity regulated by that legislation. However, the Court ruled that this lawful gambling transaction was enforceable in terms of the National Gambling Act throughout the Republic of South Africa.

Sports sponsorship in New Zealand. Article in professional journal[190]

Regarded by some as a "necessary evil", sports sponsorship deals have nevertheless become such an important aspect of sporting finance that its implications cannot be overlooked. The authors of this article adopt a highly practical attitude towards this subject, outlining key issues relating to the structuring of sponsorship agreements. They describe the various types of sponsorship deal, point out the value which it presents to the parties involved, and highlight the main drafting points to be taken into consideration. They also feature the various ways in which a sponsorship agreement can be terminated.

An interesting part of this piece is that which deals with the phenomenon of "ambush marketing". This is the practice whereby an association is presented with a sponsored person, team or organisation where no such association exists. It is a practice which is often condemned, but which attracts conflicting views as to whether it should be made illegal. However, from the point of view of the sponsor, it will be useful to learn how best to protect one's self against this phenomenon. In New Zealand, the problem for those seeking such protection is that this country does not have an accepted general right of property in personality, unlike the US. Athletes and sponsors are compelled to fall back on a number of piecemeal aspects of intellectual property law in order to enforce discrete aspects of "personality rights" which are relevant to sponsorship. The closest New Zealand law comes to prohibiting ambush marketing is the Fair Trading Act, although this can only be used where there is at least an implication of official endorsement.

This subject will be returned to later in relation to the aftermath of the Sydney Olympics (see next section, below).

Sydney Olympics "worst ever" for ambush marketers? Article in professional journal (Australia)[191]

Concern has been mounting in legal and corporate circles at the rise of the phenomenon of "ambush marketing" referred to in the previous section. The phenomenon reached such proportions at the 1996 Atlanta Games that its successors determinedly set about the task of avoiding a repetition.

The author of this piece, who examines the extent to which this phenomenon can be said to have been prevented at the 2000 Olympics, not only sets out the definition of this practice, which closely resembles that provided in the previous section, but also points out that many companies would disagree with it, arguing that they have a duty to take advantage of sporting events in order to market their product and/or brand and/or company to the public. He also points out another factor which has a considerable influence on this matter, which is that often, sponsors of major events spend millions on the official "exclusive" sponsorship rights, hospitality and marketing, leaving little or no money in the marketing/sponsorship budget for television advertising to be broadcast during the event by its official broadcaster. This often leaves the door open for a competitor to step into the breach.

He also points out that, in order to prevent the 2000 Olympics from becoming an ambush marketer's paradise, the Organising Committee devoted considerable time and resources to what became known as the Brand Protection Programme. The lawyers involved in this exercise acted on the principle that "prevention was better than cure" and made full use of the full panoply of legal instruments in order to plan, adopt and implement their carefully-prepared strategy. These involved not only the traditional intellectual property laws, such as the Copyright Act and the Trade Marks Act, but also legislation specifically enacted with a view to the 2000 Olympics (e.g. the Sydney 2000 Games (Indicia and Images) Protection Act 1996 and the Olympic Arrangements Act 2000).

The strategy also included contractual protection arrangements such as the Olympic Charter and Clean Venue Policy, the After Games Venue Lockdown and the Australian Olympic Committee's policy of prohibiting all its members from referring to the Games, any Olympic team, the year of the Games, or any implied association therewith. The prevention of ambush marketing was also assisted by ticket

conditions - thus Paragraph 5.2 of the Ticket Conditions stated that those attending Games venues were not authorised to engage in ambush marketing, display commercial or offensive signage, sell any goods or services, wear or give away political, advertising or promotional materials, etc.

The author's conclusion is that, thanks to all these precautions, the 2000 Olympics were supported by the best brand protection programme in the history of the Games.

"Save our seats" campaign at Newcastle United fails in court (UK)[192]

This was a case which was heard in the Court of Appeal[193] on 29/6/2001. It was a "David and Goliath" clash which arose after thousands of "Toon" fans were moved in favour of corporate clients as part of the £42 million renovation of St. James's Park, the home of Newcastle United FC. Over 2000 supporters (of whom 250 were involved in the court action) insisted that, according to the £500 bonds which they had bought in 1994, the club was under an obligation to them that the seats allocated be guaranteed for ten years. The club, for its part, claimed that the bond merely entitled the fans to a seat in the stadium, but not the same one for the full 10-year period.

Justice Waller dismissed the appeal from the High Court, upholding the arguments put forward by the club that the small print in the bond contracts empowered them to move bondholders from the seats allocated to them with "good and sufficient cause".

MEDIA RIGHTS AGREEMENTS

Racing media rights in turmoil - an update (UK)

In the previous issue of this organ,[194] attention was drawn to the developing rift within the world of racing on the deal struck by the Racecourse Association (RCA) with the Go Racing consortium and the threat by some smaller courses to break away from this deal and negotiate a separate one. Since then, the issue has given rise to such acrimony that it risked causing massive long-term damage to the Sport of Kings.

The threatened breakaway by the smaller racecourses resurfaced in late April 2001, when it was learned that these courses could sign a separate deal worth £67 million over five years with GG-Media. Each of these courses were promised a £100,000 start-up bonus seven days after activation, plus £31,000 per fixture thereafter. This was three times the amount they had been offered by Go Racing.[195] Initially, 11 courses (Towcester, Exeter, Sedgefield, Taunton, Newton Abbot, Fakenham, Stratford, Leicester, Cartmel, Kelso and Perth) signed the breakaway deal. Hexham and Ripon soon followed.

Towards the end of the month Peter Savill, Chairman of the British Horsecaring Board (BHB) intervened. It was Savill who had first introduced the notion of the payment of rights for pictures and data information, rather than a levy (i.e. deductions from punters' bets), into the world of racing politics. This would be a powerful gun held to the bookmakers' heads. It is this notion which permeates the Go Racing deal. Savill forcefully pointed out to the racing industry that it would only be able to maintain the strongest position in this respect if it remained a single entity, rather than allow GG-Media to undermine the Go Racing deal.[196]

The Press then reported that a revised contract had been drawn up and was due to be sent to the 59 racecourses shortly, amid speculation that the terms and conditions of the new deal would deny British racing crucial income streams from the betting generated by the sport.[197] Shortly afterwards, Arena Leisure, a key member of the Go Racing consortium, requested the Stock Exchange temporarily to suspend dealing in its shares, thus giving rise to speculation that the $400 million deal was in trouble.[198] However, Arena's finance director Ian Penrose explained this move on the basis that the proposed contract, which had been sent to all racecourses, contained confidential information about Arena. Because the latter could not allow the people involved to use that information ahead of the general public, they had asked for and obtained a suspension of share-dealing.

A week later, the RCA recommended the Go Racing media rights deal to all courses. Its Chairman, Keith Brown, declared that the RCA had thoroughly examined the contract and firmly believed it to be in the best interests of the industry.[199] However, not everyone involved in racing regarded this as a

desirable deal. Thus John Gosden, writing in *The Times*,[200] described the proposed arrangement as

> *"a media rights deal that will take control of racing away from the BHB for ten years and indirectly put it into the hands of commercial interests whose main priority is to squeeze as much cash as they can out of the industry."*

Similarly (although perhaps more predictably) David Harding, Chief Executive of bookmakers William Hill, attacked the deal as flawed in critical areas, which could bring about its downfall.[201] He also queried Go Racing's decision to use Gibraltar as a betting base, coming as it did only weeks after the principal bookmakers had agreed to return from off-shore bases in return for the Government's decision to replace betting duty with a gross profits tax.[202] Then Sir Eric Parker, President of the Racehorse Owners Association, criticised the deal because it exposed the racing industry to the danger of allowing a contract to be finalised that pawns its future, without any informed discussion. He also attacked the "draconian confidentiality clauses" which surrounded the contract and commented that the commercial framework of the deal meant that racing would be selling its soul and not even get a very good price for it.[203] Go Racing responded to Sir Eric's remarks by pointing out that the industry would receive substantial additional cash in addition to the £400 million agreed.[204]

In mid-June, the deal appeared to have been scuppered when the BHB refused to grant the media consortium in question a licence covering pre-race data. The deal had been conditional on obtaining a licence covering such crucial pre-race information as runners, weights and jockeys, which is owned by the BHB.[205] The vote was very close (6 to 5), and it also emerged that two of the directors had no idea that the meeting or vote was taking place. Another four had votes cast by proxy in their absence, one of them being apparently unaware of the move.[206] A few days later a new bidder materialised in the shape of SNAI, an Italian firm which said that it wished to bid for the media rights in partnership with British bookmakers, thus further complicating the crisis which threatened to split racing apart.[207] However, this bid eventually led to nothing.

A fresh attempt was then made at salvaging the deal in a move which starkly exposed the divisions within the BHB on this issue. On 16 June, a Saturday sitting of the High Court was held at which Justice Ferris ruled that a new BHB board meeting could be convened the next day in order to discuss fresh proposals from Go Racing's backers, i.e. Arena Leisure, Channel Four and BSkyB. However, in a bizarre twist it also emerged that five BHB directors favouring the deal would be barred from the decision-making process because of a potential conflict of interests. BHB chairman Peter Savill was to be barred for similar reasons.[208]

At the meeting, which continued until the early hours, the Go Racing consortium agreed to offer certain concessions. These concerned the length of any agreement on the sale of data - Go Racing wanted a ten-year deal whereas the BHB suggested a one-year renewable deal - an increase in the price of the data - the RCA had agreed to 1. 5 per cent without consulting the BHB - and a greater degree of flexibility on any revenues from future technology.[209] However, this set of proposals was also rejected by the BHB.[210]

Two days later, yet another attempt was made to rescue the deal following another round of intensive negotiations between the consortium and BHB, with further concessions being extracted from Go Racing.[211] On this occasion, the deal was finally given the seal of approval by the BHB. Go Racing was granted a licence for pre-race data and live pictures from racecourses for five years, with an option to renew the arrangement for a further five years. It also agreed to setting up a joint venture exploring the utilization of new technologies and a proposed "superbet". The deal guaranteed the industry the sum of £307 million provided that the option of renewal is taken up and lasts the entire ten-year course.[212]

For the stay-at-home racing fans, the deal meant that they would continue to obtain their current menu of racing on BBC and Channel Four, but that this would be supplemented by a new half-hour lunchtime programme on Channel Four in a year's time, as well as a free-to-air dedicated channel on Sky which would replace the existing Racing Channel.[213]

Media rights for 2002 World Cup - free or pay-per-view?

The previous issue of this journal had already intimated that, under controversial plans involving the media rights for the 2002 World Cup in Japan and South Korea, there was a risk that pictures of this

event would only be available to British viewers on a pay-per-view basis.[214] Developments since then have generated some hope for a different outcome, although at the time of writing the issue did not appear to have been settled one way or the other.

Initially, all seemed well for the less-than-wealthy armchair spectator. Several newspapers wrote that all 64 World Cup matches would be shown on terrestrial TV. In fact, all that happened was that a few days previously, the relevant Secretary of State had declared in the House of Lords that all 64 matches were classified as listed events (i.e. available to all) in British law.[215]

However, this amounted to little more than a restatement of Government policy that the entire World Cup finals were protected by listed events legislation. It did not take account of the reality that the Government had but limited powers to ensure that this policy could be applied. The media rights to the World Cup are in fact held by Kirch, a German media group which had little sentimental regard for the needs of the less opulent viewers, since they intended to organise an auction in which most matches could be sold to other broadcasters such as BSkyB or Ondigital. Kirch were of the opinion that only games of widespread interest in Britain, such as the final stages and matches involving the four Home Nations, qualified for protected status. BBC and ITV had offered around £50 million for the rights to the entire tournament - about ten times as much as they paid for the 1998 World Cup finals - but Kirch insisted that a fairer figure was nearer £170 million.[216] The parties are no nearer to agreement now, although the outcome of the legal dispute featured below could weaken the German media group's position.

This issue also constituted yet another embarrassment for the beleaguered FIFA President, Sepp Blatter. The latter was already under a dark cloud over his role in the collapse of the sports marketing company ISL (see below, p.63). The agreement between FIFA and ISL covered broadcasting and sponsorship rights for the next two World Cup tournaments. However, it transpired that, rather than acting as a broker for the sale of the rights, ISL had actually purchased the broadcasting rights direct from FIFA only to sell them on to Kirch. If that claim is true, the proceeds of that sale could be under the control of the Swiss accountant appointed to act as administrator for the bankrupted company, whose priority claim would obviously be in the interests of ISL's various creditors.[217]

Meanwhile, a lawsuit was being heard by the House of Lords which was heavy with implications for the final outcome of this issue. In a dispute between the Independent Television Commission and the London-based Danish station TV Denmark, the former attempted to overturn an earlier Court of Appeal decision permitting TVD to broadcast Denmark's away qualifying matches to Danish homes. ITC claimed that this breached not only Danish, but also British legislation on listed events.[218]

In the event, the ITC won the appeal.[219] Interestingly, one of the legal issues on which the case turned was the interpretation of EU Directive 89/552,[220] which deals with the harmonisation of laws on the pursuit of television broadcasting rights. The all-important provision thereof was Article 3a, which had been inserted subsequently.[221] This rule gives member states the power to protect by legislation the broadcasting of that which they regard as events of major importance. Both Denmark and Britain[222] had adopted such legislation. It also requires the member countries to ensure that its own broadcasters do not exercise an exclusive right to televise an event designated by another member state in such a way that a substantial proportion of its public is deprived of the opportunity to watch it. To comply with this provision, the Secretary of State had enacted the Television Broadcasting Rights 2000 by way of amendment to the aforementioned Part IV. Henceforth, under section 101B thereof, no television broadcaster may, without the consent of the ITC, televise an event which is a designated event in an EEA (European Economic Area) state if a substantial proportion of the public there would be deprived of the opportunity to view it.

The Law Lords rightly pointed out that it was not this provision itself which constituted compliance with the directive, but the use which the ITC made of the powers which it conferred upon it. Whether or not the ITC had in fact done so was the main legal issue in this case. In exercising its discretion, the

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R. Farrell, Hon. Secretary, British Association for Sport and Law,
The Manchester Metropolitan University, School of Law, Hathersage Road, Manchester M13 0JA.

ITC had to take account not only of the criteria laid down in the said Regulations, but also of the criteria set by the Danish authorities. These were slightly different from the British rules. The "substantial proportion of the public" requirement was 90 per cent (as opposed to 95 per cent in the UK); therefore, a broadcaster who had acquired exclusive broadcasting rights could only exercise them if it could ensure 90 per cent coverage through other broadcasters. However, that broadcaster need not do so where it is able to prove that no broadcasters satisfying the criteria were prepared to enter into an agreement on reasonable market terms.

When asked by the ITC whether TVD was prepared to make an offer of such an agreement, the latter replied in the negative, arguing that it was requesting permission from the UK, and not the Danish, authority; therefore, only the criteria laid down in UK legislation need apply. The ITC decided to refuse consent. It stated that it should certainly take its own regulations into consideration, but this did not mean that it could thereby commit itself in a way which would infringe EU law. The ITC was not satisfied that allowing TVD to exercise exclusive rights would not prevent a substantial part of Danish viewers from witnessing the matches. This was because it was not convinced that the public broadcasters had been given a genuine opportunity to acquire these rights on fair and reasonable terms.

TVD thereupon applied for judicial review against this decision, arguing that under the UK system, no account should be taken of that which TVD did with the rights once it had acquired them. The High Court refused the application, holding that the ITC had exercised its discretion lawfully, and the fact that it had taken the "Danish" criteria into account did not mean that the ITC had exceeded the terms of that discretion. TVD appealed against this decision.

The Court of Appeal found for the appellant. It held that the objective of preventing exclusive rights from depriving the majority of viewers from watching the events in question was not the only aim of the directive, and had to be viewed in conjunction with the other object, which was to promote competition and prevent public broadcasters from achieving dominant positions. It also ruled that the ITC Code (contained in the said regulations) allowed for the free market, and if a broadcaster - such as the Danish public broadcasting corporation - had enjoyed the opportunity to bid for the rights in question at a fair auction, the ITC was bound to be satisfied that it had had the opportunity to acquire these rights on fair terms. Nor could it be argued that a substantial proportion of the Danish public had been deprived of the opportunity to see the matches, since the auction provided such a possibility.

The Law Lords dismissed these findings. On the objectives of the Directive, Lord Hoffmann denied that the concern to ensure viewing rights for the overwhelming majority of the public was in any way qualified by considerations of competition or free market economics. Furthermore,

> *"(T)the argument that the public is given the possibility of watching the event if the public broadcasters are given the possibility of buying the rights at a fair auction is in my opinion wrong. The Directive requires the public to have the possibility of following the event in the sense that a member of the public may watch it if he chooses to switch on his television set. If the match is not being shown on any programme to which he has access, he does not have that possibility The reason may or may not be the way in which the party who has acquired exclusive rights is exercising them, but that is a different question."*

However, this ruling does not, in the opinion of the present author, automatically mean that it is all over bar the flicking of the remote control. It is not entirely clear from the Law Lords' judgment whether this ruling constitutes a general interpretation of the Directive, or merely one which took into account, *inter alia*, the Danish criteria. This column awaits further developments in this long-standing legal battle with considerable interest.

New monopoly rules mean a new competitor in UK sports coverage

It will be recalled from a previous issue[223] that the stranglehold which BSkyB appeared to have over sports broadcasting was increasingly attracting the attention of the UK competition authorities. The resulting action by the Government has ensured that the armchair viewer now has a greater choice available to him/her - at least in the world of football.

For nine years since they acquired exclusive rights to broadcast Premiership matches, Sky had an

unchallenged hold on televised football in this country. However, as from the current season, a new operator has entered the fray, which is ITV's new sports channel. ITV have secured the rights to the European Champions League, sharing coverage between their terrestrial and satellite channel, thus effectively freezing out Sky. In addition, ITV also has exclusive rights for the screening of Worthington Cup and Nationwide League games. However, the new restrictions introduced by the Government (see above) entail that they cannot reserve for their digital platform their most attractive asset, being the right to 66 Premiership fixtures.[224]

As a result, subscribers to ITV Digital, the new name under which ONdigital operates, will not only have the opportunity to watch all the games which ITV have the right to broadcast, but also have access to Sky's principal three sports channels through the one supplier. Since ITV has no similar obligation, Sky Digital is unable to provide such a wide range of games.[225]

However, the additional hardware which the viewer has to acquire in order to be able to watch ITV's digital channels will continue to act as a considerable deterrent.

EMPLOYMENT LAW

Rugby League salary cap travails

Until such time as the new salary cap rules enter into effect (see below), the old rules continue to apply and to be infringed. In late July 2001, Wakefield Trinity had four points deducted for such a breach. The limit which clubs could spend under these rules was 50 per cent of their income. An independent inquiry found that Wakefield exceeded the limit by more than 60 per cent.[226] At the time of writing, the Super League club was planning to appeal, although the outcome of any such application to higher justice was not yet known.[227]

In the previous issue, it was reported that the Rugby League had decided to introduce a new salary cap as from January 2002.[228] The system appeared to lose some of its credibility even before it could be put into practice, when the Super League decided to give Wigan a £500,000 leeway on its salary cap for the next season. The Wigan Chairman, Maurice Lindsay, defended this decision on the grounds that existing contractual obligations necessitated this exemption. However, Wigan's competitors could point out that the Warriors were also negotiating with, and expected to sign, some high-priced players from "down under".[229]

Strike action by sporting personalities - both real and threatened

No doubt inspired by the example - if that is the correct term to use - set by English Rugby Union players last year,[230] sporting personalities from all disciplines have been flexing their industrial muscles over the past few months.

Thus two weeks before the start to the Premiership season, the nation's footballers seemed to be gearing up for industrial action. The reason for their discontent was the reluctance on the part of the Football Association, the Premier League and the Football League to remit to the Professional Footballers' Association (PFA - the English footballers' trade union) the same proportion of their vastly increased TV revenue as they did under previous deals.[231]

This issue was the subject-matter of face-to-face talks between FA Chief Executive Adam Crozier and his PFA counterpart Gordon Taylor in early August 2001. However, these negotiations merely produced an undertaking that the 20 Premier League Chairmen would discuss the issue when they met on 19 August. In the meantime, Taylor put his members on alert for a strike ballot.[232] At the time of going to press, no strike action had actually materialised, although this could not be excluded in the course of the current season. Watch this space.

Perhaps more justifiably, industrial action was also in the air at the rather more sober context of Nationwide League club Wrexham, after it transpired that their wages had not been paid on time for the fifth time this year.[233] Here again, the threat has yet to be carried out.

Such simmerings of industrial discontent have not been restricted to the UK. In Uganda, there was a walk-out by players shortly prior to the national side crashed to a 3-0 defeat by Togo in June 2001.

This setback led to the disbanding of the team and the dismissal of their coach. The Association started an inquiry into the strike action, which was over the payment of allowances.[234]

French racing also seems to have caught the bug. In late June 2001, the Juddmonte Grand Prix at Longchamp was postponed when a group of annoyed punters staged a protest sit-in on the track when they learned that they were unable to place a bet. This state of affairs had been caused by strike action taken by staff working for Paris-Mutuel Hippodrome, employed to operate the Tote on course. They were demanding a pay increase. This industrial action dealt a severe blow to French racing, affecting as it did one of the major races of the season.[235]

Pulis v. Gillingham ends in settlement (UK)

The previous issue of this column has already documented the rather chequered career in football management to date of Tony Pulis.[236] He was dismissed from Portsmouth FC for alleged misconduct, only to move to Gillingham, whence he was also expelled for similar reasons. This caused Mr. Pulis to bring an action for wrongful dismissal against the Kent club before the High Court.

During the hearing, the reasons why Gillingham had terminated Pulis's contract became clearer. The club claimed that Pulis had broken the terms of his contract by holding clandestine meetings with three other clubs, to wit Bristol City (whom he joined within days of leaving Gillingham), Stoke City and Norwich.[237] Pulis, for his part, claimed that he had spoken to Norwich with permission of the (Gillingham) Chairman, Paul Scally, and that talking to the other clubs - who had approached him rather than the reverse - was not an instantly sackable offence.[238]

Ultimately, however, the High Court was not called upon to deliver a ruling, since the matter ended in an out-of-court settlement of £75,000. Gillingham went on to announce that they would be asking Bristol City and Stoke to cover the £150,000 in legal costs they had incurred. Paul Scally said that he had been very disappointed with the two clubs, who had denied making illegal approaches to Pulis until the eve of the court hearing. Had the admission come earlier, Scally believes, the action may never have been brought.[239]

Employment tribunal awards

During the period under review, the employment judiciary has been faced with a number of important cases relating to the world of sport.

In April 2001, seven Wakefield Trinity (Rugby League) players won their claims for compensation arising from breach of contract after having been dismissed by the Super League club. They were all awarded sums ranging from £3,000 to £25,000 as a result of the dismissals, which came at the height of the financial crisis hitting the club which caused it to terminate the employment of all players aged over 24.[240] One of the players involved, Australian Glen Tomlinson, was forced to take up employment in a paint factory at £5 per hour.[241]

However, it is extremely unlikely that the players will ever be paid these awards, since their former club has entered into a Creditors Voluntary Arrangement - a polite word for bankruptcy.

More controversially, a football hooligan who was dismissed by the Royal Mail after television pictures showed him assaulting a Galatasaray fan during the disturbances which attended the Turkish club's match with Arsenal in Copenhagen in May 2000 won his case. Londoner Tom Doherty was seen kicking a prone man and photographed aiming a punch at another. These actions caused his dismissal by the Post Office, who claimed that he had thus caused harm to the image of the "friendly postman".[242]

However, these actions do not seem to have done Doherty any harm in the eyes of his colleagues, who twice halted deliveries in North London as they walked out in sympathy with him.[243] This was followed by a challenge to the dismissal before an employment tribunal, which found that the panel which had disciplined Doherty had based their decision on news footage in which the latter's association with the Post Office had not been mentioned. The tribunal also held that the panel had failed adequately to compare his case to that of another postman who had been jailed for nine months for football hooliganism, and who had been reinstated to his post on appeal[244] (see below). Accordingly they found that Doherty had been unfairly dismissed.

However, the other "hooligan postie" case had a sequel. In a decision made a few weeks before that of Doherty,[245] the Court of Appeal heard a challenge by the Post office against a ruling that Liddiard, the employee who had been dismissed for gross misconduct by bringing his employer into disrepute, had been unfairly dismissed and should be reinstated. Allowing the appeal and remitting the case for rehearing, the Court found that the tribunal had misdirected itself in deciding that the dismissal had been unfair.

Other issues

George Graham compensation battle settled[246]

One of the less happy memories of the 2000-2001 football season in England is the unseemly manner in which Tottenham Hotspur FC and its manager, former Scotland international George Graham, parted company just before the FA Cup semi-final against North London rivals Arsenal. Graham had fallen out with new Spurs owners ENIC for having stated that the club required an influx of cash in order to buy new players. There followed a protracted wrangle over the compensation which should be payable as a result. In July 2001, agreement was finally reached on a suitable sum, reported to be not unadjacent to £1 million.

Jockey Club Head of Security dismissed after internal inquiry[247]

In August 2001, the Jockey Club dismissed Roger Buffham, its Head of Security, who was responsible for the recent investigations into doping and race fixing.[248] The Club, however, stressed that this dismissal had nothing to do with the operation of his department. It came after the Club had completed an internal inquiry into allegations of sexual harassment made by a female member of the security staff.

Dundee FC "consult lawyers" over missing players

Scottish Premier league club Dundee FC have known varying degrees of success during the past few years, although their recent form appears to be signalling an upturn in their footballing fortunes. However, some of this hard-won improvement appeared to be at risk when, on the eve of Dundee's first Intertoto Cup match of the season, two of its top players, Italians Marco de Marchi and Patrizio Billio, failed to materialise at Dens Park. Both had already been fined £25,000 for missing training. Given that Dundee's last appearance in Europe was during the 1974-75 season, the club authorities were naturally anxious to make as sound a start as possible. Accordingly, they decided to "consult their lawyers" about the continued absence of the Italian pair.[249]

Thus far, however, no concrete legal action appears to have been taken in this regard.

Ginola to become first beneficiary of new FIFA opt-out clause?

The 2001-02 English football season had hardly got under way when rumblings of discontent became audible at various clubs. One of these emanated from Aston Villa's "moody genius", French player David Ginola. Such is the scale of Ginola's disenchantment at Villa Park, that he appeared at the time of writing to be seriously contemplating legal action to be released from his contractual obligations, pleading the new FIFA rules on transfers.[250]

These rules are discussed more fully elsewhere (see below, p.60). One particular innovation has taken the form of allowing a player to approach a tribunal where he finds himself in a serious dispute with his manager. Such an application, which can be made to a domestic, continental or world football tribunal, is based on the grounds of "sporting just cause".

Ever since he joined Villa in the summer of 2000, Ginola had experienced a troubled relationship with manager John Gregory. At one particular stage, the latter had made critical observations about the Frenchman's weight, causing Ginola to consult his employment lawyers as well as the Professional Footballers' Association. Gordon Taylor, PFA Chief Executive, claims that Gregory's remarks could amount to constructive dismissal. He added that normally, in disputes of this kind, an English club

would attempt to work out a settlement of contract or allow the player concerned to move to another club - hence Ginola's unprecedented move.[251]

At the time of writing, the dispute did not yet appear to have been resolved.

Sports instructor's right to delegate personal services not incompatible with employee status, rules employment tribunal[252]

In a recent case brought before the Employment Appeals Tribunal (EAT) in Edinburgh, the appellant was a sports instructor. Originally she was responsible for her own tax and national insurance contributions. However, once she started working longer hours her employer, the Glasgow City Council, made PAYE deductions. Although Ms. McFarlane was committed to teaching certain sessions at specific times, she was only paid for the sessions actually worked. When unable to teach, she was entitled to arrange for a replacement instructor, to be selected from an approved list held by the Council. The substitute instructor would then be paid directly by the Council.

It transpired during the hearing that the appellant was entitled to neither sick pay nor holiday money, and that she had not entered into any written contract with the Council, although she did receive the standard letter setting out the terms on which instructors were engaged. At a certain point, the Council issued a new set of terms which classified the instructors as self-employed. Thereupon Ms. MacFarlane resigned, claiming constructive and unfair dismissal.[253]

The employment tribunal whose decision was under challenge had ruled that Ms. MacFarlane's licence to arrange for a replacement was inconsistent with the existence of a contract of employment. In doing so, the tribunal cited the decision of the Court of Appeal in the *Tanton* case.[254] However, the EAT distinguished this ruling in this case. Far from compelling the original tribunal's conclusions set out above, *Tanton* indicated that a contract cannot be a contract of service where it contains the provision that the individual is not required to perform the services personally. Under the arrangement with the Council, Ms. MacFarlane was not allowed simply to choose not to work in person. Only where they were unable to be in attendance could they arrange for someone else to take the session. Not only did the replacement need to be taken from the Council-approved list; the Council itself sometimes organised the replacement, and in so doing did not pay the instructor for time served by a replacement, but paid the substitute direct. The matter was therefore referred back to a tribunal for further consideration.[255]

Civil servant seconded to sporting association has contract of employment with the latter. French Supreme Court decision[256]

Under French legislation seeking to promote physical education and sport, technicians employed and salaried by the Sports Minister may be seconded to sports associations in order to promote sporting activity at all levels, train teams, discover promising young athletes and organise training programmes for trainers. Under an agreement dating from 1983, such an arrangement existed between the Sports Department of Aveyron (a French *département*) and the Aveyron Football Association. In September 1994, the President of this Association informed the Director of the Sports Department, as well as the official concerned, M. Fraysse, that it had been decided to terminate this agreement.

The latter responded by bringing an action before the local industrial court (*Conseil de Prud'hommes*) for breach of contract of employment against the Association. The *Conseil* ruled, and the Montpellier Court of Appeal confirmed, that under the agreement making M. Fraysse available to the Association, the official concerned was operating under the sole instructions of the Director of the Aveyron Sports Department, to whom he reported back on a regular basis. He was unable to produce any instructions issued by the Association regarding his activity. Nor was there any evidence that M. Fraysse exercised a different salaried activity distinct from that which arose from the said agreement, or that there was a relationship of subordination between him and the Association.

The Supreme Court did not accept this. It held that, as a matter of principle, any civil servant made available to a private establishment in order to work there is linked to that establishment by a contract of employment. Although the official concerned retained a certain link with the administrative body whence he emanated, his work had, as from the time when the 1983 agreement

came into effect, been performed in the context of aforementioned sports promotion legislation for the account of the Association - which, moreover, had taken the initiative of terminating the arrangement. The Court of Appeal had therefore infringed this legislation.

The Supreme Court therefore set aside the challenged decision.

4. TORTS AND INSURANCE

SPORTING INJURIES

Pursuiter Obree to sue Water Board over knee injury (UK)[257]

Just before this issue went to press, it was learned that the career of former cycling world champion Graeme Obree may have been ended prematurely on account of a knee injury. This was caused when the former pursuit champion was thrown over the handlebars of his bicycle after colliding with a concrete block in the course of a training run to Paisley, Strathclyde. Obree intends to sue the West of Scotland Water Board, whose workers are alleged to have placed the concrete blocks across the road whereas the white centre line led directly into the blocks.

Former Manchester City star wins compensation for burns (UK)

Whenever claims for compensation are made by sports personalities in this respect, it is rare for the action which gave rise to the litigation to have been blamed on the field of play itself. Yet this is precisely what happened in the case of Andy Dibble, former Manchester City and Wales goalkeeper currently playing for Nationwide League side Stockport County.

Whilst playing for Barry Town against Carmarthen Town in December 1998, Dibble suffered horrific burns after having dived to make a save, to the point of being scarred for life, having incurred a four-inch wide gash from his shoulder to his hip. This was because in making the save, he had scraped against pitch markings drawn using dehydrated lime. He was subsequently taken to hospital where he underwent skin grafts. For these injuries he was awarded compensation amounting to £20,000.[258]

Hydrated lime has been used for the marking of football pitches for decades, but the practice has now been phased out by the Football Association.[259]

Footballer loses compensation claim for "negligent" tackle (UK)[260]

In July 2001, Darren Pitcher, who alleged that his promising career at Crystal Palace FC, an English Nationwide League team, had been terminated by a "negligent" tackle from Paul Reid during a fixture with Huddersfield Town, lost his battle for compensation which would have amounted to over £1 million.

The High Court dismissed the allegation of negligence, ruling that the contentious late tackle had been no more than an "error of judgement".

Foot-fault? Tennis ace Hingis sues over "faulty" shoes

Obviously tennis ace Martina Hingis does not consider the £11 million she has thus far amassed on the tennis court as an adequate reward for her talents, as she is now going for the real money, i.e. that which stands to be gained form a tort action. She is suing her shoe manufacturers for the sum of £25 million by way of compensation, claiming that their footwear has irreparably damaged her feet.

Apparently the problem surfaced during the 1998 US Open, but was not so serious then to prevent her reaching the ladies' singles final. She then had the complaint examined by a New York specialist, who established that the injury was a chronic one and was the result of wearing the shoes produced by Tacchini. The latter then appeared to have added insult to injury(!) by removing her from its list of tennis stars on the grounds that her refusal to wear their shoes any longer constituted breach of contract.[261]

The grounds on which Hingis is basing her action is negligence and breach of contract.[262] The sportswear manufacturers have denied the allegations made by her, and have stated that her court action amounts to little more than an attempt to avoid paying the relevant contractual penalties.[263] At the time of writing, the outcome of the case was still uncertain.

Article on sports injury liability in professional journal[264]

As the amount of litigation arising from sporting activity increases, so does the attention paid to it by the leading writers. In an article which is characterised more by its usefulness for the practitioner than by any pretence at academic innovation, the author, a London-based barrister, takes us down the well-trodden paths of sports injury litigation. He points out the redundancy of the *volenti non fit injuria* defence, although he points to the often-neglected circumstance that the Court of Appeal[265] has set out certain conditions in which a *volenti* defence could be successfully raised.

He then documents the leading cases on all aspects of negligence in this area, particularly those that set the context in which the negligence tests are to be applied. He also goes into the liability of referees, inevitably citing *Smoldon*[266] in the process, as well as that of participants towards spectators, that of a professional association to provide medical facilities (with the *Watson*[267] decision naturally taking pride of place), and that which schools are liable to incur (on this subject, see also below, p.40). Finally, he discusses the extent to which decisions of disciplinary bodies can give rise to tort liability.

Recent German cases on liability of swimming bath supervisors

Public swimming baths are by their very nature places which are fraught with risks and therefore heavy with legal implications. This has been underlined recently in Germany by a number of court decisions in this field.

The Appeal Court (*Oberlandesgericht*) of Cologne has laid down a number of guiding principles on this matter.[268] Supervisors in swimming baths should select their vantage point in such a way as to be able to oversee the entire bath and have an overview of all the pools. If necessary, they should change their position on a regular basis for this purpose. Where a watchtower has been installed, it must be possible to view the entire bath area from this position. If this is not possible, the supervisors in question must once again move their position on a regular basis, or make use of a further supervisor.

The Appeal Court of Hamm[269] entertains a strict interpretation of the standards of care required. Where the supervisor is the only one to officiate, he or she may not leave the swimmers unattended for a few minutes only, even in order to visit the toilet. If he/she does so, this is a breach of duty and the bath operators will incur liability. The *Oberlandesgericht* of Celle,[270] on the other hand, has some sympathy for the hard-pressed supervisor. The demands made of the latter must not be excessive, since swimming baths cannot be organised in such a way as to exclude the possibility of any risk. Particularly in the case of public swimming baths it is quite conceivable that the supervisor will have his/her attention distracted in many respects. The Court also points out that the Supreme Court (*Bundesgerichtshof*) has, in its case law, refrained from requiring total and uninterrupted supervision of the swimming pools, as this cannot be achieved with the means which they can be expected to have at their disposal.

Paragliding instructor held answerable in negligence towards trainee. English Court of Appeal decision[271]

In the case under review, the claimant was a trainee paraglider who sustained injury when flying in a tandem paraglider together with the defendant, who was her instructor. The injury arose though the instructor's negligence. The latter alleged that the claimant was a passenger travelling in an air transport undertaking, since a paraglider was an aircraft within the meaning of the Warsaw Convention on International Carriage, as implemented by the Carriage by Air Acts (Application of Provisions) Order 1967.[272] Accordingly the claimant's action was barred by limitation.

The first court had dismissed this argument on a preliminary issue and held the claimant to be answerable in negligence to the claimant, whereupon the defendant appealed. At the Court of Appeal,

Henry LJ stated that the term "aircraft" was defined in neither the 1967 Order nor the consolidated Air Navigation (No.2) Order 1995 (ANO). Nor could any such definition be encountered in the Conventions referred to the Court or in the Civil Aviation Act 1982. In addition, no specific reference was made to paragliders in any of these documents. The manner in which the term "gliders" was used in the ANO made it clear that the latter were regarded as recreational aircraft requiring little regulation, rather than commercial aircraft used for the purposes of public transport, for which stringent regulation was required. The defendant was exempt from the obligation to have an air operator's certificate and UK certificates of airworthiness.

It was obvious why paragliders would at no time be licensed to fly public transport aircraft. They were private recreational aircraft, exempt from essential regulatory controls imposed on commercial aircraft. It was not reasonable to assume that Parliament had in contemplation applying the 1967 Order to a tandem paraglider training flight, for a pilot under instruction by a paraglider school exempt from the requirement to have either certificates of airworthiness or an air operator's certificate. The defendant would not have acquired an air operator's certificate because no reasonable licensing authority would have found a paraglider fit to fly in the public transport category.

The reason why the question whether the claimant was a passenger was raised is that under Section 17 of Schedule 1 to the 1967 Order, the carrier would be liable in the event of death or injury of a passenger. The claimant was under instructions when she was on the flight, and it would not be proper to describe her as a passenger. The objective was instruction, not carriage.

Justices Buxton and Bodey concurred with this view.

Whose duty is it to maintain safety standards at a gymnasium? German court decision[273]

In November 2000, the Nürnberg (Germany) Court of Appeal (*Oberlandesgericht*) ruled that the responsibility for keeping a gymnasium, as well as its equipment, in a safe condition was incumbent on its owner and operator. This was the case even where that owner and operator has hired the gymnasium out to a third party, and in so doing had failed expressly to transfer the obligation to maintain safety standards to that third party. However, the hirer of the gymnasium also has his own obligation to maintain certain safety standards.

The duty to maintain safety standards at a gymnasium also included the securing of gymnastics equipment. Thus a large mat which was stood on end against the gymnasium wall when not being used, must be secured in such a way as not to present any dangers to children where there are small children present in the gymnasium. A clamping device which consists of a single strap having a fastener which was easy to open, attached at a height of 1.4 metres, was inadequate for this purpose.

Organiser of motorcycle race held liable for damage to property caused by competitors. Italian Supreme Court decision[274]

As long ago as 1991, a motorcycle race had been held off the streets, but on a circuit open to the traffic. As well as travelling across the track provided, the competitors had also encroached upon the private property of the claimants, causing them considerable loss. Alleging that the race organisers had incurred liability for having selected an unsuitable and impassable course without adequate signposting, and for having failed to prevent the detour taken by the competitors as described above, the claimants took their dispute to the courts.

The court first seized of this case, the *Pretore*, had dismissed the claim. On appeal, the *Tribunale* confirmed this decision, holding that (a) a legitimately organised sporting event was not a dangerous activity within the meaning of Article 2050 of the Civil Code (which lays down the ground rules of tort liability in Italy), (b) since the defendant had taking every reasonable precaution to avoid damage to the properties adjoining the track, he could not be held liable, and (c) the fact that the property of the defendants had been infringed and damaged could only engage the liability of the individual competitors.

The original claimants applied to the Supreme Court (*Corte di Cassazione*) for review of this decision.

The Court awarded the decision to the applicants. It disagreed with the Appeal Court that this issue did not fall within the ambit of Article 2050 of the Civil Code. Since the race involved motor vehicles, this brought the matter within the scope of Article 2054, which was merely a specific application of the general principle set out in Article 2050. Therefore the same general rules of liability as those set out in the latter applied. The fact that the race was a legitimate one was irrelevant, since the drafters of Articles 2054 had considered that the fact of driving a car was inherently a dangerous activity.

The ruling of the Appeal Court that the organisers had taken every reasonable precaution possible to avoid the damage caused was also dismissed by the Supreme Court. Quite apart from the fact that this ruling had caused the Appeal Court to contradict itself (given its implication that the race organisers were covered by one of the defences against Article 2050, which was supposed to be inapplicable), this ruling was unfounded also on its merits. One of the precautions overlooked by the Appeal Court was the set of rules issued by the Italian Motorcycling Federation, which requires organisers to remove from the course that area which had become impracticable, and to ensure that the rules of the race are complied with. Neither of these rules had been observed by the race organisers. They were therefore to be held liable for the loss complained of.

Boxing authority still trying to appeal to Law Lords over Watson[275]

It will be recalled from the previous issue that the Court of Appeal had confirmed the original ruling by the High Court in the Watson case ordering it to pay over £1 million in compensation, and that the British Boxing Board of Control had been refused leave to appeal to the House of Lords.[276] Still refusing to admit defeat, the Board attempted to petition the Upper House direct for an appeal. At the time of writing, no decision had yet been made on this application.

Damages awarded as a result of injury sustained as a result of a riding accident. Hong Kong court decision[277]

The claimant in this case was a company director who suffered back injuries when he fell from a horse in a riding accident. The action was not defended. He had been taken to hospital where initial X-rays indicated a fractured second lumbar vertebra. Having been treated with bed rest and transferred to a convalescent home five days later, he was discharged shortly afterwards. He was forced to take sick leave for just under five months. However, on returning to work he continued to experience back pain and had to work reduced hours. The expert called on his behalf noted a mild prominence of the L2/3 spinous processes, although his spine had a full range of movements. Whilst there was a diminished sensation on the right side of the back from T4 to L3 level, this could not be explained on the basis of the current injury. Other signs were found to be normal. Although the court noted that the claimant continued to plead back pain, on medical evidence it was held that there was no basis for his complaint.

Taking all the above factors into account, the claimant was awarded primary loss assessed at $150,000, loss of earnings at $499,000 and medical and related expenses at $15,000.

Article on tort liability arising from golf by South African sports lawyer[278]

In this paper, the leading South African authority on sports law, J. Labuschagne, examines the liability for any injury suffered in the course of a golfing context, practice or demonstration. He notes that, unlike sports such as football and rugby, golf is not a contact sport. The ball is invariably hit from a stationary position, providing sufficient time to assess and consider every shot. From the case law applied in a number of legal systems, it appears that ordinary rules of negligence suffice to establish tort liability in relation to an injury sustained in the course of a golfing contest, practice or demonstration. Not only competitors are protected from intentional or negligent conduct on the part of other competitors, but also caddies, spectators, officials and employees at the golf course and those involved in organising a golfing contest or exhibition. Compliance with the rules of the sport does not in itself exclude the possibility of a finding of negligence.

Schools involved in tort litigation over sports injuries suffered by pupils

In recent months, there has been, both at home and abroad, a spate of decisions in which schools

have either incurred, or eluded, tort liability for injuries sustained by pupils whilst taking part in sporting activities held under their supervision.

In a ruling which is heavy with implications for all those involved in supervised school trips, the High Court held a school liable for failing to prevent a 17-year-old boy pupil from skiing off-piste during a ski trip to Kuhtai, Austria, and, as a result, sustaining injuries which left him in a wheelchair.[279]

Simon Chittock, the pupil in question, had obtained his parents' permission to ski unsupervised, but had been reprimanded by teachers for skiing off-piste the day before the accident. Undeterred, he and two friends once again decided to leave the ski slopes. This time, he fell on his back and was left paralysed.

The Court ruled that Woodbridge School was 50 per cent to blame for the accident on the grounds that the boys' ski passes had not been confiscated when they broke the rules for the first time. It was also refused permission to appeal against the decision.[280]

Mr. Justice Leveson dismissed the defence raised by the school that the reprimand fell within the reasonable range of responses for a teacher acting in *loco parentis*. He decided that the boys' disobedience had been a breach of instruction and demonstrated that the boys could not be trusted. He continued

> *"Although I recognise the balance which Mr. Jackson (the organising teacher) was trying to achieve, I have no doubt that in failing to impose substantial sanctions for this deliberate breach of his instructions, he failed in the exercise of the duty of care which he had undertaken."*[281]

Even though the accident had been primarily caused because the claimant was skiing too fast, and paying insufficient attention to that which was occurring around him, this state of affairs would not have arisen had Mr. Jackson removed their passes or insisted that they remain with the junior group that day.

Sue Sayles, spokeswoman for the National Association of Headteachers, criticised the decision, stating that

> *"the very fact that the school had written permission from the parents to ski unsupervised should take responsibility away from the school. This will be another factor which will result in schools no longer taking residential visits. It sounds like (sic) the school took all reasonable precautions."*[282]

A few weeks later, another English school was held liable for a rugby tackle which caused considerable injuries, although none as serious as in the previous case, which caused him to abandon his hopes of studying to become a dentist.

The claimant, Ramsey Elshafey, had been injured whilst involved in an away Rugby Union fixture, playing for Newcastle-under-Lyme school against Macclesfield's King's School four years ago. At a particular juncture, he had been lifted into the air and landed on his head incurring serious ligament damage to his neck and back. This compelled him to take time off school in order to receive medical treatment, and on his return he found it impossible to revise because of his injuries. For this reason he decided to sue the pupil who had tackled him, who was covered by his schools insurance. To this day, Mr. Elshafey is unable to play rugby and continues to suffer pain.

The High Court at Manchester ruled that the tackle in question had been negligent, and as a result the school's insurers paid £100,000 in an out-of-court settlement.[283]

However, in a French decision which resembles that described above, the school in question was not held liable.[284]

The claimant was a pupil at a "semi-public" school[285] who was taking part in a game of rugby during a break from lessons. As a result of a tackle by another pupil, he sustained an eye injury, and sued the school for damages.

The Court of Appeal of Orléans had ruled that playing rugby during a school break was not a prohibited activity; nor was it inconsistent with the age of the pupils involved (between 12 and 15). The fact that the supervising teacher, who was not bound to referee the game and who was standing

in the drive which dominated the field of play had not seen the incident did not prove that he has been negligent in performing his duties, since there was no supervision, however vigilant, which could eliminate every element of risk in a game of rugby. Tackling formed part of the normal run of play in rugby. Therefore a game of rugby could not be placed on the same level as a bout of unruliness which the supervisor had allowed to get out of control and thus render him liable. Accordingly, the manner in which the break had been organised by the school could not be criticised, since it had been provided by a supervisor to whom no fault could be attributed, and since no blame could be attached to the school for the quality of the premises or of the equipment at the players' disposal. The Court of Appeal had concluded that neither the state nor the school could be held liable.

This part of the decision was upheld by the Supreme Court.

LIBEL AND DEFAMATION ISSUES

Charlie George settles libel action[286]

In late July 2001, Charlie George, the former Arsenal and England footballer whose goal secured the 1971 FA Cup for his club, accepted undisclosed libel damages over an article which gave the impression that he would have embarked on a life of crime had he not become a professional footballer.

Mr. George's solicitor, David Price, told Mr. Justice Eady at the High Court in London that he was highly aggrieved over the article. The piece was based on an interview with scriptwriter Lawrence Marks and appeared in the *Highbury and Islington Press* in February 2000. It contained statements from Mr. Marks to the effect that if Mr. George, who attended the same secondary school as he did, had not been blessed with his considerable footballing talents he would have "ended up in prison". The piece was headed "If Charlie George hadn't been a footballer I'm sure he'd have gone to prison".

Mr. Price added that Mr. George had always enjoyed a cordial relationship with Mr. Marks when they met as spectators at Arsenal matches. He strongly resented the implication that he was of a criminal disposition. He added that the newspaper in question had apologised and made it clear that it had no intention of casting any aspersion on Mr. George's character as an adult. The reference to him as a schoolboy was intended as a general illustration of what Mr. Marks saw as the difficult environment facing children from their school rather than being directed at Mr. George personally.

The two parties reached agreement on a sum by way of damages and legal costs.

Romanian athlete withdraws slander action against team-mate[287]

In the summer of 2001, Romanian athletes Gabriela Szabo and Violeta Szekely were extremely preoccupied about the possible outcome of the big contest. Only the contest in question was not the coming World Championships in Edmonton, which produced its own legal wranglings (see below, p.80) but an action for slander fought out in the Romanian courts.

Earlier, Szabo, the Olympic 5000 metre champion, had called her arch-rival "ugly" during a television programme. This followed an earlier taunt that she was a "druggie" - a reference to a dope test which Szekely failed in 1995. This caused the latter to sue for slander, but she withdrew the action on the eve of the Edmonton Championships. She may, however, restart it at any time. Any such action could have far-reaching consequences for Szabo, since under Romanian law, the losing defendant in a slander case also faces a jail sentence.

Grobbelaar wins leave to appeal to the Lords (UK)[288]

The decision of the English Court of Appeal to overturn the libel action awarded to former Liverpool

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and Southampton goalkeeper Bruce Grobbelaar has been documented in the previous issue of this organ.[289] In July 2001, Grobbelaar won leave to appeal against this decision to the House of Lords. The Law Lords' ruling was not yet known at the time of writing.

Threats, mostly empty, of legal action over statements regarding the sporting famous

One of the more tiresome aspects of specialising in sports law is to monitor the endless procession of threats of legal action made by sports personalities, which mostly end in the proverbial humid firework. Top of the list is the threat of court action against referees for being human and making mistakes; a good second comes the dash for the lawyer's office by sports personalities whose name has allegedly been sullied by others. The period under review has not been wanting in this category.

In May 2001, former England footballer and manager Glenn Hoddle was reported to be incensed over allegations concerning him and a luxury flat in Southampton. This centres round the suggestion that Hoddle had exchanged contracts on the first-floor flat in a renovated Georgian house in December 2000, only to lose a £23,000 deposit when he withdrew from the deal in early March. If that story were found to be true, it would have supported the case of those who contended that ENIC, the new owners of Tottenham Hotspur, had decided to appoint Hoddle and approached him before the then manager George Graham was dismissed on 17 March (see above, p.35). It could have repercussions for the latter's claim for unfair dismissal by Spurs and the decision by Southampton, who then had Hoddle as their manager, to report Tottenham to the Premier League for making an illegal approach towards Hoddle.[290]

However, all the parties involved in this alleged property transaction deny having had any dealings with Hoddle. However, the latter's chances of discovering who actually started the rumour would appear to be fairly remote.

The next in the long list of the litigation-happy sporting famous was Howard Wilkinson, technical director to the Football Association, who was apparently incensed by claims that he derided Billy Bremner, the former Leads and Scotland footballer who also managed Leeds United for a while. The allegations are made by current Leeds star David Batty in his autobiography, where he alleged that Wilkinson opined about Bremner that he "may have been a great player but he wasn't such a good manager".[291] Thus far, no court action has been commenced, and is unlikely to materialise.

Sir Alex Ferguson was next. The object of the Manchester United manager's ire was a newspaper column written by former MP David Mellor. The latter had suggested that Sir Alex was paid £10,000 for every half-time and full-time interview he gave to ITV. In fact Sir Alex - unsurprisingly, in the view of some - receives no payment from ITV for his services, but was still sufficiently riled to instruct the club's solicitor, Maurice Watkins, to consider whether or not he had a case for libel against Mr. Mellor.[292] Here again, there had not been any concrete move in this direction at the time of writing.

However, one issue which has definitely seen the inside of a court of law is the dispute between Frank Maloney, manager of boxer Lennox Lewis, and his former business partner Panos Eliades. Maloney has initiated legal proceedings against Eliades for libel over allegations that he, Maloney, was directly responsible for the brain injuries which ended Paul Ingle's boxing career. Maloney was Ingle's manager officiating at the fight in question. He was one of the expert witnesses called when the British Board of Control investigated the world featherweight defence fight which ended in Ingle being knocked out in the final round and sustaining critical injuries. He acquired a blood clot on the brain which required emergency surgery, and is currently making a slow recovery at his Scarborough home.

The Board had been told that Ingle needed to lose a considerable amount of weight in order to reach the 9st. limit. Eliades had been quoted as stating that

> *"for Frank Maloney to be dealing with the dehydration situation is hypocritical. I personally blame Maloney for Paul Ingle's current condition. I hope and pray Paul Ingle recovers enough so he can tell us the circumstances prior to the fight."*[293]

This caused Maloney to take out a High Court writ seeking compensation for defamation. The outcome of the litigation was not known at the time of writing.

For more tort litigation involving Eliades, see the next section below.

OTHER ISSUES

Drugs cheats may face claims for compensation by cycling body[294]

Although it is the Tour de France in which the cycling drugs scandal has manifested itself most prominently, other events in this sport have, unsurprisingly, not been left unaffected by this affliction. During this year's *Giro d'Italia* (Tour of Italy), police conducted an overnight raid on participants in the border town of San Remo which led to over 80 people, most of them cyclists, being placed under investigation for alleged drugs offences (see also below, p.77).

Now the world governing body in cycling, the UCI, has announced that it was considering claiming compensation from such riders. It has instructed its lawyers to consider the possibility of demanding compensation for the damage caused by these competitors, since they directly harm the image of the sport as well as the professional interests of their colleagues.

Eliades "ready to sue" for gross negligence[295]

The name of Panos Eliades, estranged promoter of boxer Lennox Lewis, has already arisen in this feature on the subject of tort litigation (see above, p.43). In April 2001, it emerged that he was contemplating court action against his former employer's new management team through the US courts for gross negligence. Eliades has accused Team Lewis for a raft of alleged errors which he believes could cost the boxer some $50 million. The outcome of such litigation was not yet known at the time of writing.

Golfer takes out hole-in-one insurance (UK)[296]

Retired factory manager Maurice Pugh, of Melton Mowbray, Leicestershire, has achieved a hole in one so often that he has insured himself at the cost of £2.50 per annum against the inevitable round of drinks in the clubhouse at Stoke Rochford Golf Club, near Grantham, Lincolnshire.

Eriksson "to sue magazine" over inside story of his home[297]

In July 2001, lawyers representing Sven-Göran Eriksson, the England football team's successful manager, issued a letter to *Hello!* Magazine claiming unspecified damages and costs. The reason for this claim is a feature article about his new London home, which showed lavish interior pictures of the Swede's Regent's Park home. Mr. Eriksson is claiming that the article invaded his privacy.

Whether that claim had been met, or, if not, whether court proceedings were to be initiated was not yet known at the time of going to press.

5. PUBLIC LAW

You couldn't make it up - the Wembley saga continues

General developments

Past issues of this column have extensively documented the increasingly farcical nature of the train of events unfolding in relation to the New Wembley Stadium project.[298] Since then, developments in this long-running saga appear to have entered the realms of the unreal.

On 1/5/2001, the project moved closer to total collapse when the Football Association (FA) announced that it was withdrawing from any commitment to fund the new stadium, claiming that the project had the potential to bankrupt the Association. It pleaded with the Government to intervene in this matter, and a working group led by the then Home Secretary Jack Straw was set up in order to examine a number of options. These included building the stadium on a greenfield site outside London, or even

abandoning the notion of having a stadium for England at all, moving its home international matches around the country. However, the Government ruled out any financial support for the project, either from taxation or from the proceeds of the National Lottery.[299]

FA Chief Executive Adam Crozier revealed that a number of City institutions had requested the Association to underwrite the entire £400 million loan required for the new stadium as well as contribute £125 million towards it. The FA was not in a position to make such a commitment, Mr. Crozier said.[300]

This announcement was met with a great deal of criticism by various parties. The Prime Minister responded immediately by effectively accusing the football industry of greed, and demanded to know why the nation's richest sport was unable to produce the funds required in order to rebuild its legendary home.[301] These sentiments were echoed in various sections of the Press. Charles Sale, writing in the *Daily Mail*,[302] claimed that the money flowing into the FA's coffers amounted to some £170 million per year. This was guaranteed income for the next three years, and was in fact likely to increase significantly in the light of football's popularity.

The argument, frequently raised by the FA, that to spend the amounts specified above on the Wembley project would draw away funds from the future development of the game, is given short shrift by the author. The Association has committed £20 million to the Football Foundation - which receives the same amount again from the Government and from the Premier League - as well as £12 million per year to its own National game plans aimed at boosting amateur soccer. So even if allowance was made for Mr. Crozier's concern that sufficient money should be available for grass roots development of the sport, there should be adequate funds to ensure the construction of the New Wembley.

Various schemes were subsequently mooted in order to meet the cost. At one point, Sir Rodney Walker, Chairman of Wembley National Stadium Limited, who own the stadium, met a representative of an unspecified company aimed at exploring the possibility of selling Wembley's name to it. In the same way in which Bolton Wanderers had raised cash by allowing their ground to be called the Reebok Stadium, and Middlesbrough did likewise as regards the Cellnet Riverside Stadium, the possibility arose that future England fans would be flocking their way to, for example, the Coca Cola National Stadium.[303] To date, nothing further has been heard of that proposal.

Then ordinary fans faced the prospect of being squeezed out of the stadium altogether for the sake of raising extra money. It appeared that Sport England, which had committed £120 million in Lottery cash to the project, was prepared to disregard demands that 75 per cent of tickets should be on general sale, in order to give more scope for corporate use of the stadium.[304]

(The question of who should or could pay what will be returned to in a separate section - see below p.46).

Faced with a good deal of potential embarrassment over the increasing fiasco into which the project was degenerating (it has to be remembered that all this arose during the run-up to the last General Election), the Government appointed a "supremo" in order to extricate all concerned from the imbroglio. In one of its last actions before the June election, the Government appointed Patrick Carter, a non-executive director of the Prison Service, to decide where the stadium should be built - or indeed whether it should be built at all.[305] Carter already had some experience in this field, having analysed the finances of the 2002 Commonwealth games for the Government. He also had extensive experience of projects combining the public and private sectors, having founded, built and sold Westminster Health Care Holdings for £325 million, and having seen that organisation grow in manpower to 12,000 employees.[306]

However, even this appointment was clouded in confusion and uncertainty. Although Wembley National Stadium Limited (WNSL) had lost no time in announcing that, within days of his appointment, Carter had already been involved in meetings and would spend the time leading up to the General Election becoming aware of the complex issues involved, Carter himself said that he did not accept that he had been officially appointed and that his terms had yet to be discussed.[307]

Barely a few days earlier, Wembley officials had temporarily terminated their contract with the design team employed to attend to the new national stadium, in an attempt to save spiralling costs for the beleaguered scheme. According to some estimates, the FA was paying as much as £2 million per

month in order to maintain the Wembley project, even though no work had as yet been carried out. The bulk of the cost had been accounted for by the team of architects and engineers, who had been on monthly retainers whilst the project lurched from crisis to crisis.[308]

The General Election itself was not entirely unaffected by the Wembley fiasco. When Government posts in Mr. Blair's new administration were announced a few days later, it appeared that Kate Hoey had paid the price for her part in the crisis by being dropped as Sports Minister. Hoey, it will be remembered from previous issues, frequently clashed with Chelsea chairman Ken Bates over the project. She followed her former superior, Chris Smith (who also incurred a good deal of criticism for his part, or the lack of it, in the saga) into gubernatorial oblivion. She was replaced by Sheffield MP Richard Caborn.[309]

Shortly afterwards, it appeared that the troubled project had some new life pumped into it in late June, when it emerged that a major Australian construction firm had offered to meet most of the £500 million construction costs. Perth-based company Multiplex informed the FA that it was capable of providing up to £350 million of the funds required, in return for a 20-year lease on the new stadium. At least £100 million would still need to be met by the FA, which would rent the stadium from Multiplex until the contract ended. At that juncture ownership would be transferred to either Sport England, a government body, or the FA itself.[310]

Should the Government provide the funds?

Lack of funds - or at least an unwillingness on the part of the sport's governing body to part with them - lay at the root of the decision to put the project on hold, as described above. Inevitably, there were calls for the Government to step into the breach and supply the shortfall. This issue has also given rise to a good deal of controversy and criticism.

Even before the news of the latest breakdown of the project was announced, it emerged that the Government was preparing to step in to rescue the plan from disaster. This would take the form of assistance with grants for developing underfunded parts of the Borough of Brent and, more importantly, a commitment to underwrite the loans needed for the construction of the new stadium. Talks on this subject had been proceeding between the FA and Downing Street some time before the former announced that it was unwilling to carry the burden of financing the stadium.[311] No doubt this speculation was founded on the hope that the Government might fear that the project, if it failed, could make a laughing stock of English sport and be embarrassing for a Government which appears to have attached itself to the footballing bandwagon.

If these hopes were seriously entertained, however, they were swiftly dashed within a few days of the FA announcing its decision not to finance the project. Although it appointed a committee to look into the project (see above), the Government stated quite plainly that it could not simply write blank cheques or act as a national bank for projects encountering funding difficulties.[312]

However, all was not everything that it seemed to be. Within days came the revelation, made by a national newspaper, that FA Chief Executive Adam Crozier had requested the Government to conceal a deal whereby public funds would be allocated to the project until after the General Election. It appeared that Mr. Crozier had asked the Prime Minister for an initial £150 million, followed by subsequent monthly contributions, in order to save the proposed development.[313] He faced immediate calls for his resignation. Claire Ward, a Labour MP and a member of the House of Commons Culture Committee, expressed her amazement, not only that anyone would make such a request in writing, but also that someone would expect this sort of money to be released in secret. On the question whether Crozier should remain in post, she tersely but pointedly - if somewhat ungrammatically - replied that it was "for the FA to decide for themselves on Mr. Crozier's future."[314]

The FA immediately initiated a damage limitation exercise, admitting that the relevant letter had requested the Government to rescue the Wembley project, but never intended to conclude a secret deal to use taxpayers' money. At this point, it is extremely salutary to highlight that the relevant passage read as follows:

> *"The FA understands the difficulties the Government will face in the political process of coming to a binding agreement but this must be done by May 23, although it can be kept under wraps until after the election"*[315]

Exactly how this passage could be interpreted as anything else than a proposal to conclude a secret deal is a mystery known only to FA spin doctors, who have clearly been taking lessons at the Sir Robert Armstrong school of sophistry.

In late June there came a flurry of speculation that the Government was about to do a U-turn on funding the project. "Senior Government sources" were said to have informed a leading Sunday newspaper of the belief entertained by Ministers that the Government had no choice but to save the project from collapse, and that Whitehall officials were preparing a package made up of funds emanating from a number of departments.[316] Asked to respond to this speculation, a Downing Street spokesman said guardedly

> *"We are not ruling out public funding for Wembley for evermore and we are working hard to find a viable future for a national stadium. But there can be no blank cheques"*[317]

However, since then, and until the time of writing, nothing has occurred to suggest any renewed ardour on Mr. Blair's part (not to mention Dr. Gordon Brown's!) to bankroll this project.

Ken Bates continues to make waves

One of the more colourful characters to have been associated with the Wembley saga has been Chelsea chairman Ken Bates. In the previous issue of this column, it was recorded how he had made his presence felt not only through his controversial proposal that the new stadium should be located outside London, but also by vehemently attacking the then Sports Minister Kate Hoey for her part in the project.[318] Since then, Mr. Bates has not ceased to make waves on this issue.

In the wake of the news that the FA were abandoning their financial support for the project in early May (see above), Mr. Bates renewed his attack on the Government over their handling of the project, accusing its members of caring more about obtaining free tickets for top matches than raising funds for the new national stadium. He added that he had "nothing but contempt" for the Prime Minister following the latter's statement in the Commons that the new stadium was the FA's project, and not the Government's.[319]

Senior politicians did not constitute the sole butt of the Chelsea chairman's invective, as he had been equally scathing of leading figures in the FA itself, with Adam Crozier as the principal object of his criticism.[320] The latter had clearly hoped that Bates would not be voted back onto the FA Board as the Premiership Chairmen's representative, but the latter did just that at their Stapleford Park summit in June. In July, he went one better when he announced that he would make an audacious bid to become the Association's Vice-Chairman. In so doing, he hoped to replace his arch-rival and critic David Dein, Chairman of Arsenal FC. The relevant meeting had not yet been held at the time of writing.

Athletics at Wembley, Picketts Lock, or ...anywhere? An update

The question whether athletes should be suffered to disport themselves on the hallowed Wembley turf or not is one of the many thorny issues to have bedevilled this project, and has already been broached in the previous issue.[321] It will be recalled that the latest proposal to be made in this regard was for the construction of two stadia: one - the original Wembley project - to be used exclusively for the staging of football matches, and the other, to be built at nearby Picketts Lock, to serve as a national athletics stadium.

In early May, the attractions of this proposal had clearly begun to pall, when it was announced that senior Government figures had begun to discuss the likelihood of abandoning the project to build the Picketts Lock stadium, and, in the process, of inducing UK athletics into giving up any notion of staging the 2005 World Championships. Instead, the new Wembley would stage the 2007 championships on a temporary athletics track, returning Wembley to its original destination as planned when designs for the new stadium were launched two years ago.[322] However, the very next day, Dwain Chambers, bronze medallist at the 1999 Championships, officially kicked off the Picketts Lock project by submitting the relevant planning application to Enfield Council.[323]

The issue was thrown into further confusion in early July, when Sport England and the Government

called for a review of the plans for the proposed stadium after deferring a £60 million application for national lottery funding.[324] More particularly Sport England's lottery panel had expressed concern in four main areas: the gap in capital funding amounting to £10 million, the issue of long-term viability, the legacy of the project, and planning permission. They accordingly requested businessman Patrick Carter to conduct an urgent survey into the project. Carter, as has already been recorded earlier (p.45), was already heading a Government review into the future of Wembley, as well as recently reporting on the 2002 Commonwealth Games. Culture Secretary Tessa Jowell, however, insisted that the Carter inquiry did not signify that athletics was back on the Wembley agenda.[325]

However, in spite of the respected Minister's firm words, it appeared that earlier speculation about a Government U-turn was correct after all. In early August, the Government appeared to be signalling that Wembley could after all be a venue for athletics, in order to salvage Britain's hopes of staging the 2005 World Athletics Championships. In spite of the poor attendances at the 2001 Championships at Edmonton, the Sports Minister, Richard Caborn, continued to support the notion of Britain staging the 2005 event. However, he had been informed by the International Amateur Athletics Federation (IAAF) that the Championships could not be held anywhere in Britain except London, thus ruling out the possibility of using the facilities left by the 2002 Commonwealth Games in Manchester.[326]

This column will continue to monitor developments in this seemingly never-ending saga with a mixture of interest and amusement.

Functions of the Canaries Sports Council defined (Spain)

In 1997, the Canaries Sports Council was established by a regional statute, which left its functions and composition to be determined by decree (*decreto*). This was done in December 2000 by Decree No. 229/2000.[327] Article 2 thereof defines its functions, which consist, *inter alia*, in the following:

- to advise the Sports Ministry on sporting issues referred to it by that Ministry and to formulate proposals in this regard;
- to complete studies and reports on the concrete aspects of the sporting activities referred to it;
- to encourage the citizen to participate in, and co-operate with, the sporting authorities;
- any other function which may be entrusted to it by the Sports Ministry, or which may be imposed on it by legislation or regulation.

Articles 3-10 provide that representation on the Council shall be drawn from a wide variety of circles, including the local authorities, the Universities, the sporting associations, as well as leading sporting figures and experts.

Why legal attempts to stop Mike Tyson boxing in this country failed. Article in academic journal (UK)[328]

In the course of 2000, boxer Mike Tyson made a number of highly-publicised visits to this country, which were extremely controversial in view of the former World Champion's earlier conviction for rape. To enable these visits to take place, the Home Secretary had issued him with a temporary visa from the US. This decision ran into obloquy from several women's pressure groups, who suggested that Jack Straw had placed the interests of sport above the requirement that violent criminals be excluded from society.

Two attempts to have the Home Secretary's decision overturned by the courts failed. The first was brought in England, whereas the second was tried by a Scottish court, one of the fights involving Tyson having taken place in Glasgow. Both applications were dismissed, but for different reasons. The author of this article uses these decisions to point up some interesting differences between English and Scottish public law.

In the English decision, made by Sullivan J. in the Queen's Bench Division of the High Court, the judge dismissed the application on substantive rather than procedural grounds. In order to enter this

country Mike Tyson was bound to apply under section 3(1) of the Immigration Act 1971. Rule 320 of the Immigration Rules sets out various grounds on which leave to enter should normally be refused. Ground 18 applies this rule to those convicted of relatively serious offences unless the immigration officer is satisfied that admission would be justified for strong compassionate reasons. These are rules of practice, not rules of law, and are there for the guidance of those applying the Immigration Act; in addition, they leave room for the exercising of some discretion. This is why the judge found that there was no substance in the first submission made by the applicant, i.e. that the decision to grant Tyson right of entry was inconsistent with the provisions of the rule. The second argument was that the terms of the rule reflected underlying policy that those who had infringed standards of human decency should not be admitted to this country, regardless of whether they still represented a danger to others and that, by giving the relevant instruction, the Home Secretary had precluded an inquiry into the circumstances of Tyson's criminal conduct. Here again, the judge replied that, given the discretion conferred on the Home Secretary, he was not satisfied that this ground was seriously arguable.

However, when the matter came to the Scottish Court of Session, the judge did not get as far as ruling on the merits of the case. Lord Clarke decided to hear first submissions from the respondent, since under the relevant procedural rules the Secretary of State had lodged written answers to the petition which contained a plea of no interest to sue. This plea is heard before the merits of the case are examined. He referred to a dictum by Lord Dunedin in an earlier case,[329] which stated that a litigant must invariably present a title and interest to sue and that, for a party to have such title, "he must be a party to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies". Taking his cue from this dictum, Lord Clarke stated that it was a fallacy to suppose that, because of the public interest which dictates that ministers should act lawfully, this confers on every member of the public the right to challenge a minister's act or decision. This right must have been conferred on them by law, either expressly or impliedly. This is why he denied the Rape Crisis Centre, who had made the application, the right to challenge the Home Secretary's decision.

The author notes that the issue of title to sue did not arise in the English case, and attributes this to a fundamental difference in approach between the English and the Scottish judiciary. The former is inclined - although not dogmatically - to consider that if the judge, on a preliminary perusal of the material available at the commencement of a case, considers that this discloses that which on further consideration could turn out to be an arguable case, has sufficient discretion to hold that the applicant had a sufficient interest to have that question reviewed by the court. In Scotland, the relevant procedural rules are such that the issue of *locus standi* is one which is separate from the merits of the case.[330]

The author concludes that this difference represents an unsatisfactory state of affairs, since the pressures relating to matters of public interest which have influenced the development of the *locus standi* issue are to be found on both sides of the border. They deserve to be treated on an equal basis by the courts in both jurisdictions.

Public measures countering foot-and-mouth disease and their effect on sport - an update

It will be recalled from the previous issue that the recent outbreak of foot-and-mouth disease has affected sporting activity in this country in several ways.[331] Although the worst effects of the disease seem to have been overcome, some sports continue to suffer the impact of the measures adopted to defeat the disease.

Racing

Because of the very nature of this sport, it is obvious that racing was always going to be one of the principal sporting victims of the disease, as can be seen from the previous issue.[332]

Some semblance of normality returned to the sport in Ireland in early April. Joe Walsh Irish Minister of Agriculture, allowed racing to resume on Easter Monday, albeit on a limited basis.[333] In Britain, the horseracing authorities were a trifle more cautious. On 11 April, the British Horseracing Board (BHB)

allowed a number of courses to commence operations and established certain criteria on which a decision would be made as to which additional courses would be allowed to stage meetings. Any decision had to be approved by the Ministry of Agriculture, Fisheries and Food (MAFF). At the time, there were 14 courses where racing was prohibited because, under the relevant guidelines issued by the BHB and the Jockey Club, they fell within a 10-kilometre exclusion zone surrounding an infected farm.[334]

This obviously came as welcome news to the various interested parties in the sport. However, the fact remained that a number of courses remained closed even under the new guidelines, which attracted criticism of the horseracing authorities in various circles. Many considered that the "conscientious objection" which caused the racing industry to refrain from operating in infected areas seemed increasingly incongruous, particularly since other sporting and social events had proceeded without such precautions.[335] On 23 April eight further courses were given clearance to resume racing, which still left Carlisle, Cartmel, Catterick, Chepstow and Uttoxeter on the banned list.[336]

Other sports

In the world of rugby, the disease continued to produce adverse consequences, both directly and indirectly. In June 2001, the Rugby Football Union (RFU) decided that those rugby teams which had agreed to cancel matches in order to assist in countering the disease were to be relegated for failing to complete their fixtures. This elicited vociferous protests from supporters in rural areas, who claimed that they were merely following RFU guidelines. The RFU said that the decisions were made on the basis of an emergency formula.[337]

Earlier, Six Nations Tournament sponsors Lloyds TSB demanded a sizeable refund for the manner in which the tournament had been wrecked by postponements caused by the foot-and-mouth disease.[338]

A top international motor sport event fell victim to the crisis when the Isle of Man TT races, due to take place from 26 May to 8 June, were cancelled. Although the event is normally worth between £5 million and £7 million to the island's economy, this was more than counterbalanced by the threat to that economy if there were to be an outbreak of foot-and-mouth disease.[339]

The sport of cycling was left relatively untouched by the measures in question, even though it caused cancellation of the Girvan three-day race in Scotland in mid-April.[340]

In rallying, the Northern Ireland Motor Club cancelled the Stena Line Ulster Rally 2001, due to be held in September, because of the crisis.[341]

Even the relatively obscure sport of fell running has not eluded the consequences of these safety precautions, which forced the cancellation of the England trial race for the European Championships at Mount Snowdon. The disease had already caused the event to be postponed once, it having been switched from Cumbria.[342]

Race riots force Rugby league derby switch[343]

In July 2001, the key Rugby League fixture between Bradford and Leeds was postponed for two days on police advice. The reason for the switch was the racial unrest which prevailed in the city of Bradford, since the "Bulls'" ground, Valley Parade, is located close to one of the areas in which the rioting took place. Both clubs pride themselves on their support for a multi-ethnic society.

Bowls club fails to lift centuries-old alcohol ban (UK)[344]

In August 2001, the hopes entertained by members of a bowls club of opening a bar after a century-old wait have been dashed by councillors who consider that to do so would be "disrespectful" to a Victorian teetotaller. Members of the Hesketh Bowls Club in Dartford, Kent, wanted to install the bar in their Edwardian pavilion to coincide with the club's centenary celebrations due to be held in three years' time. However, their planning application was turned down because Dartford Council considered that it would display a lack of respect towards the wishes of Everard Hesketh, a local businessman and councillor who donated the ground to the bowls club in 1904.

Racecourse main grandstand "unsafe" (UK)[345]

The main grandstand at Towcester racecourse requires renovations costing up to £1 million, or even possible demolition, after failing to pass a health and safety inspection. Asbestos discovered in the roof area of the 1928 stand, as it is formally known, must be removed and a number of other improvements made if the stand is to meet currently applicable safety rules.

Sports Minister should have Cabinet status, says leading administrator (UK)[346]

In May 2001, David Oxley, Chairman of the Central Council of Physical Recreation (CCPR), deplored the fact that British sport was one of the poor relations of Europe, stating that among other sporting nations, only Spain is worse off than Britain in a league table of government funding. Britain spends only £1.40 per capita on sport, even though sport and leisure as an industry are worth £12 billion annually. This led him to invite Mr. Blair's second administration to appoint a Sports Minister of Cabinet status. He added that a Cabinet minister would have more clout with the Chancellor of the Exchequer and increased access to funding across departments such as health, environment and education, on which sport has a major impact.

Athletes apply for asylum following Canadian games[347]

Over 100 athletes who participated in the Francophone Games in Ottowa in July 2001 stayed behind in Canada and applied for asylum. This is believed to be the country's largest petition for refugee status in modern times. The athletes claiming asylum came from 17 different countries for an event which is designed to unite the French-speaking world. They are unusual in combining eight sports with eight cultural events.

FA under investigation over income from Charity Shield fixture (UK)[348]

The opening fixture of the 2001-2002 soccer season in England was played under a cloud in the wake of the news that the Football Association (FA) was being investigated by the Charity Commission, which alleged that for the second year running the FA has failed to indicate clearly on tickets exactly how much of the income from ticket sales will be awarded to charitable causes.

No details on the outcome of this investigation were available at the time of writing.

Fans of top English soccer clubs banned from away games[349]

In the previous issue, it was reported that the Government had ruled out a return to standing areas at football grounds.[350] However, at some stadia this appears to have been met more in the breach than in the observance.

In August 2001, safety officials and Premiership club bodies banned fans of top teams such as Liverpool and Manchester United from receiving tickets for away fixtures. This was in order to prevent a potential disaster which could be caused by supporters insisting on standing up in all-seater areas.

In addition, parts of stadia where fans ignore pleas from stewards to sit down will be closed down, in a crackdown on the dangerous and growing practice of mass standing in areas designed for seated spectators.

Smoking ban for next World Cup[351]

The Government of South Korea intends to prohibit smoking in football grounds during next year's World Cup as part of a plan to make the finals environmentally clean.

6. ADMINISTRATIVE LAW

Match result cannot be challenged after its ratification. French Supreme Administrative Court decision

This decision is reported under section 16, "Issues specific to individual sports" (below, p.85).

Leading racehorse trainer ordered to demolish stables which spoil the view[352]

Racehorse trainer David "Dandy" Nicholls and his wife Alex Greaves, Britain's best-known female jockey, enjoy a widespread reputation for training sprinters in their yard. In view of their growing success, the couple invested over £500,000 in order to provide additional stabling, as well as increasing their staff from eight to 26. Mr. Nicholls was issued with planning permission to build 27 stables, but was alleged to have added a further 50 without authority.

After a complaint was made to Hambleton District Council by a nearby resident about the visual impact of these stables, Nicholls presented a retrospective application. Planners accordingly visited the block of stables, which measures 29 by 29 yards, but subsequently refused permission because of the visual impact of the building, which is located in a flat landscape and unscreened by vegetation. North Yorkshire County Council also lodged an objection on the grounds that the development in question would cause a substantial and dangerous increase in the volume of traffic.

Hambleton's officers were later granted powers to seek an enforcement order against the additional stables.

French administrative court annuls penalties imposed on footballer for drug-taking

This case is featured under Item 15 "Drugs legislation and Related issues", (below p.76).

2004 Olympic Village given the go-ahead by Greek administrative court[353]

In February 2001, the highest administrative court in Greece gave approval to plans for the construction of the Olympic Village for the 2004 Games, to be held in Athens. The scheme had been delayed by a number of weeks whilst the Court examined the possible impact which the village could produce on water drainage in the area.

Nick Faldo's "love temple" fails to obtain planning permission[354]

To mark his third wedding, golfer Nick Faldo had envisaged the construction of a lavish Roman love temple, which was to have featured busts of Apollo and Diana, and located in the five-acre grounds of Faldo's new home in Old Windsor, Berkshire.

However, realisation of this project has been blocked by the Planning Committee of Windsor and Maidenhead Borough Council. The principal reasons for this refusal have been that the Faldos' grounds are located within the green belt, and that the temple would clash with their 18th century Gothic mansion.

Work permit refused for Moroccan international footballer[355]

In July 2001, Nationwide League club Sheffield United were refused a work permit for Lahcen Abrani, a Moroccan player with over 40 international caps to his credit.

Appeal against dismissal of racing stables conversion fails. English High Court decision[356]

In the case under review, Harwoods Properties had applied to the West Berkshire District Council for outline planning permission and conservation area consent for the redevelopment of Bourne House Stables, Lambourn. The development scheme envisaged 21 units of affordable housing, as well as roads, footpaths, parking and landscaping. The council failed to determine the application within the prescribed period, and the applicant appealed to the relevant Inspector.

The inspector described the development plan as including the Newbury District Local Plan (LP) and the Berkshire structure plan. He also found that the emerging deposit draft local plan (ELP) was up-to-date, and had reached such an advanced state in the statutory process that its policies should be given considerable weight. He dealt with policies in the extant LP and the ELP relating to the racehorse industry, and stated that "because of the prescriptive nature of these policies ... they are the starting point when considering the requirements set out in Section 54A of the Town and Country Planning Act 1990." He also considered policies regarding the provision of affordable housing and found that the "extant and emerging development plan encouraged such housing in rural areas but not at the expense of racehorse training and breeding yards." He therefore dismissed the appeal.

The applicant subsequently attempted to have the Inspector's ruling set aside under section 288 of the Town and Country Planning Act 1990, on the following grounds: (a) the inspector had misdirected himself where he raised racehorse policies above housing policies in the emerging and extant plans, and (b) he had misapplied section 54A of the Act. The applicant maintained that the requirement, laid down in section 54A, that the appeal be determined in accordance with the development plan (unless material considerations indicated otherwise) applied to the plan as a whole. The Inspector should have assessed all parts of the plan, both those supporting the proposal and those pointing in the other direction. The Inspector had erred where he had found that housing policies were relevant but had subsequently consigned them to the category of "other material considerations."

The Court dismissed the application. It was primarily for the policy-maker to interpret policy. He applicant's approach had treated the wording of the policies in a legalistic manner and divorced them from their planning context. The Inspector had exercised his planning judgment and interpreted the policies against the background of the racing industry in Lambourn. Not only was he entitled to conclude that the overall effect of the affordable housing policies was "to encourage such housing ... but not at the expense of existing racehorse training", but he was also clearly right to do so.

The fact that the inspector had referred to the housing policies under the heading of "other material considerations" was irrelevant here. It could not be maintained that he disregarded those policies. He had relegated them because he considered them to be secondary, not because he failed to treat them as part of the development plan.

A loan awarded to an amateur football club is not a public subsidy to a commercial firm. French administrative court decision[357]

Financial aid awarded by public bodies may be a traditional practice, but can give rise to considerable legal difficulties, as witness the decision of the French Supreme Administrative Court (*Conseil d'Etat*) in a case involving a loan awarded to an amateur football club.

The Municipal Council of the town of Dunkerque had, in 1994, decided to award to the Union Sportive Dunkerquoise Football (USDF) the sum of FF 2.5 million, which was to take the form of a loan attracting interest at 8 per cent, redeemable over a period of 15 years. This loan was underwritten by a loan taken out simultaneously, and subject to the same conditions, by the municipality with a bank.

The state representative of that area (*le Préfet*) challenged this decision before the Administrative Court (*Tribunal Administratif*) of Lille.[358] The Court set aside this decision. It held that, on the one hand, the aid in question constituted an aid granted to a private business and, that, on the other hand, it infringed the provisions of Article 4 of the Law of 7/1/1982 because the loan awarded did not fall within any of the categories of "direct assistance to economic development" contained in this provision. The Municipality of Dunkerque accordingly appealed against this decision to the Supreme Administrative Court.

More than five years later (!), the Court in question, i.e. the *Conseil d'Etat*, in turn set aside the decision of the Lille court. It held that the club which had received the loan did not constitute a business, since (a) it was a body which managed the training centre for amateur teams as well as the amateur section of the local football club, and (b) its funds emanated almost exclusively from the subsidies awarded to it by the Nord/Pas de Calais Region and by the Municipality of Dunkerque. Therefore the loan in question did not fall within the terms of the 1982 legislation quoted above, and the Lille Administrative court was accordingly wrong to set aside the local council decision on the basis of this legislation.

The Supreme Court also dismissed the other arguments which had been raised against the disputed decision. The first was that the granting of the loan violated the rule, laid down in a 1984 Law, under which no person other than a credit institution was allowed to engage in banking operations as a matter of practice. The Court replied that since the municipal council had restricted itself to the one loan awarded to the sports club, this could not in any way be regarded as engaging in such operations as a matter of practice. The second was that the local council had, by awarding the loan, infringed the Law of 2/1/1959 which required local councils to place their available funds with the Public Treasury. Since the award of the loan in question could not be regarded as an investment of available funds, the decision to award the loan did not infringe this legislation.

(On the EU law implications of public subsidies to sports clubs, see also below, p.57.)

Agriculture Minister was correct in rectifying a codicil to a collective bargaining agreement. French administrative court decision[359]

French social legislation allows the Agriculture Minister to intervene in any codicils which are attached to collective bargaining agreements where the latter are inconsistent with French laws and regulations. In 1998, this is what the Minister had done in relation to the staff employed at riding schools. The codicil in question had provided that employment in various capacities of equestrian training and teaching was open not only to those having the relevant state-approved qualifications, but also to those who had sufficient professional experience or were holders of other types of qualification.

The Minister had noted that this infringed the provisions of the French law on Sports Organisation of 16/7/1984. He therefore intervened in such a way that the codicils were applicable, but subject to the restrictions imposed by the said sports legislation. The relevant trade unions objected to this, claiming that they has not been able to participate in the negotiation of these codicils and the manner in which they were to be applied. The French Supreme Administrative Court disagreed, ruling that the applicable procedure, which allowed for adequate consultation of the trade unions, had been followed by the Minister. The codicils in question had been properly published in the Official Journal (*Journal Officiel*) for this purpose. Although the Minister had not included the reservations which would qualify these codicils as described above, the Court held that, under the relevant procedure, the Minister had not been obliged to mention these reservations in the announcement of these measures in the Official Journal.

7. PROPERTY LAW

INTELLECTUAL PROPERTY LAW

Tussle over rights to WWF name resolved[360]

The reader may recall a report, made in a previous issue,[361] that the World Wildlife Fund for Nature had initiated proceedings before the English High Court against the World Wrestling Federation over the use of the initials WWF. This protracted case reached its conclusion in August 2001, when the judge ruled that it was the wrestling organisation which had breached the terms of an agreement made with the environmental charity in 1994 which was intended to avoid confusion over their identities. Essentially, the agreement was that the wrestling federation would restrict its use of the initials WWF to its business activities. The charity had registered the initials as a trade mark in 1961, when it was established as the World Wildlife Fund. In spite of the subsequent name change, the charity continues to use the initials WWF, together with the panda symbol, in its advertising. The agreement reached between the two organisations had been the result of several trademark disputes

between them; however, as the Federation grew into a popular entertainment corporation, use of these initials became increasingly widespread.

In his decision, Mr. Justice Robin Jacob stated that the charity had become concerned at criminal proceedings which had been instituted against the Federation in the US, and by an article in Penthouse Magazine alleging that its wrestlers and employees were involved in "violence, paedophilia and rape". His ruling effectively prevents the wrestling federation from using the initials outside the US.

At the time of going to press, the claims for damages had not yet been settled.

Conference on intellectual property rights in sports (US)

In October 2001, a conference on intellectual property rights in sport, covering such issues as trademarks, unfair competition, and athletes' publicity rights, was held at Marquette (US) University. It was sponsored by the National Sports Law Institute of Marquette University Law School, and the law firm of Foley and Lardner.

The conference was split into four panels. Panel 1 concerned itself with the marketing and protection of professional league and team intellectual property rights. Panel 2 related to the worldwide enforcement of intellectual property rights. Panel 3 concerned athletic event sponsorship and player product endorsements. Panel 4 related to the protection and enforcement of NCAA and university marks.

Use made by tipping service of musical band's name infringes the latter's copyright. Danish court decision[362]

In this case, the claimant was a musical band known as *Bamses Venner* (Bamse's Friends), this being a trademark protected name, who brought an action against a football results tipping service for having used their name in their advertising campaign and thereby infringed the claimant's trademark rights. The latter had, in its newsletter called *Tipsbladet*, advertised its betting game called *Oddset* with particular reference to the coming match between Brondby and AGF, for which it had organised a special bet. The advertisement reminded the readership that the match was being shown on television, and that this was a match between Brondby and *Bamses Venner* - a play on words, because the leader of the band, Bamse Jorgensen, is a supporter of the AGF club.

The defendants had attempted a similar ploy by inserting in the official programme of another game, between AGF and FCK, once again advertising its bet on that match by reference to the game between FCK and *Bamses Venner*. The claimant had not given authorisation for his name to be used in this manner, and sued for breach of copyright. The first court awarded the action to the claimant, and set the sum which should be awarded by way of damages at the level which, in the court's view, would have constituted an adequate remuneration for the use of the band's name. The defendants appealed.

The Appeal Court (*Landsret*) confirmed the first court's ruling. It accepted that it was sufficiently known among the readership of the tipping service in question that the claimant was a supporter of AGF, and that they had therefore not been misled into believing that the expression *Bamses Venner* was synonymous with the name of the band. Accordingly, they had not been induced into believing that the band in question would be playing at the event advertised. However, the use of that trademark-protected name without the holder's permission was undoubtedly an infringement of the claimant's intellectual property rights. The band did not have an association with the sporting world which was such that there was a natural link between the use of the name in question and the desire to increase the defendant's turnover. Accordingly, the claimant had a right to damages.

New Law Journal feature on intellectual property in sport (UK)[363]

The UK periodical *New Law Journal* recently featured in its columns an "Intellectual Property Brief" which reported on a number of references to the European Court of Justice (ECJ) on trademark issues, such as that which concerned the question whether the use of badges of allegiance to Arsenal FC infringed the rights of the trademark owner.[364] Its author is Richard Davis, of Hogarth Chambers.

Fulham FC win rights to domain name (UK)[365]

Fulham FC, a football team who have known leaner years but this year won promotion to the English Premiership, recently had yet another reason to celebrate when the World Intellectual Protection Organisation (WIPO) awarded it the right to the internet domain name www.fulhamfc.com. Previously, this address had been registered by the Central American company Belize Domain Services. The same company has also registered the name www.wimbledonfc.com, so doubtless another application will be winging its way to WIPO in the not too distant future.

8. COMPETITION LAW

NATIONAL COMPETITION LAW

British Horseracing Board[366] and Premier League/BSkyB deal[367] under OFT investigation (UK)

The previous issue[368] contained a report on a recent High Court decision in which it was held that the bookmaker Hill's should pay the British Horseracing Board (BHB) for its pre-race internet data. Thus far, Hill's are the sole bookmakers to have taken out a licence for the use of these data. However, Hill's consider that the fee charged by the BHB for this privilege, i.e. 1 per cent of their internet turnover, was excessive.

Accordingly, this issue attracted the interest of the Office of Fair Trading, being the official competition "watchdog". Following preliminary inquiries, the OFT announced in mid-June 2001 that it had reasonable grounds for suspecting that the BHB had infringed a section of the Competition Act 1998. More particularly it is being alleged that the BHB has abused its dominant position by setting the fee at that level.

The outcome of this investigation was not yet known at the time of writing. In the meantime, it was also learned that the BHB was to appeal against the High Court ruling mentioned above.

At around the same time, the OFT confirmed that it intended to examine the three-year deal made between the Premier League and BSkyB. This follows the unsuccessful action brought against BSkyB in the course of 1999 where the OFT claimed that the collective bargaining position adopted by the Premier League was anti-competitive.[369]

Adidas fined in France over exclusive deal[370]

Sports goods manufacturer Adidas was recently fined £1.5 million by a French court for anti-competitive practices. The Court held that the company, by concluding a contract with the French Football League Association for the exclusive right to supply equipment to all clubs playing in the French First Division, had acted in infringement of competition rules.

Following the ruling, Adidas instead entered into agreements with a mere three of the 14 teams involved.

Should the use of drugs in sport be regarded as a distortion of competition? Article in German professional journal[371]

That the issue of drugs in sport is one of the more intractable problems with which the world of sport is currently faced is a proposition which hardly requires any justification for the readership of this journal. Hitherto, the legal implications of this practice have been restricted mainly to the disciplinary action taken by sports authorities against the relevant offenders. However, the author of this paper gives expression to a growing feeling amongst those involved in sport at various levels that this issue should now find its way into the ordinary legal system, to be tried before the ordinary courts.

The prime candidate for such accommodation within the legal system is obviously the criminal law. More particularly the offending athlete should be subjected to the criminal consequences of his/her

actions - in fact, the author opines that the basis for the indictability of drugs offenders already exists in Article 263 of the German Criminal Code, which penalises fraud. However, fraud only serves the protection of property interests. The result is that, on the one hand, the improper behaviour of the drugs offender towards fellow competitors is not caught by any criminal indictment, and, on the other hand, the infringement of sporting ethics - i.e. the notions of fair play and equality of opportunity - is not given any recognition by the criminal law. In order to protect this notion, which is the sole aspect of sport to serve as a social role model, through the criminal law, a new drugs offence would need to be created.

The authors put forward a proposal for a new law based on the notions of both business crime and competition law, which can also find its justification in the increasingly narrow links between sporting and commercial interests.

EU COMPETITION LAW

Commission does not object to subsidies for French professional sports clubs[372]

In April 2001, the European Commission decided not to oppose a public subsidy scheme for the benefit of professional sports clubs, which had been notified by France. The reason for this is that these subsidies do not constitute a state aid within the meaning of the EC Treaty. It was clear from an examination of the notification that the measures in question were designed to assist education and training, and as such represented an educational or comparable scheme.

Under the subsidy in question, French local authorities will be able to provide professional sports clubs having state-approved youth training centres with public subsidies of up to £2.3 million per annum for each recipient club. The sports involved are football, basketball, rugby, and volleyball. This type of education is intended by the French authorities to provide young people with an education which will enable them to reach the best possible level of sporting achievement and to reconcile sports training with a thorough education, thus allowing them to find normal employment (or, for those who take up sport professionally, to find such employment on completing their career). Other objectives of this scheme are the provision of community facilities and the prevention of violence.

The French authorities have consented to monitor the allocation of these subsidies closely, in order to prevent a situation whereby the monies awarded exceed the net cost of the training involved, and hence avoid any cross-subsidisation. This is to be achieved mainly by requiring separate accounts to be kept for training measures on the one hand, and for the economic activities of the professional sports clubs on the other hand.

UEFA's new Broadcasting Regulations cleared by the Commission[373]

The European Commission has recently decided that the new rules applied by UEFA, Europe's governing body of football, on the broadcasting of football matches, as amended in July 2000, fall outside the scope of EU competition law. The new rules allow national football federations to block the televised broadcasting of football for 2½ hours either on Saturdays or on Sundays, in order to protect ground attendance as well as amateur participation in the sport. They constitute a good example of the way in which competition rules and the special characteristics of sport can be reconciled.

The problems posed by UEFA's broadcasting rules go back several years. They had invariably met with strong opposition from commercial broadcasting companies, on the grounds that these rules unduly restricted them in their freedom to screen the matches for which they had paid. The new regulations, however, constitute, in the Commission's view, a considerable improvement on the original Regulations which were presented to the Commission originally, in terms of both scope and procedure. This has enabled the EU executive to declare the rules in question to be outside the scope of its competition law.

The old UEFA Broadcasting Regulations which were presented to the Commission were extremely complex and extensive in scope. They operated within a time window system covering the entire week which provided for different authorisation requirements. The authorisation system has been abandoned under the new rules. Football associations can therefore no longer arbitrarily veto broadcasts into their country.

The rules will provide national football associations with the opportunity of scheduling domestic matches at times when they are not liable to be disrupted by the simultaneous broadcasting of football to the detriment of stadium attendance and amateur participation in the sport. The Commission also concluded that the new Rules would not appreciably affect cross-border broadcasts since they only apply to so-called "international" broadcasts, i.e. broadcasts specifically produced for a given territory in terms of language or content, and since most broadcasters only intend to broadcast into the territory of a single football association.

The Commission also examined the emerging market for the internet streaming of football but took the view that the new Regulations would not significantly restrict the technological and commercial developments in this sector. However, the Commission reserves the right to intervene in the future if developments are brought to its attention which would indicate that the Regulations had become an impediment to the development of new Internet services.

The decision by the Commission on the UEFA rules is without prejudice to an assessment of the practice whereby broadcasting rights are sold jointly by national football associations, which continues to be examined under Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. See next section, below.

Commission opens proceedings against UEFA Champions League selling policy[374]

On 20/7/2001, the European Commission decided to open proceedings against UEFA's selling policies regarding television rights to UEFA Champions League fixtures. This took the form of a statement of objections communicated to UEFA, the body controlling European football, challenging its current arrangements for the selling of rights to broadcast Champions League matches. More particularly the Commission was concerned that UEFA's policy of selling all free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years may be incompatible with EC competition law and should be amended to ensure that European football fans could enjoy the benefit of wider coverage of major European football events.

In compliance with EU competition law, UEFA notified its Regulations concerning the Joint Selling of the Commercial Rights to the UEFA Champions League to the European Commission in the course of 1999. In so doing it requested clearance for these Regulations under EU competition rules. The statement of objections cited above relates exclusively to the UEFA Champions League television rights.

The Commission takes the view that joint selling on an exclusive basis presents a number of effects which threaten affordable access to televised football unless certain safeguards are introduced. UEFA has the power to sell all television broadcasting rights to the final stages of the Champions League on behalf of the clubs taking part in the League. One of the effects of this state of affairs is that only the larger media groups will be able to afford the acquisition and utilization of the rights in question. This in turn causes unsatisfied demand on behalf of those broadcasters who are unable to obtain TV rights in football. This absence of competition may also slow down the use of new technologies, because of a reluctance of the parties involved to embrace new ways of presenting sound and pictures of football matches.

The Commission fully endorses recognition of the specific nature of sport as expressed in the European Council declaration made in Nice in December 2000, at which the Council encouraged a redistribution of part of the revenue from the sales of television rights at the appropriate levels, as being beneficial to the principle of solidarity between all levels and areas of sport. However, the Commission also considers that the current form of joint selling of television rights by UEFA has a highly anti-competitive effect by foreclosing television markets and ultimately restricting television coverage of those events by consumers. The Commission considers that the joint selling of television rights as practised by UEFA is not indispensable in order to guarantee solidarity amongst clubs participating in a football tournament. It should be possible to achieve solidarity without incurring anti-competitive effects.

The Commission also stated that it would examine carefully any constructive proposals to render the current arrangements consistent with EU competition rules and to guarantee open access to the televised coverage of football.

UEFA has three months in which to respond to these objections, and may also request a hearing at

which it would be able to submit its arguments directly to the representatives of the domestic competition authorities.

This column will eagerly follow further developments in this case.

9. EU LAW

New work on professional sport in the European Union[375]

This work comes at a critical time for the future development of sports law. As the majority of readers of this organ are surely aware, sport is increasingly becoming commercialised and commodified, to the point where sport currently accounts for approximately three per cent of world economic activity. Its regulation remains, however, fragmentary and it is difficult to draw the line between purely sporting issues and business issues.

The work under review consists of a series of contributions by eminent scholars of sports law which examine the interface between sport, business and policy. They analyse the manner in which the law regulates sport and sports business, and demonstrate the need to redefine the frontier between "sporting" rules and legal regulation. It is suggested that sporting bodies and associations have a significant part to play in shaping the contours of this frontier. It is also suggested that there is sufficient clarity in EU policy on this issue, which allows sports associations to become proactive in their own re-regulation.

In their postscript, the editors summarise the contents of the work and draw some conclusions. It seeks to contribute to the debate concerning the question of how sport can best be re-regulated in the 21st century, and represents a significant contribution to the study of what could be called *Lex Sportiva*.

Seminar on EU transfer law (UK)[376]

In April 2001, representatives from various professional football clubs, including Newcastle United, Manchester City, Norwich City, Peterborough United, Sheffield United, Watford and Barnet, were in the audience to hear Tom Usher, a partner in London law firm SJ Berwin, inform a seminar organised by the firm that the recent deal aimed at transforming the transfer system is likely to be challenged both at the national and at the European level. The members of the audience expressed themselves as being opposed to the reforms, saying that they were unworkable in practice and potentially damaging to British football.

"Floodgates" warning of new transfer rules (UK)[377]

In May 2001, a warning was issued that English football would be open to all foreign players if the Premier League were forced to accept the elimination of the current quota system in the light of the recent EU deal on transfers. This represented the greatest threat to the future progress of home-based players, according to a team of Premier League lawyers who have been studying the legal position which now allows freedom of movement for players who are citizens of an EU member state.[378]

Survey of EU law on freedom of movement published in journal[379]

The article under review constitutes a workmanlike survey of the applicable EU law on the freedom of movement of professional athletes within the Union. It traces the major cases decided both by the EU judiciary and by the national courts in this field, charting the course followed from the very inception of this case law, being the *Walrave and Koch* decision by the ECJ,[380] until the latest decisions which have been featured in this journal (e.g. the decision by the French Administrative Court of Appeal in the *Deliège* case[381]).

The most interesting aspect of this piece is that the author devotes a considerable amount of space to the Association Agreements between the EU and various non-member states, which all have a non-discrimination clause incorporated into them. With professional sport becoming increasingly international, and at a time when one of our Premiership teams once fielded a side containing not a

single Englishman, this clause is increasingly likely to loom large in the panoply of legal instruments used in sports law - see, for example, the decision by the French Administrative Court of Appeal, recently cited in these columns, in the *Lilia Malaja* case.[382]

Commission acts against Member States for infringements regarding mutual recognition of professional qualifications[383]

On 30/7/2001, the Commission decided to take legal action against a number of member states for having infringed various provisions of EU law on the mutual recognition of professional qualifications. Indeed, one member state, Greece, is actually being taken to the European Court of Justice (ECJ) for its failure to transpose a directive on this subject. However, the action which concerns issues affecting the world of sport, which has been taken against Italy, has not quite reached that stage yet, in that it has merely been the subject-matter of a "reasoned opinion", which under Article 226 (ex 169) of the EC Treaty is the final stage of the conciliation procedure before matters are taken to the ECJ.

The reasoned opinion taken against Italy concerns Directive 92/51/EEC on a second general system for the recognition of professional education and training (supplementing 89/48/EEC) concerning access to professional sport, as well as the professions of coach, technical director, sports director and trainer. Italy stands accused of having failed to incorporate this measure into its domestic legislation. Whether or not Italy had responded satisfactorily to this reasoned opinion was not yet known at the time of writing.

Reform of FIFA rules governing transfers - an update

The previous issue has extensively documented the arrangements - for want of a better term - reached between FIFA (the world governing body of football) UEFA (the organ controlling European football) and the European Commission on achieving consistency of the football transfer system with the requirements of EU law. It also reported on the initial reactions from various interested parties.[384] These included the worldwide players' union FIFPRO, which seemed less than ecstatic with these developments and had threatened court action to remedy this state of affairs. Shortly afterwards, in fact, proceedings were initiated before the Brussels Court of First Instance.

The main concerns behind this litigation was whether (a) the disciplinary measures provided, (b) the so-called stability period, during which the a player is not allowed to change his employer, and (c) the compensation awarded for the training of young players were all consistent with EU law. FIFPRO lawyers were also unsure as to what the possible consequences could be for a player who wished to rescind his contract, whether during or after the stability period. The feeling was that a player may be allowed to walk out of a club, but did not know how many bullets he could expect in the back.

However, in July these proceedings were adjourned at the players' union own request on the grounds that it wanted to give consideration to the newly revised FIFA regulations on this subject.[385] This move was objected to by FIFA, because it wished to avoid that the new regulations would be tested against the law. It believed that it stood to gain if it was only the 5 March "agreement" which was to be examined. However, the judge held that the FIFPRO request was well-founded.

The court action was originally based on the 5 March "agreement". However, shortly prior to the FIFA conference in Buenos Aires in early July 2001, some major changes had been made to the transfer regulations. One of the most important of these changes concerned the rules applicable to the new International Arbitration Tribunal. Under the new system, there will be a three-tier arbitration panel which will adjudicate disputes between clubs and players. The first will be at the national level, the second at the European level and the third at international level, to be run by a FIFA-appointed organ.[386] Players wishing to extricate themselves from their contracts would probably take their case to the last-named organ, to be known as the Global Football Arbitration Tribunal, which would have the power to take a decision in the matter.

Commenting on the proposed new regulations, FIFA General Secretary Michel Zen-Ruffinen stated:

> *"For cases like Patrick Vieira's (then in dispute with Arsenal FC over his desire to move) there will be a new organisation to settle disputes. The principles of the new transfer system have been discussed by FIFA and we are confident that we have come up with something that is acceptable to the majority"*[387]

It goes without saying that this column will follow the outcome of this case with the keenest of interest.

10. COMPANY LAW

A tale of four basketball clubs and one licence. German Supreme Court decision[388]

Recently, the Supreme Court (*Bundesgerichtshof*) of Germany was called upon to adjudicate in one of the most tangled webs in the legal relations between sporting clubs ever encountered. The case concerned the question whether the transfer of a basketball licence from the estate of a bankrupt club was voidable.

The claimant was the liquidator of a registered friendly association (*eingetragener Verein*) under whose name a team played in the 1993-4 season of the First Division in the German Basketball League. At a certain point this association declared itself insolvent, which prompted a second association, located in the same town, to set up a new basketball club. However, it was not possible for the second association to be entered in the official Associations' Register before the new season began. In order to circumvent this, the first association transferred its licence, issued by the official German Basketball Federation (*Deutscher Basketballbund* - DBB), to a third association, which was a long-standing basketball club situated in the same town. It is this third association which was the defendant in the court proceedings. A bankruptcy petition was subsequently entered against the first association.

Under the name of the third association, a team started playing in the new season of the Basketball League. However, the costs associated with this participation were borne by the second association from its internal funds. In the meantime, the second association had succeeded in obtaining official registration, as a result of which the third association transferred the disputed licence to the second. The latter, however, in turn transferred the licence to a fourth association and subsequently went bankrupt itself.

The original transfer from the first to the third association was the subject-matter of a challenge by the liquidator of the former, who considered that the licence in question was worth a considerable sum of money and therefore should stay in the estate in order to meet the claims of creditors. Accordingly, he brought an action against the third association for the payment of DM 69,000, which is the value which he placed on the licence. The District Court (*Landesgericht*) agreed with him and ordered the third association to pay the amount in question, on the grounds that the transfer of the licence was a voidable transaction. However, the Court of Appeal (*Oberlandesgericht*) dismissed the claim.

This caused the liquidator to apply to the Supreme Court for a review of this decision. The 10th Division (*Senat*) of the *Bundesgerichtshof* set aside the Appeal Court decision and referred it back for a new ruling by a different Appeal Court. It held that the transfer, without consideration, of the DBB licence from the first to the third association, which was effected shortly before the former went bankrupt, was voidable under Article 32 of the Bankruptcy Code (*Konkursordnung*). Under Article 171 of the DBB Regulations, a club may in principle transfer its licence to another club. However, this was normally done for a consideration. Therefore this licence constituted an asset.

The Supreme Court dismissed the finding of the Appeal Court that the licence in question would have presented no value to the creditors of the bankrupted club because a club against which bankruptcy proceedings have been commenced loses its right to take part in the basketball league, since it loses its legal capacity. Whilst it was true that, under Article 42 of the Civil Code (*Bürgerliche Gesetzbuch*) a registered association loses its legal capacity once bankruptcy proceedings against it have commenced, Article 49 thereof stipulates that this legal capacity is deemed to continue for the purpose of the liquidation, until such time as the latter has been completed. The creditors therefore retained in essence the benefit of the assets from which their claims were to be met. They could, in other words, have sold the licence to another club during the liquidation process. Keeping the basketball club going was not a consideration which took precedence over this fact.

Arsenal FC form new company (UK)[389]

Leading English Premiership club Arsenal FC have formed a new company to finance their proposed £100 million stadium as they continue their quest to be counted amongst the elite of English football.

The Annual General Meeting of the club, traditionally held in August, was delayed until September in order to allow the necessary paperwork to be processed. These proposals were adopted at the AGM by an overwhelming majority of 39,213 to 37.

Arsenal Holdings plc has become the holding company for Arsenal FC with an independent Board of Directors. Prior to this, Arsenal were part of OFEX, a share-trading platform for unlisted and unquoted securities, off-exchange.

Huddersfield Town taken over by consortium

In July 2001, it was announced that Paul Rubery, Chairman of English Nationwide League club Huddersfield Town, was to relinquish control over the club in favour of a consortium led by former vice-chairman David Taylor.[390]

This changeover took place on 19 September.[391]

Queens Park Rangers in structural difficulties

London football team Queens Park Rangers are a club whose fortunes over the past few years can only be described as mixed. This has been mirrored in the club's finances, which have taken a sharp downward turn of late. Indeed, at a certain point the company operating the club went into administration.[392] One of the remedies sought for this state of affairs was a proposed merger with Wimbledon FC, also a London club which had known better days. At a certain point, this merger appeared to be a likely proposition, since those interested in taking over were openly talking about moving to Milton Keynes - a move also contemplated over the summer by Wimbledon (see below, p.84). However, in July 2001 Chairman Chris Wright announced that this proposal had failed.[393]

This did not, of course, do anything to bring a solution to QPR's financial problems any closer. An attempt by a consortium headed by Andrew Ellis failed when the club's Council voted against it. However, hope dawned in August 2001 when a fan-based consortium made a £5 million take-over bid for the club.[394] Whether this bid was successful was not yet known at the time of writing.

Belgian football club placed in receivership[395]

Another football club in deep financial trouble is the Belgian side of Dison-Verviers, currently languishing in the lower reaches of the Belgian league. In July 2001 it was put into receivership because of an accumulated deficit of BEF 6 million (£100,000). It is expected that a new non-profitmaking association will be founded in order to enable the club, one of the oldest in Belgium, to survive.

FIFA's company goes bankrupt... as well as its leadership. An update on the ISL saga

It will be recalled that, in the previous issue,[396] this column recorded the increasing evidence that ISL, the company responsible for marketing the rights to next year's World Cup in football, stood on the verge of bankruptcy with debts totalling over £300 million. For a while, the stricken company succeeded in keeping liquidation at bay, but the inevitable ultimately prevailed.

ISL is a company which was founded by the later Horst Dassler, the man who inherited sportswear giant Adidas. It held uninterrupted marketing rights to FIFA events ever since it concluded a "sweetheart" deal with former FIFA president Joao Havelange when the company was created in 1982. Right up to the moment of its demise, it continued to be owned by the Dassler family. Its principal activity was to sell sponsorship packages, including advertising boards at matches, tickets and corporate hospitality functions, at £10 million each. It recently concluded a £1.1 billion deal with FIFA which forced up the price of World Cup coverage by almost 600 per cent for television companies such as the BBC and ITV. The difficulties which led to its predicament stemmed from its loss of marketing rights to the Olympic Games prior to the Atlanta 1996 event, and its practice of over-bidding for other rights - thus it had pledged £860 million to the Association of Tennis Professionals, and £150 million to CART, a North American motor racing group.[397]

In mid-April 2001, the company was granted three months' protection against its creditors by a Swiss court whilst it negotiated a possible buy-out with German television company UFA. Otherwise, however, the signs looked quite ominous. FIFA held an emergency meeting in order to create its own company, FIFA Marketing, as a contingency against ISL being wound up. Then company staff were informed that Patrick Magyer, the man in charge of marketing the World Cup, had left. He was said to have been escorted from company premises in the Swiss city of Zug following accusations that negotiations which he had conducted with FIFA during the previous few days were not in the company's best interests.[398] Presently Glen Kirton, director of ISL's football department, informed staff that the company had failed to pay pension contributions. The pension company in question was naturally inundated with inquiries from concerned employees, who feared a Swiss version of the Maxwell/Mirror pension scandal of the early 1990s.[399]

In the meantime, frantic attempts were being made by FIFA to rescue the stricken company. At the emergency meeting mentioned above, which was attended by FIFA president Sepp Blatter and a representative from its six federations, Africa was represented by Slim Aloulou from Tunisia, who made an impassioned plea that Vivendi, a French television company which owns the famous Canal Plus channel, might be persuaded to rescue ISL. This led to talks between it and ISL.[400]

However, just under a month later, these rescue plans collapsed when it was learned that Vivendi had refrained from stepping into the breach. Apparently the French media company were deterred by the enormous debts incurred by ISL, and their fears that, should they take over the marketing company, they would be called upon to take responsibility for its World Cup obligations.[401] FIFA reacted by cancelling its contracts with ISL to sell television rights outside Europe and North America for the 2002 and 2006 World Cups, as well as protecting its sponsorships to prevent the receivers from impounding them. ISL had guaranteed FIFA $1.8 million for both deals. Some payments were received, but it is understood that at least $100 million were lost.

In addition, FIFA were compelled to cancel the World Club Championship, scheduled to take place in Spain during the summer.[402] However, all was not as it seemed in this regard, since it transpired that the rights for this event were being handled by Traffic, a Brazilian company, which did not have the right to sell them. The suspicion arose, particularly in UEFA circles, that FIFA were giving the impression, wrongly, that this cancellation was due to the ISL collapse - adding yet another murky dimension to the entire saga.[403]

Reading the above in conjunction with the World Cup media rights difficulties documented under the section devoted to the law of contracts (see above, p.31), the attentive reader may have come to the conclusion that there could only be one winner from collapse of ISL - i.e. the media group headed by German mogul Leo Kirch. The latter had already secured the European and North American rights for the World Cup. Now he was able to exercise his option to take over ISL's worldwide rights to this event and thus complete its global domination.[404]

Not unnaturally, all this caused considerable concern throughout the world of football. In late May, European governing body UEFA called for an extraordinary meeting of the FIFA Executive to discuss the crisis, which threatened to bankrupt the 2002 World Cup in its wake, at which the hapless Sepp Blatter, FIFA's president, would be asked to account for the manner in which this fiasco came about. UEFA were particularly concerned at the lack of transparency which had attended the entire train of events.[405] It was widely expected that should Blatter's explanations on these matters fail to satisfy the Committee, he would be asked to resign.[406] Nor were the criticisms being levelled at Blatter purely at the level of his competence, since accusations were being made that he had accepted bribes over the awarding of marketing and television rights for the World Cup, however strenuously Blatter denied these rumours.[407]

The affair took yet another dramatic turn when, shortly afterwards, Blatter called a press conference at which he admitted for the first time that there was evidence of untoward financial dealings by ISL and its parent company, International Sports Media and Marketing (ISMM). He revealed that the world governing body was to take legal action against ISMM/ISL concerning the disappearance of £30 million paid by the Brazilian company O Globo for the rights to broadcast the 2002 tournament. The money should have been paid by ISMM into an account accessible to FIFA, but, according to Blatter, was instead paid into a secret account - allegedly opened in Liechtenstein - and used for other purposes. This prompted UEFA President Lennart Johansson to repeat his organisation's demands that Blatter should offer a personal explanation or face a vote of no-confidence.[408] He later wrote to Blatter asking him 25 probing questions about the affair.[409] In addition, the *Daily Mail* claimed to have obtained a copy of the secret minutes of the final meeting of ISL before it went bankrupt, in which the £30 million in question were described as "a loan".[410]

Blatter survived the meeting in question without forfeiting his position,[411] but this did not mean that the fall-out from this affair had ceased. At the FIFA Executive meeting of 5 July, Blatter admitted that the total losses resulting for FIFA from the ISL disaster could amount to £368 million - three times as high as any previous estimate and ten times the figure publicly admitted to by Blatter previously. To make the entire picture even more dismal, it appeared that this figure was based on the assumption that with ISL in bankruptcy, the media rights deals which the latter negotiated for the 2002 and 2006 World Cup would return to FIFA. However, the bankruptcy administrator indicated that he may not allow such a move automatically.[412]

This had led to a gap in FIFA's accounts which was being met by a £125 million loan granted by a Swiss bank, with a further £144 million arranged for next year. This prompted fears that FIFA were trading at a loss, and also meant that FIFA were borrowing funds in the hope of repaying them through future television and sponsorship deals.[413]

To what extent should sports clubs tolerate outside interference? Debate in German law journal[414]

The extent to which sports clubs should allow third party influences in their internal policies and practices has been the subject-matter of an interesting debate in German legal circles recently. This has been sparked off by the publication of a 270 page work on the subject submitted as a Higher Education Teaching Thesis (*Habilitationsschrift*) by author Anja Steinbeck, as reviewed by Bernhard Pfistner, Professor at Bayreuth University, in a leading German law journal.

Both contenders agree that, in order to ensure a degree of uniformity in sporting rules and their application, all those involved in sports which are governed by federations have an interest in having this task assumed by the federation in question, and to that extent renounce their autonomy. Unlike Steinbeck, however, Pfistner considers it perfectly possible to draw an analogy between the world of sport and religious groups in this regard, in respect of whom the Constitutional Court (*Bundesverfassungs-gericht*) has allowed a certain degree of third party influence. In both cases, it is the uniformity of observance - whether of a certain philosophy or life or of a regulatory framework for sport - which is the essence of their existence. In order to secure this uniformity, the federation requires legal mechanisms of enforcing the rules against everyone, including those who resist them. However, there exists naturally the danger that the federation will abuse these legal mechanisms by using them for non-sporting ends. This means that, although the autonomy of sports clubs - and of the athletes - must necessarily be restricted, this may only be the case subject to certain limits.

11. PROCEDURAL LAW AND EVIDENCE

Canadian Olympic Association wins dispute over court costs[415]

In this dispute, the defendant had successfully resisted two appeals brought by the Canadian Olympic Association under s. 56 of the Trade Marks Act 1985. Before the appeals were heard, the respondent offered to settle the appeals subject to the condition that the appellant should discontinue the appeals and pay the respondent's costs. The latter filed two bills of costs and brought a motion for an order (a) doubling its party-and-party costs from the date on which it made the offer to settle, (b) making a lump sum cost award in lieu of any assessed costs, (c) fixing or directing the assessment officer that costs assessed under Tariff B be the maximum number of units under Column IV, and (d) for the inclusion of specific costs and disbursements.

The Federal Court held that the motion be dismissed with costs at the Column III scale. A lump sum cost award in lieu of assessment was not appropriate. The assessment of the bills of costs was to take place before an assessment officer subject to the following directions: (a) the doubling of party-and-party costs, and (b) an increase from tariff B, Column III.

Conflict of jurisdiction arising from motocross accident. Belgian court decision[416]

In November 1996, an official motocross race took place in the village of Lummen, which was organised by the Flemish Federation of Amateur Motor Riders Associations. At a certain point, one of its participants lost control of his mount, as a result of which the latter landed amongst the spectators

who were located behind a double fence in an area to which spectators were allowed admittance. This resulted in injuries to three spectators, including the claimant in the case under review.

The facts of the case were not in dispute. Nor was it disputed that, although the claimant had taken part as a rider in other races at this meeting, he was only a spectator at the time of the accident, and thus had nothing to do as such with the race which took place on the occasion of the accident. However, one of the defendants, being the organising body, challenged the jurisdiction of the Police Court on the grounds that the latter may only hear actions for compensation arising from traffic accidents. The relevant provision, Article 601b of the Judicial Code (*Gerechtelijk Wetboek*) does not define the term "traffic accident".[417] The defendant in question contended that an accident only existed where the Road Traffic Code was applicable to the event in question, or where the rules of the Code need to be applied by analogy.

The Court conceded that the rules of the Code could not be applied, even by analogy, to the relations between participants in a race. However, in the case under review the accident occurred outside the course, since both the relevant safety rules and the defendant's own insurance policy provided that the course needed to be closed off by means of a double fence. Therefore the area which was located behind that fence was not part of the course. Where a motor vehicle finds itself in this off-course area, any liability arising from an accident involving it may no longer be assessed on the basis of the rules which apply specifically to the sport being practised. Only the participants are subject to these rules - not the spectators.

In addition, there was nothing to indicate an express or implied agreement between the organisers and the riders on the one hand, and the spectators on the other hand, whereby the rider would be exempted from normal rules of liability. Therefore this was a case where the rules of the Code could be applied by analogy. The *Politierechtbank* therefore had jurisdiction to try this case.

The substance of the case was easily solved, since the defendant had not only admitted liability, but had also failed to challenge the amount claimed by way of damages.

13. FISCAL LAW

High-earning footballers to be taxed on testimonials[418]

If proposals recently mooted by Sports minister Richard Caborn are translated into law, wealthy footballers will face a 40 per cent tax bill on their testimonial matches. Mr. Caborn's sentiments were prompted by the match between Manchester United and Glasgow Celtic in early August 2001, organised for the benefit of United's Wales international Ryan Giggs. Mr. Giggs stood to earn around £1 million from this fixture without being required to pay a penny in income tax. This will come as welcome news to long-standing critics of the current system,

Testimonial matches were introduced in order to reward injured or loyal players, traditionally following a period of ten years' service. However, those were the days when players earned but a fraction of the vast fortunes currently pocketed by even the dullest of Premiership journeymen, and wages were not allowed to exceed a certain ceiling. The Sports Minister wants the Treasury to reconsider the tax-free status of these events.

In order to allow the lower-paid footballer to continue to enjoy the benefit of the original intention behind the scheme, one solution could consist in setting a salary ceiling, and decreeing that any player earning in excess of that ceiling should be taxed on testimonial income.

The current system was, however, defended by Gordon Taylor of the Professional Footballers' Association.

England a "tax paradise" for footballers, according to report[419]

It would appear that it is not only because of the tax-free status of testimonial income that England is a footballer's fiscal paradise. According to a report issued by Arthur Andersen's Sports Consulting Group (Score), a leading finance firm, professional footballers pay much less in tax and national insurance than in any other of the "big five" European footballing countries. Players in England pay 39

per cent of gross income in tax and insurance, as opposed to 45 per cent in Italy, 46 per cent in Spain, 50 per cent in Germany and 57 per cent in France.

This tax advantage goes some way towards explaining why 25 per cent of English Premiership players are imports. Nevertheless, players abroad tend to be slightly wealthier because of the widespread practice whereby players negotiate a high net income in the first place, leaving their clubs to fill in the tax and social contributions.

The said report comes at a time when players' earnings are assuming an increasingly large proportion of Premiership clubs' expenditure. (On this subject, see also under Section 16 "Issues specific to individual sports", below p.86).

"Bridging pension" paid by professional footballers' welfare fund is not a pension for tax purposes. Netherlands court decision[420]

England may be a fiscal Shangri-La for the professional footballer (see above), but the Netherlands must rank as one of the countries having the best welfare provisions for the soccer professional. Because of the relatively short duration of the player's career, all players in the Dutch professional leagues are required to contribute a certain percentage of their wages towards the Professional Footballers' Welfare Fund (*Stichting Contractspelersfonds*) of the Netherlands Royal Football Association (KNVB), in return for which the Fund makes regular payments to the player once his career is finished. These payments take the form of a "bridging pension", the amount of which is determined by whatever is left once the player's old-age pension has been catered for. They are therefore not a bridging pension in the true sense of the term, since they do not necessarily cover the entire period which elapses between the end of the player's career and his reaching pensionable age. These contributions are tax-deductible from the point of view of the players' wages, but are taxable when paid by way of benefits.

One of the players involved in this scheme had emigrated to Belgium following his career as a professional. His financial prospects, as far as the Fund was concerned, were that he would enjoy (a) an old-age pension as from the age of 65, and (b) a "bridging pension" of 44 quarters, i.e. payable during 11 years. The benefits mentioned above were paid to him in Belgium. The former player, however, considered that these payments were taxable in Belgium rather than the Netherlands under a provision in the Treaty between Belgium and the Netherlands on the avoidance of double taxation. Since in the Netherlands international treaties take precedence over domestic law, this would mean that the rule contained in the Netherlands fiscal legislation taxing such payments in the Netherlands would not apply. Naturally the question of precedence would only enter into play where there was an inconsistency between the treaty and national legislation.

However, the Netherlands Tax Authority did not agree that the Treaty was in fact inconsistent with the applicable Netherlands rules. In substantiation of this view they relied on two provisions of the Treaty: (a) Article 15, under which income earned by a citizen residing in one of the two countries is taxable in that state unless that income is earned in the other state, in which case it may be taxed in the latter state, and (b) Article 17, which stipulates that, in the particular case of income which is earned by professional artists and athletes by virtue of their personal activity, this income is taxable in the country where this activity takes place - and that regardless of anything stipulated in Article 15. The ex-player, for his part, relied on Article 18, under which pensions and similar benefits were taxable in the country of residence, and Article 22, which provides that earnings not falling in any of the above categories were only taxable in the country of residence.

Essentially, the question then to be resolved was whether the payments from the Fund constituted "pensions or other benefits" or not. The Appeal Court (*Gerechtshof*) of 's-Hertogenbosch awarded the case to the tax authorities. It held that there was a hierarchy between Articles 15 and 17 which meant that income earned by a sporting professional fell within the exclusive scope of Article 17. The fact that the present tense [... in which this activity takes place (*waar deze werkzaamheden worden verricht*)] was used in this provision did not prevent previous earnings from also falling within the scope of Article 17. The income in question was therefore taxable in the Netherlands. The former player applied to the Supreme Court (*Hoge Raad*) for review of this decision.

The Supreme Court dismissed the application. It held that the Appeal Court was correct in refusing to classify the income in question as a pension, on the grounds that the possibility of the "bridging

pension" not being fully payable to the beneficiary - in the event of his death his dependants would receive the remainder - was not a relevant factor when the benefit was fixed. It is an essential characteristic of a pension that its benefits terminate with the life of the beneficiary. Therefore the payments which the player received after retiring from football were not a bridging pension within the statutorily accepted meaning of the term, which meant that they ranked as income taxable in the state where that income was earned in accordance with Article 18 of the Treaty - i.e. the Netherlands.

The Supreme Court therefore confirmed the decision of the Appeal Court.

Fantasy football leagues to be taxed and made subject to licensing in Britain[421]

Fantasy football leagues have proved to be one of the major success stories of the British entertainment industry in recent years, with thousands of such leagues being run in pubs and offices the length and breadth of the country. Under regulations recently introduced by the Government, however, they are about to feel the heavy hand of officialdom in the shape of the taxman and the licensing officer.

Henceforth, every small local league will be required to obtain a betting licence, which could cost over £100, and be subject to 17.5 per cent pool betting duty on their jackpot money. The regulations in question state that all such leagues are to be considered as official betting where (a) entrants pay a fee, (b) there is a cash prize, and (c) there is an element of skill involved in picking teams or players. Virtually every fantasy league in the country meets these conditions. Exactly how this will affect these leagues is as yet unclear.

Tax-free betting sooner than expected - only to be replaced by a new levy? (UK)

Readers will recall that the British racing punter was given what appeared to be a boost with the imminent abolition of betting tax, to be replaced by a direct tax on the gross profits made by bookmakers.[422] This together with the abolition of the levy system and the pooling of media rights aimed at securing better funding for racing (see above, p.29) undoubtedly heralded a new dawn in horserace betting finance. That this new age would be far from trouble-free was evident from the first few weeks of its existence.

Even as the racecourses were arguing amongst themselves as to which media rights offer to accept (see above, p.30), there arose the threat that racing would attempt to compensate for the loss of the levy by charging bookmakers for the relevant television pictures and racing information, possibly quadrupling the current Levy revenue of £60 million per year, and amounting to 4 per cent of turnover. In turn, the bookmakers threatened to pass on this percentage to the punter. In fact, according to Warwick Bartlett of the Confederation of Bookmakers, this would have to rise to 5 per cent to take account of the fall in turnover which would result. This would obviously serve to undermine the very object of the changes which the Government was introducing.[423]

Because of these fears of the effect which this new charge levied by the world of horseracing would produce on income, the Confederation made a 27-page submission to the Home Office pleading the doubtful lawfulness of this charge, which the bookmakers allege infringes competition law by wielding monopolistic powers. They also implied that they would be in favour of retaining the Levy Board, at least as an arbitrator. Considering the obloquy heaped on the Board by bookmakers for some years, this proposition is not without a good deal of irony. The submission by the bookmakers also objected to the sale of the Tote to racing at a preferential price, suggesting that this could break EU rules on state aid.[424]

Undeterred by the above, the Government announced in early July 2001 that the start of the tax-free betting era would actually be brought forward from 1/1/2002 to October 2001. This move was prompted by the rapid progress made by bookmakers and Customs in this regard, according to Paul Boateng, Financial Secretary to the Treasury.[425]

Speculation that bookmakers would attempt to make the punter foot the bill for the rights which the British Horseracing Board could charge them intensified following the Annual General Meeting of the Tote, held in mid-July. Peter Jones, the Tote Chairman, when asked at that meeting, stated that he could not guarantee that bookmakers could absorb all the new costs without leaning on the better.[426]

These suspicions hardened a few weeks later following a meeting between bookmakers and Peter Savill, Chairman of the British Horseracing Board (BHB), at which the latter outlined the charges which he expected the betting industry to pay following the demise of the Levy system. More particularly Savill wanted bookmakers to pay what amounted to 2½ per cent of turnover on racing income, plus up to £2,500 per betting shop in order to cover the provision of live pictures of meetings. Estimates of the total charge varied between £190 and £220 million per year, compared to the £75 million which bookmakers currently pay racing via the Levy and SIS.[427]

Chris Reynolds, BHB managing director, called these charges fair and reasonable, and saw no reason why they should be reclaimed from the punter. Bookmaker spokesman Warwick not unnaturally disagreed, stating:

> *"We are already absorbing the gross profits tax payable to the Government and we would have to pass on this cost to the punter. There would be a deduction in the region of 1½ and 2 per cent on the British horse racing product (sic), which means it would be less competitive against other products we offer to punters, such as sports betting. The repercussions of this dastardly act of greed that will rob punters of their only opportunity to be tax-free for 33 years will be considerable."*[428]

Will the era of tax-free betting end almost as soon as it started? This column pledges itself to keep its readership fully informed of further developments.

14. HUMAN RIGHTS

RACISM IN SPORT

Racism in Italian football combated in various ways

It is an unfortunate fact that football grounds have often been breeding grounds of racism, and Italy has proved no exception to the rule. However, there are signs that the problem is being taken seriously by the authorities and players.

One club which has been particularly plagued with a racist element amongst its following has been Lazio Rome. There was a particularly ugly outburst of bigotry during the local derby with AS Roma, whose two black players, Cafu and Zebina, were subjected to racist taunts whenever they touched the ball, despite pleas from Sergio Cragnotti, the Lazio president, to stop. In addition, some fans spread a banner reading "Black team, Jewish supporters" across the stadium.[429] The Italian football authorities penalised Lazio with a one-match ban from their home ground, as well as a £20,000 fine.[430]

A few weeks later, some players devised their own way of hitting back at the racists when members of Treviso, an undistinguished Second Division side, decided to wear black paint during their home tie with Genoa in solidarity with their Nigerian striker Akeem Omolade. The week before, Omolade had been booed by Treviso supporters when making his debut for the side.

One group of fans left the ground in protest at the players' gesture of solidarity. However, Omolade had the last laugh, scoring the goal which clinched a 2-2 draw.[431]

English football apologises for decades of racism[432]

In July 2001, the Football Association issued a public apology to black former players for the racism which they had to endure in the course of the 1970s and 1980s. At the same time, it admitted that it could have done more to condemn the abuse and harassment they had to suffer during their playing careers. This apology came as the FA prepared for an anti-racism conference organised by world governing body FIFA, which was held in Buenos Aires.

It appears that FIFA is keen that other national football associations should learn about the racial problems which were once a serious headache for the English game, as well as the measures taken by the FA to combat it. In spite of the apology, the FA is currently regarded as a leader within world football on how to go about countering this disease.

The FIFA conference itself heard contributions from a number of delegates from Africa, Europe and

Asia who outlined the problems facing non-white players. The black France defender Lilian Thuram attended, but, contrary to expectations, England's John Barnes failed to appear.[433]

... but cannot afford to become complacent...

The apology featured in the previous section coincided, by accident or design, with the publication of a work by journalist Dave Hill[434] documenting the extent to which racism has been, and in some ways continues to be, a malignant influence in English football. Writing in *The Guardian*[435] about the events which prompted this work, Hill recounts the incident which made him realise the extent of the problem.

The occasion was the Liverpool derby of 1987 at Goodison Park. Although black players had become commonplace in English football by then, Merseyside football had remained conspicuously all-white - until the arrival of Jamaica-born John Barnes. The booing of the man who was to become one of the most distinguished representatives of this country on the football field was so loud and persistent that it dominated the entire occasion - yet hardly any major figure in football acknowledged, let alone condemned, this behaviour. Hill concluded that, rather than constituting yet another example of Scouse wind-up humour, this revealed something less appealing about the city of Liverpool, and English football culture. His subsequent investigations allowed him to make the case that the absence hitherto of black players amongst the teams of a city containing the longest-established black community in the country had to be more than just coincidence.

Yet it took an outsider in the shape of Lord Justice Taylor, in his post-Hillsborough recommendations, to acknowledge that racism was inherent in the wider chauvinism of the worst English fans. Since then, creating a climate in which the chanting of racist slogans is frowned upon has become part of a wider mission to modernise the game.

... and still lacks support among the ethnic minorities[436]

In spite of the genuine measures undertaken to combat racism in football, a recent report suggests that most English football clubs fail to attract ethnic minorities, either as supporters or employees, whilst the game as a whole has failed to meet government guidelines on how to increase their participation in the sport.

These were the conclusions of a survey of football clubs and racial issues completed by researchers at Leicester University. Even clubs in predominantly non-white areas fail to attract ethnic minority supporters. In addition, many clubs use cultural stereotypes of non-white fans as a way of explaining why they do not attend football fixtures. The report also found that fewer than 31 per cent had written equal opportunities policies, in spite of government recommendations to that effect. Also, some clubs which had such policies routinely ignored them.

The research was conducted by a postal survey of all 92 Premier League and Football League clubs, to which 88 replied.

UEFA funds fight against racism[437]

As FIFA delegates discussed the problem of racism in football at the Conference convened for that purpose in Buenos Aires in July 2001 (see above), the UEFA, the body governing European football, announced that it was to award $400,000 towards a network of groups campaigning against racism.

Basketball coach dismissed for racism (Israel)[438]

In July 2001, Pini Gershon, coach of Israel's prestigious basketball team Maccabi Tel Aviv, was dismissed for having attacked his black US players as being "dummies" and "slaves". He has been replaced by his deputy, David Blatt.

Gershon had been summoned to appear before a Parliamentary commission on violence in sport following his tirade against black players during a speech to Israeli businessmen. He was quoted as having said

"There are two shades of blacks. The light skin are a lot smarter than the dark blacks - those are the real dummies. The dark ones are like slaves. Whatever you tell them to do, they'll do without thinking about it. They usually come from the streets."

The *Jerusalem Post* reported that these remarks had been released on a website and that Gershon had attempted to play them down, alleging that many of the comments had merely been said in jest.

Maccabi won this year's European Superleague title mainly through the efforts of their Afro-American player Arriel McDonald.

Halifax rugby league player cleared after racism storm (UK)[439]

In May 2001, Jamie Bloem, who captains South Africa at rugby league and plays for English side Halifax, was accused of having racially abused a black player in a reserve match with Salford. The Rugby Football League received an official complaint from Salford, who have signed up for the Sport England directive which is very precise about the type of procedures to be adopted in such circumstances.

Mr. Bloem was, however, subsequently cleared of the accusation. He commented afterwards that in his view, racism was currently being used too frequently as an allegation.[440]

Brentford player was "denied use of car on racial grounds" (UK)[441]

In April 2001, Gavin Mahon, who plays for Nationwide League team Brentford, claimed that he was denied the use of a sponsor's luxury car because of his race, and has called upon a trade union to back his case. It is being alleged that Mahon, who is black, was refused the use of a $35,000 Jaguar S Type after being voted the club's player of the month. Brentford had entered the second month of a three-year agreement with the local Stratstone Jaguar dealership. Michael Dobson, the previous player of the month, had already used the vehicle.

A spokesman for Stratstone claimed that Mahon had left the award ceremony after 40 minutes, before the dealership were able to give him the car. The investigation continues.

Racism still rife in Southern African sport?

Apartheid is gradually receding as a bad dream in South Africa and Zimbabwe, but that does not necessarily mean that its effects have become totally extinct in all aspects of their societies, particularly in the world of sport. This has been highlighted by a number of recent developments.

In July 2001, a research group commissioned by cricket administrators reported that racism in Zimbabwean cricket was so widespread as to threaten the sport's very existence.[442] This created tensions, open hostility and anger among players, officials and supporters. The report proposed that Zimbabwe should aim at including five black players in its national squad by the beginning of next year, with four being on the field at any one time. By September 2004, seven blacks should be included in the 14-man squad, and six black players should always take the field.

The report also urged the integration of more non-whites in coaching, umpiring and cricket management.[443]

Although they appeared to be less stark in their dimension, similar problems appeared to exist in South African cricket, according to a report in British newspaper *The Independent*[444] which appeared in late May 2001. The problem here appeared to be not so much that black players were discriminated against, but that cricket facilities in the country had barely altered since the apartheid days. The best grounds continue to be located in white areas, whereas the majority of black cricketers never experience any game other than that which is played on a concrete strip with a tennis ball.

More seriously, it appeared that not even the 2003 World Cup, awarded to South Africa at least in part for the purpose of stimulating a transformation - will advance the game among blacks. This was particularly the case after Ali Bacher, the former South Africa batsman and currently the top cricket

administrator of his country, was compelled to concede that a World Cup deal struck between the International Cricket Board and Sky Television would effectively preclude matches being played in black townships.

This caused uproar in Durban, where Dr. Bacher was accused of reneging on a promise that Chatsworth, a Durban township ground, would host at least one World Cup fixture. Dr. Bacher replied that upgrading the ground to the required standard would cost up to $1.5 million, which the United (South African) Cricket Board did not possess. However, a local committee claimed that $250,000 would be enough.

Even if some World Cup fixtures took place in townships, however, it is doubtful whether this would have much resonance amongst the majority of South Africa's blacks, since cricket is essentially still seen as a white man's game.[445]

OTHER ISSUES

Award of Olympics to Beijing prompts human rights protests

The decision, reached in July 2001, to award the 2008 Olympic Games to Beijing has been greeted in many quarters with a mixture of concern and criticism. Particularly the fact that the award was made to a country having a regime which has presided over massive human rights abuses caused widespread disquiet, since the staging of the Games threatened to confer glamour and respectability on the regime in question. Although officially many governments remained non-committal, individual politicians have voiced the view that the decision was mistaken. Thus in Washington, Tom Lantos, a leading Democrat on the House International Relations Committee, gave vent to his feeling that the award would allow the Chinese regime to bask in the glory of the Games despite having one of the worst human rights records in the world.[446]

Quite apart from the shootings in Tiananmen Square which took place a decade ago, there is also the question of Tibet, where comprehensive human rights abuses have taken place ever since it was invaded by China in 1950. The Tibetan government in exile, which is based in India, bitterly criticised the award, with spokesman Kalon T C Thethong stating that the award would mean more repression, and referring to

> *"the suffering that will be unleashed on ordinary people by a totalitarian one-party state which will assume that it has received international permission for its horrendous repression."*[447]

One of the most critical official reactions came from the European Parliament, which just prior to the award had issued a resolution calling upon the International Olympic Committee not to award the Games to Beijing in view of its poor human rights record.[448]

However, not all comments were negative, since the award meant that for the next eight years the eyes of the world would be on Beijing and the Chinese authorities. It could even mean that Taiwan, which broke away from China but has never been recognised by the mainland regime, could declare independence without needing to fear any corrective action from the mainland.[449]

"Saddam Hussein's son tortured me" claims Iraqi international footballer[450]

Saad Keis Naoman, a footballer who represented Iraq in international tournaments including the 1988 Seoul Olympic Games, has become the latest Iraqi footballer to claim to have been physically abused by Uday, son of the country's military dictator Saddam Hussain. On one occasion, the player apparently had his head shaven and was beaten on the back with a heavy cane because Uday was furious at Saad having been sent off during a fixture. Uday heads the country's football federation and national Olympic committee.

Saad's testimony is confirmed by that of team mate Sharar Haydar Mohammad al-Hadithi. After fleeing the country in 1999, Sharar described how he was hit on the soles of his feet, dragged on his bare back through gravel, then forced into a tank of sewage in order that the wounds become infected. FIFA was called upon to suspend Iraq from world football and commenced investigations, but after a perfunctory inquiry the world governing body did precisely nothing.

Pakistani children are kidnapped and sold as camel racers, claims human rights organisation[451]

In recent months, allegations have been made that at least 30 boys per month are being kidnapped in Pakistan and sold to feed the banned slave trade in racing camel jockeys in the United Arab Emirates. Often these boys are as young as four. According to the Karachi-based Ansar Burney Welfare Trust, 2000 boys have been taken to camel camps over the past two years, in spite of laws introduced in the UAE in 1998 prohibiting the use of small boys in this frequently dangerous sport.

The trade in young camel-riders has for some time now been the subject of a campaign by the United Nations and Anti-Slavery International. However, all the evidence suggests that the practice is if anything on the increase. According to Anti-Slavery International, boys are often kidnapped, sold by relatives, or taken on false pretences. Once in the UAE, they are underfed and made to undergo crash diets in order to render them as light as possible. There have been reports of children being beaten or incurring serious injuries whilst racing.

Although anti-slavery campaigners and the UAE police have had some limited success in freeing individual and returning camel slaves, it seems that the practice will continue unless effective international action is taken.

Intellectual disability not recognised at "Paralympics"[452]

In May 2001, it was decided that athletes with intellectual disabilities will not be allowed to compete in the distastefully-named "Paralympics". An International "Paralympic" Committee investigation has concluded that two-thirds of the competitors having intellectual disabilities at the 2000 Games in Sydney lacked proper certification. Ten out of twelve of the Spanish basketball team were not genuinely disabled and were compelled to return their gold medals.

Supreme Court backs Casey Martin right to drive cart on golf courses (US)

The Casey Martin story should be one with which readers of this column are well familiar by now. In previous issues[453] it was documented how golfer Martin originally brought a successful action against the Professional Golfers' Association (PGA) in which he won the right to compensate for a chronic and painful circulatory disease by driving a cart on the golf course during PGA tournaments. This decision was later challenged by the PGA before the US Supreme Court.

In late May 2001, the highest US court confirmed the original ruling, thus presenting golf with a major regulatory headache. Previously it was assumed that one of the sport's defining characteristics was that they were required to walk. Now Judge John Paul Stevens has ruled that walking is not fundamental to the game, adding that the use of carts has become commonplace and that golf is all about shot-making.[454] However, it would appear that carts are only in common usage on the US Seniors Tour for the over-50s.

Not that Martin's case is unique. Last year, Ed Fiori, a winner of four events on the US tour who has chronic back trouble, requested the use of a buggy. He was told that he would have to take court action, and had already consulted a lawyer. This may not be necessary after the Martin ruling.[455]

Martin denies that that a cart offers an unfair advantage.[456] However, many fear that this will open the door to many other demands that the use of carts be allowed, by people with a good deal less justification than Martin.

Golf ban on autistic child sets off legal battle (US)[457]

Hot on the heels of the Casey Martin decision mentioned in the previous section, there looms another legal battle for golf in the US. Matthew Ross, aged nine, is a gifted boy golfer from Florida who stands head and shoulders above most children of his age group. Yet since he suffers from autism, he cannot keep his own or his opponent's score, which is why the Greater Tampa Junior Golfing Association have indicated that he is no longer an appropriate candidate for their age-group contests.

However, Matthew's mother Susan has placed the matter in the hands of a lawyer, and the case is expected to have much the same effect as the Martin decision. Watch this space.

Footballer suspended in child slave accusations in Germany[458]

In early May 2001, a German football club suspended one of its leading players after it emerged that the latter owned the ship allegedly transporting child slaves off the West African coast in April. Jonathan Akpoborie, a Nigerian footballer who plays for VfL Wolfsburg, immediately flew to the Benin capital of Cononou in an attempt to disprove the allegations.

Anti-hooligan measures and civil liberties. Article in French academic journal[459]

Although its football fans are reputed to be amongst the most placid in Europe, France has unfortunately not succeeded in eluding entirely the disease of hooliganism - both from visiting supporters and from those of the home-grown variety (those of Paris-Saint-Germain being particularly notorious - see above, p.22). This has prompted a number of measures, commencing with the "Alliot-Marie Law" of 1993.[460] These naturally involve a number of freedom-restricting measures, which could be open to abuse and give rise to civil liberties being infringed. (A similar debate has been taking place in Britain in relation to the Football Disorder Act, as the discerning reader will doubtless recall.[461])

The author of this extensive article starts by setting the French legislation in its historical and social context, and describes the manner in which hooliganism has developed down the ages, as well as pointing up a number of differences between hooligans in various countries. He also documents a number of measures which have been taken in other countries to counter this phenomenon, with pride of place going naturally to the UK Football Disorder Act. He also draws attention to the instrument which inspired much anti-hooligan legislation throughout Europe, which is the Strasbourg Convention of 1985, concluded under the auspices of the Council of Europe. He then examines thoroughly the main aspects of the raft of laws (of which the Alliot-Marie Law is but one), i.e. (a) the introduction and use of dangerous objects, (b) the fight against alcohol abuse in the stadium, (3) incitement to hatred, (4) banning offenders from the grounds and (5) pitch invasions. In each case he spells out the limitations of such measures imposed by the observance of existing civil liberties legislation, although he says remarkably little about any actual or potential threat to civil liberties which may result from them.

He also scrutinizes a number of complementary measures taken since the Alliot-Marie Law, dividing them into two categories: (a) those inspired by safety considerations, such as the organisation of holding areas (the so-called "hooligan cages") in the stadium, the infiltration of hooligans, video surveillance measures, stop-and-search measures and the keeping of files on known hooligans, and (b) those which are not related to considerations of security, such as the organisation of official supporters' cards and of supporters' associations, the use of probation orders, and the use of private forces for the maintenance of law and order.

His general conclusion is that (a) it is the non-legal mechanisms, such as the manner in which football grounds have changed over the years, which have contributed most to the fight against hooliganism, and (b) the legislation in question appears to be quite effective even if it is not applied as frequently as its authors may have intended or wished. However, at this point he has little to say on the actual civil liberties aspects of the legislation - which one thought was the object of the exercise!

Interestingly, he adds a table of football ground incidents which have resulted in the loss of life of spectators, starring those which have not resulted from hooliganism. Even more interestingly, he adds no star to the 1989 Hillsborough disaster. "O wad some Power..."

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited.
Contributions should be supplied on disk (Mac or PC) and saved as ASCII format.
Disk should also be accompanied by a hard copy of the article.
Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

Articles should be forwarded to
R. Farrell, Hon. Secretary, British Association for Sport and Law,
The Manchester Metropolitan University, School of Law, Hathersage Road, Manchester M13 0JA.

15. DRUGS LEGISLATION AND RELATED ISSUES

GENERAL ISSUES

United against drugs (UK)

Although the world of soccer has recently had its own problems in relation to drug abuse (see below, p.75), some of its leading personalities have joined the general campaign against the use of drugs in society as a whole. In April 2001, it was revealed that Manchester United manager Sir Alex Ferguson and striker Andy Cole have agreed to join a campaign aimed at dissuading teenagers from taking drugs.[462] A few months later, Sir Alex revealed that he had been approached by Chancellor of the Exchequer Gordon Brown to lead a Government crusade against drugs. The "Reds" manager turned down the invitation on the grounds that at this time, he was too busy to take on such a role; however, he hinted that he would assume such a task once he had retired from football.[463]

New Olympic chief sees drugs as main threat to future of sport

Jacques Rogge, the newly-elected President of the International Olympic Committee (IOC) has expressed his fear that the Games may never be free of drugs involvement, pinpointing drug abuse as the principal threat to the future of sport as a whole. Speaking on the eve of the European Youth Olympic Days in Murcia, Spain, he warned that the credibility of sport is being tarnished by the drugs cheats. One of the main problems was that there were a number of drugs on the market which cannot currently be tested - more research was needed in this area.[464]

On the eve of the World Athletics Championships in Edmonton in August 2001, Rogge joined the Canadian Minister for Amateur Sport, Denis Coderre, in reaffirming their commitment to fight doping in sports.[465] Earlier, he had ruled out any reduction in the list of banned substances, which was a policy proposed by his predecessor, Juan Antonio Samaranch.[466]

European Commission not yet ready to fund WADA budget[467]

In July 2001, Viviane Reding, European Commissioner with responsibility for sport, reported back to the Commission on the feasibility of the EU contributing towards the operational budget of the World Anti-Doping Agency (WADA). The Commission has repeatedly listed doping in sport as one of its priorities for action and has shown itself prepared to support WADA projects which fall within the scope of the EU sphere of action. However, Ms. Reding felt that the prevailing legal and political conditions for the time being excluded the possibility of EU participation in the WADA budget. She hoped to restart negotiations with WADA so that the right conditions can be put in place as soon as possible for this to happen. In the meantime, the countries of Europe would need to reach agreement on the breakdown of Europe's contribution towards WADA's operational budget as from 2002.

France incorporates amendment to Doping Convention[468]

By Decree 2001-564 of 25/6/2001, the French Government incorporated an amendment to the appendix of the Strasbourg Anti-Doping Convention. This amendment contains a new reference list of the pharmacological categories of prohibited doping substances and methods, as well as a new appendix which complements it.

Dietary supplements may cause positive nandrolone tests, new research shows[469]

As has been illustrated in previous issues of this column (as well as the present issue - see below, p.75), there have of late been an uncommonly large number of athletes who have tested positive for nandrolone. Recently research carried out by a German academic may prove that these results were not caused by any desire to cheat on the part of the athletes in question. Professor Wilhelm Schänzer, of Cologne University, believes he has found a link between rogue elements in dietary supplements and positive tests for nandrolone, a banned anabolic steroid.

Professor Schänzer's supporters have emphasised that his discovery does not establish innocence in

all cases, but may instead explain why so many athletes continue to test positive long after nandrolone made headline news. The news certainly caused a measure of panic amongst governing bodies, who could face expensive lawsuits by athletes seeking to clear their name. There is also the danger that there will be those who will use Professor Schänzer's findings in order to conceal their guilt.

Controversy surrounds use of asthma medication by athletes

Given the sophisticated and diversified nature of many current medicines, there has always existed a danger that some may, unbeknown to their user or even their manufacturer, have the unintended consequence of harbouring substances which are prohibited in a sporting context. In addition, there are some which contain substances which are banned if used in a certain way, or if the authorities are unaware that the competitor is absorbing them.

Prominent amongst such medicine is that which is used to cure asthma. Steroid-based asthma drugs such as salbutamol are not banned if the competitor takes the drug by inhaler and notifies the authorities before the competition. An additional constraint has recently been placed on the use of these substances. Recently, the World Anti-Doping Agency (WADA) recently announced that competitors using asthma medication must prove they need to use them or face the risk of being banned.[470]

This additional restriction seemed to be amply justified some weeks later when an IOC survey showed that at the Sydney Olympics of 2000, athletes took an average of six or seven substances, such as drugs for asthma or vitamins, with one athlete taking no fewer than 29 substances during the three days preceding a drugs test. This gave rise to the suspicion that many were taking permitted medicine in order to mask the use of banned performance-enhancing drugs. Certainly concern was expressed at the high number of athletes claiming to be suffering from asthma, which was higher than the average number in society.[471]

FOOTBALL

World Cup stars test positive for nandrolone

The increasing number of sporting competitors testing positive for banned steroid nandrolone, referred to above, has recently claimed a number of high-profile victims in the world of soccer. Some of these play in Italy, and their case has highlighted a problem which has become increasingly acute in the Italian League.

In April 2001 the news broke that Portugal's Fernando Couto,[472] who plays for Lazio Rome, and Dutchman Edgar Davids,[473] a Juventus midfielder, had both tested positive for nandrolone. Both were suspended by the Italian federation and later by FIFA, although the latter apparently failed to inform the Portuguese and Netherlands federations, who had hoped to field both players for their World Cup games on the same day on which the FIFA ban was pronounced.[474] FIFA President Sepp Blatter later claimed that the test which had done for Davids had also revealed traces of drugs other than nandrolone.[475]

The Davids and Couto cases highlighted a drug abuse problem which Italian football has considered to be but a minor irritant until a few years ago. Although the odd drugs scandal had arisen in Italian football from the 1960s, it was believed that the problem had been eliminated. However, in 1998 the AS Roma coach, Zdenek Zeman, in an interview with the topical magazine *Espresso*, alleged that drug-taking was rife in Italian football. He named current Watford manager Gianluca Vialli and Alessandro del Piero, although he failed to make specific allegations against them. Both protested their innocence and initiated legal action against Zeman.[476]

Shortly afterwards the Italian Olympic Committee (CONI) conducted an investigation and concluded that there was no serious drugs problem in Italian soccer. However, the Government was unimpressed and started its own investigation, which led to Acqua Acetosa, an accredited laboratory, admitting that documents relating to drugs tests in football had disappeared. This caused the laboratory to close down and the CONI president to resign. At around the same time, accusations of drug-taking were levelled against Parma, whereas later, a separate inquiry led by Turin magistrate Guariniello, led to a list containing the names of around 200 top footballers being submitted to the new CONI President.[477]

At around the same time as Davids and Couto were found to have tested positive, the same fate befell another Dutch star, Frank de Boer, who plays for Spanish side Barcelona - one again, the drug in question being nandrolone.[478] In spite of passionately protesting his innocence, he was banned by FIFA for one year. His lawyer, Cor Hellingman, protested that this ban should not have been imposed before the outcome of a hearing of de Boer's case, which was expected to last until September 2001. The outcome of this hearing was not known at the time of writing.[479] In addition, Theo Zagorakis, a former Leicester City player then turning out for AEK Athens, tested positive for anabolic steroids and was suspended from the Greek national squad.[480]

The scandal involving Davids, de Boer and Couto was part of a trend which threatened the integrity of football itself, according to FIFA Vice-President David Will. The increase in drug abuse, plus the false passports scandal highlighted in the previous issue of this column,[481] could cause enormous damage to the reputation of the sport. He identified the main reason as the enormous sums that currently stand to be earned from winning at all cost.[482]

Drug abuse rife in the English premiership?

Any feeling of complacency on the part of football enthusiasts at home as a result of the drugs scandals in Europe, detailed above, evaporated in the course of July when a series of revelations highlighted the extent to which the problem may have taken root in the English Premier Division.

In July 2001, an investigation conducted by Radio 5 Live into alleged shortcomings in the detection and prevention of drug-taking in English football suggested that the problem had assumed serious proportions in this country, particularly in the prestigious Premiership. The programme highlighted a case in which a physiotherapist at an unnamed Premiership club had found anabolic steroids in the players' dressing room. This discovery was never communicated to the Football Association. A spokesman for the latter dismissed the incident as a mere allegation.[483]

This was not, however, the first time that allegations of this nature had been levelled at English football. Earlier that month, Watford manager and former Chelsea star Gianluca Vialli had claimed there was a conspiracy of silence over performance-enhancing drugs in the domestic game. Interviewed by an Italian magazine, he alleged that the pressures of the modern game made it hard for many to speak openly about it, and that the fear of speaking out affected all those involved in the sport - players, clubs, agents and the media.[484]

The Radio 5 broadcast mentioned earlier made a number of other allegations which particularly related to a number of defects in the system of enforcing drug abuse legislation. Thus it was claimed that Premiership players have but a remote chance of being tested because the vast majority of tests take place in the lower divisions and in amateur football, that clubs were advised in advance of visits by inspectors, that some clubs employ private drug testers to take samples from their players, without ever releasing any results, and that doctors who give drugs to track athletes are currently also treating footballers.[485]

French administrative court annuls penalties imposed for drug taking[486]

When a French footballer was tested for drugs, he was found positive for nandrolone and penalised by the French Football Federation. However, the sample provided by the player had been divided into two containers, one measuring 45 centilitres, the other 15 centilitres. However, the relevant rules, laid down in a decree of 1991, stipulate (Article 6) that each urine sample must be equally divided into two sealed containers by the licensed doctor in question, which must carry an identification label bearing a code number.

The player concerned appealed against this decision before the local Administrative Court (*Tribunal administratif*), which set aside the Federation's decision because of this irregularity. The Federation, however, appealed to the Paris Administrative Court of Appeal. The latter found that the rule that the sample be divided into equal parts was a substantive requirement, the absence of which entailed the voidance of the testing procedure. This was regardless of the fact that no such formality was required by corresponding rules of the International Olympic Committee (IOC), or that failure to observe this requirement had no effect on the outcome of the test.

The Court therefore confirmed the first ruling.

CYCLING

Giro descends into chaos following drugs raids (Italy)

Although less prestigious than its French counterpart, the Tour of Italy (*Giro d'Italia*) is nevertheless one of the major fixtures on the international cycling calendar. Hitherto it has succeeded in avoiding some of the more hair-raising drugs scandals which have afflicted its sister race across the Alps. However, this year proved to be a massive exception.

On 6 June, drugs police staged a mass raid on the *Giro* as it was passing through the North-West of the country. Instead of competing in a key mountain stage through the Southern Alps, as originally scheduled, the riders spent the day on strike in a state of outrage in the resort of San Remo, previously best known for its Italian song contests. At a certain point they even threatened to abandon the race. Between 9 pm on the Wednesday and 6 am the next day, police searched every hotel room occupied by the teams whilst the riders waited in the lobbies and corridors. The police later left bearing quantities of caffeine, cortisone, testosterone, anabolic steroids and various unidentified medicines.[487] The day before the raid, Pascal Hervé, the veteran French rider, was withdrawn from the race after testing positive for a banned substance. Previously, Hervé had been suspended after he admitted during last October's trial in the Festina case that he had taken EPO whilst a member of the Festina team.[488]

The next day, Dario Frigo, who was lying second overall in the race, was compelled to quit after admitting that banned substances had been encountered in his room.[489] As the race ended in Milan a few days later, press reports suggested that 70 riders were featured on a list compiled by magistrates leading the judicial action.[490] However, by far the most dramatic news came the following day, when initial results of the raid pointed to a new development in drugs use for sporting purposes, to wit the "next generation" of blood-boosting drugs, which replicate the effects of erythropoietin, the banned red-cell booster which was at the centre of the 1998 scandal in the Tour de France. The substance found in Frigo's quarters was Hemassist, a modified haemoglobin produced by the American pharmaceutical giant Baxter, which was removed from the market following trials. This is the first occasion on which a blood substitute has been found at a major sporting event. It is produced by genetically modifying either cow's blood or human blood recycled from blood banks.[491]

The other substitute found during the raid was RGR-13, a synthesised molecule which increases the release of energy-producing oxygen into the muscles from the red cells which carry it into the blood. It mimicks the substance in the red cells which performs the process naturally. It is produced by a small company in Denver, Colorado.[492]

A few days later, following an emergency meeting, the Italian cycling federation announced the suspension of all events from 18 June onwards. The move, which had been invited by the Italian Olympic Committee, covered all nationally sanctioned amateur and professional races.[493] Prosecutors in Florence were in the meantime investigating 86 people in connection with the drugs scandal.[494] One of these was former Tour de France winner Jan Ullrich.[495]

Drugs continue to make the headlines during this year's Tour (France)

Although the drugs issue has beset cycling in general, and the Tour de France (or Tour de Trance as some have come to describe it) in particular, since the 1960s, it was the 1998 Tour which genuinely opened the eyes of the world to the true extent to which this cancer had eaten away at the sport. Each of the subsequent races has continued to yield a fresh revelation, and this year has been no exception.

For the 2001 race, however, the organisers had left little to chance in their efforts to curb the abuse of illegal substances, and announced a 10-point plan to combat the problem. Rather touchingly this included requiring the competitors to take an oath "on their honour" that they would abide by the ethical charter on refraining from using banned drugs. In addition, daily drugs tests were increased to ten and, prior to the start of the race, team managers and doctors were required to give a written undertaking that they would not administer or prescribe banned substances.[496]

However, the race was barely 24 hours old when it became immersed in controversy, as American Lance Armstrong, campaigning for his third successive Tour victory, confirmed that since 1995 he had

worked with cycling's most controversial trainer, the Italian doctor Michele Ferrari. This association began barely a year after the doctor had stated that the blood booster erythropoietin (EPO) was no more harmful than five litres of orange juice. He was banned by his team for this remark, and is currently awaiting trial on charges of supplying banned drugs to a long list of cyclists - who do not include Armstrong, but did contain his friend and former team-mate Kevin Livingstone. Armstrong dissociated himself from the EPO remark made by Ferrari. However, he admitted that he had hardly gone out of his way to publicise the relationship.[497]

A few days later, Spaniard Txema Del Olmo gained the unenviable distinction of being the first competitor to leave the race under a cloud after he had tested positive after the prologue time trial at Dunkirk. The substance in question was said to have been EPO.[498]

The anti-drugs rules were also a talking point in the bizarre manner in which Armstrong's fellow-countryman Jonathan Vaughters was forced to abandon the race. He appeared at the start of the stage which commenced in the Basque town of Pau with the right side of his face swollen following an allergic reaction to a bee sting. The anti-inflammatory medicine he required to cure his condition rapidly contains cortico-steroids, which are banned but can be used locally under prescription. Doctors of the International Cycling Union, however, refused him permission to use the drug, and the hapless American was forced to pull out of the race, bitterly condemning existing procedures. To add insult to injury, the French anti-doping body had revealed the previous day that the use of corticosteroids in the Tour continued to prevail, since half the 16 urine samples carried out the previous weekend had contained traces of corticosteroids used under prescription.[499]

French amateur cyclists "acted as drug pedallers" claims witness in court case (France)[500]

In a recent court case heard in Poitiers, France, it was suggested that the country's weekend amateur cyclists may be as drugged as their professional counterparts. The case in question concerned the trial of some 41 riders, trainers and alleged drug dealers charged with taking or administering performance-enhancing drug cocktails. When questioned, various witnesses revealed that combinations of amphetamine and caffeine were widely used during amateur races or taken at the end of the day in order to relieve fatigue.

One rider informed the Court that he hid a syringe under his jersey and injected himself in the stomach as he rode. Another defendant claimed that at first, he took it during the race because it made him feel much stronger. However, when he reached home and experienced headache, he took it again. Then he started to use it in the morning, at midday...

The practice had come to light when two cyclists from Poitiers complained to a doctor of sweating, anxiety attacks and liver pains. They said that they believed the drugs cocktail which they had been using was safe and legal. It was sent away for analysis, and the doctor reported that the cocktail would lead to rapid physical and psychological dependence, adding that amongst the older riders there was a serious risk of heart failure. One of the defendants, a well-known amateur, had died last year aged 50.

Other cases

- In late May 2001, German track rider Guido Fulst, a member of the team pursuit squad which won gold at the Sydney Olympics, escaped with a £800 fine after he tested positive for caffeine in the Stuttgart six-day race in January.[501]

- In August 2001, the first sporting figure apparently to test positive for EPO, Danish cyclist Bo Hamburger, won a legal battle against the verdict when he was cleared by the Danish Cycling Federation, although the world cycling governing body UCI stated it was examining the ruling with a view to a possible appeal.[502]

- In June 2001, Roland Meyer of Switzerland returned a positive test for EPO after the *Flèche Wallone* race.[503]

- In late July 2001, Australia's Anna Milwood, one of the world's top road cyclists, tested positive for a banned local anaesthetic.[504]

New Zealand swimmer wins appeal against national drug agency[505]

The appellant in this case was an international swimming and surf lifesaving competitor. In November 1999 he provided the New Zealand Sports Drug Agency with a sample of urine for drug testing. The agency froze the sample and sent it by courier to Sydney on 25 November. The courier failed to append the appropriate Customs declaration, as a result of which the sample lay unfrozen in the quarantine area of Sydney Airport for two weeks. On 9 December, it reached the Sydney laboratory and was refrozen. When tested for the first time on 7 January, the sample indicated the presence of drugs. The second test confirmed this result. The appellant, a Mr. Bray, was advised that the agency had determined that he had committed a drugs offence, and the agency entered details of the case in the Sports Drug Register which it is required to maintain. The agency further advised the relevant sporting bodies.

Mr. Bray appealed to the District Court against the agency's determination, claiming that the testing procedures followed were not in substantial agreement with the regulations. He specifically averred that there had occurred an inordinate and inexcusable delay between taking the urine sample and the advice of the first result. The District Court upheld his appeal and set aside the determination. Thereupon the agency appealed, and the High Court reversed the decision. The High Court decision was challenged by Mr. Bray before the Court of Appeal, Wellington.

The Court of Appeal awarded the decision to the appellant. It ruled that the scheme and language of the New Zealand Drug Agency Act 1994 compelled the conclusion that urine samples held for testing needed to be despatched to, and arrive at, the testing laboratory as soon as practicable after they had been supplied to and received by the agency. The emphasis in the Act was on the expeditious performance of the steps involved in testing. The question whether or not the samples had been despatched and received as soon as practicable necessitated an objective assessment of the statutory and regulatory requirements, and no questions of blame or prejudice arose. Also, construed in its context, the phrase in Regulation 30 "send ... to a laboratory" referred to the circumstance of causing the sample to be conveyed to the particular destination, rather than simply starting the package on its way.

Leading Australian coach banned and sent for trial

In April 2001, Gennadi Touretski, a top swimming coach, whose charges include Olympic champions Alex Popov and Michael Klim, was suspended by the Australian Institute of Sport following allegations of illegal possession of anabolic steroids. Institute director Mark Peters explained that the ban had been imposed pending the outcome of a court case in which Touretski was to answer accusations of unlawfully possessing a small quantity of banned steroids. Australia Swimming also banned the Russian-born coach.[506] The outcome of the trial was not yet known at the time of writing.

Former and current swimmers hit out at existing drug control systems

Swimmers are not normally the most attention-seeking of sporting figures, but the attitude towards drugs adopted by the sporting authorities has moved a number of them to biting criticism.

In April 2001, Mark Spitz, who gained a record seven gold medals at the Munich Olympics in 1972, accused the International Olympic Committee (IOC) of being "soft on drugs", stating

> *"They can test for all the drugs that are performance-enhancing but they have a vested interest in not wanting to know"*[507]

A few months later, similarly biting comments were made by swimmer Ian Thorpe, this time directed against the world swimming body FINA. He stated that one of the areas in which FINA disappointed was its failure to organise doping tests. Earlier that day, one of the FINA drugs experts, Andrew Pipe, had raised doubts about the quality of tests relating to the banned EPO substance - however, FINA did not even organise tests during the swimming World Championships. Thorpe went on to condemn what he considered to be a total absence of deterrent against the use of drugs in the sport.[508]

CRICKET

Herschelle Gibbs penalised for smoking cannabis

South African batsman Herschelle Gibbs is far from a happy man these days. Already under a cloud for having been found guilty of taking a bribe before a one-day international against India in 2000[509] (which some believe he escaped too lightly), he once more incurred the wrath of the cricketing authorities later that year for "conduct unbecoming" (i.e partying) in the early hours of the morning before a match with Australia, which earned him a three-match ban and a $1000 fine.[510]

Earlier this year, he found himself in trouble again when he admitted to having smoked cannabis in a hotel room in Antigua during South Africa's Test series against the West Indies. In this offence, however, he was not alone, since team-mates Paul Adams, Roger Telemachus, Andre Nel, Justin Kemp and Craig Smith also admitted to having partaken of the illegal substance that evening.[511] However, Gibbs, who seems to lead a charmed life in these matters, escaped suspension at a United Cricket Board of South Africa disciplinary committee in Johannesburg in early June. Instead, he was ordered to complete an appropriate mentoring period.[512]

Condon report highlights growing drugs problem[513]

The Condon report on corruption in cricket (see above, p.17) has pointed up issues other than those related purely to bribery and other forms of financial corruption. It also drew attention to a growing drugs problem besetting the sport. This essentially took two forms: first, an increased use of performance-enhancing drugs; second, allegations that some players and officials were using baggage and equipment in order to carry recreational drugs on tour. This has led to calls for the International Cricket Council (ICC) to organise a suitable anti-doping programme.

Under the current system, players can only be tested during domestic fixtures, but not when engaged on international duty. (In England, tests are carried out by UK Sport.) The ICC is the only major world governing body not to have instituted an anti-drugs programme. The issue is now likely to be discussed at a forthcoming ICC meeting.

ATHLETICS

The Olga Yegorova affair

The World Athletics Championships held recently in the Canadian city of Edmonton may have produced little excitement on the track - to the point of causing the town to be renamed as Deadmonton - but produced a good deal of controversy off it. Much of this was related to the fact that an athlete who had tested positive at an earlier event was allowed to compete.

At the Golden league meeting in Paris on 6 July, Olga Yegorova recorded the world's fastest time over 3,000 metres, but was caught out by an unscheduled drugs test, as a result of which she became the first athlete to test positive for the banned steroid EPO. However, by the time that the Edmonton Championships started, the blood test had yet to confirm the urine test, as is required by the relevant rules before an athlete can be banned. As a result Yegorova's name appeared on the entry lists for the 1,5000 and 5,000 metres events in which she could expect to rank as one of the favourites.[514]

This news was greeted with a storm of disapproval from many of the Russian athlete's fellow-competitors. Gabriela Szabo, Romania's Olympic champion over 5,000 metres, announced that if Yegorova appeared at the starting line, she would sit out the race in protest. Britain's Paula Radcliffe said that similar threats had been discussed amongst the British team, and even talked about methods of co-ordinating this protest with other competitors. These protests appeared to have been quelled when the IAAF announced that the Russian would be suspended whilst awaiting the results of the blood sample.[515]

The reluctance on the part of Yegorova's fellow-athletes to give her the benefit of the doubt may be explained by the fact that, at the relatively advanced age of 29, she had made an almost miraculous transformation from a competitive but average athlete to a major world-beater, culminating in her victory in the 3000 metres event at the World Indoor Championships in Lisbon (in which she defeated none other than Gabriela Szabo herself).[516]

Then came the revelation that the testing process continued to be mired in legal uncertainties and had not yet been validated. This meant that athletes would only be found guilty of taking the drug if they had tested positive on both the urine and the blood tests. It now appeared that the French federation, under whose auspices the Paris meeting was held, had failed to require a blood sample. This left the International Amateur Athletics Federation (IAAF) little alternative but to reinstate the Russian and allow her to compete. Arne Ljungqvist, the IAAF vice-president, clearly showed the unease which accompanied this decision when he stressed that the decision had been made for "strictly legal" reasons.[517]

The next day brought a further twist in the saga. It appeared that Yegorova could be banned after all if a different test, taken shortly after the Paris meeting, revealed traces of the banned steroid.[518] However, this test did not reveal any such substances, and Yegorova was allowed to compete. To a mixed reception from the crowd, she won both the 5,000 and the 3,000 metres events, defeating both Szabo and Radcliffe in the process, who had withdrawn their threatened boycott of the events.[519]

Chinese coach under fire as athletes fail drugs test[520]

The decision by the Chinese athletics authorities to appoint Ma Junren as deputy head coach of their team may prove to be an unhappy one after it was revealed that two of his athletes were suspended for failing drug tests. Ma's techniques have come under suspicion ever since his "army" of female runners swept the board at the 1993 World Championships, as well as breaking a number of world records at the Chinese domestic championships. These performances have been clouded by claims that the athletes concerned had taken drugs, whereas Ma alleged that their success was the result of training and diet consisting of turtle blood and caterpillars.

Last year, six of Ma's runners were amongst 27 athletes dropped from the China Olympic team when tests showed that they may have taken EPO. One of them, Liqing Song, was later banned for two years after failing out-of-competition tests in July 2000.

Marion Jones employs supplement scientist (US)[521]

Triple Olympic gold medallist Marion Jones has become so apprehensive about the risk of inadvertently testing positive for banned substances as a result of taking health supplements that she is currently employing a scientist to analyse everything she consumes. She has taken this measure in the wake of many top sporting figures testing positive for the anabolic steroid nandrolone - including her husband, world shot put champion C.J. Hunter, currently serving a two-year ban as a result.[522]

Round-up of individual cases

- As anticipated in the previous issue of this column[523] Britain's Mark Richardson had his drug ban lifted after serving only seven months of his two-year suspension. He was reinstated under the IAAF's "exceptional circumstances" rule.[524]

- In August 2001, it was announced by the IAAF that Italian marathon runner Roberto Barbi had failed an out-of-competition test for EPO on the eve of the World Championships.[525]

- The outcome of the Katrin Krabbe case, reported in the previous issue,[526] was favourable to the former East German World Champion, when a Munich court ruled that the two year ban imposed by the IAAF, in addition to the ban pronounced by the German Athletics Federation, was unlawful. She was awarded compensation amounting to $382,000.[527]

- In June 2001, Czech shot putter Miroslav Menc failed a drugs test for the second time in three years, and could be banned for life.[528]

- In April 2001, Dieter Baumann, the former Olympic medallist who was serving an international drugs ban, was prevented by a German Court of Appeal from running in the Hamburg Marathon. Baumann had tested positive for nandrolone in 1999, and although he was cleared by the German Athletics Federation having claimed that his toothpaste had been spiked, an IAAF arbitration panel had imposed a two-year ban. The Court ruled that the IAAF

ruling represented the valid basic legal principle, rather than the that issued by the German Federation.[529]

- The Algerian Athletics Federation has announced that Ali Saidi-Sief had tested positive for nandrolone. This announcement came after the athlete had finished second in the 5000 metre event at the Edmonton World Championships.[530]

- During the British Grand Prix at Crystal Palace, held in July 2001, cleaners discovered a container and syringe in the athletes' toilets and passed to regulating body Sport England. The phial in question was full, which will assist the relevant drugs investigators.[531]

RACING

Cocaine incidents at various racecourses (UK)

Because of its very nature, the Sport of Kings is never short of controversy. Hitherto, however, it had been reasonably successful in steering clear of any involvement with drugs. Recent events, however, have threatened to shatter this complacency. Although the incidents in question did not involve performance-enhancing drugs, they come on top of alcohol-fuelled incidents which have marred some meetings this year (see, for example, above, p.23).

In June, a 24-year-old Leicester man was cautioned for possession of cocaine after being arrested at Newmarket's Rowley Mile racecourse. The arrest came on the day when the course took the unprecedented step of using plain-clothes police officers to assess the extent and nature of drink and drug-related problems at the course. In a separate incident, another staff member found two capsules in the Grandstand toilets which initial tests suggested contained amphetamine.[532]

Later that month, it was revealed that cocaine was being used in the Royal Enclosure at Ascot. Evidence collected on the opening day of the festival was sent to a Derby laboratory, which confirmed the presence of cocaine at four sites around the course. This was in spite of a massive increase in security following the drug abuse discovered at Newmarket, mentioned above.[533]

Jockey has licence temporarily withdrawn following drug test charge (UK)[534]

In June 2001, conditional jockey Tony Coyle had his licence withdrawn for six months by the Jockey Club after he left the racecourse where he had been selected for a random drugs test. He had complained of feeling unwell before leaving Lingfield racecourse without providing a sample. Following a hearing, the disciplinary committee held that by leaving the course without leaving a sample, or without requesting or receiving clearance from the local stewards, Coyle had infringed the relevant rules.

Horse disqualified after testing positive (UK)[535]

Colt Noverre was disqualified from the French 2000 Guineas race after testing positive to a substance used to ease his arthritis, although he had been treated therapeutically within internationally accepted veterinary guidelines.

TENNIS

Argentinian player banned for steroid abuse[536]

In April 2001, Juan Ignacio Chela, a promising 21-year-old Argentinian player, was suspended for three months for drug abuse. He tested positive for methyltestosterone, a banned steroid, on the occasion of the Masters Series Tournament, held in Cincinnati (US) in August 2000. This could have earned him a two-year ban, losing a good deal of prize money and ranking points in the process. However, he succeeded in convincing the relevant anti-doping tribunal that he had not knowingly taken the drug, which caused the ban to be reduced. He did, however, forfeit the $6,000 which he won at the tournament in question.

ITF campaign warns players against use of steroids[537]

The case quoted above may have been one of the factors which have motivated the International Tennis Federation (ITF) to mount a major campaign aimed at dissuading players from attempting to boost their performance by taking prohibited steroids. It includes giving players graphic descriptions of the medical dangers of taking these substances, such as growing breasts, blood clots and liver failure (for men) and facial hair, deeper voice, smaller breasts and menstrual interference (for women).

WRESTLING

Germany lose world championships because of drugs scandal[538]

In May 2001, Germany were stripped of the right to stage the 2003 World Championships because of a drugs scandal involving Alexander Leipold. The latter lost his 76 kg freestyle Olympic gold medal after testing positive for anabolic steroids. The wrestler, who blamed food supplements for the test results, compelled the German Wrestling Federation to lift his domestic ban, but remains suspended internationally.

OTHER SPORTS

Rugby League (UK): in June 2001, David Highton, the Warrington hooker, was suspended by the Rugby League until next May for drug abuse. He was also fined £1,000. Highton failed a drugs test in a match against Huddersfield on 6 May. He had pleaded guilty, and claimed that he took the product in good faith.[539]

Pigeon-racing (Belgium): In April 2001, the relatively unglamorous sport of pigeon racing was the subject of a major drugs probe in Belgium. Police raided more than 80 houses across the country over claims that pigeons were having drugs administered to them in order to make them go faster.[540]

16. ISSUES SPECIFIC TO INDIVIDUAL SPORTS

FOOTBALL

The Chesterfield saga - an update (UK)

It will be recalled from the previous issue[541] that in February 2001, a joint FA and Football League inquiry was commenced into allegations of financial irregularities at Chesterfield FC - concerning more particularly payments to players and attendance figures. The penalties which were ultimately imposed left many people with a feeling that the club had escaped lightly - although question marks over the club's future remain.

First, details began to emerge on the methods used by the investigators to discover the improprieties in question. It appears that, one cold morning in January, Graham Bean, the FA's compliance officer, accompanied by three investigators, arrived at Saltergate and told surprised club officials to open their files and submit all documentation to the joint FA/Football League team which had been despatched to Chesterfield. Following seven days of exhaustive investigations, Bean concluded that all was not as it should be at the club, which led to the charges being made. Nor was this all.[542]

In April, two police investigations were opened: one by the fraud squad into the management of Chesterfield, the other investigating allegations of witness intimidation. The first led to the arrest of Andy Marples, an accountant who worked for Chesterfield, at his home, where a number of documents and computer disks were seized. He was later released, pending further investigations. The second resulted in a file being sent to the Crown Prosecution Service in which it was alleged that witness statements presented to the joint FA/Football League inquiry had been distributed to Chesterfield fans at a local pub in the hope that they would intimidate those giving evidence to the inquiry panel at Hillsborough.[543]

Then on 12 April, following a three-day grilling by the Football League disciplinary panel and facing 90 allegations of regulation infringements, Chesterfield had nine points deducted from their Third

Division total and were fined £20,000. Most of the charges had been left unproven, but eight had been upheld. The panel concluded that the club had committed financial irregularities over the signing of Luke Bennett from Chester and the recording of gate receipts.[544] Many thought that the club has escaped quite lightly, since the points penalty would still leave them in third place and thus qualify them for promotion.

Nor were all those involved in the game convinced that the panel were correct in dismissing the overwhelming majority of the charges, which were also the most serious. Many were unhappy at the composition of the panel, particularly the presence of former Nottingham Forest manager Frank Clark, who is deputy chairman of the League Managers Association, and was thus sitting in judgment over one of his own members, Chesterfield boss Nicky Law.[545]

In a moment of hubris, Chesterfield lodged an appeal against the verdict,[546] but withdrew the appeal two days later.[547] The following week, the Football League caused something of a sensation by announcing that it had refused to accept the disciplinary panel's decision and instructed the latter to reconvene. Only the points deduction was capable of review, the fine remained as envisaged at £20,000. The League obviously invited the panel to deduct a number of points which would be sufficient to prevent Chesterfield from being promoted.[548] However, when the panel reconvened on 1 May, it failed to alter its decision, as a result of which the Football League Board confirmed the original decision on 3 May.[549]

This was not, however, the end of the legal road as far as the "Spireites" were concerned. Six Third Division clubs agreed to support whatever team finished at the bottom of the Third Division (and therefore faced relegation to the Conference) in an attempt to obtain judicial review of Chesterfield's results. More particularly they would seek to have Chesterfield deprived of the points they won when the contentious Luke Bennett was on the pitch.[550] The outcome of any such move was not known at the time of writing.

Shortly afterwards, however, there were new question marks over the club's survival when it was taken to court over a winding-up order worth £800,000. The club's debts stood at over £1.6 million.[551] In the meantime, a group of Chesterfield supporters had acquired a majority shareholding in the club and raised £270,000, which they hoped would help towards taking the club out of administration.[552] The High Court subsequently allowed the club to do so.[553] In the meantime, an attempt by 13 Football League chairmen to have Chesterfield expelled from the League failed.[554]

Birmingham City bid to annul play-off result because of shoot-out fails (UK)

In May 2001, Birmingham City found themselves involved in the play-off matches over who should have the right to accompany Fulham and Blackburn Rovers in the Premiership the following season. The first stage was a two-leg tie against Preston North End, and ended in an aggregate score of 2-2. This made a penalty shoot-out inevitable, which Preston won 4-2. However, Birmingham City appealed to the Football League over the fact that the shoot-out took place at the end which accommodated the Preston supporters, rather than at the other end, which had a building site behind it.[555]

However, the Football League dismissed the appeal and supported the decision by the referee, Paul Danson, to hold the shoot-out at that particular end. Both Danson and the Lancashire police had said that the decision had been taken purely on safety grounds. Birmingham City immediately announced that they were consulting their lawyers on this matter, although ultimately nothing came of these threats.[556]

Proposed move by "Dons" to Milton Keynes fails to obtain approval (UK)

Wimbledon FC are a club who for some time now have been "homeless". Ever since they left their old ground at Plough Lane, which no longer met safety requirements, ten years ago, they have shared Selhurst Park with Crystal Palace in South London. Then in early August, the club announced that it was seeking to relocate to Milton Keynes, where a new 28,000 stadium was to be built.[557] However, not everyone agreed with this proposal, least of all most of Wimbledon's supporters who were naturally not looking forward to travelling for home matches as well as away fixtures.[558]

Undeterred, Wimbledon made a formal application to the League to this effect on 2 August.[559]

However, the latter failed to oblige. The League's Chief Executive David Burns defended the refusal on the grounds that football clubs are the heart and soul of their local communities, and that this was not something that could be moved from place to place. To allow this move would have created a dangerous precedent.[560]

Liverpool face Haka rather than Haifa in Champions league after illegal player ruling

When Israeli team Maccabi Haifa beat Finnish side FC Haka for a place in the European Champions League, it seemed as though they had won for themselves an extremely lucrative tie with English side Liverpool FC. However, it transpired that in so doing, they had fielded an ineligible player in the form of former Wimbledon midfielder Walid Badir, which caused European governing body UEFA to award the tie to the Finns.[561]

The Israeli club considered that this move would cost them over £1 million, and enlisted the services of prominent sports lawyer and Manchester United director Maurice Watkins in appealing against this decision. The appeal failed.[562]

Match result cannot be challenged after its ratification. French Supreme Administrative Court decision[563]

Although recently there have been fewer incidents involving the use of false passports than during the period covered by the previous issue,[564] its reverberations continue to create legal difficulties - not least in France, judging by the decision under review. Because certain players in the French league had played under these false credentials, moves were made in order to have the results of the matches in question annulled. However, in the meantime the results of these matches had already been officially ratified. This gave rise to a dispute which made its way through the system of French administrative courts, ending before no less a body than the *Conseil d'Etat* (French Supreme Administrative Court).

The Court held that these results could no longer be challenged. It recognised that the rules of the French Football Federation (FFF) required the players involved in a fixture to meet the conditions and requirements set out in these rules, and that, because certain players had made use of false passports, the acquisition of the relevant footballing licences constituted fraud within the meaning of these rules. This was not, however, sufficient to qualify the decisions to ratify the results of the matches in which these players had participated as fraudulent acts capable of justifying the annulment of these decisions. Under the same FFF regulations, match results could not be challenged for reasons relating to the players' qualifications, unless a reasoned objection, specifically naming the player in question, had been inserted in the referee's match sheet and a reasoned and written complaint made to the appropriate authority within a period of 48 hours of the match having been played.

Under the FFF regulations, match results could be challenged by the relevant Committee because of any fraud which may have tainted the identity of a player, but only as long as these results have not yet been ratified. As a result, the results in question were beyond challenge.

J'accuse! Wenger *et al.* complain of poaching and other irregularities (UK)

Since the previous issue went to press, accusations have been flying thick and fast across the nation's football clubs of various malpractices involving both attempted and real transfers - and not only of players. Prominent in this commotion have been managers (Wenger, Ferguson, Hoddle) players (Stam, Vieira) and agents (Roach).

The first of these accusations came from Premiership club Southampton. In early April 2001, they announced that they were considering lodging a complaint with the Premiership over the manner in which Spurs had succeeded in winning over manager Glenn Hoddle to their ranks.[565] They alleged that Spurs had infringed several principles contained in the Premier League's code of conduct, to wit (a) in all discussions relating to the employment of managers, each club must behave with good faith, (b) a

club may not enter into direct negotiations with the manager without prior permission, (c) no club may induce a manager of another club to commit breach of contract, and (d) clubs must observe the terms of their contract with their managers and ensure prompt settlement of any monies owed.[566] However, on 1 June Southampton announced that they would not after all make the complaint envisaged.[567]

As the new season approached, new accusations were levelled - this time about illegal approaches towards players. In mid-July, Arsenal coach Arsène Wenger accused Manchester United of having made an unlawful attempt at luring Patrick Vieira from Highbury to Old Trafford.[568] Earlier, Arsenal Chairman David Dein had made it clear that he would investigate the part played by both clubs and individuals in the events leading up to Vieira's desire for a transfer.[569] Arsenal had also announced that they were considering a direct protest to world governing body FIFA about this matter.[570] United Chief Executive Peter Kenyon, however, steadfastly denied these allegations.[571]

This affair looked likely to join the lengthy list of threatened actions which never materialise, until on the very eve of the season Patrick Vieira himself released the proverbial feline from the floppy container by announcing, that, although he himself had had no personal contacts with various clubs about a possible move, his manager had. One of the clubs cited by him was Manchester United.[572] To make matters worse for the "Reds", their Dutch midfielder Jaap Stam claimed, 24 hours later, that Sir Alex Ferguson had infringed FA and UEFA regulations by arranging a meeting with him whilst he was still at PSV Eindhoven, and that Ferguson had done so before approaching the Dutch side.[573] Stam made these revelations in his autobiography called *Head to Head.*

Matters looked to be heading for a veritable showdown at the official level, when a few days later, Arsène Wenger admitted that he himself had contacted players' agents about possible moves to Highbury. The Alsatian denied that this practice constituted "tapping" as it is colloquially known in the relevant circles; however, it did seem to cover the same type of irregularity of which he had originally accused Sir Alex. Wenger added that he did not wish to see United penalised by the FA for this.[574]

In late July, the FA announced that it had charged Dennis Roach, Glenn Hoddle's agent, with infringing five regulations following an investigation into two transfer deals. The investigation had been sparked off by a letter of complaint sent to the FA in September of the previous year. Four of the charges relate to two transfers made within eight days of each other last September, i.e. Paul Wanchope's from West Ham to Manchester City, and Duncan Ferguson's from Newcastle United to Everton. The other charge referred to Regulation 22, which covers accepting monies from persons other than his principal client. Roach immediately reacted by accusing Adam Crozier, the ubiquitous FA Chief Executive, of waging a witch-hunt against him.[575]

Earlier, Crozier had made an astonishing attack on football and the chairmen, managers, players and administrators connected with the sport.[576] One of the more contentious allegations made by him was that agents and "hangers on" made £7 million out of the £9 million which Aston Villa paid for Colombian striker Juan Pablo Angel.[577]

In a separate development, Belgian champions Anderlecht claimed, in early July 2001, that Everton had illegally approached their highly rated Canadian striker Tomasz Radzinski.[578]

UEFA call for salary cap[579]

The increasingly stratospheric dimensions reached or aspired to by leading players - Sol Campbell is reported to have asked for £130,000 per week during his negotiations with Tottenham - have prompted calls by UEFA, the European governing body, to call for the introduction of a squad salary cap, of the type that already exists in the United States. Under such an upper limit, players would remain free to negotiate their own wages, but the entire club would be restricted to a certain payroll. UEFA spokesman Mike Lee explained:

> *"We are not naive and we recognise the difficulties in implementing salary capping. It could only work if there was total agreement between clubs, and that may prove difficult. Unless we are alive and alert to these issues then inevitably the bubble will burst. The consequences of that for a large number of professional clubs could be severe"*

Earlier, English football had already been advised that it faced meltdown if no curb was placed on

players' wages. Industrial analysts Deloitte and Touche, in their annual survey of Premiership finances, predicted that at the current rate, wages would overtake club income within six years.[580]

The report issued a similar warning to Scottish football: currently, the Premier League clubs, with the exception of Celtic, were spending over 50 per cent of turnover on players' wages, with Hibernian the worst offenders at 89 per cent.[581]

Round up of individual cases
(all months quoted refer to 2001, unless stated otherwise)

- In August, Swindon Town (England) manager Andy King received a four-match touchline ban as well as a £750 fine following an incident during an FA Cup match with Gateshead the previous season, in which he abused a fourth official. He was promptly dismissed by Swindon.[582]

- In April, French team Saint-Etienne lost their appeal against a League decision to deduct seven points from their total for having fielded three players with false passports.[583]

- In July, the Football Association turned down a plan proposed by the Nationwide Conference for a two-up, two-down promotion and relegation system between the League and the Conference.[584]

- In August, former Derby County and West Ham defender Igor Stimac, who currently plays for Hajduk Split, was banned for six matches by UEFA after having "seriously assaulted" a Real Mallorca official following a Champions League match.[585]

- In April, Nationwide League clubs Gillingham and Crystal Palace were fined by the FA following a mass confrontation during their Boxing Day fixture at Gillingham. At least 12 players were involved in a mêlée in injury time of the first half after Vince Bartram, the home goalkeeper, had conceded a penalty.[586]

- In early May, Leeds United had to play their European Cup semi-final second-leg tie with Valencia when UEFA handed Lee Bowyer a three-match suspension for stamping on an opponent during the first leg at Elland Road.[587]

- The Albanian Football Federation incurred a UEFA fine following the racist behaviour of a section of their supporters during the under-21 game against England in March.[588]

- During the same month, the FA's independent appeal board agreed to reduce the fine imposed earlier on Gary Neville, the Manchester United and England defender, from £30,000 to £7,000 for using foul and abusive language towards a match official. His two-game ban, however, was confirmed.[589]

- Bernard O'Byrne, Chief Executive of the Football Association of Ireland, resigned following an internal inquiry into the use of his official credit card. O'Byrne denied any improper action had occurred.[590]

- In July, Preston (England) manager David Moyes escaped disciplinary action after his club launched an investigation into allegations of a late-night brawl during the club's pre-season tour in an Austrian nightclub.[591]

- In April, Scotland captain Colin Hendry was issued with a six-match ban after he was found guilty of elbowing San Marino's Nicola Albani during an international at Hampden Park in March.[592] However, this sentence was subsequently reduced to a three-match ban.[593]

- In May, Greece were given a World Cup lifeline when FIFA ruled that they had three months in which to prove that there was no Government interference in the Greek Football Association. This reprieve meant that their tie with England on 6 June could go ahead as scheduled.[594]

MOTOR RACING

Four-match probation for de Ferran[595]

In May 2001, defending CART champion Gil de Ferran received a four-race probation from chief stewards for repeated breaches of conduct in a race at Motegi, Japan. The Brazilian had exceeded the 50 mph pit-lane speed limit whilst qualifying, but ignored his penalty and failed to respond to the instructions of race officials.

He was also cited during the race as fluid leaked from the rear of his car. He was black-flagged by CART stewards, but ignored the notice before bringing his Reynard into the pit-lane.

Jaguar abandon quest for Newey (UK)[596]

In June 2001, Jaguar Racing abandoned their attempt to lure Adrian Newey, top Formula 1 designer, away from McLaren after realising that they could not win the High Court dispute involving the two teams. Jaguar had announced the capture of Newey two weeks previously, only for McLaren to react with the assertion that Newey was to remain with them beyond his present agreement, which expires in August 2002.

However, on 16 June the two sides agreed that Newey should remain at McLaren. The Human Rights Act prevented Jaguar, who signed a legally-binding contract with Newey, from forcing the technical director to work for them, and they had little to gain from a court battle.

FIA reject Raikkonen appeal[597]

In June 2001, the world governing body in motor racing, FIA, dismissed an appeal by British American Racing (BAR), the Formula One team, over Kimi Raikkonen's fourth place a the Austrian Grand Prix. BAR had challenged the Sauber driver's points finish, alleging that he might have overtaken illegally under a yellow flag at the previous month's race. Raikkonen passed backmarker Luciano Burti's Prost vehicle as Benetton's Jenson Button crashed out. BAR, whose French driver, Olivier Panis, came fifth, alleged that the overtaking manoeuvre was unlawful. The FIA Court of Appeal rejected this view, and confirmed that the results would stand.

Bennett ban (UK)[598]

In August 2001, Briton Phil Bennett was banned from the next round of the British Touring Car championship for dangerous driving. He had clashed with several drivers during the race at Croft.

RUGBY UNION

Rebels defeated, then win - but rugby unites in the end

The fundamental split between the Rugby Union and Premier Rugby, the body representing the leading Premiership clubs, which threatened to tear English rugger apart, has been extensively documented in the previous issue.[599] Particularly the formation of the Reform Group, who aimed at shifting the balance of power within the game's authorities, seemed an ominous development for the future of the sport.

However, at the Special General Meeting of the RFU convened in April 2001, the existing management won a sweeping victory over the few hundred grass-roots members seeking to derail their delicate negotiations with the country's top clubs. Faced with seven resolutions, the RFU won them all comfortably, securing the all-important vote on the question whether the Union should be allowed to transfer any significant control to Premier Rugby. Despite a low attendance - less than 60 per cent of those entitled to vote attended - the RFU expressed considerable relief at surviving what they considered to be a real threat to the future of the Union.[600]

However, the rank-and-file of the rugby ran out of patience at the Annual General Meeting held over a

month later, when they elected Graeme Cattermole rather than Brian Baister onto the RFU Management Board. Baister, who had been Chairman since 1998, had the support of the Council to serve a fourth and final year, Cattermole, on the other hand, enjoyed the backing of seven County RFUs and won the vote by a 3-2 majority. His victory came despite what appeared to be a trump card on Baister's part when the latter claimed that the long-awaited agreement between the RFU and the Premiership had been reached.[601] However, Cattermole's victory looked likely to revive the prospects of a breakaway by Premiership clubs, since he was seen as representing the grass roots against the might of the big clubs.[602] Considerable concern was expressed at the low turnout, with the vote accounting for less than 25 per cent of the electorate.[603]

However, the prospects of a unified and harmonious future for the sport looked much more promising a few weeks later, when the RFU, the Premiership clubs and the players combined to form a united body called England Rugby Ltd. Top priority is given by the new organisation to the national team, with the prospect of a national squad of 55-60 players being announced early in the season and monitored accordingly. No-one will be allowed to play more than 32 matches per year, and this will include an allowance of ten internationals per year and eight per season. There will be an 11-week close season to enable proper recuperation and pre-season training to take place. In addition, a strict code of conduct has been established for the reporting and treatment of injuries.

England Rugby Ltd. will be owned 50 per cent by the RFU and 50 per cent by Premiership Rugby, which is an alliance of the Premiership clubs and their players. Each will have five directors on the board, with an independent, non-voting chairman. It will negotiate all the commercial and television rights, both for the England national side and the domestic club competition. Revenue and profits will be shared at all times. Club sponsorship, commercial schemes and gate receipts will remain with the clubs themselves, but if those clubs start earning profits in excess of those stated in their submitted business plans, the surplus goes into a collective pot. Players' salaries will be paid by the clubs, with payments for international appearances coming from a central fund to be administered by the Players' Association.[604]

League/Union defection talk puts League on war footing (UK)

The Rugby League came into existence in 1895 as a result of the unbending amateur code of Rugby Union, from which it broke away. Ever since, many a Union player has been lured into changing codes by the financial rewards which were not available to them under the Union system. However, since both codes are now professional sports, the flow of players has begun to turn the other way, much to the vociferous - and somewhat hypocritical - dismay of the League clubs and authorities. However, it was not until July 2001 that dismay turned to something approaching panic as the Union code stepped up the pressure to entice League players.

Although the RFU steadfastly denied reports that it was about to provide each of the 12 Premiership clubs with £125,000 each to "cherry-pick" league talent as part of the attempts to end its six-year internal strife (see above), RFU Chief Executive Francis Baron admitted that his organisation would assist any player who wished to change codes. He also dismissed as "pure speculation" suggestions that the RFU was contributing towards the wages of Henry Paul, the stand-off who moved from Bradford Bulls to Gloucester. However, since the said peace deal guaranteed each top Union club the sum of £1.6 million, the money is plainly available for the execution of this and many similar raids on the human resources of the League.[605]

The latter, meanwhile, were becoming so flustered at the implications of the current spate of cross-signings that Sir Rodney Walker, Rugby League Chairman, called upon the government to intervene, and stated that he would be raising the matter with Sports Minister Richard Caborn. The outcome of these talks remains as yet unknown.

"Grannygate" gets in way of high-profile code-switches[606]

Two of the high-profile League to Union defections referred to above have been those of Iestyn Harris from Leeds Rhinos to Cardiff and Keiron Cunningham from St. Helens to Swansea. Or at least they would have been, had not the ghost of Grannygate returned once again to haunt Welsh rugby, since Cunningham failed to satisfy the Welsh Rugby Union (WRU) that his grandfather had been born in Swansea, and Harris was required to provide documentary proof of his Welsh ancestry.

The International Rugby Board requires players to register with a Union and provide the latter with incontrovertible evidence of their eligibility. This rule was introduced after Wales were found to have fielded three ineligible players, i.e. Shane Howarth, Brett Sinkinson and Tyrone Maullin, in the scandal which became known as "Grannygate". It appears that when Cunningham first played for Wales at Rugby League six years ago, he was not required to provide evidence that he qualified through his grandfather's origins. As he was the third brother to represent Wales at Rugby League, his eligibility was taken as read.

This will not mean, however, that Cunningham will henceforth be banned from playing for Wales or produce a yellowing birth certificate.

Round-up of individual cases
(all months quoted refer to 2001, unless stated otherwise)

- In May, Canadian Ryan Banks was suspended for a week after being sent off in Canada's 20-6 defeat by Argentina for having elbowed Agustin Pichot, the Bristol and Argentina scrum half.[607]

- Swansea back-row forward and British Lion Colin Charvis was suspended for two matches following reckless play during the Lions' sole victory of the 2001 Australia Tour at the "Gabba" in Brisbane.[608]

- In July, Wallaby lock David Giffin was suspended for three weeks for punching Robbie Fleck during the match against the Springboks in Pretoria which the latter won 20-15.[609]

- In June, South Africa's outside half Butch James was banned for two weeks for late-tackling France's David Bory during the second Test between the two countries in Durban.[610]

- In May, Wales and Lions coach Graham Henry was accused by the New Zealand rugby authorities of having made an illegal approach to one of the "Super 12" coaches, aimed at enticing the latter to join Henry in crossing the equator. Legal action has been threatened but not, thus far, used.[611]

- During the 2001 Lions tour of Australian, Wallaby Duncan McRae, the former Saracens fly-half, was found guilty by an independent tribunal of having punched Irishman Ronan O'Gara 11 times and was suspended for seven weeks.

RUGBY LEAGUE

League structure faces major overhaul[612]

In June 2001, it emerged that Rugby League, faced with the major onslaught from "th' other lot" as described above, planned to overhaul its structure radically, including a new five-division format. The Rugby League Council has supported proposals by the Strategic Planning Committee which would see the slimmed-down format enter into operation as from 2003.

Central to the plan is the introduction of four national divisions (two professional and two amateur) under the Super League, all playing from March to October. The thorny issue of international fixtures has also been addressed, with clubs pledging themselves to supporting an expanded programme. In addition, the Super League is likely to be reduced from 12 to ten.

Round-up of individual cases
(all months quoted refer to 2001, unless stated otherwise)

- In May, Brandon Costin, Huddersfield's Australian stand-off, was banned for three matches and fined £250 for a late challenge which effectively ended the season of St. Helens player Sean Long.[613]

- In June, Warrington centre Toa Kohe-Love was banned for four matches for the high tackle which resulted in his dismissal during the Super League fixture with Salford.[614]

- In April, Doncaster winger Neil Bennett was suspended for eight matches following the injury inflicted on Whitehaven winger Chris Campbell.[615]

- In May, Leeds winger Karl Pratt was issued with a two-match suspension.[616]

- In France, Saint-Gaudens, who dropped from second to fourth place in the final league table after the French Rugby League had docked them four points, won their appeal against this decision in April and restored as runners-up to Villeneuve.[617]

- In August, Halifax player Paul Davidson was banned for three matches and fined £250 for being dismissed in the match against Hull. In the same match, Hull player Jason Smith was fined £450 for a high tackle.[618]

RACING

The Kieren Fallon affair (UK)

Three-times champion jockey Kieren Fallon will certainly have cause to remember the Ayr meeting in late May 2001, but not for the best of reasons. During an unglamorous sprint event, he barged illegally into another horse and was banned for three days. That meant that he would have to forfeit the Epsom Derby, one of the jewels on the crown of racing in this country.[619] Although technically the stewards' decision was correct, some commentators considered the penalty out of all proportion to the offence.[620]

Fallon, however, appealed against this decision - which in itself was risky, given that an appeal which is considered to be frivolous can lead to a ban being extended by one or two days.[621] Ultimately, the appeal made no difference since the Jockey Club stewards at Portman Square confirmed the original decision. Fallon had argued before them that the manoeuvre which led to the ban was caused by the fact that, when a slight gap appeared, his mount unexpectedly, and of its own accord, veered leftwards. The stewards ruled that this was not borne out by the evidence, and that Fallon, who had been waiting for a gap to appear, made a manoeuvre to his left when it should have been obvious to him that this would have resulted in interference.[622]

Stewards' inquiries to be overhauled (UK)[623]

In July 2001, it was announced that the somewhat arcane practices of the racecourse stewards' room were to be made significantly more accessible to the general public. Televised summaries of inquiries which affect results are soon to be available. In addition, as from early next year, the amateur tradition will be broken when a professional stewards' secretary will be added to every panel.

It is also believed that this may be a precursor to other changes, such as having cameras and microphones installed in every inquiry, in order to enable the punters themselves to witness the resolution of incidents which frequently impinge on their faith and finances.

Ex-footballer Quinn penalised for neglect of horses

The equestrian career of former Newcastle and Coventry striker Mick Quinn took a sharp downward turn during the summer, when he suffered a ban imposed by the Jockey Club. An allegation that Quinn had neglected three horses in his care last winter was upheld by the JC disciplinary committee, who banned him from training for 2½ years. This resulted from a complaint made to the RSPCA by a member of the public that horses Winsome George, Arab Gold and Zola were emaciated and suffering from rain scald. The RSPCA passed on the complaint to the Jockey Club.[624] As in the case of Fallon cited above, there were not wanting those who, like trainer Richard Hannon, thought the penalty "unfair".[625]

However, Quinn appealed to the Jockey Club's Appeal Board, who reduced the ban by one year. He

was represented before the Board by Peter McCormick, who represented Leeds United at the trial for assault involving Lee Bowyer, Jonathan Woodgate and Michael Duberry in April.[626]

Kinane wins High Court ruling - but is racing the winner (Ireland)?

On 18/7/2001, Irish jockey Mick Kinane was suspended for two days for careless riding at Leopardstown, which meant he would miss Ascot ... unless he won an appeal before the Irish horseracing authority, the Turf Club.[627] This took place a week later, and extended over two days.[628] This appeal was lost, but the Kinane team decided to invoke an even higher authority by applying to the High Court in Dublin. Mr. Justice McCracken found that the relevant Turf Club rules were flawed, and granted Kinane an interim injunction, which meant that he could compete at Ascot after all.[629]

However, not all commentators were ecstatic about this outcome. Some believed that the implications for racing were quite drastic, since, if every failed appeal against a jockey's suspension ended in the courts, the rules of racing would become unworkable.[630]

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- In May, trainer Henry Cecil won his appeal against the disqualification of his filly Double Crossed after she had beaten Silver Grey Lady in the Lingfield Oaks trial (UK). The Jockey Club stewards reversed the decision of the Lingfield stewards who originally found that Double Crossed had caused interference to Silver Grey Lady, who momentarily collided with the running rail.[631]

- At a Doncaster (UK) meeting in July, the stewards decided to reverse the first two placings after an enquiry. They decided that Nashaab, the original winner, had drifted right, intimidated the original second, Unshaken, and pushed him across the course.[632]

- Irish jockey Richard Hughes will probably remember the past few months as the "summer of discontent" after picking up five bans in twelve months.[633] For the last of these, the Jockey Club stood him down for no fewer than eight days, this penalty being imposed for "failing to ride to his draw" at a Yarmouth meeting (UK).[634]

- Frankie Dettori also incurred the wrath of the stewards in late May, when he picked up a four-day ban for irresponsible riding of a minor nature (UK).[635]

- Also in May, Darryll Holland was banned for 14 days after throwing away the SIS Huxley Stakes on Island House (UK).[636]

- In August, trainer Lynda Ramsden was fined £1,000 and jockey Michael Hills suspended for five days under the non-triers rule over the running and riding of Marweh at a Doncaster meeting (UK).[637]

- In May, Lee Newman was suspended for 14 days after throwing away a winning chance at Bath (UK).[638]

ICE HOCKEY

Allison given 14-match suspension for brawling (UK)[639]

In February 2001, Sheffield Steeler Scott Allison was issued with one of the most severe suspensions ever to be imposed in domestic ice hockey for his part in the shaming scenes during a fixture between Sheffield and Nottingham Panthers, which led to eight players and both coaches being dismissed. He was banned for 14 matches, i.e. ten for a cross-check to the head, two for fighting and two for leaving the penalty box, and was also fined £850.

His captain, Dennis Vial, was suspended for six games and coach Mike Blaisdell was banned for two matches and fined £500. Nottingham's Barry Nieckar was banned for five games and fined £700.

Super League to clamp down on violent play (UK)[640]

In May 2001, the Super League announced plans to clamp down on violence in ice hockey, with increased penalties for fighting. Any player who "drops the gloves" is to be penalised by a five-minute period in the sin-bin (as opposed to the current two or four minutes). If the player is caught fighting a second time, he will be sent off.

CYCLING

Rider banned from Giro for punching spectator (Italy)[641]

As if the *Giro d'Italia* (Tour of Italy) did not have sufficient problems to contend with on the drugs front (see above, p.77), it now has violent riders to add to its list of woes. Italian Wladimir Belli, who was lying third overall in the race, was removed from it for punching a spectator during the final climb of the stage to Arco, in the Dolomites. It appears that a spectator bearing the colours of his arch-rival called him a "bastard", and he responded with a right hook of which John Prescott would have been proud.

It is the first time such a measure has ever been taken in a major cycle race.

Steels attacks "little dictators" after been relegated to final place in Tour (France)[642]

Belgian sprinter Tom Steels accused the race referees of acting like "little dictators" after being relegated, in somewhat bizarre circumstances, to the final place for dangerous riding in a spectacular sprint finish. This is not the first time that Steels has fallen foul of the Tour *commissaires*.

BASKETBALL

Sheffield Sharks stripped of their franchise (UK)

In May 2001, Sheffield Sharks, one of the more successful Premiership clubs of recent years, had their franchise removed by the British Basketball League (BBL) because of breaches of their deed. They thus became yet another casualty of the fallout from the Chesterfield FC investigation (see above, p.83). This measure was taken after financial commitments sought from the Sharks' owner, Darren Brown, were not provided, this giving the authorities little choice but to sever all ties with the former Chairman of Chesterfield.[643]

Later, the BBL granted the Sheffield franchise to Montgomery Leisure Services, and the new club is now entitled to play in the 2001-2002 season.[644]

Ogunlesi banned (UK)[645]

In April 2001, Thames Valley Tigers player Simon Ogunlesi, who had been dismissed twice a few weeks previously for attacking players and abusing officials, was banned from playing in this country for a year by the English Basketball Association (EBA). Ogunlesi was sent off in the home ties with Sheffield Sharks and played only ten games for the club before being suspended by the Tigers.

BOXING

Judges to be watched by cameras[646]

Judges at the amateur world championships held in Belfast in June 2001 were for the first time scrutinised by cameras in order to ensure that they made the correct decisions. This also happened at the Sydney Olympics.

CRICKET

Crackdown on the ill-disciplined - various measures mooted

It is a sad fact that cricket, a sport once known and praised for its essentially correct approach towards the game and its rules, has increasingly shed this reputation what with open dissent on the field and various other expressions of ill discipline now being an all too familiar feature of the game. As a result, various schemes have been proposed, some with greater prospects of acceptance than others.

Thus Australian proposals to introduce a football-style system of disciplinary measures based on yellow and red cards have been met with various degrees of enthusiasm by the game's authorities. Australia has discussed the matter with the International Cricket Council, but is facing entrenched opposition from England, which believes that the system might itself lead to increasing disciplinary problems. The England and Wales Cricket Board remain committed to the new system of five-run penalties introduced last year.[647]

Later, the newly-appointed Chief Executive of the ICC, Malcolm Speed, warned that under his stewardship the days of slapped wrists and suspended sentences for ill-behaved players would be numbered. He was particularly concerned about the dissent being shown with umpiring decisions, as well as the practice of charging aggressively at the umpire when appealing.[648]

Jacobs banned for bringing game into disrepute[649]

In July 2001, Ridley Jacobs, the West Indies wicketkeeper, was banned for three one-day internationals for bringing the game into disrepute. Television replays showed Jacobs stumping Indian batsman Virender Shewag with his right hand, even though the ball was in his left, during the triangular tournament in Harare, Zimbabwe. Match referee Denis Lindsay, the former South African wicketkeeper/batsman, found Jacobs guilty of breaking the ICC's Code of Conduct because, although he did not claim the stumping, he failed to recall Shewag.

Kent warned about illegal approach (UK)[650]

The practice of making illegal approaches seems to be infecting virtually every sport currently practised (see above) - even cricket. That much was evident when, in May 2001, Kent were warned about their future conduct after having made an illegal approach towards Jamie Hewitt of Middlesex.

TENNIS

Rios fined for party row[651]

In May 2001, embattled player Marcelo Rios, already under the threat of being charged with assault and resisting arrest after an altercation with the police in Rome, was fined $7,000 by the Association of Tennis Professionals (ATP) for incidents alleged to have taken place at the Masters Series players' party in the Italian capital. He was said to have displayed aggressive behaviour, which included spitting on the floor. The fine represents the maximum penalty permitted under ATP rules.

GOLF

Venue for 2009 Ryder Cup rests with PGA[652]

In June 2001, lawyers confirmed that the choice of venue for the 2009 Ryder Cup rests with the Professional Golfers' Association, according to Sandy Jones, their Chief Executive. Jones had sought this confirmation after Ken Schofield, his counterpart from the PGA European Tour, interrupted the Ryder Cup bidding process by suggesting that the decision had been made to award the fixture to Celtic Manor in Wales. Schofield had also intimated that his organisation were poised to take over rather more than their current 50 per cent stake in the match, a suggestion which caused Jones to respond that the PGA had no intention of selling any of their share at any stage.

Footnotes

(1) *The Daily Telegraph* of 14/6/2001, p. 12; *Daily Mail* 15/6/2001 p. 11.
(2) *The Observer* of 17/6/2001, p. 22; *Daily Mail* 18/6, p. 94.
(3) [2001] 1 *Sport and the Law Journal*, p. 3.
(4) *Daily Mail* of 11/7/2001, p. 18.
(5) *The Guardian* 11/7/2001, p. 8.
(6) *The Daily Telegraph* of 30/4/2001, p. 11.
(7) *The Lawyer* 11/6/2001, p. 3; *Gazette* 14/6/2001, p. 8.
(8) *The Lawyer* 30/7/2001, p. 7.
(9) *For the Record*, Official Newsletter of the National Sports Law Institute, April/May 2001, p. 4 et seq.
(10) *Gazette* 26/7/2001, p. 13.
(11) *Gazette* 5/7/2001, p 9.
(12) *The Guardian* 6/6/2001, p. 30
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Transfrontier Broadcasting of World Cup Qualifying Games

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With extraordinary speed, the House of Lords[1] has recently given judgment in the case of TVDanmark,[2] which concerned the broadcasting of the 5 'away' 2002 World Cup qualification matches ("the matches") of the Danish national football team. The broadcast rights had been acquired exclusively, and at considerable cost, by a relative new-comer to the Danish TV market, TVDanmark ("TVD"), as a 'driver' for channel subscriptions.

The principal issue was whether TVD was entitled actually to *broadcast* exclusively in(to) Denmark the rights it had *acquired* exclusively, given that TVD has only a limited coverage (approximately 60%) of the Danish TV market.[3] In the House of Lords, the Independent Television Commission ("the ITC"), with the aid of an intervention by the Secretary of State for Culture, Media and Sport,[4] successfully argued that the answer to this principal issue is no - exclusive broadcasting of these matches is not permitted, nor is exclusive broadcasting of other similar sports events permitted, save in most unusual circumstances. The reason that it is not permitted is that the matches are "designated" by Denmark as events of "major importance to society" and, as such, are governed by the *special, protective* legal regime set down in Article 3a of the "TV Without Frontiers Directive"[5] ("the Directive"). A resounding 5-0 judgment on this issue was important, in light of the mistaken view taken by all 3 members of the Court of Appeal, and the clear potential implications of that Court of Appeal judgment for UK "listed" events.

The secondary issue, more vexed as a matter of Community and domestic law, was the manner in which the ITC should exercise its discretion to permit, or prohibit, exclusive transfrontier broadcasting; in particular, (i) the extent to which the ITC should have regard to the views of the authorities of the other Member State in question and (ii) the weight to be given to a fair, free and open auction process by which the rights to an event are acquired in the first place.

Again, the ITC and the Secretary of State successfully argued that the answers to these questions are (i) that decisions taken by authorities in other Member States are determinative on some issues, such as the events which are designated, and persuasive on others, such as the reasonableness of the price paid to acquire the rights and (ii) that the auction acquisition process is a relevant factor to be taken into account, but it is not determinative, either way.

The judgment helpfully and correctly clarifies some aspects of the law in an area in which there is a great deal of interest, in which increasingly huge sums of money are expended and in which there is another brewing dispute, namely, the sale by the Kirsch Gruppe of rights to the 2002 World Cup tournament itself. It does not, however, answer all the difficult questions posed by the Directive either as to designation, or as to reciprocal, transfrontier enforcement.

THE PURPOSE OF ARTICLE 3a OF THE DIRECTIVE: WHY DESIGNATE AN EVENT?

The key consideration in the case is the purpose of Article 3a of the Directive. Article 3a(1) permits a Member State to designate events[6] which

> *"are regarded by that Member State as being of major importance for society..."* and allows them to *"take measures... to ensure that broadcasters under its jurisdiction do not broadcast [them] on an exclusive basis..."*

It is the backbone of the relevant parts of the domestic implementing legislation in the Member States.

To appreciate the purpose of Article 3a fully, regard should be had to its genesis.

Subscribers to pay TV still represent a relatively small part of the total viewing audience in the Member States. Accordingly, a large section of the community will be deprived of the possibility of viewing events, if those events are broadcast exclusively on pay TV. Indeed, in the past 15-20 years

that is precisely what has happened. Pay TV broadcasters have continued to acquire the exclusive rights to many top flight sports events, precisely because they are so important for driving subscriptions and extracting value from a relatively small number of viewers and from advertisers.

As such exclusive acquisitions have increased, particularly during the 1990's, a conflict of interest has crystallised between the pay TV broadcasters (and, to an extent, the sports bodies, event organisers and sports participants), on the one hand, and the general viewing public (and the 'public' broadcasters), on the other hand.

It was, and is, widely perceived that the interest of the general viewing public is culturally and socially more profound in relation to certain 'special' events that have come to enjoy a special national resonance, such as, in the UK, the FA Cup Final, the Grand National and Derby horse races, and the Wimbledon Tennis Finals or, for example in France, the Tour de France.[7]

The general public interest dimension of broadcasting is frequently and expressly recognized in the Community. Thus, in the Services of General Interest in Europe Communication from the Commission (COM (96) 443 final) it is stated, under the heading "Broadcasting", that:

> *"television and radio have a general interest dimension... being linked to moral and democratic values, such as pluralism, information ethics and protection of the individual..."*

Put another way, it is commonly considered that, in light of their traditional and cultural importance, the general public has a 'right' to see these 'special' events on widely accessible, free-to-air television. Certainly, history has shown that these 'special' - sometimes called "Crown Jewel" events - consistently attract very large TV audiences on free-to-air TV. Accordingly, such "events of major national importance" constitute important aspects of the public's (human) right to freedom of information: this point is expressly recognized at Recitals 15 and 18 of the Directive.

In addition, widespread viewing access to major sporting events plays an important role in the so-called "European Model of Sport", which prides itself on the social and cultural benefits of access to, and participation in, sport. As the Committee of the Regions (COR) put it (in 1999):

> *"The COR sees pay-TV as posing a risk to sport if pay-TV channels acquire exclusive rights with excessively lengthy, and therefore generally unacceptable, lifespan. They could be tempted to pay large sums of money for such exclusive rights in order to secure a foothold and develop markets. Public access to televised major sporting events would then be seriously impeded and market distortion would result. So as to safeguard the aforementioned social role of sport, it is necessary to ensure that public channels retain broadcasting rights to sports events and consequently to regulate in an appropriate manner the world of pay-TV which, because of its exclusive rights to broadcast certain sporting events, is undermining the right of everyone to enjoy sport as a spectator."*

Yet, precisely because they are so enthusiastically and regularly watched by the general public, and form such an important part of the national sporting calendar, the Crown Jewel events are highly valued by pay TV broadcasters who, absent legal safeguards, would have powerful incentives to outbid public, free-to-air broadcasters for the rights to those events, just as they have increasingly done for other high profile sports events.

Against that background, Member States began to legislate domestically to 'protect' such 'special' events against exclusive broadcast by limited-coverage, pay TV broadcasters. In the Broadcasting Act 1990, for example, the UK protected certain "listed events", including those UK events mentioned above.[8] Gradually, other Member States did likewise, according to their own traditions and tastes. Accordingly, the protection of special events began to occur on a fragmented, piecemeal and purely domestic-law basis across the Member States.

Whilst differing in the detail of their operation, all the various domestic measures inevitably recognised that 'special' events were to be precisely that, 'special'. Almost by definition, they were not to be subject to the ordinary market forces of supply and demand, precisely because those market forces provided insufficient protection to the general viewing public. In other words, a legislative balance was struck by individual Member States between the competing interests, and the balance came down clearly in favour of wide, free-to-air broadcast of a handful of Crown Jewel events.

At the same time as fragmented domestic protection occurred, the general development of TV

market(s) proceeded rapidly, giving rise to many more possibilities of transfrontier provision of TV services. By 2000, for example, there were over 580 TV channels (terrestrial, satellite, or cable) broadcast in the EU with potential national coverage, an increase of 170% since 1996, and over 50 channels which target mainly markets in countries other than their country of establishment.

Not surprisingly, the differing national protective regimes created actual and potential problems in the developing market for the free transfrontier movement of television broadcasts.

The Directive was first promulgated in 1989.[9] Its purpose then was to co-ordinate provisions of the Member States in a host of *other* broadcasting areas, such as jurisdiction, television advertising and sponsorship, the protection of minors and the right of reply, where the differences between them were such as to create impediments to free movement of services. As the Recitals to the Directive then put it:

> *"Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broadcasts within the Community and may distort competition with the common market."*

The idea was that adherence to a set of coordinated rules would mean that, provided a broadcaster complied with the rules set down in its own Member State of establishment, its broadcasts could be received and retransmitted without further hindrance throughout the remainder of the Union, thereby facilitating the free flow of broadcasting and related services.

By 1997 sufficient political impetus had been built up for the Member States to add protection for "designated" events into the coordination framework of the Directive. That protection was added in the form of a brand new Article 3a.

Thus, the genesis of Article 3a expressly involved:

- an attempt to facilitate *improved* transfrontier provision of broadcasting services for major events, in light of the then-prevailing disparate national restrictions;
- a recognition of the importance to society of widespread, free-to-air broadcasting of a handful of "events of major national importance";
- a recognition that, inevitably, 'protection' of such events, even when coordinated and reciprocally respected among Member States, would involve restrictions both on competition and on freedom to provide services.

There were 2 other elements of the coordinated framework in Article 3a. First, there was a provision (in Article 3a(2)) for the designated events and the domestic measures to be notified to the European Commission in order to verify their compatibility with Community law and to facilitate their prompt communication to other Member States. This provision may not have been strictly necessary and gives rise to some interesting, unresolved questions, such as the legal effect of notification and verification of compatibility.

Second, there was a provision (in Article 3a(3)) effectively to ensure reciprocal enforcement in Member States of the rules relating to events that had been designated by other Member State. Without this latter provision, of course, the purpose of the Article could, and probably would, largely have been frustrated by broadcasters simply setting up in a neighbouring Member State and exclusively broadcasting from there, particularly given developments in technology.

Once the principal purpose of Article 3a is recognised, it becomes clear that TVD's case was doomed to failure. It had acquired exclusive rights to broadcast Danish designated events, and it sought to broadcast exclusively[10] those events into Denmark from the UK, notwithstanding that Danish free-to-air broadcasters (with greater than 90% coverage) continued to wish to broadcast the same events - and were prepared to pay for the right to do so.

WHEN MIGHT EXCLUSIVE PAY TV BROADCASTING BE PERMITTED?

There are perhaps only 3 genuinely conceivable - albeit unusual - sets of circumstances in which a pay

TV broadcaster might have succeeded against that sort of background:

(a) the free-to-air broadcasters were not willing to pay any reasonable price for the rights to the events;

(b) the free-to-air broadcasters were not even interested in broadcasting the events;

(c) there was genuinely too little time available post-acquisition, but pre-performance, of the events for the free-to-air broadcasters to take advantage of the rights.

As to (a), a crucial point was recognised by the House of Lords. A "reasonable" price to one category of broadcaster may legitimately differ from a "reasonable" price to a different category of broadcaster. This case was a good example of the point. The nascent TVD *needed* the exclusive rights to the matches to drive subscriptions, boost advertising, and establish itself on the Danish TV market. Accordingly, it was "reasonable" for TVD to pay a large amount for the rights (if exclusive) - which it did. In contrast, the free-to-air broadcasters could not reasonably afford to pay such high prices for the matches (whether exclusive or not), given their other public service broadcast commitments and their limited ability to extract specific, extra value from either the audience or from advertisers.[11] This point is fundamental to the operation of TV markets, but was not appreciated by the Court of Appeal. It means necessarily that the argument that a mere free, open and fair auction process for designated rights - in which auction the pay TV broadcaster emerges as the victorious highest bidder - is sufficient protection for the events could never succeed by itself. Such an auction is the epitome of the free market, but that is precisely what the Directive is designed to avoid for the Crown Jewel events.[12]

As to (b), lack of interest is a possibility, but not likely. Almost by definition, the free-to-air broadcasters are interested in the Crown Jewel events and have a history of broadcasting them.[13] Perhaps the most likely application of this point is in the context of a designated tournament or major, multi-sport event. For example, a dead-rubber between 2 minor, overseas teams in a football championship may be of no interest to a broadcaster. This point could, though, merge into point (c) below: the free-to-air broadcasters do not manifest an interest *in time*.

As to (c), the hypothesis is that there is a scheduled, designated event and, for some reason, the broadcast rights are not sold until the event is almost ready to be performed. The rights are then acquired exclusively by a pay TV broadcaster who is, logistically, just able to broadcast the event in time. Thereafter, the free-to-air broadcaster continues to insist on a right to (pay to) broadcast the same event, but there is insufficient time left to negotiate the sale of shared rights and allow the free-to-air broadcaster actually to put itself in a position to broadcast. In these circumstances, there is a reasonable argument that exclusive pay TV broadcasting should be permitted, but it would depend on a number of key factors:

- what was the reason for the delay in the initial sale - if it was a deliberate ruse, by pay TV broadcaster and/or by event organisers, it may be proper for consent to exclusive broadcast to continue to be refused (even though that may mean that the event is not broadcast at all);

- was there a fair, free and open auction in the first place - if not, then consent may again be refused.

Whilst very late sale presents a window for exclusive pay TV broadcasters, it is unlikely that there will be a great rush towards last-minute dealing, principally because it does not suit those pay TV broadcasters for other reasons. For an exclusive right to be of greatest value to a pay TV broadcaster it has to be capable of being both advertised and marketed in advance. Without advance advertisement an exclusive right cannot itself hope to increase subscriptions to any significant degree, particularly given the lead-in times for physical hook-up. Likewise, without advance marketing, a pay TV broadcaster cannot realistically hope to maximise advertising revenue for a particular event. Indeed, last minute acquisition of rights could be counterproductive, if it leads to high levels of frustration for subscribers and/or advertisers.

RECIPROCAL ENFORCEMENT

In the UK, the decision to provide, or refuse, consent lies in the hands of the ITC. It is to be made in

accordance with familiar public law principles. However, under Article 3a(3) regard must be had to the overseas protective regime that is, effectively, being enforced. Certain aspects of the overseas regime are binding on the ITC, that is:

- which events are "designated";
- whether the prohibition should relate to live, or deferred, coverage;
- what proportion of the general public needed to be covered by a broadcast.

Without domestic authorities deferring to overseas authorities on these issues there would be no meaningful reciprocity.

That said, the key question under Article 3a(3) of whether, in fact, there has been a deprivation "of the possibility of following events..." remains in the hands of the domestic authority, the ITC.

Sensibly, and reasonably, the House of Lords confirmed that regard can, and should, also be had to the views of the overseas authority on this key question, including, perhaps most importantly, on the question of reasonableness of prices paid/offered at the auction of the rights. The overseas authority ought to be in a position, perhaps the best position, to give reasons, supported by data, on reasonableness of price. If timing of the auction is an issue, then, again, the views of the overseas authority could also be persuasive.

Perhaps the UK system could be improved in this area. Under the Danish, and the German rules, provision is made for reference to an independent body on the question of reasonableness of price. The UK public law system would probably be made more transparent, if it had a similar provision, perhaps reference to an arbitrator or to a specialist body. Likewise, timing issues could also be dealt with in revised UK rules, so as to clarify this additional area of uncertainty.

It will be interesting to see how the question of price is affected by the continued development of the TV market(s). For example, as digital technology expands, will the increased marketing opportunities that it presents, for both free-to-air broadcasters and pay TV broadcasters, be introduced into the price equation?

Paul Harris appeared as Junior Counsel for the Secretary of State in the case.

Footnotes

(1) The case was fought in the English courts because TVD is established in the UK, though its business consists principally of transfrontier broadcasting, namely, from the UK into Denmark.
(2) *R v. Independent Television Commission, ex parte TVDanmark 1 Limited:* judgment of 25th July 2001, [2001] UKHL 42. The matter first was heard by way of judicial review before Jack Beatson QC, sitting as Deputy Judge of the High Court, on 1st September 2000, immediately prior to the first of the matches being played. It was then appealed with extreme expedition - given that the timetable for the remainder of the matches remained unchanged - to the Court of Appeal on 3rd October 2000, with judgment on 5th October. Leave to appeal to the House of Lords was given on 14th December 2000 and the hearing took place on 3rd and 4th July 2001. Of the 5 matches, there remains 1 to play - in September 2001.
(3) which is well below the "substantial proportion of the population" requirement of 90%, as set out in the Danish rules. There may, of course, come a time when pay TV broadcasters, in fact, meet the coverage requirement. The balance of argument may then shift, because it may no longer be the case that a substantial proportion of the population is being "deprived of the possibility of following such events".
(4) and of combined written intervention submissions from the BBC and ITV.
(5) Directive 97/36/EC, OJ 30.7.97 L 202/60
(6) In practice nearly all the events designated have been sporting events, with the notable exception of the San Remo music festival in the Italian list.
(7) In *Commission of the European Communities v. The Hellenic Republic* Case C- 198/89 [1991] 1 ECR 727, the ECJ recognized that similar social and cultural interests (in that case relating to the "...artistic and archaelogical heritage of a country...", as opposed to "events of major national importance":) constituted "...an overriding reason justifying a restriction on the freedom to provide services...": see page 741, paragraph 21.
(8) At that time the "listed events" were protected against pay-per-view TV: see s.182 of that Act.
(9) Directive 89/552/EC, OJ 17.10.89 L 298/23
(10) and actually did broadcast exclusively 4 of the 5 matches, prior to the House of Lords judgment.
(11) It should not be overlooked that there is often competition between free-to-air broadcasters to obtain the broadcasting rights to the listed events, meaning that there is a real incentive for them to make respectable, realistic bids.
(12) Exactly what figure is "reasonable" to any category of broadcaster is a difficult question, though its difficulty should not be exaggerated in light of the experience of broadcasters in performing precisely this calculation. Regard is, and should be, had to previous prices paid for the event, to potential advertising revenue, to time of broadcast and other relevant factors.
(13) Indeed, in the UK, under s.97(2) of the Broadcasting Act 1996, the Secretary of State is obliged to consult the BBC when drawing up or revising the list of protected events.

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British Horseracing Board v William Hill

Fraser Reid and Rustam Roy

The judgment by Mr Justice Laddie in the case of *The British Horseracing Board Limited* (BHB) *and others* versus *William Hill Organisation Limited* (WH), February 2001, clarified the scope of the new sui generis database right, created by the Database Directive[1] (the Directive) and implemented in the UK by the Database Regulations[2] (the Regulations).

The Database Directive was implemented into UK law on 1 January 1998 and applies to databases created before and after 1 January 1998. The Directive creates a two-tier system in relation to databases, whereby copyright and the new database right can subsist independently of one another in the same database. Copyright, inasmuch as it applies, can protect the format or structure of the database, as well as individual data that make up the database. The database right protects the investment that goes into obtaining, verifying or presenting the contents of a database for the duration of the right. Such investment may consist of the expenditure of financial resources, time, effort or energy.[3]

THE FACTS

The BHB is the governing authority for the British racing industry and, in support of its administrative functions, it maintains a computerised collection of information (the BHB Database) which is continually updated with current information. Weatherbys (W) are employed by the BHB to maintain and update the BHB Database. The information contained in the BHB Database consists of, among many other items, pre-race information that is made available in advance of the race. After each race, details of the outcome are recorded on the BHB Database, to which an estimated total of 800,000 new records or changes to existing records are made each year. Maintaining the BHB Database costs the BHB approximately £3 to £4 million per annum. A daily feed of race information from the BHB Database is made available by W to a large number of subscribers, including Satellite Information Services (SIS). SIS makes this data available to its own subscribers, one of whom is WH. SIS supplies WH with an audio and video service to WH's Licensed Betting Offices and also provides a satellite channel to facilitate the supply of information from WH to WH's Licensed Betting Offices. A substantial part of the information that WH uses in its business, therefore, originates from the BHB Database, for which the BHB receives financial compensation.

Since February 2000, WH has offered Internet betting on all mainstream horseracing in the UK. The dispute in this case arose because WH displayed on its websites racing information relating to races to be run that day, which was identical to part of the information provided to it by SIS. WH was not authorised by BHB to use the information provided by SIS for its Internet betting business (and SIS did not sublicense WH to do so).

THE BHB's CLAIM

The BHB claimed :

(a) a Declaration that it owned database rights in the BHB Database;

(b) that WH was making unlicensed use on WH's betting websites of some of the data contained in the BHB database; and

(c) that WH was breaching its database rights in the BHB Database by

- **(i)** extracting or re-utilising a substantial part of the BHB Database, contrary to Art. 7(1) of the Directive; and/or
- **(ii)** by repeatedly and systematically extracting or re-utilising insubstantial parts of the BHB Database, contrary to Art. 7(5) of the Directive.

WILLIAM HILL'S RESPONSE TO THE BHB's CLAIM UNDER ARTICLE 7(1) OF THE DIRECTIVE

WH accepted that, at specific dates, the BHB Database qualified as a collection of data in respect of which database rights existed. WH's defence consisted of the following claims:

(a) that WH did not use a part, in the relevant sense, of the BHB Database;

(b) that, even if WH did use a part, in the relevant sense, it was not a substantial part; and

(c) that WH's use of the part did not amount to extraction from or re-utilisation of a part of the BHB Database.

The discussion of each of the defence claims is examined below.

Part of the Database

Article 1(2) of the Directive defines a database as a "...collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means". WH argued that the Directive did not create a new right to protect the information contained on a database, and that, therefore, taking only individual data from a database could not infringe any database right that may subsist in the database. WH also argued that the definition of a database (above) indicated that the database right really protected only the systematic and methodical way of arranging data, i.e., the form or structure of the database (counsel for the defence called this the "database-ness" of the collection of information). As WH had not copied the form or structure of the BHB Database (i.e., its "database-ness"), it could not have breached any database right subsisting in it.

Mr Justice Laddie accepted as accurate that the Directive distinguished between the right that may subsist in the individual data, and the database right. Recitals 13,27,45,46 and 58 to the Directive indicate as much. However, there is nothing in the Directive that supports a concept like "database-ness", which, as used by counsel for the defence, seems to incorporate both the form of the database as well as the content of or investment in the database. Indeed, the Directive makes it very clear that the database right protects the investment that goes into obtaining, verifying or presenting the contents of a database.[4] WH took data from the BHB database, not for its form or structure, but for its accuracy and applicability to current racing events, which is precisely the result of the relevant investment that the database right seeks to protect.

Substantial Part

Article 7(1) states that "substantiality" is to be evaluated qualitatively and/or quantitatively. Counsel for the defence argued that, in relation to a quantitative analysis, the part used by WH was not substantial, as it represented a very small part in relation to the vast amount of information contained in the BHB Database. The same reasoning was advanced for a qualitative analysis, i.e., that, in relation to the amount of important data held on the BHB Database, the amount used on the WH website was very little. It was not the correct approach, according to WH, to examine how important the data used on the WH website was for WH.

Mr Justice Laddie accepted "substantiality" has to be examined by looking at what was used on WH's website, and by comparing it to the whole BHB Database-i.e. the quantitative test. However, it was equally important to examine how important the part used was to the alleged infringer-i.e. the qualitative test. Rather than two separate analyses of the part, in relation to quantity and quality, both aspects had to be examined together. The purpose of such an analysis must always be to examine whether, by using the part, the alleged was exploiting the results of the investment that went into obtaining, verifying or presenting the contents of the database in question. In this case, WH, according to Justice Laddie, used the "most recent and core information in the BHB Database" in a manner not authorised by BHB. Accordingly, the part taken was held to have been a substantial part.

Extraction and Re-utilisation

The BHB needed to establish not only that WH infringed the BHB's database right in the BHB database

by taking a substantial part, but also that WH's activities in relation to that part amounted to "extraction" or "re-utilisation" according to Article 7(2) of the Directive.

WH argued that the meaning of these words was to be interpreted restrictively. For example, "extraction" would necessitate the "taking away" of the part from the parent database and, accordingly, it is only the first removal of the part in question from the database that would amount to extraction, since, once it was taken away, it could not be re-inserted again. WH argued that the part of the BHB Database that was displayed on its betting websites had already been extracted (prior to such use by WH) by other, licensed, users of data from the BHB Database. Accordingly, WH argued, it did not extract the relevant data from the BHB Database, but used data that had already been extracted from it.

Mr Justice Laddie held that "extraction" did not mean the permanent removal of data from a parent database, and that subsequent, indirect use could amount to "extraction" for the purposes of the Directive. What is required to establish "extraction" is the transfer of a substantial part to another medium, by any means.

As to "re-utilisation", WH argued that this must mean only first publication of the part, as it was not possible to make something available to the public[5] if the public already had access to it. As all the information contained on the WH websites was already available in newspapers such as the *Racing Post*, as well as in WH's Licensed Betting Offices, it was not re-utilised.

Mr Justice Laddie pointed out that the Directive was intended to prevent the unlicensed use of data taken without permission from a database, and that "any use which transmits or makes available the extracted information to the public is covered by the database right and can be restrained". It is not relevant whether the data in question is available to the public from another source, as this was entirely possible.

Mr Justice Laddie held, therefore, that WH's act of taking information from the data supplied to it under licence, and displaying it for an unlicensed purpose (i.e., on its betting websites) amounted to the acts of extracting a substantial part of the BHB Database and re-utilising it on its websites in breach of the BHB's database right under Article 7(1) of the Directive.

Apart from its claim under Article 7(1) of the Directive, the BHB also claimed infringement of its database right under Article 7(5), which deals with the "repeated and systematic extraction an/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database".

WILLIAM HILL'S RESPONSE TO THE BHB's CLAIM UNDER ARTICLE 7(5) OF THE DIRECTIVE

WH argued that:

(a) the information displayed on its websites did not amount to a part, in the relevant sense;

(b) the constant addition to and the updating of the BHB Database meant that there never existed a single BHB Database from which WH took a part; rather, WH took a single insubstantial part from several distinct databases, each of which was created by the addition of new data to the existing BHB Database[6]; and

(c) WH's activities in relation to the part did not amount to such activities as stated in Article 7(5) (see above).

Mr Justice Laddie had already dealt with the argument relating to being a "part" and had rejected it, holding that the information on WH's websites did amount to a part.

In relation to the updating of the BHB Database, it was held that the Directive applied to such dynamic databases in the same manner as discrete databases. If WH's argument were correct, it would be impossible to determine where one database ended and the next one started. it would also make other provisions in the Directive (such as the right to assign the database right) inoperable.

Accordingly, the BHB Database is to be looked at as "a single database in a constant state of refinement". The frequent addition to the BHB Database did not result in the creation of new databases, but in extending the term of protection for the whole database, so that, in relation to an extract of data from the database, the term of protection would start from the date when all the extracted information was contained in the database for the first time.

Finally, Mr Justice Laddie stated that, in relation to deciding whether the infringer's activities conflicted with those of the owner of the database right, it was not possible to define precisely an objective definition. He declined to do so in this case, as WH's activities in relation to the data extracted clearly undermined those of the BHB, by making available to the public data that it has not paid for, which deprives the BHB of a part of its income and undermines its existing licenses.

POINTS OF LEGAL AND COMMERCIAL SIGNIFICANCE

While the Directive quite explicitly states that it intends to create a new *sui generis* right, capable of existing alongside and independently of copyright, this decision highlighted the commercial significance of this new right. It does not matter anymore that an infringer taking a part from the database does not copy the layout or structure of it, because database right protects content against extraction and use as distinct from copyright, which protects content and form against copying. The decision highlights the fact that it is the information contained in the database that the new right seeks to protect, independent of how it was laid out or structured. As Justice Laddie pointed out, there is no such concept as "databasenes" with respect to data extracted from a database.

The case highlighted what it means to protect the "investment in obtaining, verifying or presenting" the contents of a database. To a potential infringer, it is precisely the results of such investment that are of value, rather than the layout or structure of the database (which may qualify for copyright protection, if sufficiently original). If someone attempts, without authorisation, to use the most recent and up to date parts of a database for commercial purposes, it is only being attempted because such investment has made that information commercially valuable.

In deciding whether an infringer has taken a substantial part of the database, the decision made clear that the test to be used is a subjective one-an examination of the qualitative and quantitative aspects of the data in question. This is essential, as a more rigid, objective test, would make it difficult to judge, in each instance, whether the investment in obtaining, verifying or presenting the data was threatened by an alleged infringer taking data from the database. Because databases can be of a wide variety, as can their commercial uses, it would not have served the purpose of the Directive if the criteria for judging substantiality were universally applicable and objective.

Similarly, the judgment made clear that the infringing acts ("extraction" and "re-utilisation") were to be given their simple meaning, and not interpreted restrictively. "Extraction" can be direct or indirect, and "re-utilisation" is not limited to first publication. If this were not so, the authors of a database would not be able to protect the investment beyond the first sale, license or publication of a part of the database.

Perhaps the most "controversial" aspect of the Directive and the judgment concerns the addition of new data, or the editing of existing data, in relation to an existing database. Article 10(3) of the Directive attempts to protect the evolution of a database by guaranteeing that, if the investment in changing an existing database is substantial enough, the resulting database will get its own term of protection. Mr Justice Laddie's decision is not as clear in its treatment of this aspect of the Directive as is the remainder of his judgment. First he states that "...the BHB Database is a single database which is in a constant state of refinement[7]... An attempt to split it into a series of discrete databases...would not reflect reality." He then goes on to say, that as "new data are added, so the databases' term of protection is constantly renewed." It is not clear, therefore, what the distinction is between a database in a constant state of refinement, and a new database that is created by a substantial investment in an existing database. If the refinement of an existing database is substantial enough for its term of protection to be renewed, why would such investment not be enough to create a new database, with a term of protection that begins from the conclusion of the substantial investment that created it? The importance of this distinction is that the existence of a new database could facilitate a defence to an infringement action under Article 7(5) of the Directive (as, indeed, WH attempted). In this case, the outcome would not be affected, as WH was found liable under Article 7(1) as well as Article 7(5).

The Directive created, and the judgment reinforced, a *sui generis* right that looks likely to be interpreted in favour of an author of the database. Some commentators may argue that this creates a new monopoly right-however, the recitals to the Directive state clearly that it is the very intention of the Directive to protect the investment that goes into establishing certain databases, because such protection was, prior to the implementation of the Directive, patchy at best. The Directive doesn't prevent anyone else from undertaking a similar effort to arrive at a similar database-it merely protects the investment that went into establishing a database. Unlike copyright legislation that existed prior to the enactment of the Directive, the new legislation is very commercial in its approach. It is framed in such a way as to give the courts the opportunity to look at the underlying commercial purpose of a database (and of the commercial value of the part taken by an alleged infringer) so as to protect the investment that went into establishing the database. Any author of a database can benefit from this development-whether in sports, entertainment or finance.

IMPACT ON THE SPORTS INDUSTRY

First and foremost this case has confirmed the creation of a new tangible property right for those who invest time and money in collating sports data and information which, if properly exploited, can be converted into a valuable and additional revenue stream. Rights owners may include sports bodies, like the BHB, clubs, event organisers, even possibly sports persons themselves, sports publications, media companies (Sky's "match stats" to accompany the live games for instance) or the sports marketing companies who acquire (by creation, assignment or licence) the rights to exploit.

Sports content is, as we all know, recognised as the killer content to promote the ever expanding multiplicity of media platforms and the display of sports data is one of the principal tools used to attract traffic on the thousands of sports websites. The database right may now be used as a valuable tool by rights owners against the unauthorised use of sports data on the internet and other media (particularly and increasingly interactive platforms) and become an integral part of sports marketing programmes.

Fraser Reid and Rustam Roy are members of Theodore Goddard's Sports Group

Theodore Goddard acted for the British Horseracing Board.

Footnotes

(1) Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases.
(2) Copyright and Rights in Databases Regulations 1997, SI1997/3032
(3) Recital 40, the Directive
(4) Recitals 39 and 40
(5) See definition of "re-utilisation" in Article 7(2) of the Directive
(6) WH supported this claim by reference to Article 10(3) of the Directive.
(7) Paragraph 72 of the judgment

Fraser Reid and Rustam Roy

Football Contracts - Fact or Fiction

Paul McGrath

INTRODUCTION

Contrary to popular belief,[1] football contracts are not legally unique. They are as enforceable by the courts as any other contract of employment. The difference lies in the attitude of the football world to such contracts and the involvement of the Football Association and other regulatory bodies in their enforcement. In particular, the transfer and registration schemes have traditionally given clubs (and the governing bodies) greater control over the movement of players than would ordinarily be the position. The *quid pro quo* for that has been that the usual legal remedies associated with breaches of contract have not been utilised as against recalcitrant players: if no compromise can be reached with the player, a transfer is organised and a fee paid. None of this would usually come near the court room door.

There remains great uncertainty as to the future role, if any, to be played by a transfer system. Although FIFA/UEFA have reached an agreement with their proposals with the EC Commission, FIPro, the footballer's association, is still in dispute.[2] If the transfer system is all but abolished, the general perception appears to be that football is on the edge of a precipice: that the clubs will no longer be able to control the movement of their players and, if not quite chaos, then at least uncertainty will ensue. The reality is a little different. In the event that the transfer system is abolished, it is likely to be replaced by, at least initially, greater use of the courts,[3] with matters eventually settling down to a routine whereby the 'purchasing' club pays a fee in settlement of all claims to be brought by the 'selling' club against the player himself, the player's agent and the 'purchasing' club.

If footballers wish to be treated like ordinary employees then they must be subject to the same potential legal remedies.[4] This paper examines the remedies potentially available to a club under English domestic law.[5] The ultimate position under English law is likely to be an award of damages albeit in lower sums than can be commanded under the transfer system: players will not be forced to carry out their contracts. Even under the present system, the reality, as exemplified by the Anelka-saga, has always been that modern players are able to force a move if they want to.

NATURE OF A FOOTBALLER'S CONTRACT OF EMPLOYMENT

The unique attitude towards the obligations arising under football contracts[6] derives from the fact that football contracts have never been treated as truly bilateral contracts. From the very introduction of professional contracts within football, when the regulatory bodies could ignore 'boot-money' no longer,[7] the FA imposed strict controls including the need for the player to be registered with a club.[8] In 1893/94, and out of a genuine concern to reduce the imbalance between the wealthy large city clubs and those in smaller towns unable to afford the best players' wages, the League introduced the League Registration Scheme which required a player to be registered with one club and was unable, whilst registered with that club, to play for any other club. So was born the 'retain and transfer' system.[9]

From the outset, therefore, the enforcement of football contracts has involved the Football Association and Football League neither of which was strictly a party to that contract.[10] This meant that whilst the clubs did have the upperhand on the issue of control, this was not through the traditional contractual remedies but through the rules imposed by the regulatory bodies.

The ability of clubs (and the FA) to control the players' contracts through the retain and transfer system was never really challenged until *Eastham v Newcastle United FC.*[11] George Eastham had unsuccessfully sought to be released from his contract with Newcastle. The club refused. He therefore left the game. The PFA approached him to become a test case and, although he obtained his wish and transferred to Arsenal, the case came before the Courts. Wilberforce J held that the combined effect of the retain and transfer system was an unreasonable restraint of trade. In the Judge's view, the retain aspect went far beyond what was reasonably required to protect the club's genuine interests. As a result of the judgment, the League abolished the retention aspect of the scheme but nevertheless the transfer system remained effectively unchanged until the *Bosman* judgment.

Space does not permit a detailed examination of this judgment.[12] Its direct effect is limited to players who have come to the end of their contracts. For those players, the court rightly held that the clubs can no longer demand a transfer fee. The case did not concern the transfer of players who remained in contract. There are, however, those who see the case directly applying on the basis that when a player indicates that he no longer wishes to be bound by his contract, that repudiatory breach without more brings the contract to an end.[13] This view ignores the basic fact that a unilateral breach does not per se bring a contract to an end, even a contract of employment.[14] This erroneous view would give Bosman a much wider application than anyone could properly have intended.[15]

This leaves the enforceability of the modern football contract to a transfer fee system imposed by the governing bodies as opposed to reliance upon legal remedies. In the future, that which clubs may need to rely upon are likely to be perceived as weak legal remedies. With the court playing a greater role than hitherto, it might be hoped that this, by a side-wind, will ensure there is a better understanding within football of the obligations under football contracts. Given football has rarely been exposed to the courts on such issues, there has been a real failure to understand basic concepts of contract law. A good example of this is the Ian Crook saga when, as a Norwich player, he signed for Ipswich on 21st June 1996 after Norwich had failed to offer him new terms on his existing contract

before the third Saturday in May. Norwich had a change of manager and Ian Crook signed for Norwich on 26th June 1996. His original contract with Norwich was not to expire until 30th June 1996. In an acrimonious legal battle, which saw Ipswich obtain and then lose an injunction, it is clear that few had any idea as to when, if at all, Ian Crook's original contract with Norwich came to an end. Ultimately, Norwich paid Ipswich compensation of an undisclosed sum.[16]

One further point as to the nature of footballers' contracts should be clarified. There has been much recent debate about giving footballers the same contractual right to leave their club on 3 months' notice as available to ordinary employees. This argument fails to take into account the fact that no such notice period will be implied into a *fixed term* contract such as a football contract.[17] In such contracts, the parties are free to include an express notice period if they wish but failing which none will be implied as the court considers that the relevant notice period is the unexpired portion of the fixed term contract. On this basis, the clamour heard on this issue appears misconceived. Further, it is to be questioned whether footballers themselves would wish to have a clause which could see them out of a contract on such short notice.

LEGAL REMEDIES

INJUNCTIVE RELIEF

Introduction

Reliance upon injunctive relief differs in several important respects from the enforcement of football contracts through the registration/transfer system in that, even if a case falls within the parameters of such relief, the granting of that relief is discretionary and will require a club to offer a satisfactory cross-undertaking in damages. The former makes it difficult to advise with certainty whether injunctive relief will be granted. The latter focuses the club's financial minds as to whether they wish to risk the enforcement of the undertakings in the event that it is subsequently shown that no relief should have been granted.

Further, just as a club under the traditional transfer system ultimately would not hold on to a player who has stated his desire to play elsewhere, so, if injunctive relief were available to enforce a football contract, it is unlikely a club would view this as a long term remedy. It may prove useful in being an immediate form of relief, preventing a star player from jumping ship to a rival club at a crucial stage of the season, but ultimately a club will want monetary compensation.

The principal difficulty lying in the way of a club obtaining injunctive relief is the English law view that no injunctive relief will be given to enforce a contract for personal services.[18] Such injunctions are said, rather dramatically, to conjure up images of slavery[19] - images which are somewhat difficult to imagine in the case of players on £50,000 plus per week![20] Nevertheless, the standard legal texts trot this point out as a bar to injunctive relief.

It is not suggested that the present rule against injunctive relief for enforcement of contracts for personal services is inappropriate. This principle need not, however, be stretched so as to create a bar to obtaining a negative injunction preventing a player, for example, from leaving his club prior to expiry either of his contract or of an agreed period of time. Such an injunction was obtained in *Lumley v Wagner*[21] where a singer had agreed to sing exclusively at one London theatre and not at any other venue. She was then lured by a higher fee to sing at another establishment. Lord St Leonards granted an injunction preventing her from doing so.[22] Similar reasoning led to a film studio obtaining an injunction preventing the actress Bette Davis from appearing in any film made by another studio for the remaining three years of her contract.[23] Branson J remarked that Bette Davis was free to undertake any other form of employment during this period and the fact that such other employment may be so less remunerative as to tempt her back into completing her contract with the film studio did not equate to forcing her to do so.[24] On the basis of such reasoning, there would be significant hope of obtaining an injunction, at least for a limited time, particularly when most footballers these days have considerable outside financial activities from which they derive large incomes.[25] However, the view in *Warner Bros* line of cases, whilst never strictly overruled, has not been followed in several cases[26] culminating in *Warren v Mendy*[27] where the Court of Appeal endorsed the view in *Page One Records Ltd v Britton*[28] that it was necessary to look at the realities and practicalities of the situation, something which was, according to the CA, not done in *Lumley v Wagner*. On this view, if the injunction were granted, the issue is whether the defendant is likely indirectly to be compelled to return to his employer.

Even if *Warren v Mendy* does represent the present position under English law, it is not at all clear, however, that if the injunction were sought for a short period, say two months, that the reality and practicality of the situation would result in the player being forced back into employment with the club. Players are often out of the game for such a period for other reasons e.g. injuries without suffering any particular career damage and, as stated above, most players have lucrative sponsorship and other deals, as well as significant reserves of cash, not to be pressured back for such a relatively short period.[29] Some have shown a willingness to languish in reserves to sit out a lucrative contract rather than pursue their career elsewhere for lower wages. It remains to be seen to what extent such arguments will sway an English court.[30] It is to be hoped that on this issue English law can be persuaded by the general approach adopted under US law, namely whilst personal contracts cannot be specifically performed, there is no legal principle preventing a negative injunction preventing an employee from playing for another club for the duration of his contract or perhaps more realistically for a shorter defined period.[31]

Having regard to the uncertainty as to the enforceability of restrictive covenants, clubs may wish to consider 'gardening leave'. This can either be implied into a contract (on the basis of the express notice period) or be expressly incorporated. The latter is the preferable solution since the Court has held that in certain contracts of employment, the employer is obliged to provide work and therefore there would be no basis to imply gardening leave into such a contract.[32] In essence, such a provision would stipulate a period of time in which the employee remained employed receiving full pay but was not required to come into work. This would at least provide the club with an opportunity to find a replacement whilst denying a potential rival the use of one of its players at a crucial stage of the season. Although not free from doubt,[33] such clauses appear more susceptible of enforcement, by way of an injunction, than restrictive covenants.

Monetary compensation

Whatever the position with injunctive relief, ultimately the club will need to let the player go but in a manner which ensures that it will receive suitable monetary compensation. There are various potential avenues for such recovery, albeit some will be dependent upon the particular drafting employed in the player's contract. None are likely to result in awards comparable to the transfer fees of today but crucially all provide the club with a direct claim against the player. A player is unlikely to welcome being embroiled in lengthy litigation with his former employers and will no doubt ensure that his new club reach an amicable arrangement with his former employers.

Damages

A footballer is no different from a normal employee in being liable for damages for breach of contract. Various reasons have been suggested as to the paucity of authorities on point[34] but, in the context of football, the most obvious is the existence of the transfer fee system. With that gone, a club will have every incentive to pursue this avenue.

In principle, therefore, a club, faced with a player intending to play for another club, would be entitled to compensation calculated on the basis of placing that club in the same position as it would otherwise have been in had the contract been performed.[35] It is assumed that such a basis provides a good economic incentive for supporting the sanctity of contracts.[36] This incentive, however, is, in reality, very much undermined by the rules as to causation or proof of loss. This is all the more so where the claim is against an individual who only operates in conjunction with 11 or more other employees in an event whose unpredictability is encapsulated in the well-known phrase 'Football's a funny old game'.[37]

The typical basis for assessment of damages where a player, in breach of contract, leaves his club would be the cost of procuring another player of a similar ability, less the amount that would have been paid under the contract to the leaving player.[38] On this basis, it is a sobering thought for a leaving player that he may find that any improvement in wages he has managed to negotiate with his new club reflects a general trend in the market, resulting in his old club being able to claim additional wages it has had to pay to that player's replacement. In the event that no substitute can readily be found or profits have been lost before any such substitute can be found, the club can sue for consequential loss flowing from the player's breach.[39] In the football context, causation is a real problem. A club will need to show that 'but for' the breach, certain profits would have been earned. If

a star player were to leave a club in a season where that club was chasing a place in the Champions' League, it is very difficult to perceive of a situation where the club is going to be able to establish that had the player stayed, the club would have gained entry, particularly if the squad is large and adopts the rotation system.

That said, it is not all doom and gloom. The club may well be able to claim other profits which can be more readily established. So, for example, it has been known that the signing of a major player can have a significant impact on season ticket and merchandise sales and the signing may well have taken place for this very reason in addition to success on the pitch.[40] If that player were to leave with, say, 2 years left on his contract, and assuming no replacement was to hand, the club may well be able to establish a direct link between the absence of the player and a downturn in sales of season tickets and merchandise. Larger clubs, whose games are usually sold out every week are unlikely to be able to show any loss of revenue from gate receipts or season ticket sales. However, they should be able to identify loss of merchandising e.g. reduction in the sale of a star player's videos although such losses are not themselves likely to be significant.

In the event that loss of profits cannot be readily proved, it may be possible for a club to obtain what has sometimes inaccurately been called restitutionary damages for breach of contract. These damages have the aim of disgorging some or all of the profit obtained by the breaching party rather than the loss suffered by the club. The law on this issue is still very much in a state of flux and there is no certainty that a club will succeed. The most recent authoritative statement from the House of Lords indicated that such damages may be recoverable in exceptional circumstances only but refused to be drawn on the ambit of such circumstances: *A-G v Blake*.[41]

The availability of such damages is a complex issue which cannot be determined within the constraints of this paper.[42] If available, such a claim would include the club receiving some or all of the financial benefits obtained by the player in making the move in breach of contract. It is difficult to see how this could be said to be in restraint of trade since the player would be able to move to the new club and only his *additional* (or some of them) financial benefits would accrue to his old club. The power of such a claim, if available, for settlement purposes would clearly be immense. The lack of clarity on the law on this issue is probably to the club's advantage. If a club relies on this claim any litigation is likely to be both expensive and very time-consuming. No player will want to be involved and it is clear that the 'new' club will be persuaded to reach a compromise with the player's old club in order to remove any distractions from their star player.[43] Such are legitimate tactics of litigation.

As an alternative, a club may wish to recover its wasted expenditure. This approach was expressly endorsed by the Court of Appeal in *Anglia T.V. v Reed*[44] where the actor Reed repudiated his contract of employment by refusing to perform the lead role in a film. The film had to be abandoned as it was not possible to find a suitable replacement. The television company successfully claimed their wasted expenditure - it being impossible to identify the likely profits the film might have made.[45] Importantly, in such cases, the burden is on the player to establish that the club would not have recouped such expenditure had there been no breach and not on the club (as in ordinary damages).[46]

There appear to be two obvious roles for this type of claim. The first is that insofar as a club has paid a transfer fee or other compensation for the services of a player who subsequently leaves prior to expiry of his contract, there appears to be no legal principle preventing the club recovering a proportion of this sum by way of wasted expenditure. It is true in *Lou Macari v Celtic* 19th February 1998 the Court of Session dismissed Celtic's counterclaim for damages in the amount of £250,000 being the amount Celtic had had to pay Stoke to secure Macari's services as manager. The court held that these damages 'did not flow naturally or directly' from Macari's breach of contract.[47] However, in principle, the CA's stance in *Anglia v Reed* shows that such losses can be recovered. The second is that such claims are likely to arise when young players leave the club where they have received the benefit of training through the club's academy system.[48]

Overall, there are several different ways a club may pursue its damages claim against a player. It will be readily appreciated, however, that where the club can establish some loss associated with a player leaving, such loss is unlikely to lead to significant amounts relative to previous transfer fees. That does not mean, however, that the claim is insignificant. Tactically, it will be of some considerable importance as it is a claim directly against the player himself. In itself, it should help to focus minds and whilst it cannot sensibly be suggested that the threat of such litigation will have the desired result of persuading such a player to stay, it is likely to assist in ensuring that the 'new' club (who will be facing their own claim: see below) reach an agreement to settle the player's claims on terms favourable to the club.

Liquidated Damages

In order to avoid the time-consuming and potential expensive proof of actual damages, the club may wish to insert into the player's contract a liquidated damages clause. Care must be taken not to overstep the mark in drafting these clauses: the obvious desire to ensure a club gets as much as possible in the event of a player leaving may result in the clause being considered as being *in terrorem* i.e. designed precisely to penalise a player should he wish to leave. If that happens, no monies will be recoverable under the clause, which will be considered a penalty, and the club will be left with its claim for common law damages.[49]

In essence, a liquidated damages clause will be upheld if, at time of entering into the contract, it is a genuine pre-estimate of the damage which would probably be caused by the contemplated breach.[50] If the player suddenly achieves greater status (e.g. by playing well in the World Cup Finals) that will not validate a clause which, prior to that, would not have been considered a genuine pre-estimate of damage. The difficulty in identifying a club's loss will make it far harder for the player to establish the clause as being extravagant and unconscionable,[51] which is a prerequisite for finding it to be a penalty.[52] In any event, the modern approach appears to be in favour of upholding these cost-reducing clauses.[53]

A club wishing to rely upon a liquidated damages clause will need to overcome what some consider to be a general principle of English law that such clauses in contracts of employment are usually considered penalties.[54] This stance manifested itself in two early cases, *Astley v Weldon*[55] and *Kemble v Farren*[56] which related to the employment of an actress and an actor respectively who both failed to appear. A sum was payable in this event. The court held in both cases that the respective clauses were penalties and not liquidated damages. This is not surprising in that each contract rendered both parties to the contract liable to make the payment in the event of breach of contract - that is not something which can be said to be a genuine pre-estimate of likely loss. In addition, the court correctly took into account the fact that the payment would become due in a wide range of breaches, some of which were only trivial. While such clauses were properly struck down, care and attention in the drafting of the clause should enable the club to avoid such consequences.

In relation to football training contracts, *Neil v Strathclyde Regional Council*[57] is instructive. This case concerned an agreement whereby the defendant was put through a training course in return for agreeing to remain in the claimant's employment for a period of two years thereafter. The Court upheld the clause which required the defendant to pay to the employer a proportion of the amount expended on the defendant's training, such proportion to be determined by reference to the period in which the defendant had remained in employment. Suitable drafting might well enable a club to incorporate a similar graded clause based upon a transfer fee paid, enabling a club to recover a proportion of a transfer fee in the event that a player leaves prior to the expiry of his contract.

Agreed compensation clauses

Closely associated with, but legally distinct from, liquidated damages clauses are clauses stipulating the payment of a sum on the occurrence of an event. Crucially, that event must not amount to a breach of the player's contract.[58] If it does, the compensation clause will need to satisfy the liquidated damages clause rules before being enforceable.

Applying this to the context of football contracts, a club might include a provision for the payment of specified sum in the event that a player decides to exercise an option to move to another club. By giving the player an option to move on payment of a certain sum, the club is, of course, reducing its control over the player's movement. However, given the amount to be paid appears not to be limited by the penalty rules, a club may be able to insert a sufficiently large sum that should the player leave the club will receive a not insubstantial payment.[59] Such clauses are not uncommon in manager's contracts where no transfer fee as such is payable and are usually calculated on a formula tied to the salary to be earned during the unexpired portion of the manager's contract. Care should again be exercised when drafting to ensure that the sum specified is not so large as to give rise to complaints of restraint of trade.

Claims against third parties

For all its sins, the transfer system provided a system enabling one club to approach another club and

offer a fee for the services of one of its players without the buying club facing potential tortious claims of inducing breach of contract. In the event that framework is removed, and with the role of the regulatory bodies in the transfer of players significantly reduced, buying clubs will lose that protection. Indeed, those who champion the rights of the players as individuals would do well to consider how a club will be able to approach a player direct and offer increased wages/benefits without that club running the very real risk of inducing a breach of contract. The only way a buying club can confidently avoid this risk is to approach the club (and not the player) and see what fee would suffice to buy the player out of his contract.[60] That is not something envisaged by those who wish players to have greater control over their careers.

Assuming the buying club does not approach the club direct, it is very likely that its conduct, and that of the player's agent, will be considered to be inducing a breach of contract, entitling the club to seek tortious damages against both the agent and the club.[61] These damages are calculated on the loss actually caused to the club by the player's move as opposed, eg, to loss of profits that would have been obtained had the player seen out his contract. Whatever the basis for their assessment, these damages are not likely, in themselves, to lead directly to the 'selling' club being entitled to sums equivalent of the present transfer fees. However, the damages claim provides a real negotiating lever to the 'selling' club which, if properly used, should be capable of engendering a decent settlement. The incentive for the 'buying' club is again the desire not to become embroiled in lengthy litigation. There are several examples in the context of manager moves. Everton and Walker were fined £75,000 and ordered to pay £50,000 in compensation to Norwich because of Everton's conduct in poaching Walker whilst under contract to Norwich. Similar accusations arose when Leicester City lost both Brian Little (to Aston Villa) and then Mark McGhee (to Wolves) in close succession whilst both were under contract as manager. If a club gains a reputation for fighting hard to retain its players and not being shy of going to the courts, it is likely to be better placed to negotiate a release fee.

CONCLUSIONS

Stripped of the protection afforded clubs by the transfer regime, it is probably correct to say that clubs will be able to do little to ensure that *performance* obligations under the contract are respected. This does not render the contractual obligations fictional. The present writer for one questions how different this is from the position under a transfer system which clearly enables a big star to move whenever he wants.[62] Under that system, ultimately clubs could only rely upon receipt of money in the form of a transfer fee. Under the usual legal rules, while there is a real case for the occasional resort to injunctive relief for a short period in the event the player is seeking to move to a rival club at a crucial stage of the season, the club will again need to fall back on receipt of money in the form of damages or agreed compensation. Clubs should look more closely at their contracts to see if the insertion of agreed compensation clauses or options may assist their position. Finally, it is perhaps a sobering thought for clubs that the only effective way to be confident of securing the services of a player for the entire duration of his contract is to structure his contractual payments (e.g. loyalty bonuses) such that he has a very real financial incentive to remain at the club. Testimonials used to be awarded for outstanding long service to a particular club, as well as providing a well-needed financial boost prior to retirement. In the future they may be merely a means to ensure that an already wealthy player merely carries out his existing contractual obligations.

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Footnotes

(1) 'The Legality of Poaching: Footballers' Contracts Revisited' [1997] *Sport and Law Journal* Vol.5, Issue 1 at p.49 (M. Nash)

(2) See Andrew Caiger in [2000] Sp. Law Bulletin Vol.3, No.6 at p.1.

(3) This is seen in the context of manager moves where the number of court hearings are significant relative to the number of contentious moves: e.g. Macari v Celtic, Norwich v Walker and Everton and Leicester City's loss of both Brian Little (to Aston Villa) and Mark McGhee (to Wolves).

(4) Andrew Caiger and John O'Leary present a consistent case that footballers must be given al the rights of ordinary employees: see 'Changing the Transfer System in Professional Football: Towards Contract Stability.' [2000] Sp. L. Bulletin, Vol 3, No.6 at p.1. However, one does wonder how footballers are going to react when they are faced, effectively for the first time, with claims being made against themselves directly when previously they have been able to hide behind the transfer system. This is likely to be one of the more interesting aspects of the future of the game.

(5) Space does not permit a detailed examination of the European legal issues relating to the transfer system. That must be for another day.

(6) See M. Nash: 'Players and their promises' 15th October 1993 *N.L.J.* 1449

(7) 'Boot-money' refers, not surprisingly, to the wads of cash which used to be left in players boots before games in the days before professionals were allowed to play.

(8) It appears that the FA also banned professionals from being appointed club captains! For an excellent overview of the history of football contracts see *From Boot Money to Bosman: Football, Society and the Law* (McArdle) Chapter 2.

(9) One method of circumventing this system was for a player to play in another league, such as as the Scottish league. This avenue quickly was closed, as leagues began to recognise each other's rules. This happened in the case of the Scottish league in 1897.

(10) In typical style, Caiger and O'Leary describe the position thus: 'The relationship between registration and transfer system and player's contract is anomalous and can only be explained by the history of the game: the early feudal lords' desire to control players and their freedom to play.' 'In My Opinion' [1999] Sp. Law Bulletin Vol.2, No.5 at p.2

(11) [1964] Ch 413. The earlier case of *Kingaby v Aston Villa* (1912) *The Times* 28th March only challenged Aston Villa's motives and not the actual system of retain and transfer. The challenge failed.

(12) The most detailed treatment of the case is to be found in '*The Bosman Case: The End of the Transfer System*?' (Blanpain and Inston).

(13) See Caiger and O'Leary 'Whither the transfer system?' [2000] Sp. Law Bulletin Vol 3, No.1 p.13.

(14) *Thomas Marshall Ltd v Guinle* [1979] Ch 227. Otherwise, it would never be possible to obtain injunctive relief in aid of enforcement of a negative covenant.

(15) It should perhaps be noted that in its statement of objections to the present transfer system, the EC Commission expressly refers to transfer fees being paid after a unilateral termination of contract: Jean-Francois Pons, Deputy Director General DGIV, October 1996: see http://europa.eu.int/comm/dg04/speech/1999/en/sp99019.pdf.

(16) See *fn* 1 *infra*.

(17) A fixed term contract is one in which the maximum duration is fixed: *Harvey on Industrial Relations and Employment Law* at para.2325; *Dixon v British Broadcasting Corpn* [1979] IRLR 114. All football contracts must expire on the 30th June.

(18) E.g. *Clark v Price* (1819) 2 Wills Ch 157; *De Francesco v Barnum* (1890) 45 Ch D 430; *Ehrman v Bartholomew* [1898] 1 Ch 671.

(19) Even Bosman's own lawyer, Jean-Louis Dupont, has commented: 'To speak of slavery is insulting to the real victims of slavery,' in 'In the Footsteps of Bosman...' [2001] Sp.Law Bulletin Vol 4, No.1 at p.2

(20) See 'The Anelka Case: the Contractual Nightmare' Sp.Law. Bulletin 1999 Vol 2 Issue 6 for Peter McCormick's no holds-barred views on this.

(21) (1852) 21 LJ Ch 898;

(22) *ibid* at p.902: 'It is true, that I have not the means

of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do...in continuing the injunction, I disclaim doing indirectly what I cannot do directly.'

(23) *Warner Bros Pictures Inc V Nelson* [1937] 1 KB 209. See also *William Robinson & Co. Ltd v Heuer* [1898] 2 Ch 451; *Marco Productions Ltd v Pagola* [1954] KB 111. In *Evening Standard Co Ltd v Henderson* [1987] ICR 64, the employer obtained an injunction preventing an employee leaving prior to expiry of the notice period after undertaking to allow the employee to work and to continue to pay him even if he did not work during this period.

(24) *Ibid* at pp.219-20

(25) An injunction was refused by the CA in *Radford v Campbell* (1890) 6 TLR 488 to prevent Campbell from playing for Blackburn having also signed for Nottingham Forest.

(26) Starting with *Mortimer v Beckett* [1920] 1 Ch 571 where a boxing manager unsuccessfully sought to restrain a boxer from boxing for another manager in breach of his agreement.

(27) [1989] 3 All ER 103

(28) [1968] 1 WLR 157

(29) Very large fines handed out by clubs and the FA appear to have little impact on players and their attitude.

(30) *Colchester United FC Ltd v Burley and Ipswich Town FC Ltd* Unrep. 30th October 1995 supports the possibility of a negative injunction in a football context: see *Sports Law* (Beloff Q.C. et al) at para.8.63.

(31) The comparison between the English and US positions on the enforcement of negative injunctions is extensively examined by P. McCutcheon in 'Negative enforcement of employment contracts in the sports industries.' (1997) 17 L.S. 65.

(32) *William Hill Organisation Ltd v Tucker* [1998] IRLR 313 (CA).

(33) *William Hill v Tucker supra.*

(34) *MacGregor on Damages* (16th ed.) at para.1248; Harvey on *Industrial Relations and Employment Law* paras. A[740-744].

(35) E.g. *Robinson v Harman* (1848) 1 Exch 850 at p.855.

(36) See Fuller and Perdue in their seminal article, 'The Reliance Interest in Contract Damages' (1936-37) 46 Yale LJ 52 and 373. It has also received support by Posner: *Economic Analysis of Law* (4th ed., 1992) Ch.4.

(37) A good, if painful, reminder of this for the writer is the 1988 FA Cup Final between Liverpool and Wimbledon.

(38) See *National Coal Board v Galley* [1958] 1 W.L.R. 16 (C.A.). *Richards v Hayward* (1841) 2 M. & G. 574 provides a useful illustration of this principle.

(39) E.g. *Ebbw Vale Steel Co. v Tew* (1935) 79 S.J. 593 (CA) where an employer brought a claim against a coal-face worker for damages based upon the value of the output lost less the expenses which would have been incurred in obtaining that output.

(40) It is said that Real Madrid recovered a significant portion of the £37m fee paid for Luis Figo on the back of increased merchandise sales, particularly shirt sales before his first season began.

(41) 'Exceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases.' [2000] 3 W.L.R. 62 at p.645 per Lord Steyn.

(42) The literature on this topic is immense: see e.g. *Goff & Jones* (5th ed) at p.518 et seq.; A. Burrows, 'No Restitutionary Damages for Breach of Contract.' [1993] *LMCLQ* 453; R. O'Dair 'Remedies for Breach of contract: A Wrong Turn' [1993] *RLR* 31; P.Birks, 'Profits of Breach of Contract.' (1993) 109 *LQR* 518.

(43) This happens all the time. Clubs will make payments, even large payments, to remove distractions from player's mind. For example, if a player is accused of fathering a child, a club may take on the CSA payments. Certainly, the present writer has been involved in a case where a top club set up a trust to do just that so that its star player could focus on playing football.

(44) [1972] 1 Q.B. 60 (C.A.)

(45) There are obvious parallels with claims by clubs. A club is unlikely to show that the presence of a player would have resulted, e.g. in succeeding in claiming a Champions League spot and so is unlikely to be able to claim loss of any such profits.

(46) *C.C.C Films (London) Ltd v Impact Quadrant Films Ltd* [1984] 3 W.L.R. 245.

(47) Noted in [1998] Sp.Law Bulletin Vol.1, No.2 at p.5

(48) There appears to be a general consensus that a club should be entitled to some form of compensation for training costs, at least up to the age of 23.

(49) *See MacGregor on Damages* (16th ed) at para. 489.

(50) This phrase was first used by Lord Robertson in *Clydebank Engineering Co. v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6 at p.19. It later achieved its time-honoured status by being incorporated in Lord Dunedin's list of rules in *Dunlop Pneumatic Tyre Co. v New Garage and Motor Co.* [1915] A.C. 79 at p.86.

(51) The burden would be on the player to establish the clause as a penalty and not on the club to establish it as a genuine pre-estimate of damage: *Robophone Facilities v Blank* [1966] 1 W.L.R.1428 (C.A.) at p.1447 per Diplock L.J.

(52) *Dunlop Pneumatic Tyre Co. v New Garage* [1915] A.C. 79 at pp.87-88: 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise estimation almost an impossibility. On the contrary that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.'

(53) *Philips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at p.59.

(54) *MacGregor on Damages* at para.517

(55) (1801) 2 B. & P.346

(56) (1829) 6 Bing. 141

(57) [1984] IRLR 14 (a Scottish case)

(58) A good example involving a footballer and his insurance policy is *Alder v Moore* [1961] 2 Q.B. 57

(59) It is understood that under Spanish law, the validity of such clauses is protected by statute. It is believed that Louis Figo's clause for Real Madrid is in the region of US$105m.

(60) When Cantona wished to transfer from Nimes to Leeds, he bought himself out of his contract for $700,000 only to find that Leeds subsequently also paid a transfer fee of $900,000: see *fn* 6 *infra.*

(61) *Lumley v Gye* (1859) 118 ER 749; *Allen v Flood* [1898] AC 1 (HL).

(62) '...player contracts have become virtually unenforceable by clubs, with discontented players able to move almost at will irrespective of the remaining term.': *Contract and Control in the Entertainment Industry* (Greenfield and Osborn, 1998), Ch.2 at p.26

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Taxation of Sportsperson's Image Right Company Schemes and Potential Application of IR35

Dalton Odendaal

INTRODUCTION

As the entertainment value in sport is becoming more important, athletes are turning into models and artistes. A leading sportsperson with a national or international reputation can command fees for personal appearances, interviews with the media and personal endorsement of products. The consequence of this world wide growth in personality merchandising is that, from a financial point of view, sportspersons have an additional source of income available other than performance income or their salary, namely royalties from the exploitation of their "image rights".[1]

This paper will address the UK tax position of sportspersons engaged in team sports, such as football, rugby and cricket who are resident in the United Kingdom and who are employees of their respective clubs in regard to their playing services. It is not possible to pay such a sportsperson's income derived from his/her playing contract with his/her club directly to a service company to circumvent the sportsperson's status as an employee as there are provisions in the rules governing such team sports which stipulate that a player must be personally contracted to his/her club. Even where a sportsperson is deemed to be an employee in respect of his/her 'playing' income, such a sportsperson will often enjoy income from activities not directly connected with his/her employment such as income from sponsorship deals, personality merchandising and endorsements. In such cases, a service company may be a useful tax minimisation tool for sheltering the sportsperson's other income.

The purpose of this paper is to review the UK tax position of such UK resident sportspersons who are employees of a club and who set up a service company in order to exploit their image rights. The investigation of the UK tax position will focus on whether such arrangements can be attacked by the Inland Revenue ("the Revenue") as constituting a sham, and also whether IR35 is potentially applicable to such arrangements.

IMAGE RIGHTS COMPANIES

Prior to 6 April 2000, it was possible for workers to work through intermediaries such as personal service companies to provide services to clients in circumstances where, if it were not for the service company, the worker would be an employee of the client. If the contract were concluded directly between the worker and the client, the worker would be an employee of the client. However, the worker does not contract directly with the client. The personal service company enters into a contract with the client under which it agrees to supply the services of the worker. As there is no contract between the worker and the client, the worker is not an employee of the client. Therefore, the Schedule E and National Insurance Contribution ("NIC") legislation does not apply to the amounts which are paid to the personal service company in respect of the worker's services. The use of the personal service company in this way allowed the client to make payments to the personal service company rather than to the individual worker, without deducting Pay As You Earn ("PAYE") or NICs. The client could pay the service company the gross amount of the fee for the provision of the worker's services (without deducting PAYE and NICs) and the personal service company would then have complete flexibility over how it disposed of what is essentially the worker's wages. The worker could take money out of the service company in the form of dividends instead of salary. Taking money out in this way is tax beneficial as dividends are not liable to NICs; so the worker paid less in NICs than either a conventional employee or a self-employed person. Accordingly, it was possible for an individual who would be regarded as an employee if engaged directly by the client to avoid being taxed under Schedule E and paying Class 1 NICs by providing his/her services through a personal service company.

This same principle (of providing personal services via an intermediary) has been utilised by sportspersons who have set up separate companies in order to exploit their image rights. The sportsperson sets up a personal service company (which, for the sake of convenience, will be referred to as an "image rights company" in this paper) and transfers his/her image rights to such image rights company. The sportsperson also contracts with such image rights company to perform those entertaining or promotional activities and services directed by the image rights company. The image rights company in turn contracts on behalf of the sportsperson with third parties for the provision of those image rights and also for the performance of certain promotional services by the sportsperson. All earnings and royalties derived from the performance of the promotional services by the sportsperson and the exploitation of the image rights accrue to the image rights company.

It is necessary to consider whether these image rights company schemes established by sportspersons to exploit their image rights by providing promotional services to their club and/or to other third parties via the image rights company are effective from a tax point of view - namely, whether such schemes enable the club or the third party recipient of the sportsperson's services not to be regarded as the sportsperson's employer and so to avoid paying employer NICs on and deducting PAYE from the payments made to the image rights company. If this is possible the sportsperson will also be able to avoid a further NIC liability by stripping the profits out of the image rights company by way of dividend (as opposed to receiving a salary). Image rights company schemes need to be considered from two perspectives:

1. Are they vulnerable to being struck down as being shams?

2. Are they caught by IR35?

ARE IMAGE RIGHTS COMPANY SCHEMES A SHAM?

The Revenue has tried to attack image rights company schemes utilised by sportspersons by arguing that the payments made to the image rights company owned by the sportsperson amounted to taxable income for the sportsperson on the bases that: (i) the payments made to the image rights company were inextricably linked to the sportsperson's employment at his/her club and were therefore emoluments of the sportsperson's employment and subject to PAYE; (ii) that the additional agreements to provide promotional services in the exploitation of the image rights were payments of extra income over and above the club's wage structure; and (iii) that the documents were not genuine commercial deals.

The nature of payments made to sportspersons for the exploitation of their image rights and the provision of promotional services pursuant thereto was considered in the case of *Sports Club and Others v HM Inspector of Taxes* (SpC253) 2000.

Facts

Two players (Dennis Bergkamp and David Platt) each entered into service agreements with Arsenal Football Club ("Arsenal"). The salaries paid under their service agreements for their performances as professional footballers were emoluments of their employment. Both players had also entered into promotional agreements with their own respective image rights companies under which they agreed to provide promotional services to such companies. Arsenal entered into agreements with both such companies (which were owned by the players) under which the companies agreed to supply to Arsenal certain promotional services of the players in return for fees paid by Arsenal to the companies.

In connection with both players the Special Commissioners ("the Commissioners") had to decide:

(a) whether the payments made by Arsenal under the promotional agreements were emoluments from the employment of the players and therefore chargeable to income tax under Schedule E by virtue of Section 19 of the Income and Corporation Taxes Act 1988 (the "Taxes Act"); and

(b) alternatively, whether the payments were benefits in kind within the meaning of Section 154 of the Taxes Act.[2]

Decision

In considering whether the payments were emoluments from employment the Commissioners took the view that the promotional agreements constituted a series of contractual obligations (both positive and negative; positive in the sense that the player would, if called upon to do so, do certain things like endorsing products or going to photo shoots and negative in the sense that he could not undertake such activities for others) for the personal endorsement of products. They were agreements to provide promotional services and they were genuine commercial agreements which could be enforced. They found further that both players were established stars and could earn substantial sums from such contracts. This led the Commissioners to decide that the promotional agreements were capable of having, and did have, an independent value.

The Revenue suggested that the promotional agreements were just smokescreens, allowing additional remuneration to be paid to the players, with little promotional work done for the money. It was also alleged that the promotional agreements were entered into as a way of circumventing Arsenal's pay ceiling. The Commissioners said that although the image rights might not have been adequately exploited by Arsenal, when Arsenal entered into the promotional agreements it expected to exploit the rights and make money from them. Furthermore, the promotional agreements were legally enforceable (with the parties intending activities to be performed under them in return for payments) and these realities could not be ignored for tax purposes. Accordingly, the promotional agreements were not smokescreens for the payment of additional remuneration.

The Commissioners then went on to consider whether the payments made under the promotional agreements were emoluments from the players' employment. The Commissioners said that the promotional agreements were contracts for full consideration and as such were excluded from tax under Section 19 of the Taxes Act for that reason alone. However, in addition, they found that the payments under the promotional agreements were made in return for image rights and promotional services and were not made in reference to the playing of games which was the service rendered by each player by virtue of his service agreement with Arsenal or as a reward for such services. Thus the payments were not emoluments from the players' employment.

The Commissioners found that the payments were not made by Arsenal by reason of the players' employment, but were made by reason of separate commercial contracts to provide promotional services. They did not consider that any benefit was provided to either player since, in their view, the expression 'benefit' in Section 154(2) of the Taxes Act had to exclude anything provided in return for good consideration under a separate commercial contract. Furthermore, even if the benefits were provided, they were not provided to the players, but to the players' respective companies. No authority was cited to the Commissioners to indicate that they could pierce the corporate veil and consider the ultimate destination of the payments. Accordingly, the payments made under the promotional agreements were not benefits in kind.

Points to be taken from the case

The Revenue appeared to suggest that some of the players' emoluments were being directed to their separate companies in the guise of marketing payments and that such payments were not genuine payments paid for the exploitation of their image rights and the provision of promotional services, but rather that they were actually disguised emoluments. The Revenue felt that the scheme was a sham as it was designed to avoid Arsenal's salary cap and still accommodate the players' financial requirements. The Commissioners decisively rejected the Revenue's attempts to challenge the tax position of the players by using the substance of the transaction rather than the form. The case re-affirms that it is entirely possible for sportspersons to legitimately separate their playing services from their promotional services and image rights in such a way so that their promotional services do not form part of their contract of employment, provided that it is a genuine arrangement.[3]

The crux of the case is that the promotional agreements were genuine commercial arrangements which had an independent value. It is implicit in the decision that the players had demonstrated that there was sufficient value and marketability in their images for the players to transfer their images to a company and for that company to trade on their images and in the course of such exploitation of the images provide the promotional services of the players. This was dependant upon the fact that the players were well known so that their images did indeed have an independent value. The Commissioners accepted that the payments made were for the genuine exploitation of the image

rights and the provision of promotional services by the image rights company which was carrying on a trade of exploiting the image rights. It is essential for the sportsperson to actually undertake the promotional activities to ensure that the arrangements are genuine (and keeping a diary of the promotional activities is useful from a proof point of view). Furthermore, the split between the salary element and the payment for the provision of the promotional services needs to be commercially justifiable. This split will depend on the individual circumstances of the sportsperson involved and on how valuable and marketable his/her image rights are.

The case therefore confirms that it is entirely possible for a sportsperson who is an employee of a club to be involved in providing promotional services to the club which do not form part of his contract of employment, provided that it is structured correctly and reflects commercial reality. It can be inferred that these image rights company schemes will only work for top level high profile sportspersons as the sportsperson's image has to be sufficiently marketable so as to have an independent value for the image rights company to be able to carry on a trade with it on its own account.

It is understood that the Inland Revenue have no plans at present to challenge the Commissioners' decision in the case.[4]

Although it seems (in the aftermath of the above case) that image rights company schemes are still viable from a tax planning point of view, the case only looked at whether the structure was a sham and did not investigate whether the structure was potentially subject to IR35. Accordingly it is now necessary to consider the potential application of IR35 to image rights company schemes.

ARE IMAGE RIGHTS COMPANY SCHEMES CAUGHT BY IR35?

IR35: Personal Service Company Legislation

This legislation deals with tax and NIC avoidance through the use of intermediaries such as service companies and is generally referred to as IR35. The Chancellor of the Exchequer announced proposals in the Budget of March 1999 which were designed to ensure that people who would otherwise be employees of their clients could no longer avoid paying their fair share of tax and NICs by working through personal service companies and other intermediaries. Clause 60 and Schedule 12 of the Finance Act 2000 (together with the Social Security Contributions (Intermediaries) Regulations 2000) introduced legislation to prevent the sort of avoidance that the Revenue were concerned about.

They introduced new rules concerning the taxation of workers who provide their services to clients through intermediaries, such as personal service companies. The new rules use existing case law to define an employee and basically determine that, where workers meet that definition in relation to work done for their clients, they will pay broadly the same tax and NICs as an employee, even if they provide their services through an intermediary. The new rules came into effect on 6 April 2000.

Schedule 12 specifies the detailed tax rules concerning the provision of services through intermediaries. The legislation applies where a worker provides services to a client under arrangements involving an intermediary in circumstances such that if the contract had been made directly then the worker would have been an employee of the client for tax purposes. The main conditions for the legislation to apply are:

- a worker provides his/her services to a third party client for the purposes of that client's business;
- the arrangements for those services are not made directly with a client but through a third party (known as an intermediary);
- if the services had been provided under a contract between the client and the worker, the worker would have been regarded as an employee of the client;
- the worker, or an associate of the worker, receives or is entitled to receive a payment or other benefit from the intermediary that is not chargeable to tax under Schedule E; and
- the conditions of liability are satisfied according to the type of intermediary. Where the intermediary is a company the legislation will apply if the worker (or his/her associates) has a material interest in the company.[5]

Where IR35 applies the effect is to treat the fees paid to the intermediary in respect of relevant assignments not as company revenue upon which corporation tax is payable after deduction of allowable expenses but rather as deemed salary to the worker. The worker is thus subjected to Schedule E income tax and employee NICs on that deemed salary. The intermediary is liable for the collection of that tax and NICs, together with payment of its own employer's NICs on the deemed salary. The third party client is not affected and can continue to make gross payments as before.

It is worth mentioning that the legality of the rules affecting the provision of services through personal service companies contained in IR35 was considered in the recent case of *The Queen and Commissioners of Inland Revenue v Professional Contractors Group Limited and Others*.[6] Mr Justice Burton held that IR35 did not breach the European Convention on Human Rights or European Law. Despite misgivings about some of the Revenue's guidance material on employment status issues, the Judge did not think that this led to unacceptable uncertainty. Although the Judge felt that providers of services would have some uncertainty as to whether IR35 would apply to a particular engagement, he found that this was not incompatible with fundamental rights. The Judge pointed out that what was prior to IR35 an immunity from consideration of employment or self-employment in relation to any services provided by the service provider has now gone and the service provider is in the same position as he would be in if he were a sole trader or a partnership, deciding in relation to a particular project or projects how he should treat them for tax purposes. Thus service providers are subject to the same law as they would have been, but for the interposition of the service company.

The key point arising out of this judicial review case appears to be that little has changed. As the Revenue press release of 2 April points out rather bluntly:

> *"the IR35 legislation is the law of the land ... Individuals affected by it will need to make sure that they take the necessary actions to ensure they comply with their obligations under this law."*

Those who were clearly within IR35 before the case will be so now. Those that were outside will remain outside.

IR35 applied to Image Rights Company Schemes

If one looks at the image rights company schemes entered into by sportspersons it is clear that IR35 is potentially applicable to such arrangements as the sportsperson will be providing his/her promotional services to the club (which is a business) via an intermediary (namely the image rights company) and the sportsperson will normally have a material interest in the intermediary (as the image rights company is normally a one man service company where the sportsperson and his/her spouse owns all the share capital). Accordingly, the crucial issue is to determine whether the circumstances are such that the terms on which the promotional services are provided, having regard to the terms of the contract forming part of the arrangements under which the promotional services are provided, are such that if the promotional services were provided under a contract directly between the sportsperson and the club the sportsperson would be regarded for income tax purposes as an employee of the club. It is necessary to consider what the relationship would have been between the club and the sportsperson in regard to the provision of the promotional services if the image rights company had not existed. IR35 will apply if the relationship would have been that of employer and employee had the sportsperson been engaged directly.

The employment status test

IR35 relies on the existing tests used to determine a worker's employment status (and thus the boundary between Schedule D and Schedule E) in deciding whether a worker in a service company is subject to the new rules.[7] There is no statutory definition of "employment". However, the question of employment status has come before the Courts on numerous occasions. The approach taken by the Courts has been to identify factors which help to determine if a particular contract is a contract of service (employment) or a contract for services (self-employment). Relevant factors which have been identified by the Courts in the past are:

- whether the client has the right to control what work is done, where or when it is done or how it is done;

- the right of the worker to get a substitute or helper to do the job;
- who provides the equipment;
- whether the worker assumes any financial risk in doing the work;
- basis of payment;
- if the worker has the opportunity to profit from sound management;
- if the worker is part and parcel of the client's organisation;
- what rights of dismissal the client has;
- whether the worker is provided with any employee benefits (such as sick pay, holiday pay, pensions and expenses);
- the length of the engagements;
- factors which are personal to the worker and which have little to do with the terms of the particular engagement being considered; and
- the intention of the parties.

Whether a worker would have been an employee if engaged directly by the client depends upon a range of factors. The final decision is not reached by running down a checklist and adding up the number of factors pointing towards employment and comparing that result with the number pointing towards self-employment. The Courts have specifically rejected that approach. In *Hall v Lorimer* 66 TC 349, Mummery J made the following comment which was quoted with approval by Nolan J in the Court of Appeal:

> *"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through a checklist to see whether they are present in, or absent from, a given situation... It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."*

When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person in business on his own account or a person working as an employee in somebody else's business.

In deciding whether a worker would have been an employee if engaged directly by the client it is first necessary to establish the terms and conditions of the engagement. In a simple case involving one intermediary (e.g. where a worker works through a service company) these will normally be established primarily from the contract between the client and the intermediary. It is that contract which will usually reflect the terms that would have applied had the worker been engaged directly by the client.

Having established the terms and conditions of the engagement it is then necessary to consider any surrounding facts that may be relevant. In this context other contracts that the intermediary has under which the worker's services are supplied to third parties and any business organisation of the intermediary which is relevant to the supply of the worker's services will be taken into account as relevant surrounding facts.

Applying the test to Image Rights Company Schemes

The next step is to evaluate the image rights company scheme where the sportsperson provides promotional services via the image rights company in light of some of the factors mentioned above (as not all of them will be relevant) and to see what overall picture is painted by looking at the various factors.

Control:
It is important to consider that the Courts have indicated that control cannot be the decisive test when one is dealing with a professional man or a man of some particular skill and experience.[8] Accordingly, the fact that the club will have little actual control over the way in which the sportsperson renders the promotional services is not determinative of the issue.

Substitution:
The lack of ability to get a substitute to do the promotional services is not necessarily indicative of employment as one would not expect a professional or highly skilled person to be able to appoint a substitute.

Provision of equipment; basis of payment; right of dismissal; employee benefits:
These factors are not relevant to the situation being reviewed and accordingly they are not indicative of employment or self-employment.

Financial risk:
Where a skilled worker incurs significant amounts of expenditure on training to provide himself/herself with a skill which he/she uses in subsequent engagements, this can be treated as a pointer to self-employment if there is a real risk that the investment would not be recovered from income from future engagements.[9]

It is arguable that a sportsperson spends a considerable amount of money setting up an image rights company and implementing an extensive programme of exploitation of image rights (e.g. registering trade marks) and that this expenditure is used in subsequent engagements and is not only for the benefit of the club. If the exploitation of his/her image rights is not successful these expenses will not be recouped. This could be a factor indicative of self-employment.

Part and parcel of the organisation:
It is important to ensure that the sportsperson does not represent himself/herself to third party clients as an employee of the club in regard to the exploitation of his/her image rights. This will be of particular relevance where the image rights company provides the sportsperson's promotional services to third parties in addition to the club. The sportsperson is an employee of the club as far as his/her playing services are concerned but not as regards the provision of his/her promotional services (to either the club or third party clients) where he/she does not form part and parcel of the club. In that regard he/she is a person carrying on a business outside and separate from the club.

Personal factors:
Due to the unusual nature of the services being performed personal factors will be extremely relevant in determining employment status at image rights company schemes. The writer is of the opinion that the image rights company scheme is akin to the situation of a skilled worker working for a number of clients throughout the year and having a businesslike approach to obtaining his/her engagements, which is indicative of self-employment.

Commentators have indicated that for those people working via an intermediary such as service companies it is the decision in *Hall v Lorimer* which is potentially most significant.[10] Mr Lorimer was a vision mixer who customarily worked for twenty or more production companies. Most of his engagements lasted only a single day. He operated under the direction of the production companies and they provided most of the equipment. However, he was held to be self-employed and effectively selling his skills to a succession of different companies. The Revenue have said that it believes that that case will have particular relevance to engagements where:-

- the worker provides similar services to many engagers; and
- there is a mutual intention not to create employment; and
- the worker has a businesslike approach to obtaining and organising his engagements and incurs expenditure in this type of area not normally associated with employment.

The *Lorimer* case is extremely important as it suggests that the number and variety of different engagements will help when painting a picture of an individual running his own business.[11] Similar arguments can be used in relation to the sportsperson providing promotional services to the club and other third parties.

Accordingly, the level of exclusivity granted by an image rights company is of paramount importance. It is better if a sportsperson's image rights (together with the provision of the promotional services) are licensed and provided to a club on a non-exclusive basis. This is because if the image rights company enters into an exclusive arrangement with the employing club, the image rights company can only have one client and will therefore find it difficult to show that it is trading with and exploiting the sportsperson's image (as opposed to merely being an inserted intermediary). A non-exclusive arrangement provides the image rights company with the opportunity to licence the image rights and procure the provision of the promotional services to other commercial partners in addition to the employing club. It enables the image rights company to argue more persuasively that as it has several clients it is trading on the sportsperson's image rights in the course of a business carried on by it. If this is the case then if one considers what the position would be if the sportsperson were engaged directly by the club in regard to the licensing of the image rights and the provision of the promotional services, it will be possible to contend that the sportsperson is carrying on a business of exploiting his/her image rights on his/her own account and he/she is not an employee of the club in regard to his/her promotional services.

Looking at the overall picture painted by a non-exclusive image rights company scheme and relying on the rationale of the decision in *Hall v Lorimer*, the image rights company scheme should not fall foul of IR35. However, it is important to bear in mind that everything should be done to ensure that the impression of the image rights company carrying on a genuine business of exploiting the sportsperson's image rights is sustained in practice, including making sure that the licences and agreements for the provision of promotional services entered into with the employing club are non-exclusive and that they are genuine commercial agreements.

CONCLUSION

Many sportspersons receive endorsement fees, appearance fees or fees for appearing in advertisements. Even where these are paid as a consequence of the sportsperson's involvement with an employer club, these can be assessable under Schedule D. This would be on the basis that the sportsperson is carrying on a separate trade of exploiting his/her intellectual property rights and the money received from the club for such services is not an emolument of his/her employment. If the individual sportsperson directed such fees to a service company and it is the company that is carrying on the trade of exploiting the sportsperson's image rights the company would similarly have Schedule D income.

The case of *Sports Club and Others v HM Inspector of Taxes* looked at whether the specific image rights company scheme was a sham. The Commissioners found that the image rights company scheme was a genuine commercial arrangement and accordingly it is possible for sportspersons to separate their playing and promotional services in such a way that their promotional services do not form part of their employment. Although the case did not specifically consider whether the structure was potentially subject to IR35, it found that the arrangements were such that they amounted to a payment for a genuine exploitation of the image rights by the image rights company which was carrying on a trade of exploiting the sportsperson's image rights. Thus if the arrangements are structured correctly (and in the writer's view this means making sure that the arrangements are non-exclusive) the individual sportsperson should also be regarded as carrying on a trade of exploiting his/her image rights if the service company was not interposed. In such circumstances the individual sportsperson would be regarded as carrying on a business of exploiting his/her image rights on his/her own account and falling within Schedule D and not Schedule E.

The *Sports Club* case confirms that it is entirely possible for a sportsperson who is an employee of a club as regards his playing services to be involved in providing promotional services to the club which do not form part of his contract of employment, provided that it is structured correctly and reflects commercial reality. This principle is confirmed by the Revenue in its Employment Status Manual at ESM 1095 where it states that it is perfectly possible for an employee of a company to provide services quite legitimately to that company in a separate capacity. In such cases the payment for the services would not be income from employment assessable under Schedule E. The important factors to bear in mind are that the arrangements must be genuine and also non-exclusive. The amounts paid for the exploitation of the image rights and the provision of the promotional services must not be disguised salary but must be genuine payments made for what the image rights and promotional services are worth. As indicated above, these schemes will only tend to work for top level high profile sportspersons where their image is sufficiently marketable for the image rights

company to trade with it on its own account. Thus, as long as a sportsperson has a valuable image he/she should be able to exploit it in a tax efficient way by using an image rights company scheme.

Footnotes

(1) For the sake of convenience and with due recognition of the fact that English law does not recognise that a person's image is a separate intellectual property asset, the term "image rights" will be used to encapsulate the exploitation of the name, reputation, image, voice, personality and initials and all other commercial rights in advertisements, marketing and all other forms of media of a sportsperson.

(2) Benefits in kind provided to an employee are also treated as emoluments and can fall within the PAYE regime.

(3) It is worth mentioning that the Commissioners found that there was in the course of the negotiations for the conclusion of the respective contracts no prior agreement for a single global remuneration figure for either of the players. Separate figures for salary, image rights and management were discussed during the negotiation of Bergkamp's agreement. Although Platt's salary could not exceed Arsenal's pay ceiling, as Platt's image rights were of value to Arsenal, they were willing to pay extra for them.

(4) John Newth, "Performance and Image", Taxation, 22 February 2001, page 498.

(5) "Material interest" is defined as meaning beneficial ownership of, or the ability to control, directly or indirectly more than 5% of the ordinary share capital of the company or possession of, or entitlement to acquire, or right to receive more than 5% of any distributions made by the company.

(6) Queen's Bench Division - Administrative Court, [2001] EWHC Admin 236.

(7) Inland Revenue Press Release of 23 September 1999.

(8) *Morren v Swinton & Pendlebury Borough Council* [1965].

(9) *Marketing Investigations Limited v The Minister of Social Security* [1968] 2QB 173.

(10) Anne Redston, "The Good, the Bad and the Indifferent", Taxation, 30 September 1999, page 667.

(11) See the Inland Revenue Booklet IR175 "Supplying Services Through a Limited Company or Partnership" where the Inland Revenue indicate that the number of clients a worker has may be relevant to the decision whether they work for each as an employee or as a self-employed person; if a person has many different clients this may indicate self-employment and be a factor that should be considered in addition to the actual details of each contract. Sarah Walker, the Assistant Director of the Personal Tax Division, also confirmed that the Inland Revenue will take account of the criterion established in *Hall-v-Lorimer* where the fact that an individual worked for multiple engagers for short periods of time and was not dependent on a single one was taken as a point to self-employment.

Dalton Odendaal, Harbottle & Lewis

Is it Time for English Football to Adopt a Salary Cap?

Nicholas Tsatsas

"An increasing number of clubs...[are] now spending more than two thirds of their income on wages...Wage restraint...is now more critical than ever before"
(Deloitte & Touche Annual Review of Football Finance 2000)

1. INTRODUCTION

Over the last few years, media coverage of football has focused increasingly on the wages earned by footballers. The marked rises in players' wages in modern times can be traced back to 1992, when the Premier League ("the Premiership") was founded, and to the subsequent sale of its television rights to BskyB (as it then was). Players' salaries received a further boost in 1995, following the European Court of Justice's ruling in the *Bosman* case,[1] which resulted in the abolition of transfer fees for players whose playing contracts had expired.

In the ensuing years, salaries have continued to spiral. In the 1998/9 season, wage and salary costs of Premiership clubs rose by 28% against the equivalent costs for the 1997/8 season.[2] More significantly, wage and salary increases are outstripping the growth in turnover that both Premiership and Football League clubs are experiencing, as clubs pursue success on the field. Thus, in the 1998/9 season, wages of Premiership clubs were equivalent to 58% of turnover (up from 52% in 1997/8) whilst the wages of Football League clubs were equivalent to 65% of turnover (up from 61% the previous season). Deloitte & Touche suggest that, as "a rule of thumb", clubs paying less than half of their turnover in total wages and salaries are carefully managing for the long term, whereas wages of over 2/3 turnover are unlikely to be sustainable over a similar period.[3] In the 1998/9 season, only 15 clubs

(20%) in all divisions had a wage/turnover ratio of less than 66%, as compared to 38% of all clubs the previous season.

Of equal concern is that wage increases are leading to gaps not only *between* divisions, but *within* them. In the 1998/9 season, the highest wage bill in the Premiership was 4.5 times higher than the lowest.[4] The situation was even more pronounced in Divisions One and Two of the Football League, where the highest wage bills were, respectively, 5.8 and 7.9 times greater than the lowest. These ratios demonstrate a substantial difference in financial competitiveness, which is becoming more and more difficult to overcome by good management and team spirit on the pitch. There is an ever-increasing danger that football might become a

> *"predictable business, where the league table mirrors the economic status of the club."*[5]

There is every reason to believe that wages will continue their present rate of growth, unless "artificially" restricted. The recently negotiated sale of television rights for the 2001/2 season should result in revenues to the Premiership of more than £500million each season from domestic broadcasting, as compared to the £170million that it earned from domestic television in 1998/9.[6] Further, the reform of the football transfer system recently agreed by FIFA/UEFA and the European Commission is expected to result in a further reduction in transfer fees and a consequent increase in wages, similar in effect to that experienced following *Bosman*.

Two concerns arise in relation to the dramatic increase in footballers' wages over the last ten years. The first is that these increases are not sustainable, and that they will lead clubs to financial ruin. The second is that they are responsible for the apparent reduction in competitive balance in English football. If increased spending on players can be shown to increase the likelihood of sporting success, then those clubs with the biggest budgets have a real competitive advantage.[7]

It is not only English football that has experienced a reduction in competitive balance in recent years. This phenomenon is evident in most, if not all, commercially mature team sports both in Europe and America. Increasingly, sports leagues are adopting an interventionist approach to address this imbalance, and this paper considers whether it is time for English football to do the same, through the imposition of a salary cap (hereafter, "a Cap").

2. SALARY CAP CHARACTERISTICS

Essentially, a Cap is a limitation on the amount that may be paid by a club to its playing staff over a given period of time. However, the precise form of the Caps that have been adopted in different countries and sports vary greatly. It is, therefore, instructive to consider the characteristics of some of the Caps already in existence (both in other jurisdictions, where the Cap "concept" is more developed, and in England), together with the reasons for their adoption, in order to establish a sense of their scope.

The National Basketball Association ("NBA") in America first adopted a Cap in 1983, primarily as a result of the dire financial state of the entire league, in which two thirds of the teams were losing money. At that time, the NBA faced crippling image problems, not least due to a surfacing drug culture, which had in turn, resulted in corporate and media apathy. The NBA's Cap was designed to control costs and give the players a vested interest in the NBA's fortunes by assuring them a share of the League's revenues. The introduction of a Cap in English rugby league (or the "Super League", as it is now known) in 1998 was prompted by similar concerns, as in the early to mid 1990's, most professional rugby league clubs in England were in a state of financial crisis.[8]

Conversely, a Cap was introduced into Australian rugby league in 1990 primarily as a result of the desire to prevent the wealthiest clubs from dominating the league.[9] The concern was that those clubs with the greatest financial resources were acquiring all the best players, and Australian National Rugby League ("NRL") administrators considered that if this practice were to continue, it would result in a drop in the playing standards of the teams fielded by the financially weaker clubs. That, in turn, would almost certainly result in an erosion of support for such clubs both in terms of public support and sponsorship.

Caps are often referred to as "hard" or "soft", depending upon how flexible the salary limit is. "Hard" Caps, such as that adopted by the National Football League ("NFL") in America, impose a fixed and

(theoretically) inflexible amount that can be spent on a team's payroll. By contrast, a "soft" Cap also establishes a team payroll limit, but provides for a series of specific exceptions which allow a team to exceed the Cap. The Cap adopted by the NBA works in this way. The most famous of the exceptions to the NBA's Cap is known as "the Larry Bird Rule",[10] and allows a team to re-sign its own free agent (that is, a player whose contract has expired) for any amount, regardless of whether it has room under the Cap. (In fact, this exception ought to be re-christened "the Michael Jordan Rule" since he was its biggest beneficiary, earning a playing salary in 1997-8 (about $33 million) that was greater than Chicago Bulls' total Cap that season ($26.9 million).)

What both the NBA and NFL Caps have in common, though, is that the same payroll limit applies to every team in the league. On the other hand, the Cap that was first introduced into the NRL was not a uniform one. The ceiling imposed on each club in relation to payments to its players, was based on that club's financial capacity to pay and meet objectives including stability of membership. Thus, at the outset of the 1990 season, when the NRL's Cap was introduced, the Maximum Team Salary for each club in the NRL varied from between $1,100,000 to $1,500,500.[11]

Historically, the Super League's Cap has also varied from team to team, in that, broadly, it allows clubs to spend up to 50% of their net income per year on all player payments ("the 50% Rule"). Consequently, clubs with greater revenues have been able to spend more on players than the "poorer" teams in the league. It is important to recall that the Super League's Cap (in its original form) was not designed to promote parity, but rather

> *"to try and ensure...the longterm financial survival of rugby league clubs."*[12]

However, in an effort to stem the increased competitive imbalance amongst clubs over the course of the last three years, the Super league has been forced to "harden" its Cap. Accordingly, a rule stipulating that a club may pay only 20 players more than £20,000 per year was introduced at the start of the 2000 season, so as to prevent the bigger clubs from "stockpiling" the best players. The Super League Cap will be further tightened by the introduction of an absolute ceiling of £1.8m on player wages from the start of 2002.[13]

The incentive for clubs and players involved in professional sports to evade the restraints imposed by a Cap will always exist and every league that has introduced a Cap has had to address this issue.[14] It is selfevident that a Cap will be of limited value if it is not supported by measures designed to deter the circumvention of its terms, and to punish those parties who, nevertheless, seek to do so.

Penalties for breaches of the Super League's Cap can be severe. Any clubs who, at the end of the year, have spent more than 50% of their revenue, but less than 55%, may suffer a penalty of a twopoint deduction at the start of the following season.[15] Clubs who spend between 55% and 60% of revenue will suffer the penalty of a twopoint deduction as well as losing half of their Super League prize money. Clubs who spend more than 60% of applicable income on player payments will be deducted 4 points at the start of the following season and will lose all of the Super League prize money.

In the NBA, both players and clubs are penalised if salaries exceed the Cap. With effect from the 2001/2 season, 10% of all players' salaries will be deducted and placed into a league escrow fund. If, in any given season, salaries rise to more than 55% of basketball related income, the NBA will be entitled to retain some or all of that fund. Moreover, if salaries rise to more than 61% of league revenue a team "luxury tax" will be triggered. In this case, teams with payrolls that exceed $55 million will have to pay the league one dollar for every dollar by which they exceed the Cap. The NBA's determination to support and enforce its Cap was graphically demonstrated at the outset of this season, in case involving Joe Smith, then of the Minnesota Timberwolves. Both the NBA, and an independent arbitrator ruled that the contractual arrangements Smith had agreed to with Minnesota violated the NBA Cap. The NBA subsequently announced an unprecedented series of penalties against Minnesota, including the forfeiture of Minnesota's firstround draft picks between 20015, a fine of $3.5 million, and the voiding of the player contract between Smith and the team for the 2000-1 season, along with all contracts previously entered into by Smith and the team. Minnesota owner Glen Taylor and Vice President of Basketball Operations Kevin McHale were also suspended for a year.

It is clear from the experiences of those leagues that have already adopted Caps, that the "harder" (or more restrictive) the Cap, and the more vigorously it is enforced, the more likely it is to achieve the particular aims that led to its inception. Paradoxically, that type of Cap will also be more vulnerable to legal challenge.

3. COMPETITION LAW AND SALARY CAPS

An attempt to introduce a Cap into English football might be subject to challenge on the grounds that it amounts to a restraint of trade.[16] Broadly, a contractual term that fetters an individual's freedom to trade can only be valid and justified if that restraint can be shown to go no further than is reasonably necessary to protect a legitimate interest of the party in whose favour it operates. However, the focus of the restraint of trade doctrine is the private law question of the effect of a particular contract on one person's ability to trade. Challenges to anticompetitive behaviour (such as that undoubtedly encouraged by a Cap), which affect the marketplace generally, are as likely to be based on European Union ("EU") competition law principles.

For such principles to apply , the anticompetitive arrangement must have an appreciable effect on interstate trade. Given that Premiership clubs spent £132.6m on foreign players (the majority of whom came from within the EU) in 1998/9,[17] this requirement is clearly satisfied. In any event, EU competition principles are now also mirrored in domestic legislation in the form of the Competition Act 1998, allowing equivalent legislation to be enforced in a purely domestic context.

Sport is subject to EU law in so far as it constitutes an "economic activity" within the meaning of Article 2 of the EC Treaty. That term is construed broadly, and there is no doubt that professional, and even semiprofessional sports, fall within its ambit.[18] As a general proposition then, rules and decisions affecting the way in which sport is organised fail to be assessed under the provisions of the Treaty. Like English law, EU law recognises a region of autonomy for the organisers of sport, within which the law will not interfere.[19] This autonomy is afforded to rules which are characterised as being "of sporting interest only". Although the courts have sometimes found it difficult to identify whether a particular provision is properly to be viewed as sporting or economic in nature, no such difficulty would arise in relation to a Cap. There is nothing to suggest that limiting salaries is a necessary and inherent feature of a particular sport - such provisions are clearly economic in nature.

The competition law principles upon which a challenge to a Cap would be based are those encapsulated in Article 81 (formerly Article 85) and 82 (formerly Article 86) of the Treaty of Rome.[20] Article 81 prohibits agreements between undertakings or decisions by associations of undertakings which prevent, restrict or distort competition, unless such agreements benefit from an exemption pursuant to Article 81(3) granted by the European Commission. Article 82 prohibits the abuse of a dominant position by one or more undertakings.

A set of rules relating to a Cap clearly constitute either an agreement between undertakings or a decision by an association of undertakings. There is little difficulty in classifying clubs as undertakings and governing bodies as either undertakings or associations of undertakings.[21] Caps will clearly have the effect of restricting or distorting competition (that is, after all, their purpose), to the degree that they deprive the clubs of freely competing with respect of the signing of players.

They key question therefore appears to be whether a Cap might benefit from exemption under 81(3)? An individual exemption may be granted where, broadly, the arrangement can be shown to (a) support legitimate aims which benefit consumers and (b) constitute the least restrictive method of achieving such aims.

Professional football is substantially different from other markets in that clubs are mutually dependent on each other. Each club has an interest in the health of other clubs and generally does not aim to exclude its competitors from the market. Likewise the economic success of a league does depend on a certain degree of competitive balance between its clubs, and it has been acknowledged that certain restrictions on competition may be necessary in order to maintain that balance.[22] As in the United States, the courts have developed a "rule of reason" approach balancing the positives and negatives of team co-operation in the context of professional sports.

The two aims that football seeks to serve by introducing a Cap are ensuring clubs' financial stability, and promoting the competitive balance that is necessary for its leagues to survive and flourish. It is doubtful whether the first of these aims is sufficient to justify the anticompetitive effects of a Cap. EU competition law would not be expected to allow the steel industry to fix the price of raw materials in order to permit failing companies to remain in business and, arguably, football should be no different.

On the other hand, it is submitted that the goal of competitive balance is sufficiently important to justify the introduction of potentially anti-competitive measures. The need for competitive balance

derives from the notion that the sports fan values that Szymanski and Kuypers term "outcome uncertainty" (in relation to individual matches, as season, or longer term).[23] The only way to maintain outcome uncertainty is to have a competitive balance in the league.

However, it has been suggested that there are less restrictive methods of preserving competitive balance than by the use of Caps, most notably through the redistribution of income (i.e. revenue sharing).[24] Stephen Ross, for example, is particularly critical of "blanket restraints" such as uniform Caps that apply equally to all teams regardless of their performance. He considers that by restraining "inferior" teams, blanket restraints effectively harm competitive balance, by denying those teams the opportunity to take whatever steps necessary to match their superior rivals. He advocates restraints that are limited to teams with superior records, citing with approval, baseball's luxury tax where those teams with the highest payrolls effectively subsidise those with the lowest by sharing revenue. He argues that under a system that included revenue sharing and did not impose Caps, a "poorer" team would not only be permitted to sign highly-paid superstars, but its ability to do so would be enhanced, given the funds that it would receive from richer clubs.

However, it is submitted that the concept of revenue sharing sits more comfortably within American professional sports, where franchises derive a large proportion of their revenue from the sale of their media rights to local, as opposed to national, television networks. As a result, the ability of franchises to generate revenue generation depends, to a great degree, on the size of their local "media markets". Given that the disparity in revenue that exists between teams in American professional leagues arises as much as a result of an "accident" of location, a policy of revenue sharing does not seem unreasonable. That analysis does not, though, apply to English football, where it seems less equitable for clubs who have bigger stadiums, or who demonstrate commercial efficiency and innovation, to subsidise those who do not. Moreover, over recent years, revenue sharing has become an increasingly uncommon feature of world sport. Instead, the most successful teams and players are demanding a greater share of the revenue "pie", usually by threatening to breakaway and leave the remainder of their sport without its major attractions. This trend has been evident in tennis, rugby union, European basketball, and even darts and snooker, but nowhere more graphically than in football, where such demands led to the creation of the Premier League and might yet result in a European Super League. Whilst football does continue to acknowledge the merits of revenue sharing,[25] the practical steps that it has adopted to achieve such a policy are superficial, and unlikely to result in any material re-distribution of income. In the circumstances, it is submitted that the adoption of revenue-sharing practices is an unrealistic and impractical alternative to the Cap mechanism.

It is not clear whether the imposition of a Cap would amount to an abuse of a dominant position, pursuant to Article 82. An undertaking acts in contravention of this Article if it occupies a dominant position in the marketplace, and it abuses the dominant position by acting anticompetitively. In the case of a Cap in football, the relevant market must be the market for players in Europe. That is a market in which clubs participate, not governing bodies. Therefore no issue arises as to the dominance of a governing body or association. At the same time no club is likely to be dominant in that market. Whilst the clubs might hold a collectively dominant position, it is difficult to see how a Cap to which all such clubs are subject could amount to an abuse. The Cap only produces anticompetitive effects as between the clubs themselves, as opposed to the clubs on one hand and consumers on the other.

4. PRACTICAL DIFFICULTIES RELATING TO THE ADOPTION OF A SALARY CAP IN ENGLISH FOOTBALL

Quite apart from the legal issues identified above, the introduction of a Cap in English football would face a number of practical obstacles. Some of these difficulties - such as the types of expenditure covered by the Cap, or the manner in which it is to be policed and enforced - have had to be addressed by every league that has adopted a Cap. Others, though, are particularly relevant to football, and fail to be considered in greater detail.

At what level would a Cap in English football be set?

If the Cap were set at the level of the club with the highest wage bill, then arguably it would have no effect, given the disparity on spending in relation to wages and salaries. (In the 1998/9 season, Manchester United, whose wage bill totalled £36,965,000, spent at least twice as much on wages as ten

other clubs in the Premiership, and four and a half times as much as Charlton Athletic, whose wage bill amounted to £8,226,000). The reality is that those clubs with the smallest wage bill will not be able to raise their wage expenditure to the level set by Manchester United anytime in the foreseeable future. Conversely, if the Cap was set at the level of the lowest paid squad, the impact would be "disproportionate and discriminatory",[26] as the "richest" clubs would have to discard a significant amount of their players, whilst the "poorest" clubs were allowed to retain all of theirs. The danger of setting the cap somewhere in the middle of the present range of spending is that it combines the worst elements of the other two options: the richest clubs would have to release players and in all likelihood suffer a drop in playing standards, whilst the poorest teams would still be unable to spend at the higher level. An alternative approach would be to prohibit the team topping the table at the end of the season from increasing its spending on salaries, whilst permitting the remaining teams to increase spending by a defined percentage, with the biggest permitted increase for the lowest, non-relegated team at the bottom of the table. As Paul Harris points out,[27] there are two clear objections to this type of "differentiated" salary cap: firstly, it seems grossly inequitable that players be directly and personally penalised for their success. Secondly, it seems rather fanciful to suppose that a team which has just escaped relegation will be in a financial position to commit to a large increase in wages.

What happens to existing contracts upon the introduction of a Cap?

Assuming that a Cap were adopted, some players would be earning wages under present contractual arrangements that consume such a large proportion of the Cap that their clubs will feel that they can no longer be accommodated, given the need to fit ever-increasing squads of players within the confines of the Cap. Those players could be transferred, but prospective purchasing clubs might also be unwilling to take on such comparatively high salaries.

Any attempt to unilaterally remove the players from the playing squad would probably constitute a breach of contract entitling the players to damages in lieu.

Will the players accept a Cap?

It is apparent that a Cap can only be imposed and maintained with the support of the players who will ultimately be restricted by it. The Cap that exists in English rugby league has survived, in part, because it has never been the subject of a challenge by the players, who realised that without the Cap, there was a very real prospect of clubs becoming insolvent, with a consequent threat to their jobs.

In the NBA, the players' acceptance of the Cap actually protects the league from antitrust (i.e. anticompetitive) scrutiny because of what is known as "the labour exemption". Essentially, US courts will not strike down anticompetitive arrangements where they arise as a result of a freely negotiated collective bargaining agreement between the players' union and the league. (Under US collective bargaining laws, if a majority of the union backs an agreement, the minority has to accept the consequences.) When the NBA first sought to introduce its Cap in 1983, the players' union naturally had reservations, but recognised the need for economic stability, and the value of a guaranteed share of the NBA's revenue. Similarly, in 1999, the players' union accepted the more restrictive form of Cap that is presently in force, in exchange for the introduction of guaranteed minimum salaries for all players.

However, it is difficult to imagine the powerful Professional Footballers Association accepting the introduction of a Cap in English football at a time when money continues to pour into the game, particularly at its highest levels. Accordingly, a Cap is likely to be perceived as having the aim (or, at least, effect) of increasing club profits at the expense of the players, rather than of securing their continued employment by protecting the financial viability of the league.

How does the concept of a Cap fit within the European model of sport?

It is, perhaps, no surprise that Caps were first introduced in America, where professional sport operates in "closed leagues", that is, leagues from and to which there is no promotion or relegation, and where out-of-league competition is prohibited. Such a structure permits a more aggressive interventionist approach: the league's members recognise the need for "competitive balance" given

the limited number of participants and are, therefore, prepared to tolerate the imposition of restrictions that are intended to facilitate that goal.

However, English football is part of a very different model. On a national level, there is promotion and relegation between a host of leagues. Moreover, success in the top domestic league and cup competitions brings about qualifications for European competitions.

Leagues with Caps, from which there is no relegation, such as the NBA and the NRL, do not encounter the problem of how to cope with the different levels of Cap amongst divisions. As noted in Part 1, financial and competitive imbalances exist within every division in English football, a fact that suggests that each should be subject to a Cap. But what happens to clubs that are relegated into a division whose Cap will inevitably be set at a level lower than that from which they are relegated? It cannot be equitable that they be subject to some form of transitional arrangements that allow them to spend more than the other teams within the division.

If a Cap were to be introduced in the Premiership, it would have to be introduced into (at least) the top divisions of the Spanish, Italian, French and German football leagues. To do otherwise would distort the market. The introduction of a Cap in English football alone would undoubtedly lead to an exodus of star players to wealthy clubs in leagues not subject to such wage restraint. It would also inhibit the free movement of players, contrary to Article 39 of the Treaty of Rome. However, trying to introduce a Europe-wide Cap would prove so complicated as to be unrealistic. The Cap would have to be set at the same level in each national league, otherwise there would still be a partitioning of national markets and an obstacle to free movement of players. The Cap would also have to be designed so as to cope with fluctuating exchange rates, different levels of inflation and taxation.

It is worth noting that, despite also being part of the European model of sport, rugby league has not had to deal with problems such as these to date. There are only 32 fully professional rugby league clubs in England, split into two divisions, and each subject to the same Cap. There is promotion and relegation only between these two divisions. Hitherto, clubs have not had to worry that their best players are likely to be poached by clubs in the NRL (the only other major national rugby league), since the NRL operate a Cap that is more restrictive than the Super League's. However, Chris Caisley, Chairman of the Super League, acknowledges that if Super League clubs continue to lose players to the game of rugby union, mainly because the Cap prevents them from matching the salaries on offer in that code, then it is likely that the Super League's Cap would be "softened" or abolished altogether.

5. CONCLUSION

Deloitte & Touche's latest review of the finances of Premiership clubs confirms that wages are continuing to rise faster than income. It estimates that if turnover and spending on wages continue to grow at the same rate, then

> *"by 2007, wages will absorb 100 per cent of income with not a penny left for anything else."*[28]

Because of the disparity in clubs' ability to generate revenue to fund the ever-increasing rates of expenditure on players' wages, the competitive imbalance that has manifested itself over recent years will become exacerbated. This imbalance will, eventually, cost all the clubs dearly as the interest of all those who invest in football - be they sponsors, media interests or even fans - dwindles away.

This threat to football constitutes compelling justification for the introduction of anticompetitive restrictions to prevent any further polarisation of clubs into "haves" and "have nots". Revenue sharing is not the answer. Whilst the biggest clubs are willing to share some of their revenue with their smaller counterparts, it is difficult to imagine that this redistribution of income will ever take place to a degree that materially reduces the competitive imbalance that is overwhelming football. Moreover, revenue sharing will not serve the secondary aim of limiting increases in wages that are economically unsustainable. In the circumstances, the imposition of a Cap constitutes a better solution to the problems facing English football at present.

Indeed, it is not just accountants that have called for wage restraint in football. In the recent past, the imposition of a Cap has been advocated by such significant figures as UEFA Communications Director Mike Lee[29] and, most notably (given the anti-competitive nature of a Cap), former European Competition Commissioner Karel Van Miert.[30]

Regrettably, though, the practical difficulties that English football would face in trying to implement a Cap are likely to prevent its adoption. The circumstances that gave rise to, and continue to underpin, the Cap in English rugby league - most notably, the existence of a financial crisis in the sport which led to the players accepting the need for wage restraint, and the comparatively limited structure of the game (both domestically and globally) - are absent from football. The game of football is too big, and the money to be made from it too great, for those with vested interests to make the necessary sacrifices that would arise as a consequence of the introduction of a Cap.

The financial growth of the "biggest" clubs in the major European leagues will continue to outstrip that of their domestic counterparts. In the absence of effective restrictive measures, there is little hope that the competitive imbalance that exists in all of those leagues will be ameliorated. Those "big" clubs will recognise that the outcome uncertainty that their fans, commercial and media partners desire can only be achieved if they compete against clubs who are their financial equals. Perhaps, then, it will be football's inability to impose a wide ranging Cap that will finally prompt the emergence of a European Super League.

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Footnotes

(1) *Union Royale Belge de Societes de Football (ASBL) v Jean-Marc Bosman* (C415/93) ECRI-4921. Following the European Court of Justice's ruling in the case, Premiership wage bills jumped by 50% between 1996 and 1997.
(2) Figures quoted in this paper relating to wages and salaries are those of clubs as a whole, not just those of players, since very few clubs disclose details of actual player remuneration.
(3) Deloitte & Touche, Annual Review of Football Finance, August 2000, p.20
(4) *Ibid*, p.23
(5) Deloitte & Touche, England's Premier Clubs - A Review of the 1998/9 season, April 2000, p.4
(6) Deloitte & Touche, Annual Review of Football Finance, August 2000, p.22
(7) Nowhere is this more evident than in the Premiership, where Manchester United (who spend more on players' wages than any other club in English football) have won seven of the last nine championships.
(8) By 1992/3 only 14 of 32 clubs had an excess of assets over liabilities - the remaining 18 were technically insolvent - The Rugby Football League, Salary Cap Proposal, February 1995, p.2
(9) During the 1980's two clubs, Parramatta and Canterbury - Bankstown won four Grand Finals each.
(10) The exception is named after the former Boston

Celtics star, Larry Bird, because when the NBA Cap was first being negotiated in 1983, the Boston Celtics wanted to ensure that, no matter what the cap limitations were, they would be able to re-sign their star player for any amount.

(11) Raymond Farrell "Salary Caps and Restraint of Trade" S.&L.J. 1997 5(1), p.55

(12) The Rugby Football League, Salary Cap 2000, p.1

(13) *The Independent*, "Super League sets ceiling on players' wages", 12 January 2001. Note, though, that the imposition of this ceiling is likely to affect only the Wigan Warriors and the Bradford Bulls (the two clubs with the highest payrolls in the Super League) in the immediate future.

(14) For a detailed analysis of the NBA's experience in relation to this issue, see Michelle Hertz "The National Basketball Association and the National Basketball Players Association opt to cap off the 1998 Collective Bargaining Agreement with a full court press: in re Chris Dudley" The Marquette Sports Law Journal 1994/5 vol.5 p.251

(15) It is, of course, important that sanctions comply with the principle of proportionality. Thus, the Super League maintains an element of discretion in relation to those sanctions that may be imposed for minor breaches of its Cap, whereas more serious breaches give rise to mandatory penalties.

(16) Indeed, this was the basis upon which George Eastham challenged, and outlawed, the "retain and transfer" system in 1963 - see *Eastham v Newcastle United FC Limited* [1964] Ch 413.

(17) Deloitte & Touche, England's Premier Clubs - A review of the 1998/9 season, April 2000, p.20

(18) *Dona v Mantero* (13/76) [1976] ECR 133 (ECJ)

(19) See, for example, joined cases C-51/96 and C-191/97 *Deliege v Ligue Francophone de Judo*

(20) The 1997 Treaty of Amsterdam resulted in the renumbering of the Articles of the 1957 Treaty of Rome. In this paper, I refer to the new numbering that has been adopted.

(21) See Distribution of Package Tours During the 1990 World Cup (Italia 90) OJ L326/1

(22) See, for example, The European Commission, The Helsinki Report on Sport, December 1999, para 4.2.1.3.

(23) Stefan Szymanski and Tim Kuypers "Winners and Losers" - The Business Strategy of Football" (1999) p.256

(24) See, for example, Paul Harris "What Position do Team Salary Caps Play in the Game of Competitive Balance" S&L.J. 1999 7(3), p.31 and Stephen F Ross "The Misunderstood alliance between sports fans, players and the antitrust laws" 1997 University of Illinois L. Rev. p.519

(25) See, for example, the Solidarity Mechanism included at paragraph 4 of the "Principles for the amendment of FIFA rules regarding international transfers" submitted by FIFA to the European Commission on 5 March 2001.

(26) Paul Harris "What Position do Team Salary Caps Play in the Game of Competitive Balance" S.&L.J 1999 7(3)

(27) *Ibid*

(28) *The Times*, "Premiership £1 billion heads world league", 12 April 2001

(29) Football 365.com "UEFA urge salary caps", 20 April 2001

(30) Speech of Mr Van Miert to the European Sport Forum, 27 November 1997

Nicholas Tsatsas, Clifford Chance.

Does English Law Recognise the Concept of an 'Image' or 'Personality' Right?

Is the Current Position Satisfactory in the Light of Modern Sports Marketing Practice and the Comparative Legal Position in Competitive Overseas' Markets?

Stephen Boyd

1. MODERN SPORTS MARKETING PRACTICE

According to a Gallup-KeyNote survey conducted in June of 1996, "*... the general importance of leisure and entertainment in modern society makes it appropriate for sportsmen and women to be seen as entertainers and remunerated like movie stars or pop stars.*"[1]

That explains why almost two thirds of the total marketing spend of UK companies is on sport related marketing with the total expenditure on sport related activities in the UK totalling £4.4 billion.[2]

"The first step towards selling a product or service is to attract the consumer's attention"[3] and sports stars can substantially enhance their earnings by exploiting their "personality" by way of sponsorship deals, merchandising and product endorsement. Indeed, the income which they make from endorsements and merchandising often dwarfs their salaries from sport.

"Express endorsement occurs where celebrities state their approval of products. Implied endorsement occurs where celebrities are shown using products or their images are used in association with products. Such endorsement has gained a higher profile with the internationalisation of films and television programmes and with the use of the Internet as a sales medium. The evolution of multi-media where advertising and promotion extend beyond national frontiers has rendered the use of internationally renowned personalities increasingly popular."[4]

Given the potential for increased exposure and profitability, association with celebrities are rights for which businesses are prepared to pay handsomely. For example, "Michael Schumacher's third Formula One title should add around 30 million German Marks ($13.37 million) to the driver's already huge yearly income. The Schumacher product line already consists of 350 articles, with the latest additions a vacuum cleaner and a scooter board."[5]

2. THE PROBLEM

"Advertising through the mass media allows but few to escape the messages and products so conveyed. Not surprisingly, in such a highly competitive field, every avenue of attack and means of attaining even the smallest advantage is fully exploited. The use of a famous face can serve that purpose effectively and, in the absence of protection, cheaply."[6]

New media technologies make celebrities particularly vulnerable to the unauthorised exploitation of their identities.

3. THE SOLUTION

"The concept of personality rights, or rights of publicity, protects the commercial or business value of a person's identity. The right enables an individual to prevent others from misappropriating the value of his or her name, image or other attribute for commercial benefit."[4]

The arguments for a discrete law dealing with a personality right, as extracted from the American cases, have been summarised as follows:

(a) Significant expenditure of time, effort, talent and finance is necessary to succeed as a sports person and that, due to such investment, he/she justifiably deserves any money flowing from his/her fame;

(b) An incentive to the population to undertake socially enriching activities is promoted by ensuring that the sports person who undertakes the activities reaps the financial reward;

(c) The unauthorised use of a sports person's identity may saturate the market, thus injuring him/her by reducing the demand for his/her image;

(d) The notion that every man and woman should have autonomy over what he or she endorses, be it an idea, a political candidate or a product.[7]

4. COMPETITIVE OVERSEAS MARKETS

The law (at least in many other jurisdictions) has developed in tandem with the growth of the

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commercial value of the fame and identity of celebrities and a personality right is recognised in many countries, including most of those in the European Community.

Other countries have developed other means of dealing with the problem. Some examples will illustrate the approaches.

(A) United States

"Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category, not just a "kind of" trade mark, copyright, false advertising or right of privacy. Whilst it bears some family resemblances to all these neighbouring areas of the law, the right of publicity has its own unique legal dimensions and reasons for being. The right of publicity is not merely a legal right of the "celebrity", but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking."[8]

Under either statute or common law the right of publicity is recognised as the law of 27 states.[9]

For example, the California Civil Code allows a cause of action where "any person knowingly uses another's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent."

Similar to the approach in New York, the Code does not require consent for use in connection with "news, public affairs or sports broadcast or account, or any political campaign".

California case law, however, provides only a limited exemption for such news and public events.

In addition, under Federal law, section 43(a) of the Lanham Trademark Act prohibits use of any "word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation" which is likely to cause confusion, mistake or deception as to the affiliation, connection, association, origin, sponsorship or approval between one party and the goods, services or commercial activities of another.

"The courts enforce this body of law vigorously, consistently and expansively. A person's right to control the commercial use of his or her personality is quite complete."[10]

(B) Canada

The Canadian courts have recognised that a person "has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right if it is invaded."[11]

Appropriation of personality was first recognised as a tort by the Ontario Court of Appeal in *Krouse v. Chrysler Canada Limited*.[12]

According to Estey JA, a professional athlete has a commercial property right with regard to his photograph or likeness when it is used in advertisements. However, where a photograph is not used to suggest an endorsement of the product by the individual but is only used to illustrate the sport in which the athlete participated, he has no cause of action.

In developing the tort of appropriation of personality, the Ontario Court of Appeal expressly recognised:

(a) A tort of this nature was contemplated within Commonwealth common law, being derived from the source of all new torts, the seminal proceeding of "the action on the case."[13]

(b) A specific comparison of the tort with "an action for trover or conversion in its modern form."[14]

(c) A favourable comparison of the tort with the American principle of "Right of Publicity", although with the acknowledgement that such a proceeding had not in itself yet been recognised in Canada or England.[15]

The development followed upon the tort of passing off being found inapplicable as the parties were not in a relationship that would cause public confusion as to an "association" between them.

The Canadian provinces of British Columbia, Manitoba, Newfoundland and Saskatchewan have privacy statutes which, among other things, prohibit the unauthorised use of a name or likeness in advertising and promotion of goods or services. Further, the 1992 Civil Code of Quebec also recognises privacy rights.

(C) Australia

"The traditional view in Australia has been that there is no proprietary right in one's own name, image, or persona equivalent to the United States "right of publicity" or the Canadian "appropriation of personality.""[16]

However, section 52 of the Trade Practices Act 1974 provides that:

> *"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive."*

Section 53 of the Act provides that:

> *"A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*
>
> ***(a)*** *Represent that goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits they do not have;*
>
> ***(b)*** *Represent that the corporation has a sponsorship, approval or affiliation it does not have."*

Although it was designed to protect consumers from buying goods or services that have been falsely associated with another product or a personality "the Act, albeit tacitly, serves to protect against the unauthorised exploitation of reputation or personality."[17]

Further, Australian passing off law is broader in scope than its English counterpart and offers greater protection against the unpermitted use of personal identity in advertising and commercial promotion.

In *Henderson v. Radio Corporation*[18] the plaintiffs were well-known ballroom dancers. They succeeded in their action for passing off against the defendant, a manufacturer of records who, without their permission, used a photograph of the two of them dancing on the sleeve of a dance music record.

The Court observed that the consuming public would probably believe that the picture indicated the plaintiffs' sponsorship or approval of the record, and that the only possible reason for the defendant's use was to attract attention to the product and increase sales. On the meaning of "common field of activity", Chief Justice Evatt did not agree with the narrow view of the English court in the "Uncle Mac" case, (see below, p.141):

> *"The remedy of passing off is necessarily only available where parties are engaged in business, using that expression in its widest sense to include professions and callings. If they are, there does not seem to be any reason why it should also be necessary that there be an area, actual or potential, in which their activities conflict."*[19]

Paul Hogan, star of the Crocodile Dundee films, established passing off by television advertisements for a shoe company which used aspects of his film characterisation.[20]

In the course of his judgment Burchett J observed that:

> *"To ask whether the consumer reasons that Mr Hogan authorised the advertisement is therefore to*

ask a question which is a mere side issue, and far from the full impact of the advertisement. The consumer is moved by a desire to wear something belonging in some sense to Crocodile Dundee (who is perceived as a persona, at most an avatar, of Mr Hogan). The arousal of that feeling by Mr Hogan himself could not be regarded as misleading, for then the value he promises the product will have is not in its leather, but in its association with himself. When, however, an advertisement he did not authorise makes the same suggestion, it is misleading; for the product sold by that advertisement really lacks the one feature the advertisement attributed to it."[21]

"Since *Hogan v. Pacific Dunlop* ... the current position in Australian law appears to be this. Following *Henderson*, a personality who can be said to be in business - and the term is very broadly understood - is always free to grant or withhold his endorsement, and therefore any unauthorised claim to such endorsement damages him by depriving him of the fee he could otherwise have insisted on. It is irrelevant that the plaintiff may have no existing licensing business or may prefer not to grant licenses. Nor does it matter that the defendant may have derived no benefit from the supposed endorsement, and would not voluntarily have paid a fee. Misrepresentation must still be shown, and the misrepresentation can be found in the public supposing there to be some sort of commercial arrangement of an unspecified kind between the plaintiff and the defendant. Given the existence of such a misrepresentation, it does not appear to have been one on which the public actually rely or to which they attach any importance, and by the same reasoning it does not have to be calculated to cause damage over and above the loss of a licensing fee."[22]

(D) France

""Personality rights" are, under French law, fundamental rights attached to the persona of the human being, intended to protect non-patrimonial attributes or manifestations of the person."[23]

"[A]s of the 1960s, more and more celebrities submitted claims to the French courts that their right to their image had been infringed by unauthorised commercial use. The issue was mainly one of protecting the celebrity against the free ride or risks of tarnishment of his or her name because of apparent endorsement of advertised products or services. The courts, struggling to find a legal ground to sanction this unauthorised use not hurting plaintiffs' privacy, affirmed an "absolute property right in one's image.""[24]

A general right to privacy was recognised in 1970 when it was incorporated in the new Article 9 of the Civil Code.

In 1995 the Constitutional Council "consented to consecrate the "right to privacy" as a constitutional right, or more accurately, as a "constitutional principle.""[25]

"Generally speaking, the content of this [publicity] right is considered in a negative manner: it is the right to prohibit the production and distribution of an individual's likeness without the subject's consent. Without the subject's consent, the jurisprudence has nevertheless exposed several exceptions to the exercise of this right:

(i) When the image is incidental and was taken in a public place;

(ii) When it concerns a subject of a current event and is published soon after;

(iii) When it concerns the reporting of a trial (whose proceedings are public); and

(iv) When it concerns the likeness of a public figure in his public life."[26] However, such publication must be made for the purpose of providing information and not for publicity purposes or for commercial exploitation.[27]

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"When concerned with the publication or distribution of the likeness of public figures, the judge may refer to the going rate (established by expert witness if necessary) in order to award on the basis of lost earnings, at most the sum equivalent to what could have been paid contractually, in accordance with the principles of the allocation of damages by virtue of Articles 1382 and 3 of the Civil Code."[28]

5. THE POSITION UNDER ENGLISH LAW

Professor Cornish summarises the position as follows:

"English law has steadfastly refused to adopt any embracing principle that a person has a right to his or her name, or, for that matter, to identifying characteristics, such as voice or image. An entitlement simply to demand that such characteristics without more amount to property in personality is highly regarded as a commodification too far."[29]

The case most often cited for the rejection of a property right to prevent unauthorised use of identity in advertising is *Tolley v. Fry*, where Greer L.J. stated that:

> *"[S]ome men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated... almost as public property."*[30]

In the Elvis case, the Court of Appeal again rejected the idea of a personality right. Simon Brown L.J. said this:

> *"... all the English cases upon which Enterprises seeks to rely (Mirage Studios not least) can be seen to have turned essentially upon the need to protect copyright or to prevent passing off (or libel). None creates the broad right for which [counsel for the plaintiff] contends here, a freestanding general right to character exploitation enjoyable exclusively by the celebrity. As Robert Walker L.J. has explained, just such a right, a new "character right" to fill a perceived gap between the law of copyright (there being no copyright in a name) and the law of passing off was considered and rejected by the Whitford Committee in 1977. Thirty years earlier, indeed, when it was contended for as a corollary of passing off law, it had been rejected in* ***McCulloch v. May****. I would continue to reject it. In addressing the critical issue of distinctiveness there should be no "prior" assumption that only a celebrity or his successors may ever market (or license the marketing of) his own character. Monopolies should not be so readily created."*[31]

Despite the absence of a discrete right, a celebrity can complain "if the reproduction or use of [his/her] likeness results in the infringement of some recognised legal right which [he/she] does own."[32]

Or, as Goodenough puts it: "plaintiffs lacking the real thing must rely on a confusing number of analogies and neighbouring doctrines."[33]

These comprise:

(a) Trademark infringement;

(b) Passing off;

(c) Defamation;

(d) Copyright;

(e) The Registered Designs Act 1949;

(f) Malicious falsehood;

(g) The Trade Descriptions Act 1968;

(h) British Code of Advertising Practice;

(i) Control of Misleading Advertisement Regulations;

(j) The Independent Television Commission Code of Advertising Standards and Practice;

(k) Data Protection Act 1998.

Further, the effect of the Human Rights Act 1998 ("HRA") also falls to be considered together with a right of privacy recently canvassed by the Court of Appeal.

I concentrate on the first two of the "neighbouring doctrines" and these two new developments below.

(A) Trademark Infringement

The Trademarks Act 1994 section 1(1) defines a trademark as being:

> *"any sign capable of being reproduced graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging."*

For something to qualify as a trademark, it must demonstrate a capacity to distinguish.

> *"If the name or image is found not to be inherently distinctive, the applicant will have to prove acquired distinctiveness through extensive trading under a sign bearing his name or image. There is a positive and a negative burden to this: the positive burden being to show trading activity that has been carried out by or under license from the celebrity in the goods or services to which the application relates. The negative burden is to show that there has not been widespread use by traders generally of the name or image as there was in Princess Diana's case and Elvis' case."*[34]

"Where the application is for goods which the average consumer would obviously associate with the celebrity and expect that his or her name on products would be by way of endorsement, for example, golfing equipment by Tiger Woods, there should be no difficulty with the application to register, but when the application relates to goods or services far from the field of activity of the celebrity, it would be subject to further enquiry."[35]

"[W]hether a registered trademark comprising the name of a celebrity is infringed by use on china, posters, t-shirts and the like will depend on the circumstances, both of the use by the proprietor and the type of use by the alleged infringer. If the public has been educated that the mark is a badge of origin (in the wider sense including approval, selection and endorsement) perhaps by the use of words such as "licensed by" or "official", there will be infringement. However, if the purchaser of a mug with the name (and/or photograph) of their hero or heroine decorating it is indifferent as to who makes it or is responsible for the name being on it, this should not constitute infringement of the trademark."[36]

"[T]he earlier the name is registered as a trademark and the more diligent the owner is in educating the public as to the selection and endorsement functions it performs, the greater the scope of protection the mark will be accorded.

The corollary of this is that [in direct contrast to the commercial reality] the more famous a person is when considering registering his or her name as a mark, the more difficult it will be to protect it, both by registration and, if registered, in infringement proceedings."[37]

In sum, "trade mark law is concerned only to distinguish the goods of one company from those of another. Trade mark law will therefore indirectly protect the publicity interest only when the celebrity's identity, name, or likeness is used in such a way as to identify a particular company's goods, and it is then used in the same way on another company's."[38]

(B) Passing off

Goodwill, misrepresentation and damage are essential to any passing off action. The three elements

are interlinked: the misrepresentation made by the defendant must be such as to cause damage to the claimant's goodwill.[39]

(a) Goodwill

Goodwill means actual customer connection or experience.[40] Reputation alone is insufficient. The claimant must establish that he is in some sense carrying on a business, with which the trade or public will be led to associate the defendant's activities.[41]

A case in point is *McCulloch v. Lewis A May Limited*.[42] The plaintiff was well known as a radio broadcaster in a children's programme, using the name "Uncle Mac".

The defendant began distributing puffed wheat under the name "Uncle Mac's Puffed Wheat". In an action for passing off, the court held that, as the plaintiff was not engaged in any degree in producing or marketing puffed wheat, there was no field of activity common to the plaintiff and the defendant, and the defendants in using the fancy name used by the plaintiff, could not be said to have invaded any proprietary right of the plaintiff and, therefore, to have passed off the goods or the business of the plaintiff.

Having considered many cases cited, Wynn-Parry J considered that the element of confusion was essential and was "satisfied that there is discoverable in all those [cases] in which the court has intervened the factor that there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged and that it was the presence of that factor that grounded the jurisdiction of the court."[43]

"In summary, the passing off action may extend to cover cases of appropriation of personality where the plaintiff has a business or potential business in his or her personality... however, until the proposition in *McCulloch v. May* is clearly overruled, the action will be limited to those cases where the business of the plaintiff and defendant overlap at least to some extent."[44]

(b) Misrepresentation

"[T]he usual difficulty with cases of unauthorised exploitation of personality lies in establishing the existence of a misrepresentation. The common misrepresentation alleged is that the public will assume that the product etc is endorsed as to its quality by the individual or, on a more sophisticated level, that there is a license agreement with the individual under which he has agreed to the use of his name, etc... With the increasing use of licensing and endorsement as a method of advertising, the public may increasingly come to make such assumptions, although ... the question whether such a misrepresentation has been made will largely be a question of fact."[45]

The attitude of the English court is clearly demonstrated in the case of *Lyngstad v. Anabas* where the plaintiffs, the pop group ABBA, sued the defendants for making and distributing in England badges, t-shirts and pillowcases which featured their picture without permission. Oliver J, refusing an application for an interlocutory injunction, emphasised that the plaintiffs carried on no business other than that of musicians and singers and stated:

> *"I am entirely unsatisfied that there is any real possibility of confusion. I do not think that anyone... receiving the goods... could reasonably imagine that all the pop stars... were giving their approval to the goods offered or that the defendants were doing anything more than catering for a popular demand among teenagers for effigies of their idols."*[46]

In other words, the purchasers of such products are buying the celebrity's likeness, not a badge of origin. Accordingly, there is no confusion.

(c) Damage

The claimant must show damage to his goodwill in his business or profession or, alternatively, to an adjunct business in licensing his image.

HRA

Article 8(1) of the European Convention for the protection of Human Rights and Fundamental

Freedoms provides:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

Article 8 is not confined to protecting individuals from state "interference".

In *Marckx v. Belgium* the court explained that there may be positive obligations inherent in an effective "respect for family life."[47]

In *X and Y v. The Netherlands* the Court stated that "these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations between individuals themselves."[48]

"The notion of "private life" in Article 8 is a broad one and is not susceptible to exhaustive definition. ... [O]n the basis that most people develop relationships worthy of protection in their working lives, the court has been unwilling to interpret Article 8 so as to exclude activities of a business or professional nature."[49]

It remains to be seen how broadly the courts will construe Article 8. However, the court's refusal "to accept that the public will take the names of celebrities on goods as an indication of genuine endorsement may change if they can argue that misappropriation of their personality interferes with their privacy. Such broad protection would also be of assistance where celebrities have obtained registered trademarks, but use of them by others does not constitute trademark use, such as decorative use on plates or t-shirts."[50]

Nascent right of privacy

In *Douglas v. Hello Limited*, giving judgment in an interlocutory application, Sedley L.J. said:

> *"... we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy."*[51]

He clearly had in mind the need for "some private space": see paragraph 111 and he made clear that it would be subject to the public interest: paragraph 125.

Later he said:

> *"I do not suggest for a moment that there is a bright line between the personal and the commercial and that everything on the commercial side, being about money, can be dealt with by an award of damages. Nor, equally, should it be thought that either Article 8 or our domestic law will never protect privacy which is being turned to commercial ends. Everything will depend on the infinite variety of facts thrown up case by case."*[52]

The other two judges were more reserved in their approach but, even if the "Hello!" judgment is the first halting step on the road to full recognition of a privacy right, it will provide little if any support for a personality right.

6. WHETHER THE POSITION UNDER ENGLISH LAW IS SATISFACTORY

"The damage caused by unauthorised manipulation or appropriation of a person's image for commercial purposes comes in two forms, the first being the invasion of the subject's privacy and the related loss of control or autonomy over the use of his or her image ["privacy right"], and the second being the loss of control inherent in the defendant's reaping an economic benefit from another person's image and the reputation and goodwill associated with it... with the resultant reduction in the scope of future potential licensing opportunities in that market sector" ["personality right"].[53]

It seems well arguable that a sports star would now be able to seek relief i.e. damages for hurt feelings, for breach of his or her privacy right in reliance on Article 8 and the "Hello!" case if, for example, his/her image was used in some way that he/her found personally offensive.

However, it is generally the need to enforce the commercial value associated with their identity which is important to sports stars and not the desire to protect their dignity. Regrettably, the Elvis case has firmly closed the door on the concept of a personality right as an intellectual property right and whatever else they may do, Sedley L.J.'s cryptic dicta clearly do not mark the emergence of a privacy derived personality right.

Times have changed since Oliver J said in *Lyngstad v. Anabas*:

> *"indeed, I do not think [that it] could be alleged on the evidence that there is any general custom for such licenses to be granted by pop singers. Indeed, the available evidence is quite to the contrary."*[54]

Since 1977 (let alone since 1947):

(a) Sport, and football in particular, has become the focus of commercial interest;

(b) It is commonplace for celebrities to exploit their personality rights;

(c) There has been a revolution in computer technology which has significantly increased the potential for unauthorised copying and exploitation.

Unfortunately, the English courts have not moved with the times.

As McCarthy says:

> *"... English law often seems tied to the legal categories of the past and, up to the present, unable to accommodate itself to the modern commercial realities of licensing and merchandising."*[55]

Professor Cornish contends that the tendency of a personality right "would be to prevent others from making reference to the person in too varied a range of circumstances to be socially and economically justified."[29]

However, the right could be limited to the prohibition of an individual's name and likeness for commercial purposes.

In *University of London Press Limited v. University Tutorial Press Limited*, finding a copyright in examination papers, Peterson J said:

> *"There remains the rough practical test that what is worth copying is prima facie worth protecting."*[56]

As Abell says, "In the modern age, this principle should arguably apply to names and likenesses as much as it did to literary works in 1916: if the image of a personality is worth exploiting without authorisation, it should be protected by law."[57]

Footnotes

(1) Cited in Julie King, The Protection of Personality Rights for Athletes and Entertainers under English Intellectual Property Law: Practical Difficulties in Relying on an Action of Passing Off, 2000 7 Sports Lawyers Journal 351 at 371.
(2) Verow, Lawrence, McCormick - Sport, Business and the Law paragraph 1.2.
(3) *Eastwood v. Superior Court for Los Angeles* 198 Cal. Reptr 347 at 349.
(4) Jenny Hatton, Personality Rights - Developing a Personality of Their Own? The International Trade Law Quarterly 1998 3 (May) 140.
(5) Sports Business, November 2000, page 3.
(6) Peter Bolger, the Common Law and the Tort of Appropriation of Personality, Part 1, 1999 3 (1) IIPR 16.
(7) Frackman and Bloomfield, the Right of Publicity: Going to the Dogs, the UCLA Online Institute for Cyberspace Law and Policy, page 2.
(8) McCarthy, the Rights of Publicity and Privacy, second edition, 1-2 to 1-3.
(9) *Ibid* 6-3.
(10) Professor David A. Anderson, the Failure of American Privacy Law, chapter 6 of Protecting Privacy edited by Basil S. Markesinis ("Markesinis") at page 146.
(11) *Athans v. Canadian Adventures Company Limited* [1977] OR 2d 425, 435.
The Jamaican Court adopted a similar approach in *Bob Marley Foundation v. Dino Michelle Limited* [1994] Supreme Court No. CLR 115 of 1992.
(12) 1973 40 DLR (3d) 15.
(13) At page 27.
(14) *Ibid.*
(15) At pages 23-24, 27 and 31.
(16) J. McMullen, Personality Rights in Australia, 1997 8 Australian Intellectual Property Journey 86.
(17) International Privacy, Publicity and Personality Laws, edited by Michael Henry 3.79.
(18) 1969 RPC 218.

(19) At page 234.
(20) *Hogan v. Pacific Dunlop Limited* [1989] 14 IPR 398; see also *Hogan v. Koala Dundee PTY Limited* 83 ALR 187.
(21) At 429-430.
(22) Christopher Wadlow, the Law of Passing Off, second edition, pages 298-299.
(23) Elizabeth Logeais, the French Right to One's Image - a Legal Lure 1994 5 Ent LR 163 at 164.
(24) *Ibid* page 165.
(25) Professor Etienne Picard, the Right to Privacy in French Law, chapter 3 Markesinis page 51.
(26) Henry paragraph 11.119.
(27) *Ibid* paragraph 11.123.
(28) *Ibid* paragraph 11.132.
(29) Intellectual Property, fourth edition, 16-34.
(30) 1930 1 KB 467, 477.
(31) *Elvis Presley Enterprises Inc v. Sid Shaw Elvisly Yours* 12.3.99 internet transcript page 30. It is germane to point out that the Whitford Committee was considering "character rights" under copyright law in connection with fictitious characters and the report contained the following passage:
"An unfair competition law would probably provide the most satisfactory solution but we make no recommendation for a further extension of the law of copyright": Cmnd 6732 of 1976-77 paragraph 909.
(32) Per Laddie J, Elvis Presley Trademarks 1997 RPC 543 at 548.
(33) Oliver R. Goodenough, Retheorising Privacy and Publicity 1997 1 IPR 37 at 65.
(34) Hamish Porter, Character Merchandising: Does English Law Recognise a Property Right in Name and Likeness 1999 6 Ent LR 180, 181-2.
(35) Kerly's Law of Trademarks and Trade Names, 13th edition, 22.51.
(36) *Ibid* 22.56.
(37) *Ibid* 22.57.
(38) William Houseley, the Unauthorised Commercial Exploitation of the Publicity Right, Yearbook of Media and Entertainment Law, 1996 2, 263 at 278-9.
(39) Clerk and Lindsell on Torts, 18th edition, paragraph 26-01.
(40) See Anheuser-Busch Inc v. Budejovicky Budvar P.N. [1984] FSR 413.
(41) Clerk and Lindsell at 26-12.
(42) [1947] 2 All ER 845
(43) At page 851.
(44) Frazer, Appropriation of Personality - a New Tort 99 LQR 281.
(45) Copinger and Skone James on Copyright, 14th edition, 21-47.
(46) [1977] FSR 62 at 68; see also *Halliwell v Panini* 6th June 1997, Chancery Division, unreported.
(47) [1979] 2 EHRR 330 paragraph 31.
(48) [1985] 8 EHRR 235 paragraph 23.
(49) Keir Starmer, European Human Rights Law, page 125 citing *Niemitz v. Germany* [1993] 16 EHRR 97.
(50) Clare Griffiths, The Human Rights Act 1998 - The Implications 2000 5 Intell Prop Lawyer 18 at 19.
(51) [2001] 2 WLR 992, 1033 paragraph 110.
(52) At paragraph 143.
(53) Peter Jones, Manipulating the Law Against Misleading Imagery: Photo-montage and Appropriation of Well-known Personality 1999 1 EIPR 28.
(54) 1977 FSR 62 at 68.
(55) McCarthy at 6-286.
(56) [1916] 2 Ch 601 at 610.
(57) Mark Abell, Protecting and Exploiting Names and Images on Merchandise, Trademark World [Internet] page 4.

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Scottish Update
A Brief Synopsis of Newsworthy Matters Concerning Football, Rugby & Others From April 2001 to Date

Alistair M. Duff

1. FOOTBALL

(a) In The Herald of 20 April 2001, it was reported *"Coin thrower has prison term quashed."* Appeal judges yesterday quashed a prison sentence on a Celtic fan who threw coins during a notorious Old Firm match in which referee Hugh Dallas was cut on the head. Paul Hodge was originally jailed for three months by a sheriff who said he

> *"participated in an inexcusable episode of serious public disorder, damaging to the reputation of football and damaging to the reputation of the country."*

But Hodge, 39, was released on bail pending a challenge against the sentence without spending a night in prison. Lord Sutherland and Lord Nimmo Smith yesterday overturned his prison sentence

and ordered that he carry out 240 hours' community service. Further on it is reported that Hodge's counsel stated

> *"This is a man of good character, save this one aberration, who has suffered extremely as a result of the consequences of what he has done."* It was reported that Lord Sutherland said it had been *"a quite disgraceful incident."*

Had there been the slightest suggestion that Hodge was anything other than of exemplary character, there would have been no hesitation in refusing the appeal. ***(See previous Journal, Volume 8, Issue Three 2000)***

(b) In The Herald of 27 April 2001, it was reported that Colin Hendry, the Scotland captain, was devastated last night by the news of FIFA's decision to ban him for six games for "violent conduct", following the incident involving San Marino defender Nicola Albani in the World Cup qualifier at Hampden last month. Hendry was also fined about $4,000. Later on it was reported that the news of a possible appeal came as a surprise as the indications earlier in the day were that it would not be permissible. An SFA spokesman said

> *"The reason that there is an appeal option seems to be that this was an initial decision, unlike in other cases where the disciplinary committee would rule on the punishment for a red-card offence. In this case Hendry was not booked or sent off and, as this was a first ruling, we are entitled to an appeal."*
> ***(See previous Journal, Volume 8, Issue Three 2000)***

(c) It was reported in The Scotsman of 18 May 2001 ***"Hendry penalty halved by FIFA."*** Colin Hendry had cause last night to thank a previously unheard of official from Guatemala as the man who has possibly saved his Scotland career. Later on it was reported that a FIFA statement read

> *"The FIFA appeal committee reached the conclusion that Hendry was not guilty of serious violence, but only of violence against another player and subsequently reduced the number of match suspensions from six to three."*

(d) In The Herald of 6 June 2001, it was reported ***"Sacked players in court move."*** Two St Johnstone footballers sacked for allegedly snorting cocaine in a Perth pub last December asked the Court of Session yesterday for a judicial review of their case. Kevin Thomas and George O'Boyle claim their dismissal by the Perth club was a breach of their human rights. No date for a full hearing has been fixed. ***(See previous Journal, Volume 8, Issue Three 2000)***

(e) In The Herald of 22 June 2001, it was reported ***"Morton closer to the brink as bitter courtroom battle looms."*** Morton were plunged closer to closure last night when the group trying to save the club confirmed that they are ready to take the administrators to court. Only a last minute change of heart by Graham Martin, of Kroll Buchler Phillips, can stave off a bitter legal battle at the Court of Session. Further on it is reported

> *"It is understood the consortium's case will rest on claims that Martin, who was appointed to run Morton's affairs by the Court of Session last December, has failed to act in the best interests of the club."*

(f) In The Herald of 16 August 2001, it was reported that Brian Carrigan said last night that he will take his case to the European courts after being frozen out of football. The former Clyde striker was dismissed by Stockport County for persistent misconduct at the end of last season, but he was stunned this week after an English League hearing ruled that Stockport could retain his playing registration until December 31 without pay. It was reported his agent, Jim McArthur, said

> *"We are astonished by the result. As far as we are concerned, this is a restraint of trade for Brian and we have now consulted employment specialists who are willing to take the matter to the European courts."*

(g) In the Herald of 5 September 2001, it was reported ***"Smasher of referee's windows ordered to pay compensation."*** A man who smashed the windows of international football referee Hugh Dallas yesterday was ordered to pay him $200 compensation. Kevin Dunn, 42, was found guilty of smashing Mr Dallas' windows after flying into a rage when Celtic were beaten by Rangers in a controversial

match refereed by Dallas in 1999. Later on it was reported that Dunn, a double-glazing executive, who lives on the same housing estate as Mr Dallas in Motherwell, had put in a special defence of alibi. However, Motherwell District Court was told at last year's trial that Mr Dallas recognised Dunn after running out when the windows were smashed. Dunn was found guilty of wilfully or recklessly destroying or damaging the property belonging to Mr Dallas and was allowed to walk free after agreeing to pay the referee £200 compensation.

(h) In The Herald of 11 September 2001, it was reported ***"Rangers to risk ban by refusing Dagestan trip."*** Rangers will pull out of the UEFA Cup today if Europe's footballing ruling body insists on the club travelling to Dagestan for their first round tie against FC Anzhi, The Herald understands. The Ibrox club were due to fly out to the Dagestan capital, Makhachkala, today, but have cancelled their flight as David Murray, the Ranger's chairman, is not prepared to send the players to the area because of fears for their safety. The club is likely to face a European ban and a fine. UEFA's decision to delay making a final ruling on the venue until today, less than two days before the match, left the travel plans of the club and supporters in chaos. The SFA and Foreign Office have voiced grave concerns about the venue and both made submissions to UEFA on Rangers' behalf yesterday. The Foreign Office has advised against all travel to the region, in the Russian Federation. It is renowned as one of the most dangerous in the world, where the kidnapping of Westerners is commonplace, and a spate of recent bomb attacks has added to the anxiety about the match. Rangers have also struggled to gain adequate insurance for their squad. However, UEFA maintains that Thursday's game still stands until further notice is given. Further on it is reported that John McMillan, general secretary of the Rangers Supporters' Association, said he was very angry about UEFA's position and the delay.

> *"I don't think the bureaucrats in Switzerland live in the same world as the rest of us."*

(i) In The Herald of 12 September 2001, it was reported ***"Rangers take UEFA to court over ruling."*** Rangers last night began proceedings in the Court of Arbitration in Switzerland in the latest move in their continuing battle with UEFA to sanction their request for an alternative venue to host the UEFA Cup tie with Anzhi Makhachkala, which is due tomorrow. Ironically, it emerged later that UEFA were considering postponing all European matches this week as a token of respect for the horrific terrorist activity in the US yesterday. However, a UEFA statement said last night that matches "should proceed as scheduled." Rangers objection to making a trip into a dangerous region of Russia to play a football game, a scenario that itself took on an altogether different perspective after events in New York and Washington, has been based on stringent Foreign Office instruction, rather than advice, not to go to Makhachkala. Further on it was reported that David Murray, the Ibrox chairman, said

> *"The incongruity of all of the various advices is best exemplified by the news that, as I understand it, about 20 Rangers supporters who applied for visas were told they could have them for Russia in general but that the Dagestan local government had turned them down 'because it was not safe to travel there'."*

Lastly it was reported that, meantime, the battle will go on, and UEFA, whose intransigence in the whole affair has been something quite appalling to behold, ain't heard nothin' yet.

2. RUGBY

(a) In the Herald of 17 May 2001, it was reported ***"Six month ban for stamping cup final stuns number 8."*** Melrose number 8, Tom Weir, yesterday was devastated to learn that he could miss the entire League Championship next season after being sent off for stamping on the head of Chris Capaldi in the BT Cellnet Cup Final. After an SRU Disciplinary Panel Hearing, held at Murrayfield on Tuesday night, the union confirmed that Weir had been banned for 26 weeks. The 26 year old sales representative said

> *"I can't believe it, because I simply did not stamp on the player's head. I have been playing for nine years and have only had a yellow card for a professional foul. It is just a no no in my book; you just can't stamp on someone's head."*

(b) In the Herald of 11 August 2001, it was reported ***"Weir ban reduced to 6 weeks on appeal."*** Tom Weir, the Melrose forward sent off in the BT Cellnet Cup Final at Murrayfield in April has had his sentence reduced by the SRU Disciplinary Committee following an appeal hearing in Edinburgh. Following a judgment from the SRU Discipline Appeals Committee on Monday night, Weir has had his

sentence reduced to six weeks and, significantly, because of the recognition that the original sentence debarred Weir from playing in New Zealand and South Africa over the summer months, the 20 week ban will now include that period meaning that Weir can resume playing after September 22nd. The Appeals Committee secretary, Ian Goodall, said

> *"The Committee found no reason to disagree with the findings of the Discipline Panel, that there had been two stamps to the head but noted that the referee had not regarded these as being deliberate stamps to the head. Accordingly, the Committee found that Weir's conduct had been reckless but not intentional."*

(This reporting seems to be wrong as the player still has to serve 20 weeks and all that has happened is the ban has been reduced by 6 weeks)

3. HILL RUNNING

(a) In The Herald of 31 August 2001, it was reported ***"Mountain of trouble looms for selectors."*** The time has come for Scottish Athletics to act over hill-running's apparent incompetence and mal-administration. Thousands of pounds of public money goes to the smallest branch of the sport: leading performers (£8,970 this year) and the governing body (£9,000 per year). The aim is to improve results, and field the best possible team. At the World Championships in Italy, a fortnight on Sunday, that will not happen. In defiance of the advice of the sport's professional endurance coach, Chris Robison, selectors overlooked Bobby Quinn, Scotland's most consistent performer. The Kilbarchan athlete, national champion on every surface during an illustrious career, and noted for his meticulous attention to detail and preparation, has been left out in favour of Colin Donnelly, a remarkable 41 year old who has completed in 16 world hill championships, but who has yet to beat Quinn. Prescribed policy dictated selectors name the first four from last weekend's trial, at Glentress, plus two others at their discretion. These two places went to Neil Wilkinson, winner of the English Trial, and Donnelly. Quinn raced the English trial, and was first to the top, but because of a slightly suspect back, cruised downhill and finished fourth, headed by one Scot: Wilkinson. This is the only time Quinn has ever been beaten by any of the six Scots named for Italy. Indeed, he is Britain's most consistent performer, with six top-10 finishes in European and World events. Further on it is reported that the board of Scottish Athletics is due to meet on Monday. If questions regarding the hill-running commission's stewardship and selection policy are not on the agenda, they should be.

(b) In The Herald of 5 September 2001, it was reported ***"Time runs out for selection criteria."*** Scottish hill-running will pay a heavy price for omitting their most consistent athlete from the World Mountain Trophy team in Italy a week on Sunday. Scottish Athletics management board felt unable to overturn a decision to leave out Bobby Quinn, who boasts an unrivalled six top-10 places in European and World Championships. David Joy, the sport's chief executive, said

> *"Because they followed their stated policy, we don't feel we can intervene.... Thought it is clear that Quinn is the country's best hill-runner."*

Further on it is reported that Quinn now faces loss of lottery funding.

It occurs to the writer that, without knowing all the ins and outs, the athlete might have had a remedy on selection along the lines of that used in the case *Deliege -v- Asbl Ligue Francophoni De Judo & Ors* The Times Law Reports April 19 2000 or the case concerning a weightlifter which was reported in La Semaine Juridique Edition Generale of 6/1/99 pp 24-27. Further, depending on the actual circumstances, the hill-runner might find further support in terms of Article 14 of the Human Rights Act, namely the Prohibition of Discrimination.

4. BOWLING

(a) In The Scotsman of 11 July 2001, it was reported ***"Bowler axed from squad over expenses allegation."*** One of Scotland's leading bowlers has been axed from the 2002 Commonwealth Games squad after being accused of attempting to forge his expenses. Raymond Logan, the 1998 national singles champion, submitted an expenses claim to the Scottish Bowls Association for a journey made from his home in Kirkliston, West Lothian, to a tournament in Kilmarnock on 1 July. Logan was informed in writing of the decision by SBA secretary, Roger Black, last week. He has appealed against

the decision and sought legal advice, but Black insisted he had little chance of success. Black is reported as saying

"There is always a possibility, but it is extremely unlikely that this will be successful. It is cut and dry."

(b) In The Scotsman of 23 August 2001, it was reported ***"Cleared Logan returns."*** The Scottish Bowler who was omitted from the Commonwealth Games squad for allegedly making a false expenses claim has been restored to the squad and cleared of any wrong-doing. After consulting his lawyer, the 46 year old former national singles champion immediately appealed against the decision made by the SBA, saying the money was claimed to reimburse the driver. It emerged yesterday that the dispute had been resolved before Logan's appeal was heard. The SBA said in a statement:

"Having had legal advice to the lack of modernity in the rules, the council of the association has quashed the decision to remove Raymond Logan from the Commonwealth Games squad. He has been restored." Logan's lawyer, Alastair Duff, added *"Any sensible person would agree that the SBA got it wrong."*

As can be seen from the above, the writer was instructed and the appeal had been set down for 15 August 2001 but, after a brief discussion with the SBA's lawyer, who is a fellow member, he, in essence, admitted that the decision could not stand. The governing body's rules were amongst the worst the writer has seen over the years and serves as a classic illustration that really, whatever sport you are dealing with, the governing bodies must make sure their rules and constitution are reviewed by appropriately qualified people and thereafter they are abided by and the correct procedures followed, failing which these types of dispute will continue.

5. CHANGING NATIONS

(a) In The Herald of 21 June 2001, it was reported that the row over the allegiance of defending quash champion Peter Nicol refuses to subside. The dispute may intensify following The Herald discovery yesterday that, despite Nicol's loudly-voiced complaints about lack of support, he has actually benefited from more than £100,000 in Scottish lottery funding. Scotland and England failed once more to reach agreement over Nicol's controversial wish to play in England's colours. Nor did England yield on Thomas Yule, the weightlifter who won three silver medals for them in Kuala Lumpur, in 1998, but who wants to switch to Scotland for whom his twin brother, father and mother, all competed in previous Games. Later on it is reported that while Nicol's flag of convenience remains at half mast, it seems Scottish squash may also be deprived of John White, who switched from Australia to Scotland to access better lottery funds. Under existing rules, because White is resident in England, and not Scotland, he is ineligible to play for Scotland in the Commonwealth Games. John Doig, the chief executive of the Scottish Games Council is reported as saying

"We are trying to clarify the issues. Scotland could end up having both Nicol and White in Manchester, or neither."

(b) In The Herald of 16 August 2001, it was reported that Scotland has lost out twice in the Peter Nicol squash saga. Having seen the world and Commonwealth champion defect to England, John White, his successor as Scottish No 1, has been blocked from competing at next year's Commonwealth Games. John Doig, chief executive of the Commonwealth Games Council for Scotland, confirmed last night that the Games federation has ruled that White cannot represent Scotland in Manchester. They have also ruled against the country's leading female long jumper, Rule Irving, who last night was "gutted" and pointed out she had already competed for Scotland in the Games. Nicol switched to England citing their superior funding . He claimed Scotland had done nothing for him, despite the fact that sportscotland contributed more than £100,00 to a squash centre bearing his name, at Westhill, near Aberdeen. When White quit Australia because of Scotland's superior support, it was believed he would play for Scotland in Manchester.

(c) In The Herald of 17 August 2001 it was reported that the World Squash Federation have interceded on behalf of John White, the Scottish squash No1 who has been banned from competing in next year's Commonwealth Games. Scottish Squash, the national governing body, yesterday said they would appeal over White's exclusion, while Scottish Athletics will also appeal over four-time national long jump champion Ruth Irving.

(d) In The Herald of 7 September 2001, it was reported ***"Blair decides England is best for him."*** After having had more than £20,000 invested in him, one of Scotland's most promising badminton talents has decided his future will be best served by transferring allegiance to England. Robert Blair's decision, revealed when he rejected selection to Scotland's 17-strong squad for next year's Commonwealth Games, evokes the defection of former world squash No1 Peter Nicol to England but it is harder to dispute. Nicol wanted to access financial and other resources. Blair is looking for a world class partner. A student at Loughborough, Blair has been in the Scottish Institute of Sport for two years. It is reported that David Kemp, speaking on behalf of the sportscotland lottery fund, said last night that a "nationality loyalty clause" is currently being drafted.

> *"It's not because of Blair's situation, and although it has been initiated since Nicol's departure, it's not because of that either. It proposes to tie an athlete to a four-year commitment to Scotland in return for a one-year award. Human Rights legislation is being taken into account in framing the rule"* added Kemp.
> **(The writer has been advising Blair over the last year)**

6. CRICKET

(a) In The Herald of 27 August 2001, it was reported ***"Cricket takes an ungentlemanly turn in crunch match."*** The gentlemen's game of cricket stirred up more than a few emotions during a crucial league fixture in Glasgow on Saturday. An enquiry is underway into allegations of suspect conduct in a match involving two of Scotland's best-known teams. It is alleged that Hillhead captain, Gordon Burns, was punched by Clydesdale rival David McArthur as the sides left the field at Hillhead's Hughenden ground in the west end of Glasgow.

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Case Study
Barry Silkman Soccer Consultancy Limited v Colchester United Football Club Limited
Morland J QBD 15.6.01

This case raised interesting issues concerning the relationship between clubs and persons paid to ensure that players sign for those clubs.

The Claimant is a licenced agent. In early 1999 it considered that there was the chance that the club would wish to sign certain players for whom it acted. It considered that the club would be prepared pay it a fee to ensure the signings.

In order not to be in breach of the relevant regulations (and in particular Reg 43 and Appendix 3 of the Football League regulations) the Claimant suspended the agency agreements between itself and the players, informing them that the club would pay it in respect of the intended transfers.

The Claimant and the club signed a contract under which monies were payable if any/all of named players signed for the club.

In due course players did sign and the Claimant rendered invoices which were not paid.

The club raised (among other matters) the following defences:

1. That the claimant was in breach of Football League regulations; that those regulations were implied into the contract to give it business efficacy and that accordingly it was in breach of contract disentitling it to the sums claimed.

2. That it had secured the contract by misrepresentation.

3. That it was in breach of the fiduciary duties owed by an agent to its principal.

The main factual allegation (relied upon in respect of all these defences) was that the alleged suspension had never occurred and that the claimant had been at all times a "double-agent". The document relied upon by the Claimant as evidencing the suspension was alleged to have been forged after the event but the Judge did not find this proved.

Notwithstanding its pleaded case (relying upon the regulations forbidding double-agency and asserting that the Claimant had induced the contract by representing itself as not being the player's agent) the club's company secretary (and a practising solicitor) admitted under cross-examination that at the material time the board of directors had sanctioned the making of arrangements to pay players' agents to secure the services of those players. It was said that this was done in ignorance of the regulations notwithstanding the Chairman's membership of various FA/FL Committees.

The Judge decided that:

1. There was no basis for implying the Football League Regulations into the contract between the parties. The case of the club that such implication was required because both parties were subject to the regulations in their businesses was rejected. This is hardly surprising given the evidence of the club's willingness to make contracts which would have breached those regulations. The Judge said that if the parties chose to open themselves to penalties levied by the Football league that was for them.

2. That there was no misrepresentation, but that in the light of the club's board's willingness to pay agents any such misrepresentation could not possibly have induced the contract.

3. The arrangement between the parties was not a true agency. The club wanted to secure the services of the player and was prepared to pay the Claimant the agreed sum in order to achieve that end. As such, any question of fiduciary duties did not arise.

Judgment was given for the Claimant.

Counsel for Claimant: William McCormick instructed by Gerard Cukier of Stock, Fraser Cukier

Counsel for Defendant: Timothy Higginson instructed by Rowe & Mawe.

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited. Contributions should be supplied on disk (Mac or PC) and saved as ASCII format. Disk should also be accompanied by a hard copy of the article. Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

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