For the 2003/04 academic year, the School of Law at King’s College London is once again offering a one-year, part-time postgraduate course in sports law, leading to a College Postgraduate Certificate in Sports Law.

The course is led by programme director Jonathan Taylor, partner and head of the Sports Law Group at Hammond Solicitors, who teaches the course along with other leading sports law practitioners such as Nick Bitel, Adam Lewis, Alasdair Bell, Nicholas Green QC and Mel Stein, and sports law academics such as Simon Gardiner, Gary Roberts and Richard McLaren.

The course covers the range of key sports law issues:
- constitutional issues: self-regulation by sports governing bodies/the European Model of Sport; judicial control of sports bodies;
- commercial issues: broadcasting, sponsorship, IP rights, ambush marketing;
- issues for individual athletes: doping, discipline, player contracts, endorsement contracts, civil and criminal liability for sports injuries;
- EC law and sport: competition law, freedom of movement; and

The course is taught in weekly evening classes from October to March and is open to both law graduates and non-law graduates. For further details, visit the KCL sports law website at www.kclportslaw.co.uk.

For a full prospectus and application form, contact: Annette Lee, School of Law, King’s College London, Strand, London WC2R 2LS Tel: 020 7848 2849, fax: 020 7848 2912, E-mail: sports.law@kcl.ac.uk

CPD credits available, equality of opportunity is College policy.
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It is now ten years since the Association was founded and to celebrate this significant milestone a reception was held on July 17th at Five Cavendish Square in London. The many members and guests who attended enjoyed a splendid evening and our thanks are due to Mel Goldberg, in particular, for organising the event and our chairman, Nick Bitel, for all his support and assistance. Over the years there has been a considerable turnover on our committee but three of the four founder members are still involved, and attended the event, viz Maurice Watkins, Edward Grayson and myself. We were very pleased to see Catherine Bond who was one of our original committee members and whose article on Judicial Review in the first edition of the Sport and the Law Journal is as relevant today as it was in 1993.

Catherine is now involved with investment bankers Seymour Peirce and is fresh from playing a major role in the recent takeover of Chelsea F.C., which would appear to be light years removed from our meetings at the Rugby Club of London in the early years when our host, Jeff Butterfield, former England Rugby captain and British Lion, held us in thrall as he recounted matches and incidents from long ago.

Members may wish to note that this year’s Annual Conference will be held in London on October 22nd and following on recent successes will again be held at Lord’s Cricket Ground. Our thanks are due to Fraser Reid and his sub-committee who are putting together another interesting programme.

We are also hoping to arrange a Conference/Seminar later in the year in Manchester dealing exclusively with the issue of the televising of Premier League football matches at the expiration of the current contract. Our intention is to coincide the event with a Manchester United European fixture at Old Trafford with tickets for the match being available to those members who wish to attend the game.

Finally, I would ask members to note that from August 18th the address of the Association will be changed when the School of Law at the Manchester Metropolitan University moves to new, purpose-built, prestigious premises. Our new address will be:

The Manchester Metropolitan University
School of Law
All Saints West
Lower Ormond Street
Manchester
M15 6HB
Sports Law Current Survey

Compiled by Walter Cairns
Senior Lecturer in Law and Languages
Manchester Metropolitan University

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

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1. General

Conferences, Meeting, Lectures, Courses, etc.

**Spanish lessons for Brazil. Seminar on stadium safety**
In March 2003, the Brazilian Ministry for Sport, as well as its Department of Justice, organised a seminar on the subject of safety standards in sports stadiums. The guest speaker was Prof. Heloise Baldy, who, drawing on her post-doctoral research conducted at the University of Murcia (Spain), concentrated on the Spanish experience in controlling violence in sporting grounds. She recalled that efforts at the European level aimed at preventing violence amongst football supporters commenced with the signing of the 1985 Convention on this subject (to which Spain acceded two years subsequently). Ever since, Spain had, according to the speaker, implemented the various measures required under this instrument, and even received the accolade of being acknowledged as a model country in this regard by the Council of Europe in 1992.

Prof. Baldy attributed this success earned by Spain to the undertaking entered into by the public authorities to take effective action for this purpose in the nation’s football grounds. Drawing on the Spanish experience, she identified a number of areas in which the situation of the nation hosting the seminar could be improved on this subject. She identified deficiencies in the existing infrastructure, a lack of preparation on the part of the organisers of sporting events and the country’s military police, the trivialisation of violence by the media, and a lack of engagement of the sporting authorities as the main problems which Brazil will need to overcome in this regard. The solution she proposed was to delegate the appropriate responsibilities to the various institutions involved, and thus called for close co-operation between the public and the sporting authorities. More particularly she proposed that the Ministry of Justice should adopt the following measures:

- To assume the task of training a police unit in handling crowds;
- To formulate, in conjunction with the Ministry of Sport, a national policy in this field;
- To establish a standing research and supervision commission in this area;
- To assume responsibility, in technical and financial terms, for the modernisation of the nation’s sports stadiums.

The speaker also urged the Ministry of Education to organise a campaign of education and prevention to accompany sporting events. The sporting bodies and federations should assume responsibility for ticket sales, for organising dates and times of sporting events which are appropriate to the needs of spectators, and for organising and defining conditions for access to sporting grounds and premises. The clubs themselves should be required to appoint full-time safety officers licensed by the Ministries of Justice and of Sport, to ensure segregation between opposing sets of supporters, and to meet quality standards for all the services provided. The Military Police, for their part, should be made responsible for invigilating the transport of supporters, the sale of alcoholic drink and the carrying of any weapons or similar objects by supporters.

**Fifth Stadia and Arena Conference and Exhibition**
This event took place in the Stade de Genève on 4-5 June 2003. It was organised by Alad Ltd (UK), and considered all aspects of the profitable and safe management of sports grounds. It will have far-reaching effects on the manner in which the sports industry regulates itself. The various topics discussed included the following:

- UEFA report on stewarding
- Dealing with racism
- Money-making opportunities outside football competitions
- Salzburg – the first pitch to be approved for European club competitions (football) during the next season
- Switzerland and Austria unveil their plans as organisers of the 2008 European Championships.

**Financial Times Business of Sport Conference**
This event took place on 9 and 10 June 2003 at the Landmark Hotel, London. It was organised by the Financial Times in association with Sport Business International. The agenda was dedicated to the financial foundations of the global sports industry. Speakers discussed key strategies for funding sport infrastructure and investment in sports businesses. The conference examined the various business models to drive content rights, the revenue potential of new technology, and the outlook for sponsorship, licensing and merchandising.

Key speakers were Tessa Jowell MP, Secretary of State for Culture, Media and Sport; Eddie Jordan, Chief Executive of the Jordan Grand Prix; Chris Bell, Chief Executive Officer of Ladbrokes Worldwide; Jaime Andreu, of the Directorate-General for Sport and Culture with the European Commission, and Peter Kenyon, Chief Executive of Manchester United Football Club.²

**German conference on insolvency and professional Sport and the Law Journal**
This item is dealt with under Chapter 10 (Company law), below p.105.
1. General

Obituaries

Sir Bert Millichip
English football is all the poorer for the passing away of this most honest and endearingly gaffe-prone of all sporting administrators. Sir Bert never played at the top level – his most notable achievement on the field was to play regularly for West Bromwich Albion’s third team – but became a WBA director and eventually also its chairman, whilst practising as a solicitor.

He became the Chairman of the Football Association (FA) in 1981, and almost immediately found himself involved in a succession of controversies, the most painful of which must surely have been the aftermath of the Heysel disaster in 1985. He was a hard-line traditionalist on the subject of hooliganism and had previously suggested many robust ways of dealing with this phenomenon, few of which were taken up with the vigour that they may have required. Thus he was an early advocate of the impounding of convicted hooligans’ passports, which aroused much opposition at the time, but has now become accepted as an essential tool in the public authorities’ armoury.

His uncompromising stance on this issue made that disgraceful night in Brussels all the harder to bear for him, and he immediately withdrew the English sides from all European competitions even before UEFA had the opportunity to impose its blanket ban. Many clubs were opposed to this move, but the country at large recognised that he had done the right thing. Thereafter he was forever appealing for more assistance from the Government in controlling supporters who travelled abroad, and the legislation which was eventually adopted surely owes a great deal to his persistence.

He was also involved in the struggle for power between the FA and the Football League which accompanied the birth of the Premier League. Controversy also surrounded his alleged agreement with the German FA that, if England were to host the 1996 European Championships, he would himself support the German’s attempt to organise the 2006 World Cup. When England proceeded to submit its bid for the 2006 tournament, this caused outrage in Germany, but Sir Bert always maintained that the alleged deal had been a “German invention”.

Robert Helmick
The Olympic movement lost a stalwart administrator with the death of Robert Helmick, a US lawyer who might have become President of the International Olympic Committee but for the allegations of corruption which caused him to resign from the Executive Board of the IOC in 1991. Earlier, he had risen through the ranks of the International Swimming Federation (FIN) to become its President, and later led the United States Olympic Committee (USOC). This seemed to provide him with an excellent launching pad for securing the succession to Juan Antonio Samaranch as IOC President, particularly after Atlanta had been awarded the 1996 Games.

However, his promising career foundered on the scandal which erupted during the run-up to the Salt Lake City Winter Olympics when, in 1999, six IOC members were expelled and four resigned over various “votes-for-favours” allegations. More particularly Mr. Helmick had been discovered to have business relations with groups which either had, or were seeking, association with the Olympic movement. He and two law firms represented by him had received around £180,000 from these clients since 1987. The subsequent inquiry found that he had repeatedly infringed the relevant rules on conflicts of interest. He pre-empted any expulsion by the IOC by hastily resigning.

These developments overshadowed the beneficial work which Mr. Helmick had performed for the sport of swimming and for the Olympic movement. He became secretary of FIN in 1976 and was its President from 1984-88. As USOC President, he urged changes aimed at enabling competitors to receive financial support whilst training, the absence of which had adversely affected US athletes in the past.

Chris Brasher
The world of athletics was plunged into mourning in late February 2003 with the demise of Chris Brasher CBE, co-founder and President of the London Marathon, at the age of 74. Even before he placed his stamp on this historic milestone in the country’s sporting history, he had been a man of many achievements, the range of which extended well beyond the racing track. He had led two expeditions to the Arctic before reaching the age of 22; as a mountaineer he was a reserve for Edmund Hillary’s expedition which conquered Mount Everest; he won an Olympic gold medal in the 3,000 metres steeplechase at the Melbourne Olympics of 1956, and had an award-winning career as a printer and journalist. He was also a tireless campaigner for nature conservation in this country.

As one of the leading lights in creating the annual London Marathon, he not only added a new sporting dimension to the nation’s capital, but also was the catalyst for a new fitness culture which affected the entire country. It is perhaps easy to forget the formidable logistical problems and the vocal opposition which he had to overcome in order to realise this project. For his pains, he and his business partner John Disley were on the receiving end of an accusation, made in the Channel 4 programme Dispatches, that
they had used the Marathon to promote their sports shoe distribution company. They took up the challenge, suing Channel 4 and the New Statesman, which had contained the initial allegations, and being awarded £1.1 million by way of damages. It is perhaps a little unfortunate that a man who numbered so many fine achievements in his own right should be best remembered for the secondary role he played in what was admittedly one of the key moments in British sport. When Roger Bannister broke the four-minute mile barrier in 1954, Brasher ran as his pacemaker.

Vernon Pugh
The sport of Rugby Union at all levels was much saddened by the untimely demise of one of its top administrators, Vernon Pugh. Apart from being one of the sport’s top officials, who was responsible for enabling it to assume professional status in 1995, Mr. Pugh was also a QC specialising in planning and environmental law. He had been a useful player himself, turning out as centre-three-quarter for, amongst others, Pontypridd and Leicester, and later turned to coaching.

As the first elected chairman of the International Rugby Board (IRB), he succeeded in persuading delegates that, after over 150 years of adhering to the amateur code, the game’s administrators had no choice but to vote for a radical change. He also knew that this amateur status was being honoured more in the breach than in the observance, since many players were already receiving quite substantial amounts of money for their participation in the sport. Under pressure from the threat of a televised professional circus in the Southern hemisphere, he chaired a working party on amateurism in 1994, and shortly afterwards ensured the transition to professionalism. Under his leadership, the IRB membership doubled to 100, and he assisted with the establishment of the Heineken Cup, the top competition bringing together European clubs and provinces. The last year of his life was unfortunately saddened by the in-fighting and bad feeling which surrounded the run-up to the 2003 World Cup.

Peter Deakin
Another prominent official in the world of rugby to pass away at a too early age was Peter Deakin. Although his roots were very firmly in the Rugby League tradition, he was later to become a visionary administrator in both codes of the sport. He had indeed played for Oldham as a professional before a serious elbow injury prompted his retirement. Inspired by the manner in which sport was presented and marketed as a family entertainment in the US, Mr. Deakin applied these principles when he took charge of the Bradford Northern club in 1996 and transformed this most dour and stolid of Rugby League institutions into an epitome of jazzed-up entertainment, dramatically increasing average attendances at the Odsal.

He later joined the sport’s Super League Europe, but left shortly afterwards in dism ay over what he considered to be a totally anachronistic manner of administering the game. He then went over to the “enemy camp” by joining Union club Saracens as its Chief Executive. His impact was at its most marked when he caused the London club to move to Vicarage Road, home of Football League club Watford. This was greeted with a good deal of controversy initially, but abundantly justified itself as attendances reached unprecedented heights.

Other personalities
Sir Peter Yarranton. Rugby lost yet another valued official with the passing of Sir Peter. After a distinguished period of military service with the RAF during World War II, he played regularly for London club Wasps, and even won five England caps during the 1954-55 season. Subsequently his administrative work for sport assumed a dominant dimension in his life, apart from his distinguished business career. Much of it, especially when carried out for charity, was unheralded, and he was as assiduous in helping at the grassroots level as he was on the international scene. For nine years he was the Middlesex representative on the Rugby Football Union (RFU) Committee, and in 1989 he was appointed Chairman of the British Sports Council. He also became the president of Ready, a charity for disabled children, and the Scarborough Cricket Festival. His other responsibilities included work as a governor of the Sports Aid Foundation and on the board of trustees of the London Marathon.

Mark McCormack. No-one had recently come to epitomise the changing commercial face of sport as Mr. McCormack, who passed away recently at the age of 72. He was a lawyer and an aspiring professional golfer, whose answer to the realisation that he was not good enough for the top flight of sport was to market those who were. He thus established the International Management Group, which became the world’s most prestigious sports agency. At the time of his passing, the list of its clients included golfers Tiger Woods and Arnold Palmer, as well as tennis players Pete Sampras, André Agassi and the Williams sisters. He also extended his sphere of influence outside sport, attracting the custom of actress Elizabeth Hurley, the Kennedy Space Centre and the Pope.

Norman Jacobs. Mr. Jacobs, a solicitor, rose to the prominent position of senior property partner at London law firm Slaughter & May. On reaching the age of 60, he sought to retire from the legal profession but not from work altogether, and therefore accepted the invitation by the then Home Secretary to become the non-executive
1. General

Chairman of the Football Licensing Authority (FLA), established in order to oversee the recommendations made by Lord Justice Taylor following the Hillsborough disaster, in which many football spectators died. The report led to a transformation in the conditions in which fans watched football. Mr. Jacobs took it upon himself to visit every football ground in the country in order to persuade clubs that the work of the FLA was indispensable. Prior to his work with this organisation, he had been a member of the British Boxing Board of Control (BBBC) and the Sports Council of Great Britain. He also became a member of the Sports Aid Foundation, which offers financial assistance to young sportsmen and sportswomen.

Lt. Col. John Stephenson. In John Stephenson, cricket has lost an administrator who saw the sport in this country through some of its most challenging times. He had taken over the secretariatship of the Marylebone Cricket Club (MCC) in 1987 at a critical moment in its development. His predecessor, Jack Bailey, had vacated his post because of his adherence to the right of the MCC to order its own affairs in a protracted battle with the Test and County Cricket Board, to which it had yielded control of the first-class game in the late 1960s. At the time when he took over, Mr. Stephenson had already served eight years as Assistant Secretary. He was appointed with a view to entering into a less abrasive dialogue with the cricketing authorities, as the club was on the verge of its double centenary and had committed large sums to the modernisation of Lord’s. Whilst never losing sight of the game’s hallowed traditions, he did not seek to preserve it in a time warp, and hired a public relations firm to improve the MCC’s image, and introduced guided tours to Lord’s. More controversially, he was called upon to attend to the power struggles and skirmishes as secretary of the International Cricket Council (which was an adjunct to his post with the MCC). Some of the issues with which he had to deal in this capacity were ball tampering, the explosion in television coverage of Test Match cricket, and the politics of World Cup venues and contracts.

Lawyers in sport

Lawyers raise charity cash in sporting events

London Marathon. The legal profession was once again well represented in this annual sporting jamboree – in all, there were over 70 lawyers from different firms and chambers (including 27 from City firm DLA). The most remarkable contribution to this event must surely be that of Sinclair Sellars, a trainee solicitor with South-East firm Thomas Eggar. She raised more than £1,000 for Cancer Research UK, part of which came from none other than Hollywood actor Arnold Schwarzenegger, who became a friend of the Eggar family many years ago when he was training at the solicitor’s gym in Portsmouth.

Calcutta Run. This is an annual charity event organised by Irish solicitors and supported by the country’s Law Society. This year it took place in mid-May, and comprised a fun run/walk, followed by a barbecue at Blackhall Place, Dublin. Participants raise cash through sponsorship. At the time of writing, details of the amount raised this year were not available; however, it is fair to state that previous runs have yielded prodigious sums. In 2002, 1,400 participants raised a total of €185,000 for two charities, being a project for street children in Calcutta and Father Peter McVerry’s shelters for homeless youth in Dublin.

Alexander Harris tournament. Leading Northern law firm Alexander Harris recently organised a charity football tournament in aid of the charities BASIC (Brain and Spinal Injuries Charity) and Childhood Epilepsy.

Retired solicitor becomes Rugby League disciplinary commissioner

In May 2003, solicitor Norman Sarsfield, who recently retired as a specialist case work lawyer with the Crown Prosecution Service (CPS), was appointed as the Rugby Football League’s first Disciplinary Commissioner. Together with former policeman Gary Haigh (the League’s Disciplinary Investigator) he will form an independent Compliance and Investigation unit dealing with match-related disciplinary and legal questions such as club disputes and doping issues.

Goalkeeper James to study criminology after retiring from football

Never a man known for doing the utterly predictable, West Ham and England goalkeeper David James has set his sights on furthering his study of criminal psychology once he has taken his last shower in the dressing room of a professional football club. He has apparently devoted increasing amounts of his spare time to the subject, and hopes eventually to be able to attend law courts and experience some of the criminal trials at first hand. He hopes to take college or Open University courses in the subject. Apparently Mr. James is far from the only sporting enthusiast of this medium. Celtic manager Martin O’Neill frequently does likewise in order to improve his insight into management.

Other items

Sailing. London law firm Collyer Bristow has decided to sponsor Olympic sailor Ben Ainslie in his bid for a gold medal at the Athens Games next year. Mr. Ainslie already has a silver medal to his credit, which he won in
Prospect of approaching solicitors seeks to put the general public at greater ease with the Bristow has a specific sports and sponsorship team United. The centre, which is available twice per month, single-handed dinghies, winning the European and Park, the ground which accommodates West Ham United. The centre, which is available twice per month, seeks to put the general public at greater ease with the prospect of approaching solicitors.

Digest of other sport journals

Recent issues of Zeitschrift für Sport und Recht (SpuRT)

Issue 6/2002. This issue of our German sister journal kicks off with a number of contributions on the subject of doping. Authors Ulrich Haas and Matthias Holla explain the recently-enacted Law on Supporting Doping Victims (Dopingopferhilfergesetz). This Law seeks to achieve that financial support should be provided from an assistance fund to benefit those who fell victim to the state-sponsored systematic doping policies which was an integral part of sport in the former German Democratic Republic (GDR). The German federal authorities have in fact set aside the sum of €2 million for this purpose, leaving open the possibility of contributions by third parties who will enjoy certain fiscal advantages in return. The Law also sets out the conditions which must be met for securing support from this fund, as well as the procedures which precede and accompany decisions on applications made to it. The authors state the view that the Law, which has been criticised by the sporting performers affected as being inadequate, must at best be regarded as a moral obligation incumbent on the federal authorities – in no way can it actually make good the damage and consequences wrought by the destructive policies in question.

In a contribution on the same topic, author Harald Körner, a member of the Public Prosecutor’s Department (Staatsanwaltschaft), replies to an article which appeared in an earlier issue of this journal on the subject of the German equivalent of “Queen’s evidence” (evidence given against fellow-guilty parties) in doping prosecutions. On the basis of his experience with this type of witness, he exposes his Achilles heel, to wit the difficulties involved in assessing their veracity. More particularly he urges a good deal of caution when this issue is being handled at the level of sporting federations, and he argues that the latter must have the staffing and financial resources to be able to assess such witness statements in a conscientious and exhaustive manner.

Thomas Summerer, for his part, examines the outcome of the Katrin Krabbe case and the various pitfalls which beset this type of trial. His conclusion is that cases which involve the international dimension of sport are accompanied not only by problems which relate to the duration of proceedings, but also by issues concerning the jurisdiction of the German courts in cross-frontier proceedings as well as the enforceability of their decisions abroad – not to mention the financial risks which such cases can entail. Finally, Michael Schamperger concerns himself with the extent to which long-term contracts binding professional footballers are reconcilable with the existing employment law. More particularly the author examines the legal issues to which the rules enacted by world governing body FIFA on the status and transfer of players can give rise for German professional footballers, more particularly where these rules restrict the employee’s right to terminate his/her contract, the lawfulness of temporary contracts, and the validity of long-term contractual relations of agreements which are not capable of being terminated.

Issue 1/2003. Here, Dr. Josef Pichler, an Austrian expert in the law on skiing, deals with the new features of the recently amended FIS (International Skiing Federation) rules applying to skiers and snowboarders. He comprehensively justifies these changes, more particularly the specific inclusion of snowboarders in the special rules on mountain climbing. The legal issues raised by licences issued by sporting federations in the field of professional team sports are extensively dealt with in a contribution by Bernhard Reichert (Garmisch-Partenkirchen). In addition, Dr. Bernard Pfister adds Part II of his examination of the case law issuing from the Court of Arbitration in Sport (CAS) (Part I having appeared in Issue 5/2002). More particularly he concentrates on the decisions involving conflicts of jurisdiction, which can arise (a) where more than one sporting federations are empowered to apply certain rules and penalties, (b) in the event of multiple “sports nationality” (e.g. where a player appears for a team in a country of which he is not a national), and (c) in cases in which the CAS has been required to deal with issues which come exclusively within the purview of the civil law. Later in this issue, Dr. Pfister also examines a CAS decision on the doping rules of the International Olympic Committee (IOC), which imposes a “double reversal of the burden of proof” when it comes to deciding the guilt or innocence of the accused sporting performer. He arrives at the conclusion that this decision serves the purpose of legal certainty, and that in such cases it is impossible to make allowance for any discretion as is the case with prima facie evidence. In another paper, the authors Hans Roth and Monika Hintz deal with the new Swiss Doping Authority, created in

Atlanta (1996), and struck gold in Sydney (2000) in the Laser class. Last year, he moved to the Fin class of single-handed dinghies, winning the European and World Championships at the first attempt. Collyer Bristow has a specific sports and sponsorship team. Football. In March 2003, East London law firm Wiseman Lee established a legal advice centre at Upton Park, the ground which accommodates West Ham United. The centre, which is available twice per month, seeks to put the general public at greater ease with the prospect of approaching solicitors.
1. General

early 2002, which applies to all sporting federations and the practicability of which remains as yet at the probationary stage. The authors take the reader through the various stages of the proceedings, and express the hope that this could lead to the development of a uniform case law, applicable to all sports.

Finally, Austrian authors Alexander Cizek and Alexander Schnider examine the legal issues raised by “inline skating” in Austria.

**Issue 2/2003.** The author Peter Tettinger (Cologne) opens with a contribution taking stock of the 10 years in which sport has been part of the constitution of the Nordrhein-Westfalen (NRW) region (Land) of Germany. He is referring here to Article 18(3) of this Constitution, which stipulates that “sport shall be cultivated and promoted by the regional and municipal authorities”. The author deals particularly with the special obligations to which this official commitment gives rise for legislators and administrative authorities. In a further paper, Martin Stopper (Kaiserslautern) examines the issues raised by the centralised system of marketing television rights to the Bundesliga (German first division in football) matches. The author examines the possibility, widely mooted, that the European Commission will grant an exemption from EU competition rules for the European Champions’ League, and analyses its implications for the Bundesliga. He concludes that, whilst it may be desirable for the various football federations to market their television rights centrally in the future, it is equally advisable that the wording of any decision to this effect should be worded in a much clearer manner in the light of any legal disputes which might arise in this connection.

Michael Schamberger (Düsseldorf) continues his study, commenced in a previous issue (see above), of the lawfulness, under existing employment law, of long-term contractual obligations for professional footballers. He examines the question whether it is lawful for football federations to enforce such long-term obligation, or those which arise from the new rules on football transfers, in the light of the manner in which long-term contracts can be enforced under the general rules on the subject. He arrives at the conclusion that temporary contracts of employment in professional football are allowable under German legislation because of the “special nature of the employment involved”; however, the question whether the right of professional footballers to terminate their contracts of employment can be restricted should be assessed according to the circumstances of each individual case.

The penalties and procedures which apply under Austrian anti-doping legislation are examined by the authors Alexander Cizek and Alexander Schneider (Vienna). In the light of the principle that, in Austria also, the penalties imposed by sporting federations for doping offences are also capable of judicial review, the authors examine the legal principles underlying the organisation and enforcement of anti-doping proceedings, as well as the manner in which doping offenders may be penalised, the procedures involved in anti-doping proceedings, and the various issues of jurisdiction of the ordinary courts in this matter. He also considers the way in which the latter review decisions by sporting federations”.

All the above are supplemented by updates and reviews of the latest legislation and case law.

**Recent issue of the International Sports Law Review**

The first issue of the current year starts with an editorial comment by Michael Beloff QC on some of the legal implications of the imbroglio surrounding recent sporting contacts with Zimbabwean Ian issue which will be extensively returned to in this Journal (p.12 et seq.), and concludes that ultimately, the decision is “one for negotiation, not litigation”. The main item of academic substance is an article by Margaret Macdonald (Oxford), entitled “Transfers, contracts and personhood – an anthropological perspective”. The author applies the methods and theory of economic anthropology to the player transfer market in Rugby League. She does so by seeking to describe its market, define its activities, and understand the cultural values of the actors within it. Central to this study is also the issue of the commodification of players, who are regarded in this context as mere goods for sale. This examination highlights the practices relating to the ownership of the “player-good” as being not only integral to professional sport, but also central to the conflict between the rules on the subject issued by sport governing bodies and the law of the land. According to the author, addressing the reality that the “player-good” subsists within the person of the player presents future possibilities for bridging the gap between “indigenous” practice and the ownership rights of the player. The European Court’s Bosman ruling, extensively documented in these columns, has served to increase awareness of this “peculiar” employment relationship. She hopes that this anthropological research into the “player-good” will resolve some of the practical debates which remain on this topic.

This issue carries an extensive section on updates on sports law throughout the world.

**Recent issue of the Sports Law Bulletin**

The November/December 2002 edition of this journal starts with an editorial comment arising from the controversy surrounding Australian Test cricketer Darren Lehmann’s racist comment which earned him a five-match ban (see also below, p.114). The Editor accordingly advocates the inclusion of anti-racist clauses
in players’ contracts, being a measure which has already been proposed in other sports. Authors Simon Gardiner and James Gray examine the paradoxes inherent in the sponsorship of sport by traders in tobacco and alcohol, whereas veteran sports lawyer Ian Blackshaw contributes a paper on exploiting sports image rights, emphasising the need for adequate legal drafting by professionals for this purpose.

The journal’s Analysis section contains an article on “Five Years of Sports law Developments” by Simon Gardner, a projection on likely sports law developments in 2003 by Ian Blackshaw, and a major contribution entitled “What is international sports law?” by Ken Foster (Warwick University). In this paper, the author draws a parallel between what Lord Beloff would call lex sportiva and lex mercatoria, and concludes that those authors who have used the term lex sportiva are in fact applying a concept of global, rather than international, sports law. He goes on to define its main characteristics. The World Digest section contains a contribution by Gardiner and Gray entitled “Should ambush marketing be a crime?” Other features include a review of UK sport finances by accounting firm Deloitte & Touche and reports on various court decisions in sports law.

Recent issue of International Sports Law Journal
The second issue of 2002 contains a number of weighty contributions. In “The legal Nature of Doping Law”, Janwillem Soek claims that, in the law on disciplinary penalties for doping offences, use should be made of the principles and doctrines which have reached maturity in the national systems of criminal law, and which have achieved international recognition, in order to achieve an equitable and just balance between the interests of the prosecuting sporting body and those of the athlete accused of a doping offence. In “Legal strategies to confront High School hazing incidents in the United States”, author Janis Doleschal (Milwaukee) focuses on the legal implications which can arise from “hazing” incidents, i.e. initiation rites engaged in by certain colleges and sporting associations and which can sometimes cause serious damage to individuals. The author picks her way through the maze which must be negotiated in the US when attempting to prosecute individuals who have taken part in hazing rituals, but concludes that this should not deter parents from pursuing every avenue of redress open to them, since the main issue at stake must be child safety. Where the schools and law enforcement agencies cannot meet their concerns, attorneys must avail themselves of every legal avenue possible in order to secure justice. This is all the more so in view of the potentially serious long-term effects of such rituals. She also adds an international dimension to this issue, insisting on the need for every country to have laws in place prohibiting this practice. This is particularly the case in view of world-wide efforts being made to secure human dignity and rights through legislation, in the context of which child protection should take pride of place.

In “The Cronje Affair”, author Rochelle le Roux concentrates not so much on the mechanics of the corruption involved, which have been extensively highlighted in these columns and elsewhere, but on the gambling culture which lay at the heart of the scandal. The author’s conclusion is that rules and regulations on this subject may superficially address this problem, but points to the unavoidable fact that the gambling spirit is very strongly embedded in certain cricket-playing nations, and that rules will have very little effect on breaking this culture. The ruling authorities should therefore concentrate on protecting and managing their players in relation to the gambling threats which accompany this culture. Author Ian Blackshaw presents his new book Sport and Mediation, in which he highlights the useful role which this method of dispute resolution can play in the world of sport, whilst insisting that it is not a universal solution for every dispute which can arise in this context. He forms the view that it is only a matter of time and education before sports mediation in its widest sense and forms comes into its own and is more regularly and widely practised and recognised throughout the sporting world.

The Secretary-General of the Court of Arbitration for Sport (CAS), Matthieu Reeb, introduces the role and functions of this organ. He traces its origins, explains its structures and procedures, and explains some of the advantages provided by CAS arbitration and mediation. The same theme of mediation is taken up by Jan Loorbach, who explains the current situation regarding sport and mediation in his native Netherlands. The issue further contains a report on the European Working Congress on Harmonisation and Future Developments in Anti-Doping Policy, held in Arnhem in April 2002.

Sport and International relations
Cricketing relations between the UK and Zimbabwe – from crisis to farce

The background
The previous issue of this journal already anticipated that the question whether England’s cricketers should do battle on the field with the representatives of Zimbabwe – whether at home or away – had the makings of a major crisis, not only in the game as such, but also in the relations between the public authorities
1. General

and our leading sporting performers\textsuperscript{34}. Since then, the entire issue has tended to dominate the sporting headlines of the national press, at times to the point of obscuring the action on the field of play, not only in cricket but also in the other major sports which normally hold the attention of its general readership.

It will be recalled the political unrest in Zimbabwe – as well as alleged injustices committed against political opponents of the Mugabe regime, both black and white – had started to raise serious question marks over the desirability and even the morality of maintaining sporting relations with that country. This issue became increasingly acute with the approach of the cricket World Cup, some of which was to take place in Zimbabwe. The view that an England team should refuse to participate in any such fixtures appeared to be held not only amongst many players and administrators in the game, but also in political circles. The Government, however, in spite of sending out some strong signals indicating that it would prefer these games not to go ahead, had yet to involve itself actively in the matter and appeared to leave the decision entirely to the cricketing authorities and players.

**The ICC gives the go-ahead whilst the Government dithers**

Shortly before Christmas, the International Cricket Council (ICC), the game’s ruling body at the international level, announced that it refused to move the six World Cup fixtures involved to a different location. The ICC insisted that this decision was based purely on issues of safety rather than on any political considerations or concerns over human rights. This provoked no reaction from the Government, but Shadow Foreign Secretary Michael Ancram bitterly criticised the decision, describing it as a denial of human values in the light of the alleged atrocities committed by the Mugabe regime\textsuperscript{35}. Mr. Ancram called upon the England and Wales Cricket Board (ECB) to disregard the ICC decision, but the ECB in fact subsequently confirmed that it would conform to the advice given by the ICC\textsuperscript{36}. Mr. Ancram responded by issuing a direct appeal to England’s captain, Nasser Hussain, to refuse to play in Zimbabwe, warning him that President Mugabe would eagerly use any such participation as an endorsement of his policies\textsuperscript{37}.

Just before the old year ended, the Government added fuel to the controversy when it indicated that it would prefer the England team to pull out of the Zimbabwe fixtures, even though it publicly insisted that the decision remained with the cricketers themselves. Officials at No. 10 Downing Street had indicated their extreme displeasure at the prospect of the fixtures going ahead, particularly in the light of new accusations that Mr. Mugabe was using engineering food shortages for political gain. The same officials also indicated that Foreign Secretary Jack Straw was also strongly opposed to any English participation in these fixtures\textsuperscript{38}. This appeared to bring sport and politics into conflict for the first time since the 1980 Olympics in Moscow, when Britain’s athletes defied Government instructions not to take part in the Games in view of the invasion of Afghanistan by the Soviet Union. Tim Lamb, the Chief Executive of the England and Wales Cricket Board (ECB) expressed his dismay that no Government minister had contacted him before making this announcement, but Foreign Minister Mike O’Brien replied that the Government had already made its views on the matter clear for several months\textsuperscript{39}. Mr. Lamb, for his part, continued to adhere to a strictly non-political stance, and remained unperturbed by statements from the Movement for Democratic Change (MDC), Zimbabwe’s principal opposition party, calling upon the England team to abandon the fixture\textsuperscript{40}.

Meanwhile, the pressure for non-participation was emerging from several other sides. John Howard, the Australian Prime Minister, also called for a boycott of Zimbabwe as a venue for the tournament, his country’s cricketers having already intimated their refusal to play there\textsuperscript{41}. Peter Hain, the former anti-apartheid campaigner who is now a Government minister, also advocated a boycott\textsuperscript{42} – as did former Warwickshire bowler Tom Cartwright, the man who had once withdrawn from the 1968-69 tour to South Africa which led to Basil D’Oliveira being selected in his place (and ultimately caused the entire tour to collapse)\textsuperscript{43}. However, some quarters remained resolutely opposed to such action. Dick Palmer, who was Britain’s sole representative at the opening ceremony to the Moscow Olympics mentioned earlier, claimed that boycotts of this nature are almost entirely ineffective and quickly forgotten, and therefore called upon the decision to be left entirely to the players\textsuperscript{44}.

Indeed, it was the opposition to a boycott by one of the countries whose fixtures were to be played in Zimbabwe, i.e. Pakistan, which was claimed to be largely instrumental in the ICC decision not to change the venue\textsuperscript{45}. In Zimbabwe itself, opinion seemed equally divided. Although, as has been mentioned earlier, the MDC opposition part had called for a boycott, Zimbabwe’s captain Heath Streak opposed it on the grounds that sport and politics should not mix – even though his family had already suffered a good deal at the hands of the Mugabe regime\textsuperscript{46}. Leading batsman Murray Goodwin also stated the view that any boycott of his country would do more harm than good\textsuperscript{47}. Other Zimbabwe players, on the other hand, supported a boycott\textsuperscript{48}. (The subject of individual Zimbabwe players’ attitude towards a boycott will be returned to later, see below, p.15). In the media, opinions were also divided, and interestingly, this division did not in any way run along ideological lines.
ECB and Government at odds over financial implications

Quite apart from any loss of dignity or honour which might result from a decision to play or boycott, it was becoming increasingly clear to all concerned that there would also be a heavy financial price to pay for any withdrawal. Indeed, so severe were the possible financial implications that the possibility was mooted that English cricket might be bankrupted in the process. As the friction between the cricketing authorities and the Government increased, Tim Lamb intimated that for England to boycott their opening World Cup fixture, which was scheduled to take place in Zimbabwe, would entail financial losses which could be as high as £10 million if Zimbabwe were to retaliate by withdrawing which was scheduled to take place in Zimbabwe, would entail financial losses which could be as high as £10 million if Zimbabwe were to retaliate by withdrawing from their 2003 Tour of England. This prompted a meeting between ECB officials on the one hand, and Tessa Jowell, the Culture Minister, and Foreign Secretary Jack Straw on the other, to discuss the implications of any boycott. The main item to be discussed was obviously going to be the question whether the Government would be prepared to pay any compensation to the ECB for any losses which it might incur by walking away from the fixture. The pressure on the Government in this regard increased considerably when it became known that its Australian counterpart would foot the bill for any decision by its cricketers to refuse participation in any fixtures played in Zimbabwe. However, at a meeting between Government ministers and the ECB on 9 January, the former ruled out any possibility of paying compensation for any losses sustained as a result of a boycott.

The authorities continue to dither, but the ECB finally says “yes” to fixture

With little over a month to go before the opening fixture of the World Cup, the situation was as confused as ever. On 6 January, the ICC responded to the pressure for a boycott from the Australian government (see earlier) by re-emphasising that they had no plans to reschedule the games away from Zimbabwe, on the basis that not one of the seven teams involved had approached it for such a move. The ECB was therefore increasingly faced with a dilemma: to boycott the fixture, which would incur the displeasure of the ICC and possibly spell financial ruin, or to play, thus earning opprobrium from the Government, which remained opposed to the match even though it did not wish to meet the financial consequences of any boycott. At the same meeting at which the Government ruled out any possibility of compensation, it emerged that Lords was to instruct the England team that might play to refuse to shake hands with Robert Mugabe if presented to him during the ceremonial part of the game, which surely failed to allay the Government’s misgivings. Nevertheless, the latter insisted that it still lacked the power actually to prevent the team from competing in Zimbabwe. The Government also came in for some criticism from the Opposition for claiming that the ECB had been informed of its unease about the games in July 2002, whereas the Board insisted that it had only been made aware of this as late as December.

All this naturally was a little confusing for the people at the centre of the issue – i.e. the players themselves. England captain Nasser Hussain doubtless spoke for the entire team where he accused the Government and the ECB of “faffing around” on the issue. The ECB responded in a manner which was obviously intended to clarify matters, but in fact muddied the waters even further when it announced on 10 January, that it would, at a special meeting to be held the following week, confirm once and for all England’s participation, unless security in Zimbabwe deteriorated. It is true that alarm had been growing at the growing unrest in the host country, to the point where the Foreign Office warned that this volatility could explode into serious violence, thus putting any visiting team’s safety at risk. These fears expressed by the FO were echoed by the Organised Resistance Group (ORG), the leading Zimbabwean multi-racial protest organisation. As a result, the ICC formed a four-man standing committee, including its president, Malcolm Gray, and Chief Executive, Malcolm Speed, for the purposes of monitoring security. The ICC had previously sent a three-man delegation to monitor security in November 2002, and had then pronounced themselves satisfied with the position as regards safety (an assessment which had been dismissed by the ORG). The ICC, however, dismissed as “baseless spin” any notion which may be floated in the media that this measure represented any back-pedalling on the part of the ICC from its stance that the matches should go ahead.

Came the day of the much-discussed ECB special meeting, at the conclusion of which the Board stated that it remained committed to playing the fixtures. However, it did leave itself the escape clause that “only lingering concerns about player safety” would now prevent the match from going ahead. It also added that England’s players would not be allowed to make oral judgments about the political situation in Zimbabwe if the match was deemed safe for them. This naturally aroused a bitter reaction from those opposed to the tour, more particularly gay rights campaigner Peter Tatchell and those who joined the protest movement because of their own bitter experiences at the hands of the Mugabe regime.

Opinions in Zimbabwe continued to be divided. On the one hand, there were reports that in Harare, where the fixtures were due to be played, the local population, particularly the young black cricketers, were elated that the
games should go ahead\textsuperscript{44}. On the other hand, civil rights groups in Zimbabwe announced that they would hold a series of demonstrations to coincide with the staging of the World Cup matches\textsuperscript{45}. England’s players responded by giving their full support to the ECB’s decision\textsuperscript{46}.

**The cracks begin to appear**

At this point, the position was clear, at least at home: the cricketing authorities and players were in favour of the match; the Government remained opposed but would neither issue a specific prohibition to that effect nor offer any compensation to the cricketing authorities should the latter comply with its wishes. At the international level, matters were a little less clear-cut, as can be seen above. Soon, however, the first cracks started to appear in the unity ostensibly displayed by the players. News came that Erroll Stew ard, the South African wicket-keeper, had become the first Test player to take a stand against playing in Zimbabwe when he made himself unavailable for selection for an A-tour to the country scheduled for the end of January\textsuperscript{47}. This may have been the catalyst for some divisions to open up in the England camp, where concern and confusion was on the increase – both as regards the moral issues and the safety question. One player told a national Sunday newspaper that, in the dressing room of the England party, then touring Australia, doubts had arisen over the moral aspect of playing the fixture in question. Also, the players were said to be requiring more information on the safety aspect\textsuperscript{48}. Even the captain admitted that his team’s consciences were being “split from day to day”\textsuperscript{49}. The players then met the Board Chairman, David Morgan, individually in Sydney in order to attempt to allay any fears they may have about the fixture\textsuperscript{50}. Even the hooligan element of England’s supporters, the Barmy Army, seemed to have discovered a moral strand when some of its members were asking the question whether it was morally right to participate in the game. Not one of the package tours to watch the game had been taken up\textsuperscript{51}.

The malaise surrounding the game also appeared to have gripped the ICC team which arrived in Harare in late January in order to assess whether the fixture presented no unacceptable safety risk for the players. The members of the team, Malcolm Speed and Ali Bacher, were certainly impressed by the display of security which surrounded them throughout their visit, but were said to be a little uneasy at the sheer display of ruthless efficiency with which this was carried out – in fact, their visit lasted a mere 25 hours\textsuperscript{52}. Another telling fact was that the ICC had made contingency plans for the fixtures to be played in Port Elizabeth (SA) should the team report unfavourably on the position as regards safety\textsuperscript{53}. In the event, following a two-hour ICC Board meeting at which the team’s findings were discussed, Malcolm Speed confirmed that there was no reason to relocate the six Zimbabwe World Cup fixtures – even though he admitted that there had been “some deterioration” in the situation since his previous visit in November\textsuperscript{54}.

**England team finally say “no”**

In the meantime, the doubts on the moral aspects of the match which had arisen amongst the England players seemed to be on the increase when, in a statement issued by Richard Bevan, the Managing Director of the Professional Cricketers’ Association (PCA), they called for their match against Zimbabwe to be transferred to South Africa\textsuperscript{55}. The statement also made it clear that these doubts had been inspired by the plight of the Zimbabwean people rather than by concerns over personal safety\textsuperscript{56}, and that if they played in the fixture concerned, this should not in any way be viewed as an endorsement of President Mugabe and his regime\textsuperscript{57}. The statement also criticised the Government for its failure to take a clear lead on this issue, and carried the implicit threat that the players would refuse to participate in the fixture if it was not moved\textsuperscript{58}. It then appeared that the England team were not alone in expressing these sentiments, as the cricketers of Australia and New Zealand also stepped up the pressure on the World Cup organisers to reschedule the games\textsuperscript{59}.

Talks then commenced with the ECB and the ICC in an attempt to resolve the situation. At their conclusion, however, the ICC confirmed its earlier position that the controversial tie should still go ahead. It had met in teleconference to consider an independent assessment of security arrangements in Zimbabwe from risk analysts Kroll Associates, which had endorsed the tournament security plan\textsuperscript{60}. The England players were at this time enjoying a break in World Cup preparations in South Africa’s Sun City, and were under the impression that ECB Chairman David Morgan was presenting their case in London in order to obtain that they would not have to cross the frontier into Zimbabwe for their opening fixture on 13 February. To their surprise, they later heard ICC Chief Executive Speed reveal that in fact the ECB had made no formal request to switch the fixture. This was because David Morgan had decided that, in the light of the Kroll report, it would be a waste of time attempting to persuade the required qualified majority on the ICC Board that the game needed to be switched. The ECB, however, emphasised that this was part of a wider strategy to explore other escape routes from this impasse, hinting that they might make an approach to the ICC Technical Committee, which was empowered to take executive decisions about the running of the tournament\textsuperscript{61}. This turned out to be the case, and a formal approach was made to the Technical Committee.

Meanwhile, several other events were combining to increase the pressure on the England team to withdraw
from the fixture. First of all, the New Zealand team ignored the ICC’s directives to play their fixture in Kenya. Even though they took this stance on safety, rather than political and moral, grounds, they had set a precedent for players to overrule the ICC’s edicts. (The Kenyan problem will be returned to later, see below p.18.) Then Morgan Tsvangirai, the Zimbabwe opposition leader, went on trial in Harare on a treason charge which carried a possible death penalty, and which was bound to increase tension in the country with little over a week to go before the fixture concerned. Labour MP Derek Wyatt commenced proceedings in the High Court in London, claiming that the ECB as the players’ employer was acting unlawfully in sending them to play in Zimbabwe against their wishes. More seriously, a letter was sent to the England team threatening that the players would be “sent home in coffins” if they participated in the World Cup fixture in Harare, and that their families would also be in danger. The letter purported to be from an organisation called the Sons and Daughters of Zimbabwe. The legal implications of the letter were so serious that the ICC released England from a 4.00pm deadline on 4 February to announce whether or not they were playing.

As the ICC Technical Committee were about to meet to consider the request made by the ECB (see earlier), there came a dramatic intervention from former South African president Nelson Mandela, who urged Nasser Hussain and his men to play in the Harare fixture. The Committee, however, were unmoved by either Mr. Mandela’s plea or the ECB’s arguments. After a five-hour meeting, it dismissed the request that the match be moved, with ICC Chief Executive Malcolm Speed calling the 150-page submission presented by the ECB “unclear and uncertain in its reliability”. The ECB immediately launched an appeal, to be heard by Albie Sachs, one of South Africa’s most senior judges and a veteran anti-apartheid campaigner. The appeal was dismissed, and it is understood that the judge had knowledge of the death threats referred to earlier. However, the wording of Justice Sachs’s decision was sufficiently reconciliatory to encourage the England team to change their minds on boycotting the fixture, acknowledging as he did that “serious economic and political issues” had arisen in Zimbabwe to which it would be mistaken to turn a blind eye. The England players thereupon spent 13 hours in talks with ECB executives, who were desperately attempting to persuade the players to change their position. However, at the conclusion of these negotiations the players voted unanimously for a boycott. In the meantime, allegations of underhand proceedings in relation to the players’ safety were beginning to surface. Whilst Justice Sachs was issuing his decision, Peter Richer, the author of the aforementioned Kroll report on player safety in Zimbabwe, was being quizzed on his firm’s risk assessment at the England team hotel. It emerged that the Kroll document had made reference to other issues, and Richer confirmed that there were five separate pieces of information – including the death threat mentioned earlier which had been sent to the ECB in January – which had not been included in the report, in case they became part of the public domain. Tim Lamb, the ECB Chief Executive, admitted that when the England team members saw copies of the threatening letter, they were considerably perturbed.

The England team made one last desperate appeal to have the match venue moved from Zimbabwe in the light of the news of the death threat, describing this as specific information capable of throwing new light on the matter. After a long series of negotiations and messages flying backwards and forth, the ECB informed the ICC that in its view the match should still be moved from Harare for security reasons. As the entire issue descended into pure farce, the ICC finally confirmed officially that England would not be playing in Harare because of security concerns. Undeterred, the ECB continued to seek a change of venue, and the matter was referred back to the same Technical Committee which had refused England’s original attempt to have the game moved. This attempt failed. The date for the scheduled match came and went without the England team turning up for the game, and the ICC ruled that England should forfeit four points for this.

It was later also learned that two English umpires who were due to officiate in Zimbabwe, Neil Mallender and Peter Willey, were released from their commitments by the ICC, who agreed to send a New Zealander and a South African as replacements.

The ECB was subsequently informed of the financial implications of the boycott, in terms of the compensation payable to sponsors and television rights holders. This was, as expected, in the region of £2.5-3 million. It was not yet known at the time of writing whether the ECB would contest this amount or not. What is certain the ICC proceeded to freeze that amount from England’s share of the tournament income.

Whatever the long-term consequences of this entire affair may be, it is incontrovertibly true that very few people and authorities emerge from this entire affair with any credit at all. An exception must be made, however, for the brave Zimbabwean players described in the following section.

**The Zimbabwean cricketing dissidents and their fate**

Reference has already been made earlier to the divisions which had opened up amongst the Zimbabwean players on the desirability of the World Cup matches scheduled for Zimbabwe going ahead. According to one national
newspaper, which approached all the Zimbabwe internationals on this issue, four of the most prominent team members were opposed to these fixtures, whilst another five were too concerned about the consequences of pronouncing themselves to make a comment103. There matters rested until the day of the opening World Cup game in Harare, against Namibia, when two of the Zimbabwe players, Andy Flower and Henry Olonga, wore black armbands as they walked out at the Harare Sports Club at the start of the game. Minutes earlier, the two players – one black, the other white – explained that their protest was directed at the "death of democracy"104. This statement was enthusiastically acclaimed by the opposition Movement for Democratic Change (MDC); however, it was clear that there existed at least a risk that the two cricketers would be made to suffer at the hands of the public and sporting authorities of their country for their gesture. Such measures were not long in coming. The very day on which the match took place, Mr. Olonga was informed by his club, Takashinga, that he was suspended because he had "taken politics onto the playing field", thus allegedly acting contrary to ICC policy105. The next day, Olonga and Flower were reported to the ICC by their own board, for having brought the gamer into disrepute106. Undeterred, the two cricketers reiterated their intention to continue their black armband protest at other matches, even if the ICC Technical Committee requested them not to107. In the event, the Committee did not press charges against the two players, even though they stated that cricket should not be used as a platform on which political agendas are advanced108. The next day, Mr. Olonga repeated his vow to continue the armband protest if chosen to play for his country against India in the tournament109. Both he and Andy Flower did, in fact, do so in the course of the India tie110. Olonga was then dropped from the side, and Flower told that he would also no longer be selected if he continued with the protest. Mr. Flower declined to give this assurance. However, senior members of the team threatened that they would refuse to take the field if deprived of the support of the nation’s star batsman, so ultimately he retained his place for the match against Holland111. Nevertheless, Mr. Flower stated after that game that he would retire from international cricket as soon as the World Cup was over112. Henry Olonga, for his part – who became the first black cricketer ever to play for his country – announced that not only would he be joining Flower in retirement, but that he would also leave Zimbabwe never to return, as it would be too dangerous for him to do so. He claimed that, ever since he had started making the protests described above, he had been receiving threatening e-mails113. He immediately departed for a safe house in South Africa, and it is understood that Mr. Olonga was informed that he could face charges of treason if he returned to his native country – which could, were to be found guilty, result in his facing the death penalty. In fact, at one point seven officers from Zimbabwe’s secret police arrived in East London with the apparent mission of taking Mr. Olonga home so that he could face these charges, only to find that their quarry had been taken to safety by South African security officers114. He intimated that he might attempt to claim political asylum in Britain, having already been invited by the Channel 4 television station to perform some commentary work during Zimbabwe’s tour of England in the summer of 2003115. It later also revealed that Henry Olonga had been offered a contract to play for the celebrated Kent pub side The Lashings, and the local MP, Anne Widdecombe, indicated that she was prepared to help with the processing of his visa application a matter which will no doubt be noted with interest by others who seek refuge in this country but find themselves reviled for doing so116. In his capacity of commentator, Mr. Olonga intimated that he would continue to wear his famous armband whilst performing his work, and to support the Stop the Tour campaign organised by Peter Tatchell in opposition to the summer tour of England by the Zimbabwe cricket team117 (see also below). As for Andy Flower, he may have retired from international cricket, but he was in action the following summer playing for English county side Essex. During the winter months, he will turn out for South Australia118.

Mugabe regime increases repression against World Cup related dissent
The treatment administered to Henry Olonga by Mugabe’s forces, described above, was far from being the sole instance of the brutal manner in which the regime sought to stifle and penalise any dissent against its rule during the run-up to, and during, the World Cup. In mid-January, as food riots highlighted the increasingly volatile nature of living conditions in Zimbabwe, the Government increased its violent treatment of dissent in an effort to impede the organisation of major anti-Mugabe demonstrations
which were being planned to coincide with World Cup fixtures. Within the space of one week, police arrested and tortured two Opposition Members of Parliament, held the Mayor of Harare in jail for 48 hours before releasing him without charge, and detained, as well as assaulting, more than a dozen others. One of the MPs in question, Job Sikhala, wept in court as he described the electric shock torture inflicted on his genitals and the prolonged beatings administered by police. This led Opposition leaders to claim that the impending World Cup fixtures were actually causing the Mugabe regime to increase its violent repression. As for Elias Mudzuri, the Mayor of Harare, he had been arrested together with 22 city officials and allegedly beaten by police. His arrest was significant because Mr. Mudzuri was one of the politicians consulted by the ICC delegation which visited Zimbabwe in November in order to satisfy the cricketing world that the World Cup fixtures would present no dangers to the players.

At around the same time, a young Zimbabwean died as a result of police torture after having been arrested at the Zimbabwe v. Pakistan match in November for having campaigned against the staging of World Cup matches in Zimbabwe. Edison Mukwazi and two others had been arrested at the Harare Sports Club where they were distributing leaflets describing the human rights breaches committed by the Mugabe government. Whilst being detained for public order offences, they were allegedly tortured before being released without charges. Mr. Mukwazi was a dedicated supporter of the MDC. A few days before the match involving England was due to take place, Martin Johnston, a sports journalist employed by The Daily Telegraph, had a gun pulled on him in Harare as he was attempting to sort out his visa requirements for covering the World Cup fixtures in Zimbabwe. He had been issued with a temporary visa at the airport and instructed to report to the Department of Information in order to have it extended. As he approached the building, he was confronted by an armed guard with a Sten gun on his shoulder and removed it from the non-offensive position to indicate to Mr. Johnson that his presence there was not desired. Although the incident ended peacefully, it highlighted the tensions in the Zimbabwean capital, particularly in the light of the threat made that very same day by an official from the Department of Information and Publicity that British journalists would be expelled from the country if England refused to participate in the Harare fixture. The repression continued long after the aborted England match; at a later fixture in Bulawayo, police charged 42 people under security legislation for displaying anti-Mugabe posters – one of which likened the president to Hitler.

Zimbabwe tour of England goes ahead – amid protests but few disruptions

The England boycott was predictably enough received very badly by the Zimbabwe authorities, and gave rise to thoughts of possible revenge in the shape of a retaliatory boycott by the Zimbabwe cricket team of the England tour scheduled for the early weeks of the English first-class season. This presaged the possibility of another financial disaster for English cricket, still reeling from the cost of the Harare boycott (see above), particularly as it looked likely that, once the Zimbabwe cricketing authorities decided to pull out of the tour, their South African colleagues would also abandon their tour, scheduled to follow the Zimbabwe matches, out of solidarity. Accordingly, David Morgan, the ECB Chairman, was hastily despatched to Harare in order to prevent such a move, particularly as the Zimbabwe Cricket Union (ZCU) was thought to be coming under strong political pressure from President Mugabe himself to cancel the tour. A meeting between Morgan and the ZCU was arranged largely through the offices of the South African Cricket Union, who, alarmed at the total breakdown in relations between the ECB and the ZCU since the Harare boycott, had used the good offices of Ehsan Mani, an ICC Vice-President, to broker a meeting between the two sides.

Realising that they very probably held the upper hand in this dispute because of these dire financial implications, the Zimbabwe cricket authorities were clearly determined to drive a hard bargain. It was made clear to Mr. Morgan on his arrival in Zimbabwe that England would need to guarantee a tour of their country before 2005 before the Zimbabweans committed themselves to fulfilling their commitment to tour England. At the conclusion of the meeting, the ZCU announced that it was in fact committed to honouring their commitment to tour that summer, in return for which England agreed to meet their pledge to a tour in the course of this year. The Zimbabwean government endorsed this decision two weeks later.

Once again, criticisms related to the morality of hosting a tour of a country with such an appalling human rights record abounded. A fierce denunciation of the ECB’s decision emanated from former sports minister Kate Hoey, who castigated the ECB for its mercenary approach and argued that it should have invited Kenya to assume Zimbabwe’s fixtures. However, ECB Chief Executive Tim Lamb defended the decision, arguing that cancellation might have caused irreparable harm to the sport’s parlous finances, dismissing Ms. Hoey’s attack as emanating from someone who had never had the responsibility of running a sport. He also revealed that he had received a communication from Culture Minister Tessa Jowell in

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which New Labour voiced its support for the tour. It did not escape attention that this represented an entirely different stance from the one which the Government had adopted earlier on the subject of the Harare World Cup matches\(^1\) (see above).

In spite of these assurances by the ECB, the protest lobbies were not impressed, and promised an active campaign of opposition to the tour on the part of Mugabe opponents. Alan Wilkinson, a Zimbabwean activist organising the protests, stated that the matches in question would be attended by those who would be willing to storm the pitch and disrupt the game at the appropriate time\(^1\). The ECB entered into negotiations with the police, and pronounced themselves confident that the protests planned would not disrupt the fixtures\(^1\). On arrival in this country, the Zimbabwe team announced that they would leave the pitch immediately the moment any such disruption occurred. Peter Chingoka, the ZCU Chairman, stressed that this was a legitimate tour which had the full support of the cricketing community\(^1\). The initial matches, played at low-profile county grounds, passed off smoothly. However, attention was naturally focused on the big occasions, the first one being the First Test between the two countries at Chester-le-Street, which promised to be a baptism of fire for this newest of Test venues.

As the date for this fixture approached, activist Peter Tatchell offered a deal to the cricketers and their authorities, which would take the form of being allowed to display a large banner decrying the Mugabe government at both Chester-le-Street and Lord’s (where the two Tests were to be held) in return for the cancellation of plans to disrupt the series\(^1\). This offer was, however, rejected almost immediately by the MCC, whereupon Mr. Tatchell repeated the threats of disruption\(^1\). This was met by opposition from a surprising source – no lesser person than Henry Olonga, the dissident cricketer who had to flee abroad to avoid the wrath of the Mugabe Government for his gesture of protest during the World Cup (see above). Writing in the Daily Mail, he opined that the protesters would “lose all respect” if they disrupted the opening Test at Lord’s\(^1\). However, stewards at the venerable old ground indicated that they would not prevent protesters wearing black armbands from attending the opening day of the Test\(^1\).

In the event, the match was marred by a few protests, but their impact was minimal. On two occasions, protesters invaded the pitch and unfurled anti-Mugabe posters, but were rapidly and efficiently escorted from the outfield without a struggle, and subsequently arrested by the police. The main protests, however, took place outside the ground\(^1\). There were hardly any disruptions subsequently, either at Lord’s or Chester-le-Street.

**New Zealand refuse to play in Kenya for security reasons**

Zimbabwe was not the only country to experience security problems at the time when the cricket World Cup was about to take place. Kenya, whose cricketers had been rising in status over the previous decade, had been allocated two matches – subject to the country being able to satisfy the International Cricket Council that its authorities could guarantee the players’ safety.

Concerns about security had arisen ever since the horrific bombing of an Israel-owned hotel in the Indian Ocean port of Mombasa, which killed 17 people, as well as a near-miss missile attack against an Israeli jet at around the same time\(^1\). Unlike Zimbabwe, however, Kenya did not have a government with a record of serious human rights abuses, so that any controversy of that country as a venue would be restricted purely to safety concerns.

An ICC team on safety and security conducted an inspection tour of Kenya on 12 and 13 January, which triggered some speculation that the ICC might consider moving the games to South Africa. Despite assurances from the Kenyan Sports Council, several members of the inspection team were said to have reservations about Kenya as a World Cup venue. In the event, the team recommended that the matches in question be switched because the players’ safety could not be guaranteed against a terrorist attack\(^1\). However, the ICC failed to follow this recommendation, despite a plea from New Zealand – the team due to play in the first fixture – to have the latter relocated. The concerns of the New Zealand party were inspired at least in part by their own experience, since their players were caught up in a terrifying terrorist attack in Pakistan several months earlier when a bomb exploded outside the team hotel in Karachi. Accordingly, Martin Snedden, the Chief Executive of New Zealand Cricket, announced that the team would refuse to play the match concerned\(^1\).

The financial implications of this decision were not known at the time of writing.

**England rugby team cause international incident in Dublin**

The England Rugby Union team may, at the time of writing, be hot favourites to win the World Cup for the first time later this year, but a few months earlier they won few credits or friends for failing to respect the protocol which normally attend international fixtures. Just before the start of the crucial match with Ireland to decide the Six Nations Championship in early April, the England team insisted on remaining standing nearest to the half of the field which they were to occupy during the first period of play. This meant that Irish president Mary McAleese was compelled to leave the red carpet in order to meet her own team. This was in spite of the protocol
having stated quite clearly how the two teams would line up during the countdown to the start of the match.\textsuperscript{143} The British media attempted to make light of the incident, dismissing it as an example of captain Martin Johnson's single-minded will to win. However, considerable exception was taken to this piece of arrogant bravado elsewhere, which may have several consequences. For one, it may have been instrumental in defeating England's prospects of holding the World Cup of 2007 in that country, as the International Rugby Council decision to that effect was taken two days after this incident.\textsuperscript{144} Secondly, it may have harmed the peace process in Northern Ireland in that it gave all the appearances of almost colonial contempt for the inhabitants of the Emerald Isle. But then the present-day top sporting performer will rarely allow such a small matter as international political relations to impede the main object of life in general, which is to win at all cost.

Sport and the war against Iraq

Security fears deter some performers more than others

As soon as it became clear that the "coalition of the willing" were determined to wage war against Iraq, a good deal of opposition arose against this design. Most of this took the form of peaceful demonstrations, but there were at least some fears that protests might assume the more violent form of terrorist action. One of the likely targets of such actions was always going to be the widely publicised sporting occasion, which is why the practitioners and administrators of certain sports became distinctly uneasy about such a possibility, particularly those taking part near the theatre of operations. As matters turned out, some sporting performers were more intimidated by these potential threats than others.

Quadruple Tour de France winner Lance Armstrong left no doubt about his position. The US cyclist stated as early as late January that he would not allow possible threats to his security in the event of hostilities deter him from attempting to win this most coveted of races for the fifth consecutive time. He stated that this would remain the case even if direct threats were made against him of if he was advised to withdraw for security reasons. Nevertheless, Armstrong has in the meantime become the first cyclist to employ personal bodyguards for the Tour.\textsuperscript{145} Also, as the war drew nearer, he became increasingly concerned about safety because it was impossible to keep control of hundreds of miles of road without any barriers, to the point of causing this year's organisers to take security a good deal more seriously.\textsuperscript{146}

Other sports also took measures to increase security at their most high-profile events. Thus the triangular cricket series in Bangladesh between the host nation, India and South Africa was played under the tightest possible system of protection as protests against the war which had started a week earlier gathered momentum.\textsuperscript{147} Earlier, many of the world's leading motor racers, including former world champions Colin McRae and Richard Burns, expressed fears for their safety if they had to compete in the inaugural Rally of Turkey, due to start in mid-February. The main reason for this was that Antalya, which was the base for the rally, is in South East Turkey, a neighbour of Iraq.\textsuperscript{148} There were even fears that the England football team's match against Liechtenstein, one of the qualifiers for the 2004 European championships, could be singled out for violent protest action.\textsuperscript{149} However, all these events went ahead despite the fears expressed.

Performers and administrators of other sports, however, appeared to belong to the cervically challenged tendency in this regard. In late February 2003, Rugby League team Bradford Bulls withdrew their captain Robbie Paul and coach Brian Noble from a promotional visit to Dubai because of the danger of war in Iraq.\textsuperscript{150} At around the same time – before the first shot had been fired in anger, it should be recalled – British golfer Colin Montgomerie was one of several who decided not to compete in the Dubai Desert Classic.\textsuperscript{151} Several weeks later, the Washington DC Marathon was abandoned because of security concerns. Race director John Stanley had made the decision after his office had received over 1,200 calls and emails from concerned runners.\textsuperscript{152} In early April, the Qatar Squash Federation postponed the women's World Grand Prix finals and the men's PSA Masters for three weeks because of the war.\textsuperscript{153}

Internal sporting implications for Iraq

Whatever may be the reader's opinion of the war, its causes and its consequences, one of its favourable aspects must surely be the removal from any position of responsibility of Saddam Hussein's son Uday, who had headed the country's football federation and national Olympic committee. Previous issues of this Journal have already reported on some of the human rights abuses of which he stands accused – including that of having tortured and mistreated a footballer representing Iraq who had been sent off during the football tournament of the Seoul Olympic Games in 1988.\textsuperscript{154} Since then, more such abuses had been alleged. In mid-January, pressure mounted on the International Olympic Committee (IOC) to investigate claims that other Iraqi athletes had been imprisoned and tortured on the Uday Hussein's orders. Indict, a London-based human rights group, communicated a file to the IOC containing details of and photographs of athletes from sports including football, volleyball, weightlifting and boxing, all alleging systematic torture.\textsuperscript{155} His wrath does not appear to have been confined to sporting
performers, since Ahmed Kadoim, a FIFA-registered referee, described how he fell unconscious several times in the course of torture ordered by Uday after refusing to fix a game in May 2002 between the Shorta club, the police team led by president Saddam’s son-in-law Mustafa Abdul, and the Air Force Club, run by the Iraqi leader’s nephew Omar Sabawi. On the eve of war, the IOC had ordered a formal investigation into the activities of the Iraqi Olympic Committee. Shortly after the coalition claimed victory in the war, the national Olympic committee was dissolved, and talks commenced with a group of exiles to rebuild sport in the nation.

Cricketing relations between India and Pakistan resume following international tension
For much of the period following World War II, India and Pakistan have not been the best of neighbours. Tensions have arisen between the two countries mainly because of the still unresolved issue of Kashmir, and so seriously did relations deteriorate that, at a certain point three years ago, a mini-war erupted between their troops at Kargil on the Kashmir frontier. There were also fears that this conflict might escalate into nuclear warfare. India subsequently banned its cricket team from playing against its western neighbour, regarding such matches as being against the national interest.

In March 2003, however, this stalemate was broken – at least on the cricket field, when the two sides met in the World Cup.

Other issues
Uniform sports code proposed at Commonwealth Lawyers Conference
This year, this event was held in Melbourne in the course of April. At one stage, it was proposed by a leading Melbourne lawyer that disputes in sporting matters should be resolved by applying a uniform sporting code. According to barrister Paul Hayes, such a code would ensure that athletes, officials and administrators would receive “a fair go” off the field of play. He deplored the current fractured position where such disputes are concerned.

ITV lawyer chosen to head Premier League legal department
In March 2003, the English Football Association Premier League appointed Simon Johnson, Director of Rights and Business Affairs at the ITV network, as its first director of legal and business affairs. Mr. Johnson had previously been employed at law firm Denton Hall (now Denton Wilde Sapte) and Central Television. This appointment seems to reflect the growing increase of commerce, and particularly television, on sport. The Premier league are said to have welcomed the new appointee’s experience of the broadcasting industry as well as his sports law expertise.

Solicitors cleared over Leeds player’s trial
The trial involving, amongst others, Lee Bowyer and Jonathan Woodgate has been extensively examined and analysed in these pages. One of the less noticed aspects of this affair was the accusation made against Peter McCormick, senior partner of Leeds firm Freeman & Co, of a conflict of interest. More particularly he was alleged to have been acting for the two footballers during the initial stages of the cases whilst a director of Leeds United, which the National Civil Rights Movement had described as a conflict. He was also accused of encouraging their team mate Michael Duberry to lie in court.

The panel solicitor investigating the case concluded that there was no adequate evidence to suggest that the solicitor had been guilty of any misconduct. The Law Society’s adjudication panel, which considers whether complaints should be taken further, agreed.

An identical finding was made in relation to law firm Freeman & Co, which had acted for Jonathan Woodgate. The firm had been accused of being in conflict because it acted initially for another player who had potentially important information to impart to the prosecution team.

Case report on injury caused by golf ball
A recent issue of Medical Science and the Law contained a Japanese case report on the traumatic basal subarachnoid haemorrhage caused by the impact of a golf ball. The case concerned a 50-year-old man who was hit by a high-speed golf ball on the left lateral side of his neck. He collapsed immediately and was conveyed to hospital, where he was pronounced dead. The autopsy revealed an extensive basal subarachnoid haemorrhage. Careful gross and histological examinations disclosed a rupture of the right vertebral artery at a site very close to the bifurcation. It was estimated that the impact of the golf ball on the left side of the neck resulted in the rupture of the contralateral vertebral artery owing to its hyperextension. Although there are many reports of traumatic basal subarachnoid haemorrhage, the type of trauma under review was considered to be very rare.
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Corruption in Sport

Cricket corruption scandal – an update

ACU pronounces World Cup “clean” – but was it?

It was perhaps inevitable that the cricket World Cup, which took place in Southern Africa earlier this year, would attract the interest of both the betting industry, particularly in the Indian subcontinent, and of Lord Condon's Anti-Corruption Unit, given the links which in the past have been clearly established between the gambling culture which surrounds the game in this region and the corruption scandal which erupted a few years ago and which has been well documented in previous issues of this journal.

Particularly the game between India and Pakistan on 1 March was heavy with betting, it being estimated that the money wagered on this fixture on the unofficial betting market across the subcontinent would be not unadjacent to £61 million. Nor did the criminal elements which control gambling there have the slightest intention of leaving their profits to chance. Nevertheless, Lord Condon left for South Africa confident that this World Cup would be the best and cleanest there had been, and conveyed the determination of his Unit to ensure that this was the case. He added:

"There will be a sensible but stringent security regime in place which will act as a major deterrent to would-be corruptors. If there are people out there who think they are going to target the World Cup they had better think again"[1].

Although the full panoply of measures recently introduced in order to prevent match-fixing was applied, including denying access to dressing rooms of “unauthorised” persons and the banning of cellphones, the word from the Indian betting syndicates was that the likelihood of match-fixing was high. This fear was exacerbated by the fact that the pressure to influence the outcome of matches had increased because of a power struggle in the Indian gambling market. In a country where gambling is supposed to be illegal, the assassination of one of its major underworld figures, Sharad Shetty, in Dubai on 19/1/2003 had brought about a major shake-up in the betting cartels before the start of the World Cup. Mr. Shetty was an aide of Dawood Ibrahim, one of India’s most wanted criminals, and was widely regarded as the kingpin of the betting syndicates. His murder left the field open for their takeover.

Shetty’s enormous financial empire relied on close links with the nation’s bookmakers, who in turn have been responsible for attempting to bribe cricketers from the subcontinent. The uncertainty over whom would succeed Shetty added to the nervous anticipation of attempts at bribery, particularly as it was reported that some of Shetty’s rivals were succeeding in obtaining a foothold in the cricket betting market. As the number of bettors and bookmakers multiplied, it was obvious that a friendly ear in the dressing room could give a vital edge. The likelihood is that no-one outside the underworld – not even the ACU – will know whether a match has been fixed or not[2].

This is particularly the case since the corruption concerned seems to be taking forms which are subtler and therefore less easy to detect and prevent. The current problem concerns not so much the fixing of results – which seldom happens these days – but the influencing of events within them, particularly those which constitute focal points for the punters’ bets. Thus a captain can be asked to open the batting using a different pair from the previous game. The best batsman in a side can be asked to get out after reaching a half century, when many bettors will be backing him to make a hundred. The highest scorer in a game may be extras, or an umpire has to uphold a fixed number of lbw appeals during an innings. The players ease their consciences by telling themselves that they are not selling the matches directly, even though they are heavily influencing their outcome. The fact that the temptation for the players to do so now comes from more than one mafia boss makes the problem even more difficult to tackle[3].

Also, in recent months Indian government tax investigators, who have examined the financial affairs of players suspected of match-fixing, revealed to a British Sunday newspaper the size and widespread nature of match-fixing. They claimed that leading figures in the international game were, in the mid-to-late 1990s, each receiving a basic amount of £31,000 per month, paid into untraceable Cayman island accounts (see also the saga of Hansie Cronje’s “nest eggs”, below p.22) by the controllers of India’s illegal betting industry. In return for an outlay of £1.9 million, per month, these criminal fraternities were able to influence the majority of Test matches and one-day internationals[4].

None of this prevented Lord Condon from informing an executive meeting of the International Cricket Council (ICC), once the World Cup had finished, that the competition had passed without suspicion. ICC President Malcolm Gray confirmed this finding, even though he admitted that the betting which attended the event was “immense”, and that to take more intensive action would be expensive and provide no guarantee of success[5].

Some may accept this situation as the best which can be achieved under the circumstances. Others are less certain of this and more critical of the ACU. Scyld Berry, writing in a leading Sunday newspaper[6], laments the fact that in the two-and-a-half years since its
establishment, the Unit has not taken one public action aimed at deterring match fixing. In spite of the preventative measures described above, public exposure of one match-fixer would have been a much more powerful deterrent than the combined effect of all these measures. Mr. Berry concludes that, on its record to date, the conclusion has to be that the ACU was never intended to rock the boat by unearthing the game’s dirty secrets, but merely served to reassure sponsors and the general public. Instead of solving the problem, the ACU has become part of it and simply ensured that the match-fixers now operate more discreetly. The finger of censure, however, must also be pointed to the sport’s authorities, which:

“have also taken active steps to make sure nothing has happened. Early last year a former player was about to be exposed for his role in match-fixing. No criminal charges could be laid, but at least the former player was going to be named, shamed and struck off the list of ICC ambassadors. Little more than a gesture itself perhaps but still a powerful signal that future match-fixers might be exposed. But this former player has friends in high places in the ICC – not [Malcolm] Gray, but still in very high places.” 173

The author concludes by stating that the eternal problem – as the ACU has frequently pleaded – is the lack of hard evidence. The latter is to be found in the offshore accounts of the cricketers who have been involved in match-fixing, and of administrators who have been engaged in their own forms of corruption. Only government authorities have the power to have access such accounts. However, the ACU is staffed by former Scotland Yard officers, and its head was Commissioner of the Metropolitan Police. Surely they could have exerted a good deal of influence in order to attempt to rid the sport of the fixers174.

ACU to be reorganised – and Condon to go?
In late January, there appeared in a leading British daily newspaper175 a report predicting that Lord Condon was ready to leave his post as head of the ACU, provided that the World Cup reported a clean bill of health. The ACU itself was to be fundamentally reorganised. The former Metropolitan Police commissioner was in fact contracted to the ICC until the end of the tournament. Although, as is reported in the previous section, the official verdict pronounced the World Cup as having been free from corruption, no official announcement heralding the discontinuation of Lord Condon’s role has yet been made.

The same report indicated that the ICC were re-examining the role of the ACU after the World Cup. The five regional security managers engaged in June 2002 were to be retained, but the Unit’s name may be changed to reflect fresh priorities and a wider remit176.

Hansie Cronje: the evidence mounts up, but South African cricket remains in denial
However much one regrets the passing of a fellow-human, even Hansie Cronje’s cruel fate cannot obscure the damage which he perpetrated on the game at all levels. If anything, the evidence against the former South Africa captain, who died in an aeroplane crash last year177, has been increasing by the month – yet it would seem that cricketing South Africa wilfully remains in denial of his misdeeds.

Just after the conclusion of this year’s World Cup, a special investigation conducted by a British Sunday newspaper revealed that the late Springbok skipper held over 70 bank accounts178. This was confirmed by three law enforcement officers in South Africa. One source, which was close to that country’s Director of Prosecutions, even claimed that this concerned only one series of accounts, and that there were good grounds for believing that there were a good deal more. Although no details emerged of the amounts of cash involved, these were said by the same sources to be colossal. All these accounts, which were held in the Cayman Islands, were unlawful since Mr. Cronje had failed to reveal their existence to the South African taxation authorities. These were in addition to the 27 accounts the cricketer held in South Africa, the existence of which was revealed in the summer of 2001.

The main difficulty in establishing the amounts of money in question resided in the fact that the forensic audit of Cronje’s affairs was terminated on his death as there was “no-one left to prosecute”. Yet even this is not all that it seems to be. One of the sources who had revealed the existence of the overseas accounts to The Sunday Telegraph claimed that the investigation had already been terminated before Mr. Cronje’s demise. The South African government were alarmed at the embarrassment which, with the World Cup in sight, the country’s reputation would suffer if the full scale of the corruption with which the former Test batsman was tainted came to the surface. Before the King Commission, which had been set up in order to investigate the Cronje affair179, Cronje had admitted, in June 2000, to having accepted £82,000 from bookmakers for fixing matches and performances. That amount had always been regarded as the tip of an iceberg, but the latter’s size is only now becoming apparent. The sheer size of the amounts involved in match-fixing never came to light during the King Commission inquiry because the investigation was restricted to the documentary evidence volunteered by
Cronje. Even the three UK bank accounts which Cronje submitted presented gaps and had “obviously been tampered with”, according to one forensic investigator. However, if the exact amounts which he received from his match-fixing activities remains a little obscure, one aspect of this affair admits of little doubt, namely the extent of Cronje’s greed and the world-wide web of intrigue in which some of his younger players became enmeshed. Yet it would seem that, in the face of all the evidence to this effect, the world of cricket in South Africa remains in blissful denial of their fallen idol’s misdeeds. Not only is there the aura of a cover-up in governmental circles on this matter, referred to earlier. The players themselves, whose world had been so badly tarnished by the former captain’s activities, continue to honour his memory as if he were one of the nation’s sporting heroes rather than one of its villains. In the course of the World Cup, after his country had made an inglorious exit from the early stages, batsman Herschelle Gibbs (himself a tainted figure, as has been documented in an earlier issue of this organ) stated, in an aside at the launching of his book, that the side still missed Cronje. Earlier, veteran fast bowler Allan Donald had said something similar to an Australian radio station. This was sufficient to set off a mood of dubious nostalgia amongst the country’s cricketing public.

During the Cup matches involving South Africa, more than one pro-Cronje banner was in evidence, and there appears to be a widespread view that the former skipper was banned because the cricketing authorities required a scapegoat.

Jadeja and Rehman reinstated

In December 2000, Ajay Jadeja, the India batsman, was banned from official cricket for five years by the Board of Control for Cricket in India after had had allegedly been associated with bookmakers and named in a match-fixing inquiry by federal investigators. In January 2003, however, the Delhi High Court overturned the ban, ruling that there was no evidence of his guilt, in that the inquiry was one-sided and that the accused had not been given an opportunity to prove his innocence. The Court later directed the Board to allow the former Test batsman to return to domestic cricket.

At around the same time, the Pakistan Cricket Board (PCB) overturned a life ban which it had inflicted on Ata-ur-Rehman, three years after he was exiled from the sport for match-fixing. The Board announced that an internal investigation had cleared the fast bowler of any wrongdoing. A Lahore court had referred the case back to the PCB after Mr. Rehman won an appeal hearing. Three years earlier, he had been banned after having been found guilty of perjury during a judicial commission investigation.

Pakistan may have deliberately lost 1999 England match, claims Miandad

The current Pakistan coach, Javed Miandad, has recently claimed in a book that his country’s team may have “thrown” a one-day international against England in Sharjah just before the 1999 World Cup commenced. In fact, such were his concerns over the conduct of his team that he resigned as coach. Since then, Miandad has once again been put in charge of the national side.

On the occasion in question, Pakistan had lost to England by 62 runs (five days after comprehensively beating them by 90). Miandad reveals that, during the interval between innings, he received certain telephone calls which suggested that his players may have been bribed to lose the match. He subsequently called in his team for an urgent meeting, making them swear on the Holy Koran that they were not involved in any match-fixing. Having outlined the tactics which he wanted the team to follow, he then noted that none of his instructions were being followed up. This naturally served to harden his suspicions.

Salt Lake City Winter Games allegations – an update

From previous issues of this Journal, it will be recalled that some of the stranger results recorded at the 2002 Winter Olympics, held in Salt Lake City in early 2002, gave rise to serious concern and accusations of bribery and other forms of corruption. More particularly the figure skating event came heavily under suspicion. In addition, accusations were made that Salt Lake City had won the right to host the Games by wooing members of the International Olympic Committee (IOC) and their relatives. These accusations at first seemed unfounded when, as was reported in this Journal at the time, a federal judge in Salt Lake City dismissed the charges, rejecting ten accusations of fraud, as well as a conspiracy charge, which federal prosecutors had brought against Tim Welch and David Johnson, who led the bid made by the Utah capital. The charges had been dismissed mainly because the case brought by the Justice Department was, it was held, based on an obscure Utah commercial bribery law.

However, a Federal Appeals Court reversed this decision, ruling that “denouncing corruption” in the Olympic bid process was a matter of keen interest to the US Government. It therefore decided that Messrs. Welch and Johnson were to face 15 charges relating to corruption in the bidding process. As well as delving deeply into the original scandal, the coming trial promises to plunge the IOC into fresh controversy as hundreds of embarrassing documents detailing the breadth of the corruption involved are brought into the public domain.
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The two accused have at all times maintained that they had been made scapegoats for the scandal, and warned that high-ranking Olympic officials, including former IOC chief Juan Antonio Samaranch, could be implicated in the course of the trial. The US Government had obtained 400 boxes of documents relating to the bid, the most damaging of which appears to be a blueprint for influencing IOC members drafted by Welch and Johnson in the early 1990s, in which the names of loyal supporters are tagged with the word "gold" (the German word for money). This word appears in a memo next to the names of several IOC members, including five members implicated for accepting cash, gifts, scholarships and other inducements from the Salt Lake bid committee. This column will naturally continue to monitor developments relating to this matter with keen interest.

As to the figure-skating scandal, in January of this year an Italian court agreed to extradite to the US a Russian accused of fixing the said figure-skating events. The court in Venice (where the Russian had been living for some time) made this ruling after a US Grand Jury had charged Alimzhan Tokhtakhounov on five counts, including conspiracy to commit bribery relating to sporting events. More particularly it is alleged that he and his accomplices had arranged that, if a French judge voted for the Russians in the pairs events, the Russians would in turn ensure that the French ice dancers would win the gold medal. The French judge in question, Marie-Reine Le Gougne, and the President of the French figure skating federation, Didier Gailhaud, were later suspended for three years. The IOC, for its part, has pointed out that a study commission last year showed that organised crime had no influence on sport. Whether this claim will survive the Russian’s trial remains to be seen.

Sepp Blatter affair refuses to die down

The various accusations of corruption and other dubious practices which have been levelled against Sepp Blatter, the President of football’s world governing body FIFA, over the past few years seem to have impressed neither the courts nor the Association’s affiliates, since, as has been reported in previous editions of this Journal, since the former Swiss army commander was cleared by a Swiss criminal inquiry of any wrongdoing and the sitting President was re-elected to his post by a crushing majority. However, developments since then have continued to fan the flames of controversy, on both issues.

Although Blatter had been cleared of any wrongdoing through the judicial medium, it is clear that the various allegations of election fraud which had attended his re-election called for an internal inquiry. It will be recalled that documents had come to light purporting to show that a Blatter ally, Jamaican FA president Horace Burrell, smuggled his girlfriend Vincy Jalal into FIFA’s 1996 Congress in order to steal the vote of an absent delegate from Haiti. Even worse, one of the votes which had originally helped to get Blatter elected was stolen from a group which appeared to be behind the earlier scandal – on this occasion, Neville Ferguson, personal assistant to North and Central America president Jack Warner, was listed as the Haiti delegate.

However, the manner in which it was proposed that this should proceed immediately gave rise to controversy when it was learned that the person whom Blatter appointed to conduct the investigation was an associate of 40 years’ standing. The main in person is Swiss lawyer Marcel Mathier, who chairs the FIFA disciplinary committee. Both he and Mr. Blatter were raised in the Swiss canton of Valais. Whereas Mr. Mathier’s committee settles disputes involving players, doping issues, clubs and national associations, they have never been called upon to investigate corruption allegations reaching the highest levels of FIFA. Horace Burrell’s presence on the Committee is also embarrassing for Blatter, who at the time when he ordered the inquiry had stated that the Jamaican could not be involved in view of his alleged involvement in the scandal. Mr. Mathier, however, showed a remarkable degree of tolerance towards Mr. Burrell. Despite the world-wide publicity given to the scandal, there was no protest from Mathier when Burrell was appointed to the disciplinary committee for the 2002 World Cup. An additional embarrassment for Mr. Mathier is that in 1996, as Swiss FA president, his association shared responsibility for checking the minutes of the congress, which was held in Zürich. He duly confirmed their accuracy, having failed to notice that Jalal had been listed as a delegate (whereas he was in fact absent – see above). Burrell and his Jamaican association were also scrutineers and, unsurprisingly, ruled that the Congress minutes were unimpeachable. FIFA claims that Mathier is independent, even though the latter made a blatantly partisan intervention defending Blatter against corruption allegations during the FIFA congress held in Seoul last year. All this hardly augurs well for the probity of the inquiry.

In addition, there is more to the ruling by the Zürich public prosecutor’s office which dismissed the criminal case against Blatter than meets the eye. On the surface, the ruling was clear and straightforward, in that it concluded that Mr. Blatter had behaved in an appropriate manner in relation to the relevant allegations, and indeed stated that the FIFA President’s accusers had “frivolously initiated” the complaint. However, the full text of the ruling, by prosecutor Dr. Beat Hubmann, has only been made available to the press recently, and it contains an extremely interesting passage. One of the
allegations made by the complainants against Blatter was that they, as members of FIFA's Executive, had been kept in the dark about an agreement to raise Blatter's salary by £8,000 per month, which was a private deal between Julio Grondona, the Chairman of the Finance Committee, and Jack Warner, the deputy Chairman. Thus the suspicion arose that Blatter was attempting to keep a veil of secrecy over his earnings by means of a secretive stratagem. However, Hubmann concluded in these words:

“The defence’s account of how the agreement between their client and FIFA materialised is fully documented. All the complainants had attended the relevant meetings and were informed of the delegation’s decision to direct the finance committee Chairman to draw up the agreement without any basic conditions with the defendant. The agreement on the file and the relevant tax declarations do not reveal any discrepancies”.

Therefore there may not have been anything unlawful or even dishonest about Mr. Blatter’s actions, but knowingly to allow an agreement on increasing one’s salary to be concluded without basic conditions by two of one's friends is not perhaps the kind of conduct one would expect of the President of an organisation which must at all times be seen to be transparent and fair in its financial dealings. This may explain why Mr. Blatter has thus far not attempted to make the judgment public...

In the meantime, however, fresh allegations have been made against Mr. Blatter in relation to his use of funds for the 1998 election campaign. Documents acquired by a leading national newspaper purported to reveal that, six weeks after his election, he submitted a claim for over £30,000 towards his travel costs and other expenses. The first document reads “Presidential election campaign: cell phone, fax and DHL courier” and claimed nearly £6,000. The second is for “travel expenses for presidential campaign” and claimed a further £26,000. These documents were confirmed by Markus Siegler, Mr. Blatter’s spokesman, as authentic, but he dismissed them as “meaningless bits of information” and claimed that they had been obtained unlawfully. He also said that these documents would be referred to the newspaper's London lawyers for legal action – although at the time of writing no such proceedings had yet been commenced. At a press conference held shortly afterwards, a furious Mr. Blatter also rejected the allegations as “absolute nonsense”.

(On the defamation action brought by Mr. Blatter in relation to accusations of fraud made against him, see below p.62).

“Rotherhamgate” affair: an update
It may be recalled from the previous issue that certain accusations had been made over the existence of a slush fund which had been constituted in order to induce Rotherham RFC to decline promotion to the Zürich Rugby Union Premiership. The size of the fund was thought to be £750,000, with each club being required to contribute £68,000. These allegations were vehemently denied by the Premiership clubs concerned, but were re-ignited when the Chairman of First Division side Worcester RFC claimed not only that the fund had existed for the 2001-2 season, but also that there were plans for another fund the following season. Inevitably, the RFU opened an inquiry into the matter at the behest of Robert Horner, its disciplinary officer, to be headed by Anthony Arlidge QC. The Premiership owners, for their part, employed the services of a lawyer to advise them on the inquiry, in the shape of Stephen Hornsby, a specialist in sports law from the Simkins Partnership in London.

Approximately one month later, there surfaced new information which was thought to be crucial to the inquiry. This identified the Chief Executive who, on the instructions of his club chairman, allegedly took two cheques – one for £33,000, the other for £35,000 – to meetings of Premier Rugby, the association of Premiership clubs, during the autumn of 2001 and the spring of 2002. It was alleged that the official concerned was unaware of the cheques’ purpose, but came to realise their possible significance as soon as the controversy surfaced. The Chief Executive in question had allegedly been invited to give his version of events to the inquiry team in London, but had referred the matter to Premier Rugby. A few days earlier, all Chief Executives and club owners in the Premiership had attended a meeting aimed at clarifying their legal position. Allegedly the Chief Executives were ordered not to co-operate with the inquiry, although Howard Thomas, the CEO of Premier Rugby, refused to give details to the press, stating that the details of the meeting in question were confidential.

The inquiry was also required to digest information supplied to it concerning three leading club officials who met at a Jersey bank in August 2002, the names of two prominent rugby officials seen together in a yacht off Monte Carlo a few months earlier, and the emergence of a tape recording said to have been made secretly and which supposedly detailed discussions of a meeting of club owners at a London hotel in early December 2002. Five months after it was set up, the Arlidge Inquiry produced its findings, which were that it had failed to produce any conclusive evidence against Rotherham that it had ever accepted any monies for the purpose described above. The terms in which the report is worded are a little unsatisfactory, since they seem to...
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oscillate between a Scottish-type “not proven” verdict and a more categorical dismissal of the charges brought. At a certain point, it states:

“It is impossible, without reviewing every single transaction of every single person/entity connected to Rotherham RUFC, to state categorically that no such payment was made but I consider it unlikely”

At a later point, however, it hardens its tone to conclude that there was insufficient evidence that any such payment was made, and indeed some positive evidence suggesting that no money was paid.

It appears somewhat strange that it was Rotherham which was the main focus of Mr. Arlidge’s scrutiny. Since it “takes two to tango”, one might have expected that the Premiership sides accused of making the payments had not been investigated too rigorously. Certainly Rotherham were the only entity involved in this affair to give the inquiry full co-operation, with Mike Yarlett, the club’s owner, opening the books not only of the club, but also of his family and Yorkshire Windows company, going back as far as three years.

The inquiry did investigate the manner in which the controversy arose. The allegations made by Worcester owner Cecil Duckworth, referred to above, stemmed mainly from a series of telephone conversations with Northampton owner Keith Barwell in December 2002. Mr Arlidge was unable to achieve clarification on several points, largely because Mr. Barwell refused to be interviewed, much to the QC’s exasperation. (Mr. Barwell wrote to Arlidge explaining that he was bound by a policy decision by Premier Rugby not to co-operate, which also aroused the chairman’s ire – and seemed to confirm the allegation referred to above.) However, Arlidge did record that, in the course of these telephone conversations, Barwell had on more than one occasion said that he had “nipped the proposal in the bud” and that no cash had been paid to anyone.

Although the inquiry concluded that no improper financial dealings took place, it had some critical words to say about the RFU, in that he opined that it had not exercised as much control as may have been desirable over payments – including the parachute payment of £720,000 to which Rotherham were entitled to compensate for their failure to make it to the Premiership. He also criticised Rotherham for their paperwork.”

Any illusion that this would lay the matter to rest once and for all were quickly shattered when the RFU’s new disciplinary officer, Jeff Blackett, published a statement relating to the Arlidge Report which was published on the RFU website. It said:

“There is prima facie evidence that some members of the Board of PRL (Premier Rugby Limited) did discuss the possibility of making payments additional to the parachute payments to Rotherham to induce the club to fail to meet entry criteria for promotion having won National Division One. Mr. Tom Walkinshaw (the Gloucester owner) and Mr. Charles Jillings (the owner of Harlequins), successive chairmen of PRL, encouraged and allowed these discussions, although there is no clear evidence that the discussions developed into serious proposals to pay the money (...) There is a prima facie case against both chairman of PRL for considering action that they have breached Zurich Premiership regulations and thereby prejudice the interests of the RFU and the Game”.

However, it appears that Commodore Blackett had confused the owners of Premiership clubs with the Board of PRL. Accordingly, PRL called upon the RFU to make a statement clarifying the position. It is not known at the time of writing whether any such statement was made. What is known, however, is that the five most prominent individuals in the entire affair (Jillings, Walkinshaw, Duckworth, Barwell and Yarlett) all received written warnings for certain aspects of their conduct.

Another controversial consequence of the affair was the fact that the RFU required PRL to pay £90,000 towards the cost of the inquiry. The Premiership clubs had yet to meet to discuss this aspect at the time of writing, but the PRL Chief Executive, Howard Thomas, was incandescent about it, pointing out that the organisation had been found not guilty of a very serious charge, and that the person who started it all, Cecil Duckworth, had only been required to contribute £10,000. He likened it to being taken to court for speeding, being found not guilty and ordered to contribute towards the cost of the hearing. (Perhaps someone should point out to Mr. Thomas that it is in fact possible in a court of law to have the action awarded in your favour and yet to be required to pay at least part of the court costs).

Football transfer corruption cases

The Rio Ferdinand/Hauge/Ridsdale affair

Most football enthusiasts, even those who are not particularly interested in the legal mechanics of the sport, will at some stage or other have come across the name Rune Hauge. Mr. Hauge is a Norwegian football agent who in 1995 was banned by world governing body FIFA for paying “bungs” to the former Arsenal manager George Graham. It would therefore seem advisable to give any commercial dealings with this rather shady personality the widest of berths,
particularly if you hold a position of some responsibility within a football club. However, some figures in the game find it hard to learn the lessons of history, judging by the events detailed in this section.

Thus in February 2003, it emerged that Leeds United chairman Peter Ridsdale agreed to pay £1.75 million to the disgraced agent after clinching the transfer of England defender Rio Ferdinand from West Ham United to Leeds three years ago. Originally, Hauge had requested five per cent commission on the deal, but Leeds subsequently agreed to pay an extremely generous figure of nearly 10 per cent of the fee, which at £18 million was a British record. It also appeared that Ridsdale had agreed to pay not only Hauge, but also a maximum of £1 million to Ferdinand’s agent Pini Zehavi.

Mr. Ridsdale claimed to have done nothing irregular, alleging that he was unaware of the amounts which both agents would charge until the deal was close to completion. However, the revelations in question, made in a leading daily newspaper, cannot have been to the liking of most Leeds fans, already in a state of apoplexy over the sale of star players such as Ferdinand (subsequently sold to Manchester United), Robbie Fowler (Manchester City) and Jonathan Woodgate (Newcastle). It also not unnaturally attracted the interest of the Elland Road shareholders, and of the club’s directors who, under Deputy Chairman Allan Leighton, launched an inquiry. In the course of their investigation, they sifted through confidential documents concerning the Ferdinand transfer, and took soundings on the amounts which other clubs pay to agents.

The result of this internal inquiry spared Mr. Ridsdale the indignity of a disciplinary hearing and a possible vote of no-confidence on the part of his fellow directors, since it cleared him of anything more than naivety. It concluded that there was “no evidence” of any financial impropriety or lack of financial controls in the manner in which he had handled the Ferdinand transfer.

However, the Leeds board did agree to make a number of changes in its operating policy as a result of these findings. The audit was carried out by the inevitable Deloitte & Touche and law firm Addleshaw Booth & Co. Both firms cleared Leeds United of any wrongdoing in connection with the Ferdinand transfer.

However, this was far from being the end of the matter, since the affair attracted the attention of the Football Association (FA), in the shape of its compliance officer Graham Bean, responsible for investigating irregularities within English football. Mr. Bean met Ridsdale at Elland Road to discuss Hauge’s role in the Ferdinand transfer, and subsequently interviewed several other people connected with the deal.

The outcome of the investigation was not yet known at the time of writing. However, the entire affair does seem to have set the seal on Mr. Ridsdale’s association with the Yorkshire club, quitting as Chairman soon after the affair erupted. He was awarded a golden handshake of £383,000 despite having led the club into financial turmoil.

Bosko Balaban
Attention was drawn in an earlier issue to the case of the Croatian player, who had been transferred from Dinamo Zagreb to Aston Villa for £6 million, of which Dinamo claimed that they had only received £1 million. This discrepancy was reported to have aroused the interest of Mr. Bean and his colleagues. Yet for a while the agent involved, Graham Smith, was not contacted by the Unit. Smith had brought Balaban’s availability to Villa’s attention and had later received £125,000 from the club for his services.

Later, an official from the Compliance Unit did visit Mr. Smith in California, where he is currently resident, and interviewed him about the £3 million which had gone missing from the deal. Mr. Smith called the meeting “constructive and friendly” and was certain that the Unit was satisfied that he had acted appropriately throughout. No further news was available on this matter at the time of writing.

“Only transfer transparency can dispel aura of corruption” – Graham Kelly
Although considerable progress has been made in ridding the world of football transfers of the whiff of corruption, mainly thanks to the efforts of the aforementioned Graham Bean, considerable problems remain, and there are some grounds for believing that the cases detailed above are merely the tip of a very sizeable iceberg. The question of how to deal with these outstanding issues is taken up by former Football League secretary Graham Kelly, writing in a prominent national daily newspaper. On the basis of a book recently published on the subject, to wit Broken Dreams by Daily Mail reporter Tom Bower, Mr. Kelly expresses his conviction that vast sums of money are still capable of being extracted in commissions on transfers without any accountability as to their eventual destination.

Mr. Kelly recalls that the 1994 report issued by Rick Parry, then Chief Executive of the Premier League, as a result of the enquiry into the various transfer “bungs” which had resulted in Arsenal manager George Graham’s one-year ban, had recommended a wide range of measures aimed at removing corruption from football transfers, including professional and objective disciplinary procedures, penalties which are appropriate and consistently applied, and effective monitoring procedures. The report had also proposed that agents should be subject to a licensing system, that contracts
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should be drawn up with their principals registered, and that a code of conduct should be adopted leading to a much more transparent process. On the evidence presented since that report was issued, however, the author concludes that the football authorities’ resolve to do anything meaningful to staunch the flow of cash skimmed from transfers into agents’ bank accounts seems to have diminished.

He attributed this situation to the fact that, from the outset, the Premier League were determined that they, and only they, would be responsible for regulating the clubs in it. Any proposals made by the FA for a specific compliance unit was objected to by the chairman on the grounds that the bureaucracy involved would be too stifling. This had prompted Rick Parry to draw up new rules and codes. Thus every director must certify material payments to agents under the various codes, which also apply to managers, and audited confirmation is submitted to the League with each club’s annual accounts. However, Mr. Kelly considers this only to be an exercise in scratching the surface, given that the system dictates that the agents operate outside the formal framework of the game and their accounts and activities are not subject to proper scrutiny. Accordingly, the author believes that all transactions should be placed on a public register”.

**Question marks over shares owned by managers in Proactive agency**

The fraught issue of conflict of interest arose in connection with a football agency when the Danish football federation (DBU) requested world governing body FIFA to investigate allegations that certain managers, including Kevin Keegan of Manchester City, had a potential conflict by owning shares in a football agency. Both Mr. Keegan and Blackburn manager Graeme Souness have stakes of around £200,000 and £400,000 respectively in the Cheshire-based agency Proactive, which has such figures as Wayne Rooney, Andy Cole and Peter Schmeichel as its clients. The concern of the Danish football authorities was aroused when it emerged that Keegan planned to sign another Danish goalkeeper, to the English game when the Danish counterpart in examining the role of this agency in transactions should be placed on a public register

Accordingly, the author believes that all transactions should be placed on a public register”.

**Beckenbauer at the centre of financial impropriety accusations**

Franz Beckenbauer, the former Bayern and Germany midfielder, is now a prominent figure on the business side of German football. Recently, however, he has been immersed in controversy over a number of deals which have called his financial probity into question.

The first involved a secret television rights agreements which gives Bayern, of which he currently the President, an undisclosed advantage over their rivals in the Bundesliga (Federal football league) and which could cause the club to be expelled from professional football. In the course of February 2003, the business magazine Manager Magazin reported that the club signed a £60 million contract in December 1999 with a subsidiary of the Kirch media group, which has since gone into liquidation, and which had just bought television rights to the Bundesliga fixtures. Under the agreement, the Munich club undertook not to carry out a threat to break away and market the rights to their matches independently. The Kirch group agreed to pay the club the difference between the £20 million per year, which it was admitted Bayern could earn by striking out on their own, and the £10 million which they would receive as their share of the League’s central marketing system. The deal was meant to apply for six seasons”.

Understandably, Bayern’s rivals were furious at this development, and even Franz Beckenbauer himself, who is also a Vice-President of the German football federation, admitted that his club was wrong not to have disclosed the agreement. German League officials are investigating the affair, the outcome of which was not yet known at the time of writing”.

The other scandal, which is linked to the first, surfaced a few months later, when Beckenbauer, in his capacity of President of the 2006 World Cup Organising Committee, was caught up in allegations that he was involved in helping to win the staging of the World Cup for Germany by means of financial inducements. According to the influential Left-wing newspaper Süddeutsche Zeitung, the country’s narrow victory over South Africa when the members of world governing body FIFA voted on the various bids was assisted by offers of up to £200,000 each made to impervious football federations in four countries whose votes were potentially decisive. Two of the countries concerned, Malta and Thailand, voted for Germany”.

The payments were offered shortly before the crucial vote by a company linked to the Kirch media group, in return for television rights to specially arranged friendly fixtures between the countries involved and Bayern Munich, the broadcasting of which had suddenly aroused the interest of Leo Kirch, the media mogul heading the
group. Organisers of the World Cup responded by claiming that it was “normal” for Bayern’s representatives to negotiate such deals around the world, and that this had not affected the vote. Mr. Kirch is no stranger to financial controversy, having allegedly been one of the contributors to the network of secret bank accounts held by former Federal Chancellor, Helmut Kohl, through which the latter kept his iron grip on his Christian Democrat party (CDU). According to the newspaper making the accusations, Kirch had set aside £2.4 million to help Germany win the right to stage the World Cup. Payments to the four countries concerned were made through Mr. Kirch’s Swiss subsidiary CWL. Mr. Beckenbauer himself strenuously denied any wrongdoing, claiming that whoever claimed that one can win the staging of the World Cup by means of friendly matches had “no idea what he was talking about.” The outcome of this affair was not known at the time of writing.

**Former Boston manager guilty of infringing FA rules on financial impropriety**

It may be recalled from a previous issue that, when Boston United were promoted from the ranks of the Nationwide Conference to the Nationwide League, the club found itself on the receiving end of no fewer than 16 charges of financial irregularities brought by the Football Association (FA). Eventually, the club were fined and had four points deducted from the total which they would achieve in the Third Division of the Nationwide League the following season.

As a result of this affair, the then Boston manager, Steve Evans, himself faced several charges of misleading and impeding the FA inquiry. Evans had admitted to four of the accusations made against him, but denied the other four relating to contract irregularities and impeding the inquiry. In late December 2002, Evans, who in the meantime had resigned as the club’s manager, was found guilty by the FA on two of these charges, whilst former Boston chairman Pat Malkinson was found guilty on one charge of contract irregularities. The penalty imposed on him for these misdemeanours the following month was a ban from the game for 20 months and an £8,000 fine. His appeal against this sentence was dismissed in May.

**Bradford manager investigated by FA Compliance Unit**

In June 2003, the Football Association (FA) launched an investigation into allegations of malpractice by Bradford manager Nicky Law (sic). The FA’s Compliance Unit is more particularly looking into claims that Mr. Law formed close links with an agent and was putting pressure on players to sign contracts with him. A complaint had been lodged against Mr. Law by an unnamed Bradford player who was concerned about the manager’s relationship with the agent.

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

**Racing corruption scandal – an update**

Recent editions of this Journal have given an indication that all is not well in the Sport of Kings as regards financial probity – even though some of the media campaigns purporting to expose it may themselves have been less than scrupulous with the truth on this matter.

The fraught year which 2002 proved to be for the sport looked set to end in further discomfort when it was learned that the Jockey Club, the body which regulates the sport, was to investigate newspaper allegations that jockey Gavin Faulkner, a work rider for the Godolphin-backed David Loder operation, was willing to sell tips in return for cash. The News of the World Sunday newspaper had in fact reported that Faulkner was filmed requesting the sum of £250 each way on his tips which “would be backed all through the morning”. It was also alleged that Faulkner revealed that horses were being stopped in races on a daily basis, and that he offered to have his brother train a horse under another licensed trainer’s name. Mr. Faulkner’s former agent, Terry Pritchard, claimed that during his time of looking after the Irish rider’s interests, the latter never asked him to place a bet for him and that these accusations were totally out of character.

John Maxse, the Jockey Club public relations director, confirmed that the governing body would take a closer look at these claims. To date, no details of their outcome have been forthcoming.

In the early summer of this year, the authorities regulating the sport decided that prevention was probably better than cure, when it announced a crucial advance in attempts to deter criminals from corrupting racing. Once again, it was the betting exchanges rather than the traditional bookmakers who have helped to pioneer this much-needed reform. Until now, Jockey Club security chiefs have often been frustrated in their attempts to investigate suspect races because of the absence of an audit trail of bets placed on the event, and the refusal of the major bookmakers to assist. However, an important agreement between Betfair and Sporting Options, Britain’s leading person-to-person betting exchanges, and the Jockey Club will remove this obstacle and assist investigators in their attempts to catch those who have attempted to profit from a “fixed” race.

A memorandum of understanding signed by the two firms will give the Club access to betting information on races which are the subject of concern. More particularly, the Club’s security department will be able to acquire the names and addresses of individuals who have backed a
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particular horse. Any request for information will need to be approved in advance by the Club’s Security and Investigation Committee, which includes independent representation and experts in the criminal law.248

Under the new rules, trainers and stable staff will also be banned from backing their own horses on betting exchanges, even though, controversially, horse owners will not be completely prohibited from doing so. John Maxse, the Club’s spokesman, said that such a prohibition would be inappropriate in cases where the owner stands to be better off by losing than winning249. Unfortunately, Betdaq, another prominent name in the betting exchange market, has thus far declined to be associated with this initiative on the basis that privacy laws were designed “to protect the innocent, not to hide the guilty”, adding that the police and the judiciary were the appropriate channels for such action.250.

Other cases

Atletico Madrid administrators jailed
In mid-February 2003, Jesus Gil, President of Spanish football club Atletico Madrid, was sentenced to three and a half years’ imprisonment for his fraud conviction relating to the Spanish club’s stock market flotation 11 years ago. The conviction also related to the financial management of the club after 1992. Mr. Gil’s son, Miguel Angel, the Atletico General Director, received an 18 month sentence, whereas the club’s Vice-President Enrique Cerezo was given a 12-month sentence. Mr. Gil, who was also fined a total of over £10 million, was said to be planning an appeal.251.

Marseille request return of League title lost over match-fixing scandal
In late May 2003, French football club Olympique Marseille requested the French Football Federation (FFF) to return their 1993 French league title, ten years after losing it because of a match-fixing scandal. The club’s President, Christophe Bouchet, had written to the FFF requesting that the title suspension be lifted. The club’s lawyers maintain that FFF rules did not make any provision for title removal as a punishment for match-fixing.252.

Hooliganism and related issues

Football
The Sunderland riot and its aftermath
Because of the previous history of enmity on display between English and Turkish fans, any arrangement whereby these two countries are paired to play each other in the same competition on a home-and-away basis is always fraught with crowd control problems. Yet, incredibly, before the match at Sunderland’s Stadium of Light between these two nations in the context of the 2004 European Championships, the main concern of the forces of law and order was that the match could become the flashpoint of trouble between Turkish and Kurdish asylum seekers, in view of the war in Iraq which was raging at the time, and the related issue of the fate awaiting the Kurds occupying the northern part of that country.253. Any thought that the English supporters may be up to no good was presumably relegated to second place.

It must be said, however, that as the match drew nearer, the Northumbria police were increasingly preparing for a confrontation with hooligans, regardless of their provenance. All police leave was cancelled for the fixture, and some 700 officers were in attendance, both in the city centre and at the ground.254. Unfortunately, this proved insufficient to prevent trouble from breaking out, either inside the ground or in the area surrounding it.

Before the match started, a group of around 25 Newcastle and Sunderland supporters had to be arrested in the city centre in a bid to prevent trouble. A further 25, believed to be followers of Leeds United, were arrested later in the day after a press photographer was assaulted. Hundreds of supporters clashed with riot police on the approaches to the stadium just before kick-off. Police also clashed with England fans as they attempted to attack coaches carrying Turkish fans to the ground. Ultimately, three people were injured and 95 people arrested during the violent clashes.255. The fighting near the stadium appeared to be inspired by English hooligans’ frustration at being unable to find any Turkish supporters to fight.256. Not one of the 5,000 Turkish supporters present at the ground was arrested.

Matters also went wrong inside the ground. Fans invaded the pitch on the occasion of the two England goals. The England players, in their infinite wisdom, chose to ignore police briefings not to stage any inflammatory goal celebrations.257. Absurdly, England captain David Beckham attempted to put the blame on “provocation” on the part of the visiting team, in the shape of the team’s kitman making a throat-slitting gesture.258. There was ample evidence of racist chanting from England fans, much of linked to the war in Iraq.259.

The clear hatred between the two sets of supporters increased the pressure on the FA to refuse their ticket allocation for the return fixture in Turkey in October.260. This was a particularly urgent plea since the fixture in question was scheduled to be played in the Ali Sami Yen stadium, known as the “hell” to visiting fans and teams alike. The antipathy between the two countries’ footballing followers had also been stoked up by incidents such as the murder of two Leeds
supporters in Istanbul and the violence which occurred between Arsenal and Galatasaray supporters on the occasion of the UEFA Cup Final in Copenhagen in 2000. Ultimately, the FA bowed to the inevitable and declined to take up its ticket allocation for that fixture. This aroused the ire of the Football Supporters’ Federation, who accused the governing body of having ignored representations made to them by fans. Its director of international affairs, Kevin Miles, made the pertinent point that this decision could in fact make the situation in Istanbul even more dangerous, since determined fans would make their way there anyway, without the benefit of the various control mechanisms of which the Federation was an integral part.

Figures released the next day confirmed the involvement of Leeds supporters in the disturbances. Of the 105 people arrested in all, 50 were from Yorkshire, 29 of them from Leeds. A further 15 were from the Sunderland area, and thought to be members of the Seaburn Casuals and the Newcastle Gremlins “firms”. Police suggested that the hooligans from different clubs had also regarded the match as an opportunity to fight amongst themselves. A Home office spokeswoman later said that it would be seeking banning orders against any of the supporters who were convicted of public order offences.

Inevitably, the entire affair also prompted action by the European governing body UEFA, who were bound to investigate the entire matter and take appropriate measures. There were plenty of calls from all sides that England should be forced to play at least one subsequent game behind closed doors, many of them emanating from inside this country. Thus a leading anti-racism campaigner, Piara Powar, being the national co-ordinator of the Kick It Out anti-racism campaign group, called upon UEFA to apply such a penalty. He argued that such a measure would be beneficial in the long term by compelling the decent fans to challenge the individuals who bring racism to the football grounds. Even the England captain himself backed such a ban if it helped putting an end to the trouble.

Ultimately, the penalty inflicted by UEFA proved little more than the proverbial light impact on the back of the hand, by imposing a £75,000 fine on the FA for the sustained malevolence on display that dreadful April night. True, UEFA insisted that this was a final warning and that any future infringements would probably be met with a ground closure, or even England’s expulsion from the 2004 tournament. However, many pointed out that this was also the tone of the UEFA response to the disturbances which marred the 2000 European Championships in Belgium, which failed to deter the hooligans who went on to cause mayhem in Bratislava for the match against Slovakia, and now again in Sunderland. Many commentators accordingly treated the UEFA decision with downright derision.

Desperate to take the initiative in attempting to prevent any further trouble, the FA announced that it was to consider using high-profile players such as David Beckham to urge better behaviour on the part of the England fans. It also made arrangements to erect what it hoped would be an impenetrable barrier of police and stewards for the next home game for the national team, against Slovakia at the Riverside Stadium, Middlesbrough (which ultimately passed without much trouble). However, in a further development, it was learned just before this issue went to press that the all-important Turkey v England game in Istanbul may itself be played behind closed doors as part of the disciplinary measures taken against Turkey following the trouble which marred Macedonia’s visit to the stadium in early June.

England fans clash with Swiss counterparts before Liechtenstein fixture

Liechtenstein is not the world’s most glamorous footballing nation, and its inhabitants and police force are as accustomed to football hooliganism as the North Pole is to heatwaves. It was therefore with some understandable trepidation that the good burghers of that tiniest of European nations faced up to the prospect of a home international with England. The authorities considered various options, particularly after it was learned that many England supporters and ticket touts had bought a significant number of tickets for the match in the Rheinpark stadium in the capital Vaduz. The Liechtenstein police force, which only numbers 70, was augmented by hundreds of reinforcements from neighbouring Switzerland and Austria. Border controls would be operated, but since they would only affect those with criminal convictions, these would not necessarily prevent ticketless fans from gaining access to the country. Police spotters would also be present in Zurich and Vaduz to spot and weed out potential troublemakers.

The very existence of the match was threatened at one point, amid growing fears about the adequacy of safety and security measures to be applied for the game. This had prompted UEFA, with a week to go before the scheduled date, to give the Liechtenstein football federation 24 hours in which to demonstrate their adequacy. In the event, the concerns by the European governing body were allayed, and the fixture could go ahead.

The match itself passed without any serious crowd control problems. However, before the game there was trouble in Zürich, Switzerland, where travelling fans alighted from flights en route to Liechtenstein. Five
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England fans were seriously injured, with three having been shot, in violent clashes during the early hours of the morning preceding the fixture. About 100 English supporters, most of them ticketless, fought running battles with riot police and youths in the cobbled streets of Zürich’s old town, and police was compelled to use CS gas and rubber bullets to disperse large groups of drunken England fans. Disturbingly, British plainclothes police “spotters” working with their Swiss colleagues reported that they were facing a new generation of previously unknown English hooligans. Much of the violence appeared to be racially motivated, with England supporters targeting people of Turkish appearance and chanting “Die, Turkey, die.”

Chelsea let off lightly following Henry missile attack

It is an unfortunate fact that some followers of Premiership side Chelsea seem to specialise in throwing missiles at members of the opposing team. It will be recalled from a previous issue that, in the course of 2002, a plastic bottle narrowly missed Les Ferdinand at the Chelsea ground during a Worthington Cup tie. These unfortunate members of the human species were at it again as the race for the title intensified towards the end of March 2003, when Arsenal’s star attacker Thierry Henry was struck by a missile and sustained a cut above the eye. The object in question was one of two lighters thrown from the stands at Stamford Bridge, and was particularly galling for Chairman Ken Bates, who had made a point, in his programme notes, of making an apology to Mr. Henry for the objects hurled at him ten nights previously at Highbury by some of his club’s followers. On that occasion, using CCTV, the Chelsea authorities succeeded in identifying the supporter in question and cancelled all five of his season tickets at the Bridge.

Others named in the Highbury disturbances also had their season tickets of membership cards cancelled. The inevitable FA inquiry followed, but Chelsea was not penalised as a result. However, the club was warned that it was likely to face a misconduct charge if its fans threw any further missiles at players. The FA stated that it took into account the banning of the supporters involved.

Immature escapades at Old Trafford penalised

Although they are less of a public nuisance than some of their more violent colleagues, some of the followers of Manchester United have caused a good deal of bother because of their immature escapades. Thus earlier this year, James Allison and Louis Lamb attempted to fulfil a bet that they would be able to score at Old Trafford – which they did by smuggling a ball onto the pitch at half-time during a match against Blackburn Rovers and put the ball in the net. For this, they were each fined £60 and given a 12-month conditional discharge by Trafford magistrates.

Then Manchester’s most notorious attention-seeker, Karl Power – whose stunts have been recorded in earlier editions of this organ – was banned for life from the club’s premises after perpetrating his most elaborate stunt to date. Together with nine associates, Power deluded Old Trafford staff into believing that they were part of an official pre-match sponsorship group prior to the crucial Premiership tie with Liverpool. The group lined up for a photograph on the pitch before making their way to the Scoreboard End of the ground where they re-enacted United striker Diego Forlan’s opening goal in the previous fixture with Liverpool at Anfield. The group then ran towards the Liverpool fans, incensing them with their celebrations. Greater Manchester Police arrested all ten members of the group for encroachment. They were also banned from Old Trafford for life.

Disturbing evidence of Real Madrid protecting hooligans

Every football club which has been beset by hooligan problems has, at least officially, invariably condemned in the most absolute terms the activities of this violent minority. However, there have been suspicions that some clubs actually connive at hooliganism by protecting them and even providing them with facilities at their home grounds. This accusation has been made against, amongst others, several top Spanish clubs, and a recent report by a particularly brave investigative reporter seems to bear this out.

The reporter in question made his revelations to the Spanish correspondent of The Guardian in March 2003. The reporter in question had felt himself compelled to change his appearance so that the Ultrasur, a group of particularly nasty-minded Real Madrid supporters, could not track him down and fulfil their promise of killing him. The reporter had spent the previous year infiltrating the most violent section of the group. He then emerged to accuse the self-proclaimed “greatest club in the world” of harbouring and, in effect, encouraging neo-Nazi, racist violence. He claims to have uncovered just how close, despite strenuous club denials, are the links which bind the hooligans and officials in a club which numbers amongst its players stars of the calibre of Figo, Ronaldo and Zidane, and enjoys sponsorship deals with reputable firms such as Adidas and Siemens.

In support of his claims, he reveals that as one enters through Gate 42 at the club’s Santiago Bernabéu stadium, turns right at the first corridor, one is confronted by a grey metal door, which is allegedly the
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gateway to what the unidentified correspondent referred to as Ultrasur’s “private office”. This is where the group apparently keeps its pamphlets, drums, megaphones and flags bearing General Franco’s shield or other neo-Nazi symbols. He had made his first contact with the gang at a bar beside the stadium where the hard core gathers after matches to organise caceras, or hunts, of blacks, prostitutes, tramps, gays and supporters of other clubs. Its leaders have been issued with free passes to the club and have long police records. After the book written by the journalist in question about their nefarious activities, they have added his profession to their list of sworn enemies.

However, the journalist warned The Guardian’s correspondent not to believe that Real were the only club to protect and aid the extreme hooligans.

Football clubs “face higher policing costs”, according to Sports Minister

The nation’s football clubs face the prospect of larger policing bills – and therefore fans that of higher ticket prices – because of the cost of dealing with hooliganism, according to Sports Minister Richard Caborn. Speaking to Supporters Direct, a football fans’ organisation, he stated that there was one officer on duty for every 48 spectators at the ill-fated match between England and Turkey in Sunderland (see above). The Minister’s statement reflects the concern felt in Whitehall and by many Chief Constables that clubs are not paying the costs of policing town centres on match days, where violence often arises³⁹.

Mr. Caborn added that unless hooliganism ended, the momentum towards charging football clubs for policing outside the grounds would become unstoppable³⁹.

France tackles hooliganism “the British way”

Until relatively recently, French football has remained free from some of the excesses which hooliganism has perpetrated in countries such as Britain and the Netherlands. However, recently there appears to have occurred a regrettable change in this area, particularly on the occasion of fixtures between arch-rivals Olympique Marseille (OM) and Paris Saint-German (PSG), which have often degenerated into running battles between rival fans outside the home grounds of the clubs in question. In addition, PSG fans, who include many skinheads and right-wing extremists, are notorious for their racist attacks. For the fixture held in Paris this year (January), 2,000 baton-wielding policemen and 400 PSG security staff had to be deployed inside and outside the Parc des Princes. The area around the stadium had to be sealed off several hours before kick-off, and cafes and restaurants were banned from selling alcohol. All spectators were body-searched. Two PSG fans were arrested and dozens of knives and pickaxe shafts confiscated³⁹.

All this has naturally caused a good deal of concern amongst the public authorities, who have sought to take appropriate measures to combat this problem. More particularly the Minister of the Interior, Nicolas Sarkozy, who is well-known for his uncompromising stance on law and order issues, has taken the matter seriously by organising a number of meetings with the country’s football authorities and club officials. It was decided to adopt the methods already pioneered in Britain for this purpose. This has resulted in legislation recently passed by the French Parliament which includes two-year prison sentences and fines capable of reaching €30,000 for repeat offenders. This follows other British-inspired measures such as all-seater stadia, a ban on the sale of alcohol at matches and special training for club stewards³⁹.

Violence marks Birmingham derbies

Midlands derbies have always been volatile occasions, but have seldom degenerated into violence. This past year, however, has been a sad exception to this rule. As a result of the pitch invasion which marred the local derby between Aston Villa and Birmingham City at St Andrews in September 2002, the latter were fined £25,000 by the Football Association (FA). (Aston Villa, for their part, suffered neither charge nor fine at the hands of the FA for the events of that day³⁹.)

The return fixture at Villa Park in early March was also marked by crowd trouble, and 40 people were arrested. The tone for this violence was set on the field with an ugly incident between Dion Dublin and Robbie Savage³⁹, which will also be discussed in the next section (below, p.37).

There is an interesting footnote to this affair. When, as a result of the September fracas, Charlton Athletic urged their supporters to exercise “extreme caution” when visiting St. Andrews, the City managing director, Karren Brady, flew into an incandescent rage, pointing out that her club were 42nd out of 92 professional clubs in a Home Office report on the table of arrests at football grounds³⁹. Quite what this statistic was supposed to prove is unclear to the present writer.

Disabled fan banned following crutch incident

Ian Nash, a disabled football fan, was banned in May 2003 from attending any matches for three years after hurling one of his crutches at Nicolas Anelka, the Manchester City striker. He used the crutch as a javelin when Anelka scored a hat-trick against Everton in August 2002. Manchester magistrates also fined him £250³⁹.
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Other cases – United Kingdom (all months quoted refer to 2003, unless stated otherwise)

London. In January, Raymond Everest, 56, of Sydenham, acquired the dubious distinction of becoming Britain’s oldest convicted hooligan when he was sentenced to five years’ imprisonment for attacking a police horse during the riot at Millwall FC in May 2002287. He had been found guilty of rioting by a jury the previous month.

Bristol/Weston-super-Mare. Violence erupted amongst supporters during the run-up to the Division One play-off between Sheffield United and Wolverhampton Wanderers in May which was held at Cardiff’s Millenium Stadium. Avon and Somerset police reported that around 100 fans caused several disturbances in Weston-super-Mare and Bristol, and a number of arrests were made.

Cardiff. The name Neil McNamara has featured before in these columns, namely when it was discovered that as a convicted Category C hooligan, he was nevertheless in the employment of Sam Hamnam, the Cardiff City owner. Having presumably learned nothing from his experiences, Mr. McNamara was once again in trouble with the law in May, when he was arrested for allegedly setting off the fire alarm in a rival team’s hotel at 3.00am during the night which preceded a promotion play-off match. He was allegedly caught on closed-circuit television at the Celtic Manor Hotel where Queen’s Park Rangers were staying before the fixture, which was to determine the team to be promoted to the Nationwide League First Division. He is believed to have booked into the hotel under a false name, but was quickly identified by police as the suspect.

Bournemouth. When Bournemouth AFC claimed their place in the play-off finals of the Third Division of the Nationwide League in a home game against Bury FC, the celebrations were marred by a pitch invasion which was far from benign, with one supporter even claiming that he had been punched by a player. Concern was expressed at the ease with which some home supporters were allowed to taunt visiting supporters and opposing team members. At the time of writing, no official action had yet been taken over this incident.

Tranmere. In late April, Tranmere Rovers’ match against Mansfield Town in Division Two of the Nationwide League had to be abandoned at half time because of a fan who had climbed onto the roof of a stand and refused to come down. Eventually, the police, who took the decision to empty the ground, ventured onto the roof and, with the help of the local fire service, escorted him to safety. The spectator’s allegiance was not known.

London. At the time of writing, London club Queen’s Park rangers were facing severe penalties from the Football Association (FA) following a pitch invasion and coin-throwing incident during a match against Crewe. The referee included both incidents in his match report.

Other cases abroad (all months quoted refer to 2003, unless stated otherwise)

Turin (Italy). In mid-February, the Serie A (First Division) match between AC Torino and AC Milan was abandoned after continuous clashes between rival fans and the police, who used tear gas sprays. Several players were affected by the gas, which caused the cancellation. Torino were later banned from playing at home for five matches, and the points for the match were awarded to Milan.

Milan (Italy). In March, two football fans were arrested and 16 others charged and released after a day of violence marred the game between arch-rivals AC Milan and Juventus. The disturbances in question, which took place both before and after the match at San Siro, left 22 police officers and some fans slightly injured. The two arrested were later charged with violence, resisting police and causing damage, and were later released pending trial. One of those involved was at the stadium despite serving a one-year ban from sports grounds on the basis of previous offences.

Turin (Italy). Before the Champions League match between Juventus and Manchester United, two supporters of the latter team were stabbed and 39 arrested. The unnamed pair had been hit on the head and in the stomach with broken bottles by a gang of Moroccans. The 39 arrested were detained for wrecking a tram.

Barcelona (Spain). After seeing their team lose 4-2 to Valencia at home in January, hooligan “fans” of the club rioted, storming the directors’ box in the process. This follows another incident in a game against Real Madrid the previous months, during which the Real players were pelted with objects ranging from a pig’s head to whisky bottles.

Posusje (Bosnia). In late February, crowd trouble initiated by visiting Sarajevo fans compelled match officials to abandon the match against Posusje. This is the latest in a series of violent incidents involving fans which has caused the Bosnian Football Association to ban two teams from using their stadia.
Istanbul (Turkey). As has been mentioned earlier (p.31) the international between Turkey and Macedonia in mid-June was marred by crowd violence. As the visitors took the lead, a shower of coins and bottles emanated from the crowd. Fans also lighted flares.

Cricket
"Barmy Army" becomes an increasing problem
The band of mindless representatives of the baseball-capped loutocracy who have recently attached themselves to the England cricket team, and masquerade as “supporters” under the appropriate name of “Barmy Army”, appear to become an increasing problem. Not content with spoiling the civilised atmosphere which has hitherto been a characteristic of cricket grounds everywhere, they are well on their way towards transforming these into glorified football grounds (without the humour).

A recent example of their malevolent effect came during the recent tour of Australia where, vexed at the lacing which the team they allegedly support was receiving from the all-conquering home side, they decided to direct racist taunts against them, holding aloft posters bearing the word “convicts”, and subjected bowler Brett Lee to a hail of abuse referring to his bowling action which has been investigated by the cricket authorities a few years ago. This has caused some players finally to speak out against their drink-fuelled excesses. Justin Langer described the feelings of many true cricket supporters where he described them in the following terms:

“I though they were a disgrace. These people stand behind a fence drinking beer with most of them 50 kilos overweight making ridiculous comments. It’s easy for someone to say that from behind a fence. They’re within their rights because they’ve paid their money, but there’s still some integrity in life, I think.”

His comments were naturally pooh-poohed by the British press, who mostly resorted to that most tried and tested of put-downs – a lack of sense of humour. The present writer, however, considers that the cricketing authorities are in danger of making exactly the same mistake as did the footballing authorities thirty years ago when they, too, trivialised the growing problem of hooliganism by dismissing it as a mere “boys will be boys” phenomenon.

Boxing
Riot breaks out after Audley Harrison contest
Boxing is also a sport which has increasingly been beset with the problem of unruly spectators. The ugly spectre of hooliganism besmirched the sport again on the occasion of a contest between Audley Harrison and Mathew Ellis at York Hall, Bethnal Green. No sooner had Harrison completed an easy second-round win against his opponent, than a riot erupted at the ringside, which revolved around the former World Boxing Organisation champion Herbie Hide.

Mr. Hide has been involved in a long-standing feud with Mr. Harrison, which started during the build-up to Harrison’s medal-winning performance at the Sydney Olympics of 2000. On the night of the fight described in this section, he was part of the BBC commentary team. He is said to have been involved in an incident with a woman after Harrison had made provocative comments about his next opponent. This incident sparked off a stampede by Harrison’s supporters and security men in which chairs were thrown and tables and barriers collapsed. Although there were no arrests, and the woman in question declined medical aid, police were continuing their investigations at the time of writing.

Some question marks also arose over the wisdom of the BBC to include Mr. Hide amongst its commentary team. In fact, Hazel Bruno-Gilbert, Harrison’s business manager, stated afterwards that she had implored the BBC not to make use of Mr. Hide, who seemed intent on exploiting the situation by goading Harrison as he won his contest. The BBC responded by emphasising that they had not actually invited Mr. Hide to be part of the team, but as he was there on the night they decided he was a “legitimate guest” at the ringside.

British Board of Control secretary Simon Block (sic) also criticised the security arrangements, which he described as inadequate.

However, there were many who pointed the finger of censure at Mr. Harrison, for the provocative tone of his comments after the fight (in the ring, that is). He was joined by former champion Frank Bruno who, like Hide, had been calling for a fight against Harrison. Seizing the microphone, the latter asked the crowd: “I just ask the public – if it’s a question between Frank Bruno and Herbie Hide, who do you think I should fight?” The question provoked the familiar chant of “Bruno, Bruno” and reserved nothing but jeers for Hide when asked for an opinion on the latter. Hide, for his part, denied that he had come to York Hall prepared for trouble, claiming that he himself had been hit on the back of the head, and his trainer had been assaulted with a chair. He pointed out that he was wearing a £3,000 Armani suit, and would not have been wearing such attire had he come to engage in a fight.

At the time of writing, no formal charges had as yet been brought as a result of this incident.
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American Football
Super Bowl final causes riot
Normally, the sport’s showcase event, the Super Bowl, is not tainted by anything that could be described as hooliganism. However, in the city of this year’s losing team, Oakland, police had to use tear gas and rubber pellets, and ultimately arrested over 65 people as fans, discontented with their team’s defeat, hurled rocks and bottles, as well as setting cars on fire.\footnote{312}

“On-Field” Crime

Atlanta Olympics bomber arrested
One of the events which caused a long shadow to fall over the 1996 Olympic Games in Atlanta (US) was the bomb which exploded in the Olympic Park, killing a woman and injuring over 100 others. The prime suspect, Eric Rudolph, was captured at the end of May 2003 in an unlikely encounter with a policeman in a small town shopping mall.\footnote{316} Mr. Rudolph is also suspected of having carried out bomb attacks on two abortion clinics and a gay nightclub. A white supremacist, he had been on the FBI’s “ten most wanted” list since May 1998, and had succeeded in eluding his pursuers in the mountains and woods of North Carolina.\footnote{311} He faces the death penalty if convicted.

Schoolboy cleared of assault for late tackle
In late March 2003, a schoolboy who broke a classmate’s leg with a late tackle during an improved lunchtime game of football was cleared of assault before the South Devon Youth Court. The boy in question, aged 17, was found not guilty of causing actual bodily harm after his solicitor questioned whether he should ever have been prosecuted. He admitted that what his client did constituted a breach of the game of football, but pointed out that he was not being tried before a disciplinary tribunal, but a criminal court.\footnote{316}

English Premiership players involved in spitting incidents
During the 2002-3 football season, a few incidents occurred in which players spat at spectators, and which attracted the attentions of the police force. During the UEFA Cup tie between Glasgow Celtic and Liverpool at Parkhead in mid-March 2003, the game was ending in a 1-1 draw when the Senegal striker El Hadji Diouf tumbled into the crowd. As he rose, several spectators appeared to lay their hands on him. Whether he misinterpreted their intentions or not, Diouf turned to spit. This incident had several repercussions. The first was the fine which Liverpool imposed on their player, which was two weeks’ wages (approximately £80,000).\footnote{313} More serious was the report which the Strathclyde Police submitted to the Procurator Fiscal, which ultimately led to an assault charge before Glasgow Sheriff Court, the outcome of which was not yet known at the time of writing. Arising from the same incident, two home fans were arrested, but later released without charge, after they tried to climb over the advertising hoardings in order to confront the African player.\footnote{314}

Mr. Diouf has in the meantime apologised to the fan at whom the spit was directed, Dominic Schiavon.\footnote{315}

Then in mid-April, it was fans of Mr. Diouf’s club who were on the receiving end when Everton and England striker Wayne Rooney was accused of spitting at Liverpool fans during the Merseyside derby at Goodison Park. It seemed at first as though Mr. Rooney may face assault charges for this incident, but this proved not to be the case. Instead, the England hopeful had a meeting with police officers at which he was given appropriate advice on this subject.\footnote{316}

Ayrton Senna case reopened
When the Williams car driven by Ayrton Senna, the three-times world champion from Brazil, crashed into a wall as he led the field in the 1994 San Marino Grand Prix, the world of motor racing lost a truly great sportsman. His death led to a manslaughter charge against various personalities directly involved in the crash, being Adrian Newey, the chief designer, Patrick Head, the Williams team’s technical director, and two officials attached to the Imola circuit where the incident took place, Federico Bendinello and Giorgio Poggi. They were acquitted, but the prosecution appealed this verdict. However, all were cleared again in 1999 by an Italian Court of Appeal.\footnote{317}

However, this was not the end of the matter. In late January 2003, the Italian Supreme Court ruled that the appeal process which followed the manslaughter trial must be reopened.\footnote{317} This column will naturally follow the proceedings which will result from this ruling very carefully. Quite apart from the freedom of the accused, at stake is also the future of Italian Grand Prix racing, which would be unlikely to survive a manslaughter verdict. The case could also have serious insurance implications.

Joe Cole and Rufus Brevett face no charges following Reebok fistscuffs
As the battle for survival in the Premiership intensified in mid-April 2002, Bolton Wanderers and West Ham United met at the Reebok Stadium in one of the deciding fixtures which would decide the issue. As the home side were leading by a single goal, tempers flared and a mass imbroglio ensued, in which West Ham’s England midfielder Joe Cole appeared to throw a punch
at Bernard Mendy, following a set-to between Rufus Brevett and Wanderers substitute Kevin Nolan. The police in attendance announced that a detailed report of the incident would be forwarded to the Football Association, and that they would await a response from the governing body and from West Ham. It seemed that any police action was heavily dependent on whatever action would be taken by the footballing authorities, since Supt. Greene, the match commander, stated:

“Once we get a response from the FA, we will decide where we are going with it. We can take action if the FA don’t”.

However, the police ultimately decided not to bring criminal charges against either Cole or Brevett, even before the FA had taken any disciplinary action. Whether this is the right type of message to send out to the nation is a matter for debate.

Dublin escapes criminal charge over Villa Park incident

Mention has already been made earlier (p.33) of the stormy Midlands derby between Aston Villa and Birmingham City, which featured an ugly incident between Villa striker Dion Dublin and City’s Robbie Savage. Dublin head-butted Savage and was sent off for this offence. The West Midlands Police subsequently refused to rule out the possibility of a prosecution against the Villa player. However, the next day it was learned that he would not be facing any police charges. The police had indicated that no charges would be brought unless a “specific complaint” was made, and Mr. Savage appeared prepared to let the matter rest.

It also emerged that rumours that a racist remark by Savage had set off the head-butting incident were false, when Mr. Dublin denied this accusation. (For the disciplinary implications of this affair, see below p.134).

Cycling trainer indicted for offences involving drugs and medication

In this case, which arose before the Cour d’appel (Court of Appeal) of Douai, the accused was a trainer attached to a team of professional cyclists, who was accused under two headings of dealing with unlawful substances.

Under the first heading, it had been established that he had been present in the hotel room of a cyclist whilst the latter was undergoing an operation intended to dilute the level of haematocrit present in the cyclist, who was about to be subjected to anti-doping checks. These operations sought to dilute the use of the banned substance EPO. Since French anti-doping legislation in question penalises the administration not only of illegal substances, but also of substances intended to dilute the use of banned substances, the trainer’s guilt was established. He had, moreover, admitted that he had in his possession the haematocrit level testing machine owned by the team, and it was proved that he was applied these tests.

Under the second heading, the accusation was dismissed by the Court. Medicinal products had been discovered, in the course of a cycling race, in the hotel room occupied by the accused. He was accordingly charged with importing prohibited substances without a licence. However, it was established that the medicinal products in question which were held by the accused were intended for the personal use of the team’s management staff, and that their quantities did not exceed the latter’s personal requirements. The products were imported from Spain, and Spanish legislation decrees that medicinal products which accompany travellers and are intended solely for their own medication are not subject to the requirements governing the exportation of special pharmaceutical products. The principle of the free movement of persons within the EU prevents the application of restrictions on the possession of medicinal products emanating from Spain, since they were introduced on French territory for the sole purpose of the personal use of patients residing in France and not in order to be resold or prescribed to other patients. Therefore, no offence had been committed by the accused under this heading.

Cyclists’ deaths cause criminal inquests

A number of unexpected and suspect deaths have recently rocked the world of cycling to its foundations, and given rise to criminal investigations.

In January, a judicial investigation for possible manslaughter was opened in Italy after a leading professional cyclist died of a heart attack. Denis Zanette, who had been a double stage-winner of the Giro d’Italia (Tour of Italy), collapsed after visiting the dentist, and the judges in question suspected a possible doping link. In fact Mr. Zanette had already been named in two of the doping inquiries already taking place in Italian cycling. He was found to have manipulated his red-blood cell count in the mountain stages of races held in the mid-1990s, probably through the banned EPO drug. He also faced drugs charges following the police raids which were held during the 2001 Giro when super-strength caffeine tablets were found on his person.

A few months later, the public prosecutor’s office (Staatsanwaltschaft) in Dresden, Germany, opened an inquiry into the second sudden death of a professional cyclist after the body of Fabrice Salanson was found by his...
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room-mate in their team hotel. The 23-year-old French rider had been about to compete in the Tour of Germany. No further details on either case were available at the time of writing.

Other cases (all months quoted refer to 2003, unless stated otherwise)

Bradford (UK). In February, a golfer was found guilty of assault after he knocked a fellow-player unconscious during a disagreement over the game’s etiquette. Dean Bradley, from Halifax, was outraged when the ball of a friend of Alan Haley landed near him. He stormed up the fairway and accused Mr. Haley’s group of failing to shout the traditional “fore”. He then hit out at the 65-year-old, who fell to the ground unconscious for a few seconds. Mr. Bradley was given an 18-month community rehabilitation order and bound over for two years. He was also ordered to pay Mr. Haley £250 and a further £150 in court costs.

Wiltshire (UK). In February, forty football referees became the first in Britain to be trained to notice signs of physical and sexual abuse of children and bullying after taking the Wiltshire Football Association’s child protection courses.

Auckland (New Zealand). The America’s Cup in sailing is not an event normally associated with criminal activity. However, this year’s contest was marred by unpleasantness which caused the forces of law and order to step in. There had already been some uneasiness between Swiss challenger Alinghi and the defending holders Team New Zealand, pitting skipper Russell Coutts and tactician Brad Butterworth against their former team, and this tension hit a low point when a police officer was knocked unconscious as a result of a tug of war. No further details were available at the tim e of writing.

Colorado (US). In early March, a British tourist was reported to be in police custody in Colorado facing possible manslaughter charges following a skiing accident in which he apparently collided with a US citizen who later died of massive head injuries. He was being held on charges of first-degree assault and reckless endangerment. No further details were available at the time of writing.

Paris (France). In May, two men were interviewed by Paris police after a lighting projector weighing 220lbs fell into the crowd at the World Table tennis Championships, injuring five spectators. Witnesses said that the projector was pushed into the crowd. No further details were available at the time of writing.

“On-Field” Crime

Duncan Ferguson once again the target of criminal fraternity

Everton and Scotland footballer Duncan Ferguson has already been in contact with the forces of law and order on several occasions: first, when, in 1995, he became the first British footballer to be jailed for an on-field incident, and next when he earned the praise of the police for tackling a burglar at his Lancashire home. In January 2003, he was once again the target of an attempted burglary, as a result of which he tackled the intruder and held him until the police arrived. However, the burglar in question made a complaint to the police...
that Mr. Ferguson assaulted him in the process, and the police investigated this claim.230 However, the following month it was the burglar who was jailed for four years at Liverpool Crown Court, which heard how Mr. Ferguson wrestled the accused, a drug addict called Carl Bishop, to the ground having punched him in the face as he found him at his Merseyside home. Mr. Bishop had initially gone on the attack using a bottle, upon which Mr. Ferguson ducked and lashed out with his fist. The Scottish international suffered damage to his knee, whereas Bishop required two days of hospital treatment.231

Woodgate once again scrutinised by the law
Another footballer who seems unable to keep out of the sights of the forces of law and order is former Leeds defender Jonathan Woodgate, who at the end of 2001 was convicted of affray in an altercation involving a student outside a Leeds nightclub.232 Since then, he has been involved in several other brushes with the law,233 a habit which he has maintained throughout the period under review. In April 2003, he was alleged to have been involved in a violent altercation with a Middlesbrough fan in a pub located in the North-East after a teenager complained to police that he had been struck on the cheekbone after speaking to the player.234

No further details were available at the time of writing.

Celtic players arrested, but not charged, after Xmas party in Gateshead
The nation’s footballers have been involved in some strange escapades in recent years, but none so bizarre as that which involved four Celtic players as a result of a Christmas party which went wrong in a North-East club of ill repute.

In mid-December 2002, three players of the club were arrested by Gateshead police after a party ended in chaos involving bikini-clad waitresses, nightclub bouncers, a newspaper photographer and allegations of theft. The three, Johan Mjallby, Bobby Petta and Joos Valgaeren, were arrested after a photographer working for the Scottish newspaper Daily Record claimed that they had stolen or damaged two cameras worth £12,000. A fourth player, Neil Lennon, was also arrested but later released without charge.235

It appears that the Celtic team and their entourage had travelled to Newcastle for a night out organised by the players themselves, and had started on a pub crawl after checking into their hotel. Their route took in a number of bars in a popular drinking area in Gateshead before the party headed for the nightclub in question. Witnesses reported that a number of players had been ejected from the club by bouncers, and that an incident developed outside its premises. Punches were thrown and a good deal of pushing and shoving ensued. The players then spotted a photographer taking pictures of the incident and chased him, cornered him and removed his cameras from him. They then allegedly threw the cameras to the ground and the memory card into the river Tyne.236

Three months later, it was learned that the three players involved would not face any charges arising from the incident.237

Following this announcement, Celtic took the unprecedented step of writing to the Daily Record’s headquarters, detailing a long catalogue of grievances against the newspaper. It claimed, amongst other things, that the Newcastle incident was a set-up, with the Record, having heard of the planned night out, making sure that a photographer was on hand to record the scene, and even lined up some attractive young women to make sure the players lost their inhibitions. Legal action against the newspaper over this incident has not been ruled out.238

Beckham kidnap case collapses amid conspiracy theories
Even more bizarre than the episode described in the previous section was the dénouement of the saga which concerned a plan to kidnap Victoria Beckham, the wife of the England football captain. It will be recalled from a previous issue that, in November 2002, a plot to kidnap Victoria Beckham and to demand £5 million by way of ransom had allegedly been foiled by the police, and that five people, all from Central Europe, had been subsequently arrested. They were subsequently charged with conspiracy to kidnap in mid-February 2003.239

Four months later, the case collapsed in ignominy after the prosecution conceded that the plan was a “put-up job” by a newspaper informant. It emerged that the four Romanians and Albanian Kosovar in question had been charged after the News of the World tipped off Scotland Yard about the alleged plot and published photographs of their arrest by the Flying Squad in November. The Crown Prosecution Service (CPS) offered no evidence at Middlesex Guildhall Crown Court after admitting that the key informant, a convicted criminal, had been paid £10,000 for helping the newspaper and could have earned £50,000 for the kidnap story.240 It appears that the informant in question, a Kosovan car park attendant, had infiltrated a criminal gang and approached the News of the World with a story about an alleged plot to steal a turban from Sotheby’s. When the investigations editor of the paper informed him that they were not interested, the Kosovan, Florim Gashi, disclosed the alleged Beckham abduction plot.241

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The trial judge, Simon Smith, immediately referred the matter to the Attorney General, expressing concern that payments to witnesses in celebrity cases were having a detrimental effect on criminal proceedings. Hard questions are also being asked about the behaviour of the newspaper in question, since the judge had made clear in court that the tabloid had precipitated the collapse of the case by making the £10,000 payment. The newspaper therefore faces further investigations into its role in the entire affair, although the present author is not retaining his breath about the possibility of the News of the World being prosecuted.

Sporting figures involved in motoring offences (all months quoted refer to 2003, unless stated otherwise)

Rio Ferdinand. In March, the Manchester United and England defender was banned from driving for six months by Leeds magistrates and fined £2,500 for speeding. He was also ordered to pay costs of £3,000.

Carl Lewis. In April, the nine-times Olympic gold medallist sprinter was arrested for drink-driving after crashing his sports car. Friends of the athlete claim that this was caused by being named the previous week as one of over 100 US athletes whose positive drug tests had been covered up. (See also below, p.127.)

André Nel. The South African fast bowler was withdrawn from South Africa’s A tour of Australia after having been arrested for drink-driving in Tasmania in April.

Lee Briers. The Warrington captain (Rugby League) pleaded guilty to a drink-driving offence in March and was banned from driving for 18 months.

Eirik Bakke. In May, the Leeds United footballer and Norwegian international was banned from driving for two years after having been caught more than twice over the drink-drive limit.

Juan Pablo Montoya. In May, the Colombian Formula 1 driver had his driving licence suspended and fined €1,000 after having been caught speeding at 128 mph. A court in Toulouse, France, heard that traffic police stopped the BMW Williams driver between the French towns of Frejus and Le Muy.

Other cases (all months quoted refer to 2003, unless stated otherwise)

Glasgow (UK). In May, the Celtic midfielder and Northern Ireland international Neil Lennon was attacked in the street by men who hurled sectarian abuse. The incident occurred after Lennon and a lady friend got into his car. As he drove off, the men chased his car, then kicked it as the couple stopped at traffic lights and attacked him when the player confronted them. It will be recalled from a previous issue of this journal that Mr. Lennon had quit international football after receiving a sectarian death threat.

Cheshire (UK). In April, thieves broke into the home of England football legend Sir Bobby Charlton whilst the latter was attending the crucial fixture between Arsenal and Manchester United in the Premiership title race. They stole several items of football memorabilia (but not his 1966 World Cup medal, which is held in the Manchester United museum).

Ipswich (UK). Approximately a month before the incident described under the previous item, another former England player revealed that he had precious memorabilia stolen by intruders. Sir Bobby Robson, currently the Newcastle United manager, made an emotional appeal for the return of the England caps which enabled him to represent his country with such distinction in the 1950s. The theft in question took place a year earlier, but Sir Bobby only revealed the crime recently in a desperate bid to recover his property.

Durban (South Africa). In February, it transpired that cricketer Chris Cairns, the New Zealand all rounder, was assaulted outside a nightclub in Durban. The player had been asked to leave by bar staff after loud behaviour by several members of the New Zealand team had been reported.

Birmingham (UK). In March, West Midlands police were alerted by English Premiership club Birmingham City to investigate a series of death threats made against their player Robbie Savage on his fans’ website. The threats were taken seriously after the fractious local derby match against Aston Villa, to which reference has already been made earlier (see above, p.37).

London (UK). In May, former West Indies and Kent bowler Eldine Baptiste was released by police after having been falsely accused of smuggling cocaine-filled golf balls into Britain. He was held in Wandsworth Prison for three days whilst the charges were being investigated. Mr. Baptiste has threatened legal action against Customs and Excise, who apologised for the inconvenience caused to the former cricketer.

Rome (Italy). In January, retired Olympic skating champion Alberto Tomba, on his way to the Seychelles, was charged by Italian police at Rome Airport after
allegedly attempting to alter his expired passport.  

**Cheshire (UK).** In June, Manchester United and England midfielder Nicky Butt was arrested by Cheshire police over allegations that he assaulted a woman in a nightclub. It is claimed that he lashed out at Mr. Tony Bolland and his wife at a Cheshire club in Hale. Mrs. Bolland was later treated in hospital. He was later released on police bail. No further details are available at the time of writing.

**Cardiff (UK).** In March, Craig Bellamy, Newcastle United’s volatile Welsh international footballer, was questioned by police investigating an alleged incident of racism outside a Cardiff nightclub in the early hours of the morning. The police subsequently submitted a file to the Crown Prosecution Service. Whether the CPS has actually pressed charges was not known at the time of writing.

**Newcastle-upon-Tyne (UK).** In January, Stefan Schwarz, Sunderland’s Swedish international footballer, was questioned by police investigating an alleged incident of racism outside a Newcastle club. He was later arrested and charged with housebreaking after being found sleeping in the bed of the South African golfer Ernie Els on New Year’s Day. Mr. Els discovered the man as he returned home shortly before dawn.

**Kingston-upon-Hull (UK).** In January, a pensioner who stabbed a football fan to death because he was singing too loudly outside his house was jailed for three years. The court heard how John Martindale went outside and plunged an eight-inch kitchen knife into the heart of Hull City fan Keith Rea, who had been chanting at around 12 midnight. The judge explained that Mr. Martindale could not be jailed for a longer period because of his age.

**Liverpool (UK).** In April, vandals attacked the family home of Everton and England striker Wayne Rooney. They used a paintball gun to spatter the house and his parents’ car which was parked on the driveway. In all, three pellets were fired at the semi-detached council house in Croxteth, Liverpool, two hitting the upper windows and a fourth coating the family’s Ford Galaxy in green paint. Nor was this the first occasion on which the Rooney family has been singled out for this kind of attention. The vehicle was twice targeted the previous November when thugs caused £140 worth of damage by slashing its tyres. The matter was reported to the police.

**Coventry (UK).** In June, Joe Montague, a boxing coach, was killed in a gangland-style attack in Coventry. He had previously been heard having a disagreement with someone over the telephone as he was watching bouts at a Coventry arena where he was watching some of his pupils performing. Hours later he was dead, having been shot at least twice in the head after pulling up in his car outside his home. No further details were available at the time of writing.

**Nottingham (UK).** In May, a Nottingham court heard how a Manchester United supporter caused a car crash which killed a father and son whilst speeding home in a rage after watching his favoured team lose to Middlesbrough. Philip Cartwright and his 12-year-old son Robert died from the injuries which they received in the three-car pile-up. The driver, Paul Taylor, had already been spoken to by police about his behaviour before he climbed into his girlfriend’s Ford escort and leaving the match. He was still in a rage as he drove along the A623, despite pleas from his passengers, and ran into an oncoming Land Rover. The latter lost control and in turn plunged into the Audi driven by Mr. Cartwright. Mr. Taylor was jailed for six years after being found guilty of manslaughter by the Crown Court.

**Houston (US).** In May, basketball player Scotty Anderson, a receiver playing for the Detroit Lions, and his brother were stabbed in the parking area of a Houston nightclub following a scuffle with another club patron. Mr. Anderson’s brother Stevie, who was once a receiver with the New York Jets and the Arizona Cardinals, was taken to hospital critically ill. Scotty Anderson’s injuries, on the other hand, were less serious. Two men were later arrested after fleeing the scene.

**Cape Town (South Africa).** In January, a 25-year-old man was arrested and charged with housebreaking after being found sleeping in the bed of the South African golfer Ernie Els on New Year’s Day. Mr. Els discovered the man as he returned home shortly before dawn.

**Derby (UK).** In April, police swooped on the offices of Derbyshire Cricket Club and seized a considerable amount of computer equipment. A 60-year-old Derby man was later arrested in connection with computer-related crime. He was later released without charge pending further enquiries.

**Oxford (UK).** Oxford University’s preparations for this year’s Boat Race were hampered by an attack on Matt Smith, who holds the vital position of stroke in the team, outside an Oxford nightclub in late March. He missed two weeks of training after being set upon by a group of men outside the Club Latino in what appeared to be a “town and gown” attack.

**Milan (Italy).** In February, it was learned that Adriano Galliani, the vice-president of top Italian side AC Milan
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as well as President of the Italian Football League, had been called to stand trial over allegations that his club evaded tax in the course of the early 1990s. He is accused of falsifying contracts and of failing to declare earnings from image rights.

Other Issues

New guidelines on parents photographing children’s sporting achievements
In late March 2003, it was learned that parents may be required to secure written permission before they may take photographs of their children’s sporting achievements, according to new guidelines issued by the Institute of Sport and Recreational Management (ISRM). Increasing concern over child abuse and the spread of mobile phones which also serve as cameras has prompted the leisure industry watchdog to advocate stringent new rules.

In a paper issued to over 10,000 local authority-operated leisure centres in Britain, the ISRM urges a ban on cameras where partly clothed children may be photographed. Those centres which allow photographs should require people to state why they want to take the pictures and to guarantee that they will not be put to improper use. Sports clubs are also cautioned against using pictures of children on websites or in promotional literature, and it is suggested that mannequins and drawings be used instead. The guidelines warn that some sports pose more problems than others in this regard, and cite swimming, gymnastics and athletics as presenting the greatest risk of potential misuse. Some councils are already applying these restrictions.

Polo ponies being stolen for dog meat
It has recently emerged that hundreds of the world’s most valuable polo ponies are being stolen from wealthy Argentinian estates to be turned into pet food by gangs of horse thieves. The ponies in question, some of which are valued at over £60,000, are sold to slaughterhouses for as little as 600 pesos (£135) and their carcasses used as dog meat. The gangs break into the paddocks at night and lure the ponies towards them with food.

Recent victims of such thefts include Adolfo Cambiasso, who is widely regarded as the best polo player in the world, as well as small-time ranchers and pony-breeders whose livelihoods are now at risk. Earlier this year, his best pony, Colibri, was snatched from his paddocks. It was discovered two weeks later in a field amongst a group of crippled ponies destined for the abattoir. The countryside around Buenos Aires is scattered with large-scale polo ranches. However, they are located within a short distance of the slums of the Argentinian capital where poverty is rampant. The La Martina polo ranch, where players from all over the world flock to play, has been compelled to employ armed guards to patrol its paddocks by night. The smaller breeders, however, do not have this option.

Football “saved me from a life of crime”, admits England international
In late January 2003, David Thompson, the Blackburn and England midfielder, declared to the media that football saved him from falling into a cycle of crime and drug abuse. He was born on the notorious Ford estate in Birkenhead, Merseyside, before he was spotted by Liverpool FC talent scouts. He said that there many temptations to go stealing and drug-taking in his youth, but that football gave him the opportunity to shun that lifestyle.

Temporary closure for Manchester City fan pub
In February 2003, magistrates confirmed the first temporary closure order served by Greater Manchester Police, on the Athenaeum, a pub used by Manchester City fans. The pub will be closed on Saturdays.
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Media Rights Agreements

Racing data rights row continues to fester

It will be recalled from the previous issue that, although a truce had been called in the increasingly acrimonious dispute between the British Horseracing Board (BHB) and the media over the use of pre-race data, the same could not be said of relations between the BHB and on-course bookmakers. Essentially, the latter thoroughly objected to plans by the BHB to be charged for the use of pre-race data as if they were off-course firms, which would mean that, as from 1/4/2003, they would be required to pay 10 per cent of their gross profits to the Levy Board. This would replace the system under which they paid an annual charge of £132, plus £15 for each day on which they are in attendance at the course. The on-course bookmakers consider this to be grossly unfair because their businesses are very different from off-course firms, who have such areas as virtual racing (Portman Park) by way of additional income, and claimed that they had been “stitched up” by the Big Three (William Hill, Ladbrokes and Coral). They pointed out that the new rate could mean them having to pay £9,000 per annum, which would make it impossible for them to survive.

In late January, the on-course bookmakers decided to escalate their campaign against the new arrangements by means of a series of wildcat strikes. They refused to offer prices “to a man” before the first race at Wolverhampton on 27 January, whilst only one of them, representing William Hill, offered odds on the first race at Exeter that day. If the on-course representatives of Hill’s, Ladbrokes and Coral had not priced up the opening contest at Kempton Park, which was shown live on Channel Four, that race would also have run without starting prices

The BHB, still smarting from its misguided attempt to increase the data rights payable by the newspapers, immediately stressed that this latest dispute was between the bookmakers concerned and the Levy Board. However, it is undeniable that it was the BHB which proposed the new data rights system.

Two weeks later, the on-course bookies once again engaged in a “no show” strike against the new data rights when they refused to set a betting market for the opening race on the card at Plumpton. This meant that, once again, no starting prices could be returned for any runners. The choice of the Sussex racecourse was far from coincidental, since its chairman is none other than Peter Savill, who also heads the BHB. On this occasion, several bookmakers added a further twist in later races by refusing to inform reporters of “notable” best prices struck, which is a traditional adjunct to the starting prices service.

Since then, the new data rights system has come into force, but the on-course bookmakers were giving no sign of abandoning their fight. Indeed, one media commentator has raised the possibility that the new charges being levied are illegal. The commentator in question had trawled the law reports on this subject, and happened upon the case of Midland Greyhound Company v. Foley (1973). This case was initiated against the operators of Monmore dog track for levying a facility charge on certain bookmakers. The latter were being required to pay in excess of the maximum amount permitted by the Betting and Gaming Act 1963, which makes it an offence to charge on-course bookmakers more than five times the public admission charge. The Midland Co. was actually providing services such as stools, porterage and chalk for the boards. However, and crucially, it was also charging for the use of “certain copyright material”. Foley won the case before the magistrates’ court, and when the case went to appeal, it was no lesser figure than Lord Widgery, the Lord Chief Justice, who presided over the case. Dismissing the appeal, he had this to say on the subject of these “service charges”:

“...If those services, including the provision of the copyright material, are properly to be described as facilities given to the bookmaker then it seems to me the offence was committed.”

Since horse racing is covered by the 1963 Act just as much as greyhound racing, there must be at least a prima facie case for the Midland precedent to apply.

This issue may be affected by the outcome of the Office of Fair Trading investigation into the ownership of racing data – see below, p.93).

Racing Channel closes down

In mid-January 2003, the fears which had been entertained by many a racing enthusiast turned into stark reality when it was announced that the Racing Channel, a free-to-air non-terrestrial television station, was to close at the end of that month. Its demise became a certainty when it lost access to the racing action in Ireland. Horse Racing Ireland, the regulatory body, was unable to come to an agreement with the American sports broadcaster TRNL, who own the Racing Channel, following a period of free broadcasting and coverage which ceased on New Year’s Day. This was the catalyst for closure. Horse Racing Ireland had demanded a guaranteed minimum income in return for its broadcasting rights, but TRNL declined to enter a bid. Satellite Information Services (SIS), which has hitherto produced the Racing Channel’s programming, will retain the broadcasting rights to the races organised by the courses which are affiliated to the GG group. It is
expected that the Attheraces channel, which was launched in May 2002, will broadcast these once a suitable deal had been struck.  

**Rugby League limbers up for new television deal (UK)**

It is a well-known fact that Rugby League is one of the first sports to have made itself almost totally dependent on lucrative broadcasting agreements to ensure its survival as a professional sport. Any developments in this area are therefore followed with considerable interest by all those involved in the game. This has been particularly the case over the past year, since the current deal with Sky Television, concluded in 1996 and worth £45 million, expires at the end of the current season and new arrangements will need to take its place.

The next television contract is particularly important for the future of the sport since several teams in the Super League – more particularly St. Helens and Halifax – are not as financially secure as they would have anticipated in 1996, when the original Sky contract (worth £87 million) was signed, mainly because of spiralling wage costs. It was therefore unsurprising to learn, as the old year turned into the new, that the Rugby Football League (RFL) had appointed a specialist media consultant, TWI, to negotiate the two expected television deals – the one with Sky mentioned above, and that which it has with the BBC for the TXU Energi Challenge Cup.

The Super League negotiators soon let it be known that they were making a pitch for a five-year deal with Sky on roughly the same terms as the current deal. A crucial element in the amount the deal would be worth was always going to be the question whether the Super League was going to expand to include a French interest, with Sky being keen to attract viewers from across the Channel. French clubs Toulouse, Villeneuve and UTC had all submitted bids.

Talks began in April, with tremendous pressure on the RFL to seek a good deal, since Chris Caisley, the Bradford Bulls chairman, had warned that clubs may very well take matters into their own hands if an improved contract was not forthcoming, and conclude their own television deals. Talks dragged on for the next two months, much to the irritation of clubs who found themselves unable to complete agreements with their players for the next season amid uncertainty over their budgets. In mid-June, it was announced that a proposed deal was on the table which represented but a modest increase on the previous one.

The deal, as it turned out, was a more generous one than anticipated. The Super League clubs discussed the deal until the early hours of the morning of 13 June, but were ultimately unable to agree on whether to accept the new deal or not. The main areas of disagreement appeared to be the manner in which the money on offer was to be shared between the 12 clubs, with the chairmen of the larger clubs arguing that the more successful teams should be compensated for frequent television appearances with an appearance fee, as happens in football. Another area of discussion was the question of the need for more exposure on terrestrial television, particularly for the Great Britain team. As a result of this impasse, the deal was sent back to the broadcasters for “further clarification”. This suggested there could be an extended role for the BBC, which hitherto had screened only the Challenge Cup fixtures, but had expressed an interest in televising Great Britain internationals and possible also some Super League games.

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

**Manchester United to sell overseas broadcasting rights to Premiership games**

In April 2003, it was learned that leading Premiership club Manchester United were hoping to sell the overseas broadcasting rights to their Premiership games as from next year as it seeks to make the club a genuinely global brand. United are currently bound by a collectively negotiated deal on overseas rights which covers all 20 Premiership clubs. However, this deal expires in June 2004, and the club have served notice of their intention to sell its own rights to television companies overseas, as well as to mobile telephone groups which could show video clips of games and other highlights. As Chief Executive Peter Kenyon put it: “We are supporters of collective domestic selling. Manchester United is not interested in a breakaway. But we do see a trend whereby clubs will get more rights back in areas like mobile and international (sic)”.

These comments came as Manchester United reported a strong set of half-year results (contrasting sharply with the large losses and heavy debt burden announced by Leeds United the previous day – see below, p.103).

(On the various machinations relating to the possible takeover of the club significant by individual shareholders, see below, p.107.)

**London to receive £825 million in US TV rights if Olympic bid is successful**

The decision by the city of London to bid for the Olympic Games of 2012 is an issue which will be extensively examined elsewhere in this journal (see below, p.65). However, the bid has implications for
media rights, as witness the news, which emerged in early June 2003, that the city will take a £825 million share of a record US television rights deal – if it is successful. The NBC have in fact won the rights to the 2010 Winter Games and the 2012 Summer Games with a record bid of £1,375 million, representing nearly one third more than it paid for the five summer and winter Games leading up to those taking place in Beijing in 2008.

The deal proves that the Olympics continue to have the same appeal to US audiences and the media networks serving them.

The Cricket World Cup boycotts – the media rights implications

The trials and tribulations with which the 2003 Cricket World Cup had to contend are extensively documented elsewhere in this journal (see above, p.11). It was inevitable, however, that there would be financial consequences attached to these difficulties, particularly the boycotts suffered by several matches. These consequences result mainly from the breaches of the media rights agreements which covered these games.

In mid-March 2003, the test-playing countries were all informed that their income from the World Cup could be reduced by £660,000 each as a result of the relevant claims, made by Global Cricket Corporation (GCC), the Rupert Murdoch-owned company, which was responsible for the television and sponsorship rights to the tournament. The claims arose mainly from England’s failure to play Zimbabwe in Harare, and New Zealand’s refusal to compete with Kenya in Nairobi.

Another cause was the ambush marketing which took place in India, where some of the country’s leading players had contracts with companies operating in direct competition with World Cup sponsors. The latter issue had already been the subject-matter of a major disagreement between the International Cricket Council (ICC) and the Indian Board regarding their player contracts, which violated the terms of the contract which the ICC had signed with the World Cup sponsors (on this matter, see also below, p.56).

Ultimately, the claim made by GCC turned out to be £31.5 million. In anticipation of this claim, the ICC had already withheld World Cup cash from the various countries involved. In India’s case, their entire allocation was held back, since the dispute over contracts referred to earlier was still unresolved by the time the ICC came to discuss the matter in June 2003. This was much to the displeasure of Jagmohan Dalmiya, the combative President of the India Board of Control for Cricket, and there are those who fear that he may use this claim to attempt to end the GCC contract.

In his annual Report, ICC Chief Executive Malcolm Speed indicated that this claim would be disputed. He conceded that the Council would need to forfeit some cash, but was unhappy with large sections of the GCC claim. Sorting out the various legal issues involved – not to mention the battle with Dalmiya over the share which India will need to pay – is expected to take around two years, and may end with the Court of Arbitration for Sport. This column will obviously follow future developments in this saga with considerable interest.

BSkyB claims Ryder Cup for remainder of decade

In April 2003, concern arose that golf fans may be deprived of the opportunity to watch some of the sport’s leading tournaments, when leading broadcaster BSkyB revealed that it had acquired the rights to some of the major events on the golfing calendar. In fact, BSkyB have secured the rights to live coverage of the Ryder Cup in 2006 and 2008, the US Open until 2009, the Professional Golfers’ Association (PGA) Championship until 2007, the European Tour with a minimum of 34 live events each season until the end of 2008, and all four World Golf Championship events until the end of 2008.

As a result of this deal, there will be less golf shown on the BBC, which had been attempting to obtain a foothold within the sport and was hoping to win the rights to tournaments such as the Ryder Cup. Labour MP Derek Wyatt, who is himself a keen golfer and has introduced a number of Parliamentary Bills aimed at improving the management of the sport, has claimed that the deal emphasised the need for the BBC to establish its own sports channel.

Dispute over broadcasting of Wales v England friendly resolved (Rugby Union)

When the English and Welsh rugby union authorities agreed to stage a friendly international between the two arch-rivals in August at the Millennium Stadium, Cardiff, it was not anticipated that the media rights involved would give rise to anything so much as resembling a dispute. The two Unions signed a contract which allowed their broadcasters, being the BBC and S4C in Wales, and Sky in England, to broadcast the fixture simultaneously. However, the Welsh Rugby Union (WRU) then found that it had committed itself to an agreement which it could not fulfil. The BBC and S4C, whose contract with the WRU stipulates that they have first refusal on all non-World Cup fixtures staged in Wales, stated that they were not prepared to give BSkyB access to the game.

At a certain point it looked as though the match could be switched to Liverpool or Manchester. It could not be played at Twickenham, since it was staging the
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Rolling Stones concert on that day (the legal ramifications have also been aired in past issues of this journal\textsuperscript{[36]})\. However, in late May a deal was negotiated. With profits from the game to be divided equally between the two unions, the indignant WRU was anxious to have its share of the fee paid by BSkyB for a live international fixture, and therefore prevailed upon its broadcasters to relax their rigid stance\textsuperscript{[37]}\. 

Legal Issues arising from Transfer Fees

General developments on transfer rules

Nationwide League fails in attempt to abandon transfer window system

It will be recalled from the previous issue\textsuperscript{[411]} that not everyone in professional football is ecstatic about the "transfer window" system (i.e. the system whereby transfers must be restricted to certain periods). Most disaffected with the system was the Nationwide League, which claimed that it had produced a disastrous effect on the transfer market. In fact, it attempted to prevail on the Premier League to join it in abandoning the system. In June 2003, however, it emerged that the Premier League had declined to do so, in spite of the dire warnings issued by League spokespersons about the consequences\textsuperscript{[412]}\. 

Staggered payments and loan transfers approved by Premier League (UK)

In June 2003, English Premier league clubs agreed to allow transfer payments to be spread over the length of a player’s contract. This is a move which should reduce the number of foreign imports to the top flight of English football. Previously, clubs had been compelled to pay 50 per cent of transfer fees from other English sides immediately and the remainder within 12 months\textsuperscript{[413]}\. The change was agreed at the summer meeting of Premier league club chairmen, following a proposal made by Everton FC. 

The same meeting also endorsed a proposal to allow loan transfers between Premiership clubs. Loans will only be allowed within the transfer windows, up to a maximum of four per season, and clubs will only be allowed two loan signings from other Premier League sides at any one time, although allowance will be made to sign goalkeepers in emergencies\textsuperscript{[414]}\. 

Allardyce calls for agents’ pay reform

In late March 2003, Bolton Wanderers manager Sam Allardyce called for a radical reform of the transfer system which would see agents paid a flat rate for their services rather than a percentage. This, he claims, would restore public confidence in the system, which has been badly shaken by recent allegations over enormous fees paid to agents involved in Rio Ferdinand’s transfer from West Ham United to Leeds (see above, p.27). He added that his club, Bolton, applied guidelines which prevented his own agent Mark Curtis from being involved in the transfer of players whom he represented. Nor does the club retain a single agent to negotiate on his behalf. Mr. Allardyce’s intervention must be seen in the context of efforts currently being undertaken by the League Managers’ Association to introduce a code of conduct which could see managers having to declare personal financial details. It will also require managers to declare whether they are related to, or represented by, an agent with whom they are negotiating\textsuperscript{[415]}\. 

The Steve Marlet affair (continued)

For a club which only a few seasons ago was languishing in the lower reaches of the Football League and had precious little to celebrate except sepia-tinted memories of Johnny Haynes, Fulham have come a long way, gaining access to the Premiership in 2001 and maintaining a respectable profile in the top flight of English football ever since. However, its reputation has been sullied somewhat by some of its forays into the transfer market, which have raised a few eyebrows amongst the sport’s governing authorities. 

The main transfer deal to come under suspicion has been that of the player Steve Marlet from French first division club Lyon. It will be recalled from the previous issue\textsuperscript{[416]} that this deal had aroused controversy because of (a) the various conflict of interests which it threw up in view of the involvement of agents acting for both parties involved, and (b) the withholding of the final instalment on the deal by the London club after it objected to the role played in the deal by the agents concerned, Pascal and Sébastien Boisseau, based in Barcelona. The latter issue became the subject-matter of a request from world governing body FIFA to provide an explanation. Fulham, however, were unhappy at what they perceived to be an unnecessarily peremptory demand from FIFA, and its lawyers wrote to the association requesting arbitration on the issue. For several weeks, they received no reply, until in mid-January 2003 they were issued with a letter from FIFA demanding that Fulham either pay Lyon the outstanding amounts or explain why it had failed to do so. Feeling that FIFA had ignored their request completely, Fulham decided to ignored this request\textsuperscript{[417]}\. In the meantime, the Boisseau agents were claiming the £500,000 which they alleged was owed to them by Fulham over the deal. 

Having confirmed that Fulham had failed to pay the outstanding amount to Lyon as instructed, FIFA opened an inquiry into the entire deal\textsuperscript{[418]} which took place in
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Agent sues “Toon” over Acuna move

In March 2003, it emerged that English Premiership team Newcastle United were being sued by an agent claiming a six-figure payment which he alleges is due to him for arranging the transfer of Clarence Acuna to St. James’s Park. Barry Silkman, a former Manchester City and Crystal Palace player, issued a writ seeking the £100,000 which he claims the club undertook to pay him for bringing Acuna to their attention in the course of 2000.

Mr. Silkman claims that he had been requested by Newcastle to find them a suitable midfielder, and that he had brought the player over from Chile for a trial on the understanding that he would receive a £100,000 introductory fee if the transfer went through. Newcastle did in fact sign the player, but Mr. Silkman claims to have received nothing. He is seeking payment of £100,000 plus VAT. Apparently “Toon” were refusing to pay on the grounds that the agent was not involved in the deal, but Mr. Silkman claims to have documentary evidence to that effect.

This dispute had not yet been settled at the time of writing.

Manchester United and Lazio reach settlement on Stam transfer

It will be recalled form an earlier issue of this Journal that a dispute had arisen between leading Premiership club Manchester United and Italian club Lazio Rome over the transfer of Jaap Stam. More particularly United claimed that Lazio still owed them £8 million over this deal, which was concluded in August 2001. This dispute led United to start legal proceedings against Lazio, which has been experiencing considerable financial problems recently (see below, p.105). Ultimately, in December 2002, the Manchester club reached a deferred payment deal with Lazio, which will mean that the Italian football federation will pay the balance owed, with payments commencing in September 2004 and ending in April 2005. In all, United will receive £13.3 million, which includes compensation for the delay in payment.

Sports groundsman not bound by contract of employment. Swiss court decision

In a decision made in April 2002, the Court of Appeal (Obergericht) of Bern (Switzerland) was faced with the case of a groundsman working for a sporting club, who received a flat rate per playing season for his services, which were described in his contract. Once he had ceased to work in this capacity, the groundsman claimed outstanding gross salary, holiday pay and child allowance from the club. The court at first instance dismissed the action, whereupon the claimant appealed.

The Court stated that the fundamental issue in this case was whether the legal relationship between the parties was a contract of employment (Arbeitsvertrag) or a contract of service (Auftrag), which are regulated by different provisions of the relevant Swiss legislation. The Court emphasised that the legal qualification of the relationship would apply regardless of the manner in which the parties described it, as this is an area which is not subject to the parties’ freedom to contract. The decisive criterion is the entire scheme of rights and obligations laid down in the contract. For an agreement to qualify as a contract of employment, several criteria must be met, which serve to indicate whether or not the main characteristic of a contract of employment was present, i.e. that of subordination. However, there are other characteristics which need to be taken into account, such as the degree to which the person in question was economically dependent on the work being performed. Other indications that a contract of service may be apply may be the fact that the person in question provides his own tools, has the freedom to involve outside help, pays his own social security contributions, etc.

In the light of these requirements, the Court considered that the disputed agreement was a contract of service. It based this assessment on several factors. First of all, the contract merely laid down the specific tasks which the claimant had to perform and not the manner in which he was to perform them. The contract laid down a timetable for work to be carried out, but this was not dependent on the claimant’s performance, but...
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rather on the fixtures and training timetable. Within this time framework, the claimant enjoyed a large measure of freedom for the manner in which he was to perform these tasks. The only constraint under which he worked was the timetable – as to the organisation of the work and manner of its performance the claimant was entirely free. There was therefore merely a very limited degree of subordination, which was insufficient to be able to decide unambiguously whether the agreement could be qualified as a contract of employment or as a contract of service. Moreover, the claimant merely spent a relatively minor part of his working time operating under the agreement, and had plenty of working time at his disposal in order to be employed in other capacities. In fact he also worked as a cleaning contractor. The extent to which this activity provided him with an adequate income was irrelevant in this connection.

It was accepted that the contract was for an indeterminate period and did not relate to short-term assignments, and therefore from this point of view it had the characteristics of a contract of employment. On the other hand, the claimant was free in the amount of time which he could devote to the work within the constraints of the fixtures and training programme. The amount of time he spent was directly related to his duties, and by means of effective organisation it was possible for him to shorten the time for which he received the flat-rate sum.

In summary, the Court concluded that all the relevant factors attending this agreement, taken as a whole, pointed to a contract of service. The Court therefore confirmed the decision at first instance.

The Supreme Federal Court subsequently dismissed an application for the review of this decision.

Can sporting performers be lawfully tested for HIV or AIDS by sports federations?
Article in South African journal

People suffering AIDS and HIV can have a considerable impact on a working environment, and this is particularly the case for professional sport. The question has thus arisen whether sporting federations and clubs have the right to test sporting performers for these ailments. The author of the article under review examines the question from the point of their duties, as employers, to ensure that the working environment is free from hazards likely to cause death or serious harm.

Having examined the relevant legislation, case law and other legal sources applicable, which include the Code of Good Practice on HIV/AIDS, the author concludes that this practice is legally and morally justified. He reminds the reader that a safe working environment entails that the employer does not by law guarantee the safety of his employee: he is merely under a duty to take reasonable care to ensure that his safety is not endangered. This statutory duty overlaps with the implied duty under the contract of employment by which the employer is obliged to take reasonable care of his employee’s safety. In order to comply with this obligation, employers must be allowed to introduce precautionary measures to assist in the diagnosis of HIV, which includes HIV testing.

Sporting federations have a responsibility towards their athletes and should introduce regulations concerning HIV testing in order to minimise the impact of HIV and AIDS on their sporting code. The author is also of the opinion that most participants in contact sports would welcome compulsory HIV testing, given the peace of mind which this would give them from the point of view of working in a sporting arena which is free from the danger and risk of HIV transmission.

Changes in footballers’ contracts of employment in new economic climate (UK)

It will not have escaped the attentive reader that some fundamental changes are taking place in the economics of professional football in this country. The ITV Digital fiasco, extensively detailed in these columns, is just one of the developments which have clearly signalled that there are limits to the amounts of money that stand to be made from the broadcasting of professional football. In this new climate of economic realism, a number of changes are bound to be felt at all levels of the sport.

Jason Burt, writing in a leading Sunday newspaper, extensively examines the implications which this may have for footballers’ conditions of employment in the future. He estimates that about 30 professional clubs are in severe financial difficulties, to which must be added the onerous financial commitments which some clubs have entered into in the shape of new stadia and facilities. All this clearly indicates that clubs will need to reduce their operating costs if they are to survive – which means cutting down on players’ wages. The opening of the first transfer window has given them the opportunity, as a result of which many footballers will not have a club to go to as squad sizes are reduced.

As a result of this shake-out, the players’ employment conditions will change. The top stars will not feel the impact, as they may compensate any reduction in the salaries paid them by their clubs through a greater autonomy to broker their own deals on merchandising and image rights deals (this had in fact already happened in relation to David Beckham’s contract with Manchester United for the 2002-3 season). However, the less renowned players will feel the impact much more keenly. Contracts will be a good deal shorter and much more performance related on the “paid if you play” model. The general trend will be...
towards lower wages and greater risk. This will result in greater movement of players, with footballers moving between clubs more freely. Squads will have five or six key players, and this will be supplemented by around 15 who can be moved on quickly.

Such changes are in fact already occurring. At Bolton Wanderers, the wage bill is structured around the possibility of relegation from the Premiership – in which case its total would drop from £20 million to £6 million, with around 15 players being released. Indeed, the Football League want the Professional Footballers’ Association (the footballers’ trade union) to agree to the inclusion of a clause in all players’ contracts signed after the current season which would entail an automatic 50 per cent cut in wages for relegated Premiership players. This proposal has been bitterly criticised by the PFA, insisting that it was unfair and impracticable for players to be scapegoated for their clubs’ problems, and that the League was wrong to highlight only one issue within a much wider financial crisis in the game. Mick McGuire, the union’s deputy Chief Executive, claimed that it was an accumulation of mismanagement which had left clubs in the dire financial straits which they currently suffered, and that it was not right that the players should suffer the burden. However, the PFA have admitted that a degree of “incentive restructuring” may be necessary.

The facts and figures which have emerged recently indicate that these are far from exaggerated predictions inspired by the journalists’ predilection for a sensationalist headline. In early June 2003, it emerged that a record number of footballers were out of work and facing an uncertain future. The continuous financial downturn in the game had prompted cutbacks meaning that a record 586 players were made available on free transfer lists, according to figures released by the PFA. Although the Association hoped that the majority of those released would find new contracts, about one third of that number could end up on the game’s scrap heap. One particularly sad case was that of Simon Rodger, who has served League club Crystal Palace very well for 13 years. He found himself training alone last summer whilst searching for a new club, and is out of contract again this year. Once honoured as Player of the Year at Palace, Mr Rodger played almost 30 games for Brighton during the 2002-3 season, but must once again contemplate the possibility of life outside the game.

Two other disturbing recent developments are indicative of the current trend. In early May, League club Blackpool, in a throwback to the “bad old days” where players were less protected than now, introduced a new contract of employment which places some of their senior players on £90 per week during the summer. At the time of writing, six of the players on Blackpool’s staff had accepted this deal. Even more worryingly, it appears that this idea has become the talk of the Nationwide League and that some club chairmen are considering it as a means of economising during the period in which no gate money is forthcoming. The same club have also devised an even more revolutionary cost-cutting measure, which is paying appearance money and bonuses per minute to the players. Currently, the average amount paid by way of appearance money is £200, the same amount being payable as a win bonus, but where a substitute only plays for one minute he would be paid just £24.35.

The other development concerned Wimbledon, until recently a Premiership side, but which has fallen on harder times more recently. At the time of writing, news broke that it may suffer a transfer embargo for failing to pay its players in May. The “Dons” were placed in administration in June 2003 (see also below, p.102), and it was presently revealed that some of the club’s players had contacted the PFA over non-payment of their wages.

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Rugby Union recession leads to wage cuts

Football is not the only sport to be going through something of a recession recently. Although its wage levels have never reached the dizzy heights experienced until recently by the round-ball game, Rugby Union has also been beset by economic problems of late. In early January, the owners of the clubs involved in the Zürich Premiership (England) announced that there was a £15 million per year gap between income and expenditure, which needed to be overcome in some way. A few days later, the Chief Executive Officer of Premier Rugby, Howard Thomas, spelt out to the Premiership’s players the stark fact that they faced a reduction in their salaries as part of a business plan for the professional game in England covering the next four years. Already several club owners had expressed the belief that the £1.9 million player salary cap needed to be reduced, and warned that they would not be able to subsidise the game to the current degree for much longer.

Later that month, Saracens, Bristol and Gloucester asked their players to accept a cut in salary immediately in order to cover the shortfall in central funding of around £300,000 per club, which had been decided as part of the survival plan mentioned above. However, the Professional Rugby Players’ Association, the players’ union, immediately indicated that they would fight these cuts. They also accused the clubs concerned of financial mismanagement. The Association’s Chief Executive, Damian Hopley, claimed that those clubs which had spent money within their means were on course to break even within the subsequent 18 months.
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Premier Rugby then proposed a number of changes for the following season. These were approved by the clubs by a three-to-one majority. The actual salary cap would remain at £1.9 million, but clubs would no longer be able to claim allowances for players when the latter interrupt the domestic season to play for their countries. For the larger clubs, this means that they will lose the opportunity to recover up to £100,000 against the cap. Also, whereas hitherto salaries have also been partly off-set for player-coaches as well as for players who have been injured for more than eight weeks, these exemptions will no longer apply next season.

Following this decision, the Saracens’ supemno Nigel Wray, the sport’s longest club owner, warned that almost 100 players in the Premiership would lose their jobs at the end of the season and that hundreds more faced swinging pay cuts. He stated that he would not be surprised if there occurred an average reduction of between 10 and 20 per cent at all 12 clubs in the Premiership. The vast majority of those who remained would be on lower salaries. He also warned that economy measures such as those adopted by Premier Rugby were totally inadequate as he had been warning for a long time that rugby was an “uneconomic business”.

Nor were economic problems restricted to English rugby. A few days before Mr. Wray issued his dark warnings, it was learned that Swansea, the champions of Wales, had gone into temporary administration and had asked their players to take a 50 per cent cut in salaries until the end of the season. The club also asked their 34 senior players whose contracts ran into the next season and beyond voluntarily to sever these agreements without compensation. Unlike clubs such as Llanelli, Cardiff, Newport, Bridgend and Ebbw Vale, Swansea do not have the benefit of a wealthy benefactor. In addition Welsh Premier Division clubs are due to receive only £50,000 each as from next season, instead of the £1 million on average as was the case in 2002-3, as the Welsh Rugby Union attempts to reduce its £66 million debt. Accordingly the “Whites” found themselves unable to honour the contracts of players who will not be part of the new restructured regional system which will apply as from next season (see also below, p.136).

English cricket slashes central contracts
Cricket appears to be yet another sport which is experiencing the cold wind of economic hardship and is therefore seeking to reduce its operational costs. One of the reasons, it has to be admitted, has been the financial fall-out of the Zimbabwe boycott referred to earlier (p.45), which is therefore a unique event and does not indicate any structural recession. Nevertheless, it remains a fact that English cricket will need to tighten its belt over the next few years, and in early April the England and Wales Cricket Board (ECB) agreed to cut its expenditure by £4 million. One of the victims of these cutbacks has been the system of central contracts binding players to the national team.

The Chairman of the selectors, David Graveney, and team coach Duncan Fletcher, wanted to issue 11 six-month contracts for the summer of 2003, thus adding to the nine players who have completed half their 12-month contracts. However, as the news of the dire financial straits affecting it emerged, sources at the (ECB) indicated that as few as five contracts may be awarded. Ultimately, the position proved to be even bleaker in that only two contracts were issued – to James Anderson and Stephen Harmison, two of England’s brightest young fast bowlers.

Dissent within ATP causes Hewitt to sue and may lead to breakaway tennis players’ union
Ever since the leading tennis tournaments opened their doors to the professional game, the Association of Tennis Professionals (ATP) has been the player’s unchallenged trade union. This monopoly may be about to end, in view of the disaffection recently displayed by several leading players with some of the aspects of its operation. The leader of the malcontents is undoubtedly South African Wayne Ferreira, who has started a breakaway union called the International Men’s Tennis Association (IMTA). It has formally requested information from the ATP, including its audited finances for the past five years, the remuneration of its leading 25 employees and a breakdown of the state of the players’ pension fund.

Although at present a mere fledgling, IMTA’s prospects of making a major impact amongst professional players were considerably increased by the support pledged by 53 leading players, amongst them the 2002 Wimbledon champion Lleyton Hewitt. The Australian’s disaffection with the ATP has become so pronounced that he is currently undertaking court action against the body. It arises from a fine which was imposed in him for refusing to give an interview in Cincinnati (US) with ESON, the North American broadcaster of the Tennis Masters event in the city, just prior to his first-round match against American Robby Ginipri. Originally, he was fined half his prize money ($105,000), but this was later reduced on appeal to $20,000. Nevertheless, Mr. Hewitt remains disenchanted and has served notice of his intention to take the players’ union to court. His lawyers announced that proceedings would be initiated before the Australian Supreme Court in June unless the matter was resolved privately. This column will obviously follow further developments in this saga with keen interest.
The John Gregory affair

These are unhappy times for John Gregory, the football coach once tipped to become the manager of the national team. Having left his employment with Aston Villa under the cloud of his unhappy forays into the transfer market, he has now been dismissed by Nationwide League side Derby County after only 14 months in the post. The circumstances of his departure, however, may cast his former employers in a none-too-flattering light which may be a central feature of the legal action Mr. Gregory has initiated against the North Midlands club.

The entire saga began in early March 2003, when he was accused of “unprofessional and incompetent treatment” in relation to one of his leading players. This came as Derby launched an investigation into claims that their coach, as well as physiotherapist Stuart Walker, badly mishandled the injury problems suffered by the side’s Scotland international Craig Burley. These allegations were made by Alan Watson, a consultant to several sporting performers and an expert in injury rehabilitation, who has had a long association with Derby until recently. Dr. Watson claimed that Gregory demanded rehabilitation, who has had a long association with Derby with his advice was ignored when the player returned to training by means of light jogging, was subject to intense fitness testing after he resumed at the club following his fitness problems. Instead, he was subjected to intense fitness testing soon after he returned. Damage to his cruciate ligaments was informed by Walker that she should not divulge the nature of the injury to the player. It has since been learned that the Scottish international was seriously contemplating legal action against the club for the manner in which he was treated, although no actual proceedings have yet been initiated.

Against this, it must be recalled that at the time, Derby were languishing in 18th position in Division One of the Nationwide League, and that the Derby board had been seeking to end Gregory’s contract for some time. Up to this point, they had been deterred from doing so because of the contract stipulation in the latter’s contract which stated that, if he was dismissed during the first 18 months of his tenure, he would receive compensation to the amount of £1.5 million. If, however, he were to be dismissed for gross misconduct, this clause would not apply. Ultimately, this was the course of action taken by his employer. He was initially informed that he was suspended pending investigations into his work at the club. A few days later, George Burley (Craig Burley’s uncle) was appointed interim manager until the end of the season.

Then on 9 May, he was dismissed “for serious misconduct” with two years left on his contract. Mr. Gregory then launched an internal appeal to the Derby Chairman, Lionel Pickering, who did not uphold it. Gregory’s legal advisers immediately set the process in motion of instituting legal proceedings before the High Court to recover £2.5 million in damages, which would cover not only the amount which was due under the 18-month clause referred to above but also the harm caused to his reputation. A statement released by his solicitors described the dismissal as “clearly premeditated and dishonourable” and a statagem to avoid paying the compensation laid down in the aforementioned clause.

If the action brought by Mr. Gregory is successful this may cause Derby County to go into administration. The club is already £30 million in the red, which would rise by a further £4 million (taking into account legal costs) if it lost the action. The outcome of the litigation was not yet known at the time of writing.

League clubs to impose salary cap

The imposition of upper limits on sporting performers’ earnings are not new. They apply in several US sports as well as in both Rugby codes in this country. Because of the realisation that excessive wage bills may one day prove the undoing of the sport, various footballing circles have also been seriously moaning the possibility of introducing such a restriction in the game. So very few people registered surprise when, in April 2003, it was learned that salary capping was to be introduced to the Nationwide League in England as part of a wide-ranging reform programme agreed by the League’s 72 clubs.

Initially, the cap will be introduced on an experimental basis and apply in the Third Division only. The clubs in question will not be allowed to spend more than 60 per cent of their turnover on players’ wages and no more than 75 per cent of their turnover on all staff costs combined. There will be no penalty for failure to comply, although at some stage in the future provision may be made for some form of punishment
for transgressors. If the experiment is successful, it will be extended to the other divisions. It is hoped that this will see a landmark shift away from profligacy towards a healthier and more sustainable future for the game. Salary capping, however, remains a controversial subject, and various commentators continue to take issue with it. Thus James Lawton, The Independent’s thoughtful sports columnist, maintains that it will prove to be an ineffective ploy, which will be no more a panacea for football’s meltdown finances than “lining your windows with brown paper” is against a nuclear attack. He claims that even if salary limits returned to the days when players like Tom Finney, Stanley Matthews and Johnny Haynes were restricted to £20 per week, the game would still be teetering on the edge of the financial cliff. He refers to a recent paper presented by Gordon Taylor, the Chief Executive of the Professional Footballers’ Association (PFA), to the Premier League, the Football Association (FA) and the Football League.

In it, Mr. Taylor claims that salary capping is attacking the wrong target, and that a culprit for the financial ills might more usefully be found among some of the more doubtful business practices in which some clubs, particularly the big ones, have been engaging for some time. He is particularly tough on the manner in which some clubs have sold the value of their players to off-shore companies and then leased back their services. It is understood that some of the clubs which have been operating such a policy are Bolton, Everton and Leeds – which may explain why the latter demanded of the much-criticised Terry Venables that he should procure them a Champions League place whilst compelling him to dispose of such players as Rio Ferdinand, Robbie Keane, Olivier Dacourt and Robbie Fowler. To this, says Mr. Lawton, may safely be added the inordinate expense which some clubs have incurred in order to build and occupy new, state-of-the-art stadiums in the hope rather than expectation of high returns.

**Bosnich loses unfair dismissal action**

It will be recalled that, in November 2002, Mark Bosnich, Chelsea’s accident-prone Australian goalkeeper, failed a drugs test for cocaine. He was subsequently dismissed by the London club, whereupon he appealed against this decision before a Premier League tribunal, claiming that Chelsea acted improperly in the manner in which they dismissed him. In early February 2003, the tribunal found for the club and rejected Bosnich’s action. The Australian had claimed that he failed the drugs test only because he had been spiked without his knowledge. He also claimed that Chelsea had no right to issue him with notice of dismissal before the Football Association (FA) had decided on the issue of his guilt and the question whether he had contravened its rules by taking a banned substance.

It was not known at the time of writing whether or not Mr. Bosnich intended to appeal against this decision. However, he has not lost his work permit to play in England, ever since the Premier league fell in line with Home Office criteria for residency, which mean that footballers from outside the European Union who have played continuously in England for five years did not have to apply for work permits.

**PC dismissed after football referee fitness test impersonation**

In December 2002, it was learned that a traffic officer in the Lancashire police force was dismissed after breaching the force’s code of conduct. The incident which gave rise to this dismissal was the fact that the officer in question, 37-year-old Gary Bretherick, had persuaded an 18-year-old friend to stand in for him in order to take the demanding Football Association fitness test as a referee. This friend was not only much younger, but also much fitter than the 14 st. Bretherick. Once his ploy was discovered, he also resigned as a referee in the amateur West Lancashire league and as a linesman in the semi-professional Unibond League.

**PFA defend Haaland after City dismissal**

It may be recalled from the previous issue that one of the more explosive revelations made by Manchester United defender Roy Keane in his autobiography was that he deliberately caused serious injury to former Manchester City captain and Norwegian international Alf Inge Haaland. Initially, Manchester City indicated that they would be prepared to undertake legal action on Haaland’s behalf as a result of this affair. However, the club later dropped any such plans after receiving advice that any such action was not winnable. More controversially, however, the club served Haaland with six months’ notice of the termination of his contract of employment, having informed him of their conviction that he will not recover from a long-term knee injury.

It is understood that the Norwegian player has enlisted the assistance of the Professional Footballers’ Association (PFA), the footballers’ trade union, in this matter. PFA Chief Executive Gordon Taylor ventured the opinion that the action by the club was premature, and that there had been no prior discussion with the player about this outcome. It was later learned that City
manager Kevin Keegan had in fact not yet ruled out a return by Haaland to the first team. It was not known at the time of writing whether any formal legal proceedings had yet been instituted.

Strike fails to disrupt Le Mans motor race
The 24-hour race which takes place in the French resort of Le Mans is definitely one of the highlights of the motor racing calendar. This year’s event, however, took place as a series of strikes over Government policy was adversely affecting French public services. In the event, the strikes did not impede the build-up to the event, in the face of fears that the scrutiny would have been affected. This process was in fact smoothly completed. There were also fears about the effect of the post office workers’ industrial action on bookings. The race authorities had successfully sidestepped the strike action by sending out pre-booked tickets by recorded delivery the previous week. In fact, the strike action benefited the race to the extent that it attracted record crowds – many of them strikers taking advantage of their period off work to attend the event.

Leading football clubs renew campaign for compensation for players’ international duties
It has been reported on several occasions in these columns that Europe’s leading clubs are becoming increasingly restive about the fact that they must often do without the services of their leading players when on international duty, and suffer the risk of injury in the process, without adequate compensation. Hitherto, the focus of their campaign has been the national associations – without success thus far. Accordingly, the clubs in question have decided to change their tactics. In March 2003, at a meeting in London involving representatives from Europe’s top leagues, a resolution was passed to put pressure on FIFA and UEFA, the world and European governing bodies of the sport respectively, to pay such compensation from the profits of their major international competitions.

FIFA and UEFA, for their part, reacted by stating their determination to block any such efforts. At present, the profits from competitions such as the World Cup are divided between the competing nations and set aside for development and for funding programmes which take up the four-year cycle between each set of finals. UEFA’s director of communications, Mike Lee, insisted that for many of the poorer footballing countries, these monies constitute a “lifeline”. Marcus Siegler, for FIFA, added that the clubs whose players compete in international matches gain from them because they raise the player’s value.

Clearly the last word has not been said on this issue, and this column will continue to monitor developments in this area with the keenest of interest.

British athletics to introduce central contracts
Although the results obtained by the England team have hardly set the world of cricket alight in recent years, it cannot be denied that the system of binding the regular members of the national side to central contracts has on the whole been a success. British athletics will now follow this lead, when it introduces central contracts for its top stars in return for guarantees over sponsorship activities and appearances at major meetings. Fast Track, the commercial agents which act for the sport’s governing body, UK Athletics, have finalised a five-year deal with Norwich Union which will provide the insurance company with guaranteed access to members of the British team, including Paula Radcliffe and Dwain Chambers. The deal in question is worth almost double the amount of sponsorship which the insurance group had provided under its previous four-year deal.

UK Athletics have confirmed that the contracts should have been issued later this year, and are consulting athletes over the new arrangements. The contracts in question will not provide the athletes with more cash than they are earning at present through the Lottery, but will make provision for a range of “enhanced services”. They will not entail that the athletes bound by these contracts must compete in every televised meeting. The World Championships and Olympics will be certainties, but UK Athletics spokeswoman Emily Lewis admitted that this may be more difficult to ensure for events such as the European Cup, particularly for top stars such as Paula Radcliffe.

Other cases (all months quoted refer to 2003, unless stated otherwise)

Football
Darren Beckford. In February, the Prince’s Trust was found by an Employment Appeals Tribunal to have racially discriminated against the former Manchester City and Norwich striker. Mr. Beckford took the organisation to an employment tribunal just over two years ago, claiming that, whilst working with underprivileged youngsters in Manchester he had been shunned by staff and ignored by managers when he complained. He won the case and an apology from the institution. The latter, however, appealed, claiming that it had neither victimised, nor racially discriminated against, Mr Beckford. That appeal failed, as a result of which the Trust faces compensation well in excess of the £10,000 which he was awarded as a result of the original tribunal hearing.
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**Dennis Wise.** It will be recalled from the previous issue that the former England international had been dismissed by Leicester City following the incident in which he allegedly broke team-mate’s jaw over a card game. The Football League tribunal subsequently ruled that the club were perfectly justified in taking such action. However, it has since emerged that Mr. Wise has decided to take the club to the High Court for wrongful dismissal, claiming £2.3 million in lost earnings. He claims that the new owners of the club remain liable despite the liquidation of the former company Leicester plc, and that the obligations of the old company have been transferred to the new. The outcome of any such action was not known at the time of writing.

**Joe Royle.** It will be recalled from a previous issue that, following Manchester City’s relegation from the Premiership after the 2000-1 season, the club dismissed its manager, Joe Royle, who then promptly initiated legal proceedings over the amount of compensation to which he was entitled. His action has been backed by the Professional Footballers’ Association (PFA). In late December 2002, City chairman David Bernstein accused the PFA of “wasting their money” over this issue, which he described as not being “in the interests of football”.

**Michael Hughes.** In April, PFA Chief Executive Gordon Taylor demanded that the Football Association (FA) should close the legal loophole which has left Birmingham City player Michael Hughes in an undesirable limbo. Mr. Hughes was unable to play during the 2002-3 season because of a dispute over his registration between Nationwide League side Wimblazon and Birmingham, and is awaiting an arbitration verdict. According to Mr. Taylor, this is unacceptable and the FA should change its rules on the subject.

**Gianluca Vialli.** The 2001-2 season was not a particularly fruitful one for Nationwide League side Watford, who finished 14th in the First Division. This was despite the fact that their manager, Gianluca Vialli, invested heavily in players. This led to the Italian’s dismissal 12 months into a three-year contract. The club offered Vialli a golden handshake of £500,000, but this did not meet the dismissed manager’s requirements. He has therefore decided to sue Watford, and in February issued proceedings for what is believed to be a sum not unadjacent to £3 million. The outcome of this case was not yet known at the time of writing.

**Coventry City.** In what is yet another symptom of the recession gripping most levels of professional football in England, Nationwide League club Coventry City announced in April that they are letting up to 15 players leave the club after revealing that they were still £15 million in the red. Nine players are available on free transfers, whereas six others will not have their contracts extended when they expire in the summer of 2003.

**Cricket**

**Neil Burns.** In early March, it was learned that the former Leicestershire wicketkeeper was taking the county club to an industrial tribunal for a claim of wrongful dismissal. Mr. Burns, who was released in September 2002, alleged that he had verbally agreed a new contract with Leicestershire’s former Chief Executive James Whittaker the previous summer.

**Mike Gatting et al.** Readers with a long memory may recall the various “rebel tours” to South Africa during the 1980s, which were organised in defiance of the world-wide ban on any sporting contact with this country whilst it applied the universally denounced apartheid regime. The last of these, which took place during the winter of 1989-90, was cut short after demonstrators in South Africa targeted the former England and Middlesex captain Mike Gatting. For the past ten years, the players who took part in that tour have been attempting to compel the South African Cricket Board to honour the contracts in question. More particularly they are seeking to obtain the £10,000 which the Inland Revenue are asking the cricketers to pay by way of income tax on the £60,000 which they should have received under the deal. They now plan to take the South African cricket authorities to court for this amount.

This affair erupted at a particularly delicate time, coinciding as it did with the run-up to the 2003 World Cup, since it will point up the efforts undertaken by Ali Bacher, the managing director of Cricket World Cup, and who at the time headed the South African board, to recruit Test players from all over the cricketing world, as well as the vast sums he was prepared to pay them.

**Cycling**

**Team Coast.** In March, the squad which includes the Olympic champion Jan Ullrich was suspended from competition for having failed to pay its riders’ salaries for the previous two months. The team’s riders had already complained the previous year that they had not been paid, and the squad was issued with a licence for this year only subject to the condition that it should provide evidence to the International Cycling Union (UCI) that wages were being paid. It was later learned that Mr. Ullrich may leave Team Coast because of this non-payment.
Other Issues

Leading law firms advise in sporting deals
The following leading law forms have recently been advising in a number of important sports-related deals:
- Newcastle firm Dickinson Dees acted for sports retailer Nike in its move to a new 11,000 sq. ft. London office off Carnaby Street. City form Lovells acted for landlord Shaftesbury.
- Wallace & Partners (Rex Newman) represented Kondar in the £40.3 million recommended cash offer for the whole of the issued share capital of Enic, a holding company with UK and international interests in sports, gaming, media and entertainment. Enic was advised by Olswang.

Racehorse owner not bound by purchase of race horse by his agent. English court decision
The Court of Appeal recently ruled that a claimant should not find himself in any worse position merely because it transpired that he was entitled to compensation for the first defendant’s breach of warranty of authority, rather than to the notional sale price of a racehorse against the second defendant.

The Court dismissed an appeal by Christopher Nimmo against a decision that he was liable to pay £70,000 by way of damages to Habton Farms for breach of warranty of authority to contract the purchase of a racehorse. The claimant company was involved in the training, purchase and sale of racehorses. The second defendant was a wealthy US racehorse owner who was assisted from time to time by the first defendant, a bloodstock agent. In September 1998, the first defendant, as well as the second defendant’s trainer and a scout, visited the claimant’s premises in order to enable the trainer to assess a horse called High Spirits. Subsequent negotiations resulted in the first defendant sending a fax dated 12/10/1998 to the claimant confirming a purchase price of £70,000 for the horse. Arrangements were made for the horse to be collected in early November.

Some time after 12 October, the second defendant decided that he did not wish to purchase the horse. The claimant, however, did not agree that the contract be cancelled. The horse remained in the claimant’s possession. However, it later contracted peritonitis and had to be put down on 2 December. The claimant then initiated proceedings against the first defendant. The judge awarded the action to the claimant, ruling that the measure of damages was £70,000. The first defendant appealed against the finding of liability and the measure of damages. He contended that the correct measure of damages was the difference between the contract price and the market value of the horse on the relevant date, and that only nominal damages were therefore capable of being recovered.

Lord Justice Auld stated that damages for breach of warranty of authority should normally reflect the difference between the claimant’s position had the warranty been true on the one hand, and his actual position in consequence of its being untrue on the other hand. Where the seller of goods has failed to deliver them because they had been lost or destroyed, his entitlement to claim the price from the buyer depended on where, in the meantime, the property and the risk lay. In the case under review, there had been no rescission or acceptance by the claimant of repudiation of the notional contract with the second defendant. But for the first defendant’s breach, the claimant would have had the benefit of the contract with the second defendant and would have shed ownership and possession of the horse and the risk of its loss in exchange for the price.

The claimant should not be in any worse position than he would have been if there had been a contract, simply because it transpired that he was entitled to damages for the first defendant’s breach, rather than to the notional sale price against the second defendant. He was therefore entitled to £70,000 damages.

Liability for damage caused by smoke bomb to football supporter shared. French court decision
This matter is dealt with below under Section 4 (Torts and Insurance – Other Issues) p.63.

American football team sued for not being good enough
It would appear that, if a court action recently initiated in the US succeeds, disgruntled fans will have an additional means of venting their displeasure at their team’s failure to perform to their wishes – i.e. to sue for damages. The Cincinnati Bengals, a none-too-successful American football team, may be about to discover that Hell hath no fury as an American consumer scorned. Local politician Todd Portune has initiated legal proceedings against the hapless team, alleging fraud, civil conspiracy, violations of anti-trust law and breach of contract, no less.
3. Contracts

The Bengals seem to have reached a nadir in their footballing fortunes, having finished bottom of the National Football League winning only two games in the process. Mr. Portune claims that their abysmal performances constitute an infringement of the lease agreement which the club entered into when they took possession of a publicly-owned stadium to years ago. The city council agreed that the Bengals should play their home matches at the venue, which cost $485,000 to erect. In return, they pledged to provide the fans with a decent team to support. Mr. Portune is particularly riled at what he describes as the “grossly one-sidedness” of the lease, since the team pays hardly any rent, keeps all the gate receipts and have virtually no operating costs to contend with.

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

Premiership (and two clubs) in legal tussle over unlicensed use of footballer’s photographs

The use of sporting performers’ images is an issue which is receiving increasing prominence in sports law, and was very much at the centre of the case under review. The English Premier League and two member clubs brought an action for (a) damages and (b) an injunction restraining the defendant, Elite Sports Distribution Ltd, from making use, in unauthorised calendars, of photographs of professional footballers which had not been licensed by the League. The basis for the action was that the defendant must have (a) incited the photographers to breach a contract with the League under which the photographer was licensed to enter the grounds of football clubs to take pictures for limited purposes only, and/or (b) infringed the photographers’ copyright, thereby giving rise to an unlawful interference with the claimants’ trade.

The defendant, for its part, applied to have the claim struck out on the basis that the latter disclosed no cause of action, had no prospect of success (because the contract between the League and the photographers was void for having contravened section 1 of the Competition Act 1998) and/or was so speculative as to constitute an abuse of the process of the court. The claimants opposed the application, and the League cross-applied for a “Norwich Pharmacal” order requiring the defendant to identify the sources from which it obtained the photographs.

The Court allowed the defendant’s application in part, and ordered disclosure against the defendant under CPR 31.12. It ruled that a person other than the copyright holder was not entitled to bring a claim for interference with their economic interests arising from a copyright belonging to another person, because to do so would be to frustrate the intention of Parliament that only a limited category of persons should be able to bring an action for the infringement of copyright. Therefore, that part of the particulars of claim had to be struck out. However, there were factual scenarios which substantiated the allegation of procuring breaches of contract. There was some evidence to support that claim, in that the defendant probably was aware of the licence agreement between the League and any photographers, and had declined to explain how it had come into the possession of the photographs. Although it was arguable that the agreement between the League and the photographers was void, that did not justify striking out the claim; in any event, the claimants would have been free to seek pre-action disclosure. The Court therefore declined to strike out the particulars of claim but would grant the defendant liberty to apply again after disclosure had been completed. Since disclosure could be ordered within the present action, there was no need for a “Norwich Pharmacal” order.

India World Cup (cricket) contracts row – an update

It will be recalled from a previous issue that one of the many non-cricketing issues to have beset the run-up to this year’s World Cup was the controversy over the sponsorship deals which the players were required to conclude with the International Cricket Council (ICC) as a precondition for participating in the tournament, and which would considerably restrict the players’ freedom by freezing individual sponsorship deals which clashed with official World Cup sponsors. This column left this particular saga at a point where a compromise deal seems to have been accepted by the Indian board and players.

The use of the word “seems” was highly appropriate in retrospect, since it was not long before the waters were muddied once again. In spite of continuing talks between the Indian cricketing authorities and the ICC which, according to ICC President Malcolm Gray “significant concessions” had been obtained, by mid-December, the Indian players had not yet returned the signed contracts. At a subsequent ICC meeting the latter issued an ultimatum to the Board of Control for Cricket in India, which stated that India’s players had to sign the ICC contracts by 14 January or face heavy compensation claims. However, Jagmohan Dalmiya, the Indian Board president, dismissed this ultimatum and called for more concessions on the part of the ICC. The main difficulty concerned the scope in time of the restrictions. Whereas the ICC initially wanted players to freeze individual sponsorships for a period extending to 30 days before and after the tournament, the Indian Board merely wanted the ban to extend to the days on which
the players were competing in televised fixtures.

The ICC put a final offer to the Indian Board, which contained some further concessions, but this was rejected by the Board after a four-hour meeting, declaring that the world governing body did not have the right to impose such sponsorship restrictions on the players. The ICC thereupon declared that it would remain firm and not depart from this offer. A few days later, the ICC increased the pressure on the Indian Board by releasing details of the contract which the Board had signed in March 2002 under which it guaranteed that its best players would compete in the World Cup. With less than a week to go before the 14 January deadline set by the ICC, the Indian Board demanded a legal settlement of the dispute, which would in all probability take the matter to the Court of Arbitration for Sport (CAS) in Switzerland.

In mid-January, the ICC announced that it had received from the Indian players signed but “altered” World Cup contracts (without entering into any details concerning the alleged “alterations”). This once again plunged the entire affair into confusion, particularly since the Indian Board had the previous week announced that all 15 squad members had signed up for the tournament, although some were unhappy about the sponsorship terms. The problem was eased a little when Hero Honda, India’s largest motorbike manufacturers and a World Cup sponsor, stated that they would be prepared to be “flexible” towards the players’ personal endorsements in order to ensure that India could field their strongest team. Ultimately, the Indian team were allowed to compete in the tournament, but faced the prospect of having their share of the tournament earnings placed in trust pending any compensation claims from sponsors who feel that they did not receive value for money.

No further details were available at the time of writing.

Sales point located on skiing area is “commercial lease”, rules French Supreme Court.

In the case under review, a chalet which served as a sales point for snacks and drinks, which was located on a skiing area managed by a municipality, operated on the basis of a succession of lease contracts, the last of which was a “season-based temporary lease” (bail précaire à caractère saisonnier). The latter contract contained a clause which excluded the possibility of a commercial ownership right (droit de propriété commerciale). When the municipality refused to renew the contract, the operators of the chalet claimed that the lease in question was a commercial lease (bail commercial) which would entitle them to payment of an eviction indemnity. The municipality claimed that this could not apply because the chalet in question was part of the public sector. The French Supreme Court did not give a ruling on this claim, as it was a matter in which the legal and factual issues were closely intermingled (the Supreme Court may not assess issues of fact) and had not been raised before the court dealing with the matter at first instance. The Court endorsed the ruling by the court at first instance which had awarded the status of commercial lease to the contract in question, since that court had established that the operators had the chalet at their free disposal throughout the year and that, in addition to the customer base yielded by the skilift operators, which was a mixed public/private partnership (régie), they had developed their own clientele. It was not necessary for this purpose to assess whether this personal clientele outnumbered that which was provided by the skilift operators or not.

Russian athletes embroiled in sponsored kit row

In February 2003, Russia’s athletes became embroiled in an international legal tussle concerning the kit they were to wear for the international fixture against Britain in Glasgow. The previous week, sportswear firm Nike saw themselves compelled to go to court in Edinburgh in order to ensure that the Russian team sported their kit as opposed to that of rival sponsors Reebok. Nike allege that they have an agreement with the Russian Federation until 2004, whereas Reebok argued that they signed a deal with the Russians this year.

No further details were available at the time of writing.

Rugby World Cup sponsorship ban threatens England income

Normally, major sporting events seek to obtain all the sponsorship funds which their organisers can lay their hands on. However, this year’s Rugby Union World Cup will be played under the “clean grounds” motto. In mid-April 2003, Rugby World Cup Ltd., the tournament organiser, went even further where it unilaterally extended the ban on sponsors’ logos from the playing field to the training ground. This meant that England’s players will not even be allowed to wear leisure clothing branded by their sponsor, O2, when they travel between matches. This has naturally angered England, as well as the other home nations, at a time when, as has been discussed earlier (see above, p.40) the sport is in desperate need of money. This is not the first time that the “clean grounds” policy has put preparations for the World Cup in turmoil, since it led to New Zealand losing its status as co-host because it refused to infringe agreements with stadium advertisers.

England are quite concerned at the effect this may have on relations with their sponsors. Paul Vaughan, the
3. Contracts

Rugby Football Union’s commercial director, feared that O2 may have serious reservations about sponsoring the team for the 2007 World Cup, and that they may even want to renegotiate the current contract. Nor did concerns about this development stop at Hadrian’s Wall. The Famous Grouse drinks firm has a four-year sponsorship arrangement with the Scottish Rugby Union, and the company reacted by stating that it may request a refund on the amount of sponsorship granted, for which it blamed Rugby World Cup Ltd. rather than Scotland. The Scottish Rugby Union’s sponsorship manager, David James announced that all European Six Nations teams would join in an appeal to the International Rugby Board, as owners of the tournament, and to IMG which handles all its marketing and legal issues. They were also enlisting the smaller Rugby nations for this purpose, particularly in view of the even more dire consequences which this policy may present for them. Visa, although it is also one of the tournament sponsors, is believed to have asked Argentina for a refund on its individual sponsorship because the team will not be able to wear the company’s logo in Australia. At the time of writing, however, Rugby World Cup Ltd. still proposed to adhere to its policy.

**Lennox Lewis threatened with legal action over Klitschko fight**

In early February 2003, Ukrainian heavyweight Vitaly Klitschko threatened to take legal action against world champion Lennox Lewis for withdrawing from their scheduled bout. The 31-year-old, who is the official challenger under the world ranking system, was supposed to fight Lewis in April, but the latter opted to fight Mike Tyson instead. At the time of writing, Lewis’s agent Adrian Ogun was holding talks with Mr. Klitschko’s adviser, Hans Peter Kohl, in an attempt to avoid court action.
4. Torts and Insurance

Sporting Injuries

Welsh Rugby referee loses appeal over scrummage injury case

It will be recalled from the previous issue that, as a result of an injury sustained during an amateur rugby union game in Wales, the Welsh Rugby Union (WRU) was held vicariously liable for an injury-time accident which left one of the players involved, Richard Vowles, permanently disabled. The referee was deemed to have failed in his duty of care by not opting for an uncontested scrum, in which players are not at risk from injuries caused by crushes. The WRU appealed against this High Court decision.

In March 2003, the Court of Appeal upheld the High Court decision. The parties had correctly proceeded on the premise that it was the test of duty as applied by the House of Lords in Caparo Industries plc v. Dickman, which had to be applied. The appellants conceded that (i) the relationship between Mr. Vowles and the referee, Mr. Evans, was sufficiently proximate to satisfy that element of the test, and (ii) that it was reasonably foreseeable that, if Mr. Evans failed to exercise reasonable care in refereeing the game, injury to Mr. Vowles might result.

The debate centred on the question whether it was fair, just and reasonable to impose on an amateur referee a duty of care towards the players in the game refereed. Morland J had, in the appealed decision, held that this was indeed the case. Rugby was an inherently dangerous sport, and some of the rules were specifically designed to minimise the inherent dangers. Players were dependent for their safety on the due enforcement of the rules. The role of the referee was to enforce the rules. Where a referee undertook to perform that role, it seemed to the Court manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care in so doing.

The law rarely if ever absolved from any obligation of care a person whose acts or omissions were manifestly capable of causing physical harm to others in a structured relationship into which they had entered. The Court was not convinced that there were good reasons for treating rugby football as an exceptional case. A referee of a rugby match owed a duty of care to the players. The standard of care to be expected of a referee depended upon all the circumstances of the case, including the nature of the game. As Lord Bingham observed in the famous case of Smoldon v. Whitworth and Nolan, a referee of a fast-moving game could not reasonably be expected to avoid errors of judgment, oversights or lapses. The threshold of liability had properly to be a high one.

Referee Evans’s qualifications were appropriate for the game which he was refereeing. He could reasonably be expected to be conversant with the laws of the game and competent to enforce them. The allegations of breach of duty made against him did not involve any higher standard of skill than that of basic competence. The issue in relation to the alleged breach of duty was whether Mr. Evans failed to comply with the requirements of rule 3(12) which concerned the substitution of a front row forward. The trial judge had rightly ruled that the first defendant abdicated his responsibility of deciding whether the situation had been reached where it was obligatory to insist on non-contestable scrumagges. This represented a breach of his duty to exercise reasonable care for the safety of the player. That decision was taken whilst play was stopped and there was time to give considerable thought to it. Very different considerations would be likely to apply where it was alleged that the referee was negligent because of a decision made during play.

There was evidence upon which the trial judge was properly able to conclude that the cause of the accident was that the first defendant had, in breach of the rules of the game and negligently, permitted a player who lacked suitable training and experience to play in the front row.

Counsel for the WRU had argued that, if the Court upheld the trial judge’s findings that an amateur referee owed a duty of care to the players under his charge, volunteers would no longer be prepared to serve as referees. Their Lordships did not believe that this result would or should follow. Liability had been established in this case because the injury resulted from a failure to implement a law designed to minimise the risk of just the kind of accident which subsequently occurred. Such a failure was itself likely to be very rare. Much rarer would be the case where there were grounds for alleging that it had caused a serious injury which were fortunately rare but they were an inherent risk of the game. That risk was one which those who played rugby accepted as being worth taking for the satisfaction which they derived from the game. The infinitely more remote risk of facing a claim in negligence should not discourage those who took their pleasure in the game by acting as referees.

Owner of riding school held liable for damage caused to rider. Italian Supreme Court Decision

In the case under review, a rider who took part in a training ride under the guidance of a riding school instructor fell from her horse which had been spurred onto a gallop by the instructor. At first instance, she had claimed compensation from the riding school and from the instructor on the basis of their joint liability. On the basis of Article 2052 of the Italian Civil Code, the first court had awarded the action against the riding school
4. Torts and Insurance

but dismissed the claim against the instructor. The Court of Appeal confirmed this decision. The riding school applied for a review of this decision by the Supreme Court (Corte di Cassazione).

The Supreme Court dismissed the application. It rejected the argument raised by the applicant that the liability of the riding school no longer applied where another party was using the animal concerned. It ruled that, in relation to any loss caused by animals, the liability for such loss may only be vested in a party other than the owner of the animal where the owner had transferred to third party the use of the animal in question – “use” being understood in the sense of deriving benefits from it. On the other hand, the liability of the owner remains where the latter retains control over the animal whilst another person is using it. This was the case where, as in the dispute under review, loss was caused by a horse to the customer of a riding school who was practising her riding skills with the assistance of a riding school instructor.

**Football foul committed in accordance with nature of game does not give rise to tort liability. Italian court decision**

The case under review concerned a game of football between friends, in which Emanuele Fregola, a minor, sustained a fractured arm with permanent effects when he fell as a result of a tackle. The parents of the injured player claimed compensation from the opponent who had made the tackle, claiming that after he had been beaten to the ball by the injured player, that opponent had committed the foul, tackling the injured player after he had passed the ball to a team mate. The player who had committed the tackle dismissed the claim, arguing that the incident had occurred in the context of a clash between two players who were attempting to win the ball, and denying emphatically that he had followed the injured player and caused him to fall after the latter had already passed the ball. The insurance company with whom the tackling player’s family had a third-party liability policy also dismissed the claim. The matter went to court.

At first instance, the Tribunale (district court) of Ravenna awarded the action to Mr. Fregola (the injured player). This decision was overturned by the Court of Appeal (Corte d’appello) of Bologna, which dismissed the claim for damages mainly on the grounds that he who takes part in a game also accepts the risks inherent in any fouls committed, and that in the case under review the margin of acceptable risk had not been exceeded since it had not been established that Salietti (the tackling player) had voluntarily endangered Fregola’s safety.

Mr. Fregola thereupon applied for review of this decision by the Supreme Court (Corte di Cassazione). The Court confirmed the Court of Appeal decision. It ruled that, in relation to injuries caused in the context of sporting activity, a foul committed by a footballer against an opponent does not give rise to tort liability if such a foul is a functional part of the game and if it has essentially been committed with a degree of violence which is consistent with the specific nature of the game in question. This was the case here, and therefore no liability applied.

**Australian court overturns swimmer’s compensation award**

In April 2003, an appeal court in Australia overturned an award of £1.4 million made to a swimmer who was paralysed when he hit his head on a sand bar at Bondi Beach, Sydney, in 1997. The victim in question, Guy Swain, had claimed that city council lifeguards failed to warn him of the danger. Two of the appeal judges ruled that there was no negligence and that Mr. Swain was bound to pay costs. The third judge agreed that no negligence applied, but stated that the injured swimmer should keep the money awarded.

**Lower threshold of liability in sports and games does not necessarily cease once the game finished. Netherlands court decision**

In the case under review, a municipality in Friesland had organised a competition under which a pulley was suspended to a cable overhanging a waterway. Competitors had to reach the middle of the waterway suspended from the pulley, then release the pulley in order to land onto a floating board. They then had to run across other floating boards to the other side of the waterway towards a canoe landing stage, where they had to ring a bell. Competitors had to perform this action as quickly as possible and without getting wet. Three friends, De Vries, Hettinga and Ypma took part in this competition. Mr. De Vries succeeded in reaching the landing stage in a dry condition, whereas the other two did not. The latter two then proceeded to throw Mr. De Vries into the water, although the latter objected. On falling into the water. Mr. De Vries’s left leg hit an object which was below the water surface and was stuck in the muddy bed of the waterway. As a result, Mr. De Vries sustained an injury which had long-term effects. The victim brought an action in damages against the two others involved.

At first instance, the court dismissed the action. It ruled that the accident did not take place in the context of a sport or game because, even though the parties took part in the same competition, they did not do so simultaneously or against each other. Nevertheless, the court did not consider that Messrs. Hettinga and Ypma acted unlawfully towards Mr. De Vries. An action creating a danger is only unlawful where the probability of an accident happening is so high that the perpetrator should, in accordance with his duty of care, have
refrained from committing the action. This was not the case here because the danger of such a fall causing injury was very small, the more so because the waterway in question had been checked for safety beforehand, if only superficially.

The claimant appealed against this decision. The Court of Appeal overturned the decision made at first instance. It ruled that the two threw Mr. De Vries into the water after the latter had rung the bell on the landing stage, and therefore the first court was right to rule that the accident did not occur in the context of a sport or game. Nevertheless, the Court held that Hettinga and Ypma had acted unlawfully against De Vries by throwing him into the water against his will. Since the waterways in The Netherlands cannot automatically be deemed to be clean, account must be taken of the possibility that dangerous objects may be present in any particular area of the water. In spite of the superficial checks which the competition organisers had carried out before the event, Hettinga and Ypma should have realised that the probability of De Vries sustaining an injury as a result of their actions was so high that their duty of care should have impelled them to refrain from their action. Therefore, by throwing him into the water they committed a tortious act.

Hettinga and Ypma applied to the Supreme Court (Hoge Raad) for a review of this decision. The Court first of all overturned the ruling that the incident did not occur in the context of a sport or game. The Court pointed to its established case law whereby the question whether a participant in a sport or game who committed an act causing injury to another acted unlawfully must be assessed with less severity than if the act in question had taken place outside the context of a sport or game. The relationship which exists between competitors in a game or sport – and therefore the higher threshold of liability required – does not necessarily end in its entirety at the moment when the rules governing the game or sport no longer apply. The expectations which these participants have of each other may continue to apply for a short period afterwards, and the fact that De Vries sounded the bell after having completed his performance does not mean that the parties in question were no longer in a sporting relationship with each other. It should be pointed out that the competition in question took place in the context of festivities where competitors falling into the water was part of the attraction.

The Court did, however, dismiss the argument put forward by the two perpetrators that even though Mr. De Vries had objected to being thrown into the water, this did not necessarily indicate that he truly did not want to be thrown in. It was true that, in such situations, it is quite normal for the "victim" to object, or at least to pretend to object. However, Hettinga and Ypma should have taken account of at least the possibility that De Vries was serious in his objection. However, the Court did accept that the mere fact that an action is perpetrated on someone against his will does not necessarily make it unlawful. The Court also overturned the Court of Appeal's ruling that the chance of De Vries sustaining a serious injury was so great that the two perpetrators should, in all reasonableness, have refrained from throwing him into the water. The Court of Appeal had failed to take into account the fact that, immediately before the incident, the parties concerned were competing against each other, this being a factor which is relevant when assessing this case.

The Supreme Court therefore set aside the Court of Appeal's decision and referred it back to a different Court. (The Public Prosecutor's department had applied to have the Court of Appeal decision set aside and the ruling by the first court reinstated.)

**Those involved in skiing accident organised by school are exempt from tort liability. German court decision**

Under German legislation, educational staff are exempt from liability for “school accidents” (Schulunfälle) – i.e. accidents which occur in the course of educational programmes. When a school pupil attempted to come to a stop during a skiing session organised in the context of a school’s sporting programme, he suffered a bad fall and hit a hard ring which was not padded or provided with any other safety mechanism. He thus sustained serious injury. The local insurance association (Gemeindeunfallversicherungsverband) classified this as a “school accident”, and the relevant insurance company accordingly paid the amounts which arose from the loss caused by this accident, and subsequently sought to recover this money. First it claimed the amounts in question from the city council which organised the school, but the court dismissed the claim where it related to the victim’s personal injury losses; for the other losses sustained the claim was allowed. The insurance company then brought a claim in respect of the personal injury losses against the director of the sporting facilities department of the city in question.

The Supreme Court (Bundesgerichtshof) dismissed the claim. It ruled that, where sporting instruction takes place, in accordance with the wishes of the authority organising the school, on a sports facility operated by that authority, not only must an accident which is sustained by a pupil in the course of such instruction be regarded as a “school accident”, but also all staff employed by the sports facility who were involved in the preparation and operation of such sporting instruction are covered by the exemption from tort liability laid down by German legislation, since to this extent they must be regarded as school staff members.
4. Torts and Insurance

Libel and Defamation Issues

Soccer star obtains injunction against “infidelity” revelations – but is named on website

Readers of these (and other) columns will doubtless recall the strange episode of Mr. Gary Fitcroft, the Blackburn Rovers footballer, who lost a long-running High Court action aimed at preventing a Sunday newspaper from exposing his marital misadventures\(^\text{124}\). In March 2003, a similar case seemed to be in the making when a Premiership footballer actually succeeded in obtaining a court order preventing as newspaper from publishing details of his alleged marital infidelity. The wide-ranging High Court injunction, copies of which were communicated to all national newspapers, not only prevented the player’s identity being revealed but also banned the Press from naming his alleged lover. The injunction also barred publication of a number of letters and photographs\(^\text{125}\).

However, the effect of this injunction was in part negated by the fact that the name of the footballer concerned appeared on a BBC website a few days later. More particularly he was named by contributors to Celebdaq, a website on which “traders” purchase virtual shares in celebrities whose value increases the more coverage they generate in the press\(^\text{126}\). The BBC lost no time in removing all references to the player from the website and started an internal inquiry, but lawyers for the player immediately announced that they were considering legal action against the Corporation, and the latter may be compelled to hand over copies of the relevant emails if the footballer believes that there were malicious intent on the part of the senders\(^\text{127}\). BBC executives also started a review of the manner in which messages on the website concerned could be monitored to prevent further breaches of the law and possible libel action\(^\text{128}\).

It was not known at the time of writing whether any further legal action has resulted from this affair.

Legal action threatened against BHB over “defamatory” Savill comments

Peter Savill, the chairman of the British Horseracing Board (BHB), has never been a man to mince his words, and as a result his popularity rating has always been rather low in some quarters. However, there have been times when his comments have caused a good deal of offence – to the point of inviting the possibility of legal action. During the winter of 2002-3, Mr. Savill criticised Northern Racing, the racecourse group chaired by Sir Stanley Clarke, and Arena Leisure over the breakdown of the Future Funding plan, which dealt with the manner in which new money earned from the sale of media rights should be divided within the racing industry\(^\text{129}\).

At a certain point, Arena threatened legal action against BHB directors over “inaccurate and unprovoked” allegations made by Mr. Savill, and demanded that the Board should publicly disown his remarks, contained in a letter to The Daily Telegraph. Northern Racing was also preparing to take similar action. However, the BHB Secretary General, Tristram Ricketts, informed Arena’s lawyers that Mr. Savill wrote the letter concerned in his capacity of Chairman of the Plumpton race course, and that therefore they were irrelevant to BHB directors. Arena responded by claiming that there was an “indisputable impression” that the BHB believed that Arena had reneged on the Future Funding Plan\(^\text{130}\).

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

Blatter wins defamation action

That Sepp Blatter, the President of FIFA, football’s world governing body, is not a man who has earned the unstinting admiration of this column will be quite obvious from the acres of space devoted to some of his less praiseworthy practices (see, inter alia, above, p.25). Some figures, more closely involved in the circles in which Mr. Blatter operates, have gone even further in their condemnation of the man who leads world football, and have done so in terms which have brought them into the dangerous area covered by the laws of libel and slander. One such person is Farah Addo, President of the Somali Football Federation, who has in the meantime had occasion to rue his intemperate remarks.

In March 2003, the FIFA President was awarded damages for defamatory statements made against him by Mr. Addo. More particularly the latter had made comments in February 2002 about irregular financial practices which he claimed were intended to assist the election of Mr. Blatter in 1998. He had made accusations against a member of the FIFA Executive Committee, Mohamed Bin Hammam of Qatar, and questioned Mr. Blatter’s integrity\(^\text{131}\).

The court at Meilen, Switzerland, ordered Mr. Addo to pay £4,700 to Mr. Blatter by way of compensation, as well as costs. It also upheld the injunction prohibiting Addo from making any further statements against Blatter\(^\text{132}\).

Insurance

Riding association was not liable to inform injured rider of the need to take out insurance. French court decision\(^\text{133}\)

Under French sports legislation, more particularly Article 38 of Law No. 84-1610 of 16/7/1984, sporting associations and clubs are obliged to inform their
members of the fact that it is in their interest to take out personal insurance which guarantees flat-rate payments in the event of personal injury, and to make available to them various options which contain the guarantee of compensating any loss arising from damage caused to their physical integrity. When taking part in a horse race organised by a sporting association, a female lawyer had sustained serious injuries. As she was not covered by personal insurance, she claimed compensation from the association which had organised the race, on the basis that the latter had failed to inform her of the fact that it was in her interest to take out an insurance policy when she had applied to renew her riding permit.

The Court of Appeal (Cour d’appel) of Aix-en-Provence had awarded the action to the claimant. It had ruled that, even though the association in question had the object of raising and improving horses as a breed, it was nevertheless a sporting association since the races which it organised constituted a sporting activity for its participants. Independently of the provisions of the Law on Horse Races (Code des Courses), it was bound to apply the provisions of Article 38 of the 1984 Law. The association had therefore failed in its statutory obligation to provide information where it had deprived the rider of the opportunity of selecting a personal insurance policy covering her injuries.

The Supreme Court (Cour de Cassation) disagreed. It ruled that the association in question came within the jurisdiction of Ministry of Agriculture, and not within that of the Ministry of Sport and Youth (Ministère de la jeunesse et des sports). Therefore it did not constitute a sporting association within the meaning of the 1984 legislation, and the provisions of this law, which cannot be applied by extension, did not apply to it.

The Court accordingly set aside the Court of Appeal decision.

Other Issues

Australian Rugby League club held not liable for motor accident caused by patron of club where she became intoxicated

In the case under review, the claimant had, shortly after having left the licensed premises of the South Tweeds Heads Rugby League club where she had become grossly intoxicated, been struck by a car whilst on a street. She brought an action for damages against the car driver and the club.

As regards the driver of the car, the Court of Appeal ruled that she had not driven negligently, and therefore was not liable. As far as the rugby club was concerned, the claim was also dismissed. There was no duty of care owed by the club’s licensee to its patrons, and therefore the claimant had to bear the consequences of her self-induced state. Therefore the club could not be held liable for the accident. In any case, the club had offered the claimant safe transport home and therefore had discharged any duty which the Club may have had to take reasonable steps to ensure her safety.

Liability for damage caused by smoke bomb to football supporter shared. French court decision

In the case under review, a football supporter had been injured by a smoke device which he had taken from the supporters’ clubhouse of a football team on the occasion of a home fixture, and put inside his leather jacket, where it had exploded. He sued the football club and the supporters’ association, both in tort and in contract.

As to contractual liability, the Court of Appeal (Cour d’appel) of Toulouse ruled that the organiser of the sporting event is bound towards the spectator who has entered into a contract by means of a “means obligation” (obligation de moyens), and the burden of proof that the organiser has committed an error is incumbent upon the spectator who was the victim of an accident. In this case, the spectator in question had provided the necessary proof. The organiser had taken no particular measures in relation to the clubhouse where young supporters kept their equipment. The organiser knew that the supporters made frequent use of smoke bombs, which should prompt the realisation that they formed part of the equipment left in the clubhouse, particularly since the organiser had been informed that smoke devices had been stolen from the SNCF (French national railways) and that these smoking devices had been found on the supporters’ persons. The organiser was therefore under an obligation to take extra precautions and to increase surveillance of the clubhouse and the path that led from the clubhouse to the stands and to the area reserved for the supporters. The organiser had therefore been grossly negligent and thus caused the damage suffered by the victim. Moreover, the incidental plea of warranty raised against the surveillance firm should also be dismissed, since it was for the organiser and him only to give all necessary instructions to the surveillance company in order to avoid a risk which was perfectly foreseeable, as it was usually present amongst the supporters of the club. In the absence of any evidence that such instructions were issued, the organiser cannot accuse the surveillance firm of having in any way been at fault in the manner in which it carried out its surveillance operations, since there was no evidence that the smoke devices had been taken to the stands in a bag and that this bag was capable of being identified by the security services.
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On the subject of tort liability, the Court ruled that, in relation to a spectator injured by a smoke bomb which had been taken from the supporters’ clubhouse and had exploded in his leather jacket, the supporters’ club had committed a fault and therefore had its tort liability engaged where it allowed smoke devices to be kept in its clubhouse without taking any measures against this and thus making it easier for its members to bring these devices into the stadium. There was direct causation between this fault and the loss suffered by the victim.

Since it was the combined faults of the organiser of the sporting event and of the supporters’ club which had caused the damage suffered by the victim because of the exploded smoke bomb, and since it is impossible to determine the individual effect of each of these faults, these two organisations must be held to be jointly and severally liable to compensate the loss incurred by the victim. However, it was also a fact that the victim had also committed a fault in relation to the cause of the accident, since he had taken the smoke bomb and put it in his leather jacket with full awareness of the facts. He knew that he was committing a prohibited action because it was by hiding the smoke bomb in his leather jacket that he caused the device accidentally to catch fire and thus to sustain his injuries. He has therefore, through his own fault, contributed to his loss. Taking into account the context of the incident, the youthful age of the victim (16) and the group atmosphere which prevails at such events, the liability of each of the parties involved was assessed by the Court at one third for the organiser, one third for the supporters’ club and one third for the victim.
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Sports policy, legislation and organisation

That London Olympic bid – the story thus far

The background

That this column is no unstinting admirer of the manner in which sports policy is conducted in this country is a proposition which will not have eluded even the most lacklustre reader of this Journal. Time and again, a lethal cocktail of prevarication, irresolution, miscalculation and incompetence have resulted in designs which are either misbegotten or badly executed. The unending Wembley saga – of which more anon – should stand as a lasting memento to everything that is wrong about sporting policy and policy makers in this country. It is hoped that the London bid for the Olympics to be held in 2012 does not suffer the same fate, but it has to be admitted that, thus far, the omens are far from favourable.

The last edition of this column left this particular issue on a typical note – following a period of considerable indecision. There were signs that the Government were moving towards supporting a bid – even if it did doctor some of the relevant evidence in the process. This trend seemed to be confirmed when, in mid-December 2002, the Government set out its strategy for sport in this country over the next 20 years. This was contained in a report issued by its Strategy Unit, which highlighted the important part played by sport in fighting crime, increasing health and social inclusion, and improving educational performance. It also emphasised the importance of staging major sporting events in this country, and set out a plan for securing such events and for improving Britain’s sporting performance. This was clearly inspired by the undoubted success earned by the Commonwealth Games, which had been organised by the city of Manchester the previous summer.

The report stressed that such bids must be backed and co-ordinated by the Government and that all levels of expertise should be involved. It stated:

“A 20-year strategy for mega (sic) events will be part of our wider vision for sport for over the next two decades. The UK regularly hosts successful major sporting events with little or no government involvement. But mega (sic) events such as the Olympic Games or world athletics championships can only succeed if central government is closely engaged from an early stage. To do this effectively, government needs to seek out the expertise that already exists and harness new skills to ensure that costs, benefits and risks are assessed before bidding takes place. We must have strong investment appraisal and project management capacity to ensure that the government is closely involved and able to ensure effective control and monitoring.”

It also sets out more general objectives for sporting policy, and insists that sport must be better organised, with less bureaucracy and fewer organisations, to ensure that funding reaches those groups which truly need it. The structure of sport also needs to be simplified and there is a need for more transparency and efficiency within sport’s governing bodies. The organisation of major events should be part of a twin-track approach, where participation can be increased at the grassroots level whilst securing major events.

The Government retreats (Mark II)

The above constitutes fine words indeed, and sentiments which should be almost elevated to Holy Writ status in the boardrooms of our sporting organisations. It is just unfortunate that, within a few days, the powers-that-be proceeded in the diametrically opposite direction by displaying the kind of timorousness and hesitation which has beset the administration of sport on so many occasions in the past. Over the weekend which preceded Christmas, the Cabinet was issued with dire warnings by civil servants that staging the world’s largest sporting event, i.e. the Olympics, would involve spending an “unnecessary” £2 billion, and that London would probably lose the race to win the bid in any event.

One report revealed that using the Games to regenerate Stratford, the impoverished area of East London earmarked as an Olympic site (see also below, p.69) would cost £2.5 billion, but that the same number of jobs and businesses could be created there for £500 million without the event. A second report, on the “winnability” of the world-wide battle between a good dozen major cities, cast serious doubts on Britain’s chances. John Scott, head of major events at UK Sport, analysed the likely voting patterns within the International Olympic Committee (IOC) which awards the event, and concluded that Paris was the most likely winner because, unlike Britain’s capital, it possesses a suitable stadium, excellent transport links and a recent history of staging major events such as the 1998 football World Cup. This was enough to send some Cabinet ministers scurrying for the unattributable briefing in which a hasty retreat from the original enthusiasm for the bid was signalled. The next day, however, Mr. Caborn, the Minister of Sport, insisted that no decision had yet been made on the bid. He said that appraisals were still being made and that the Cabinet would decide by the end of January. This news appalled the head of the British Olympic Association, Craig Reedie, who urged the Prime Minister to be bold and endorse the
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bid, warning that 2012 would be the only opportunity to stage the games in Britain for a very long time. To add to the confusion, however, Gerald Kaufman MP, the Chairman of the Parliamentary Select Committee for Culture, Media and Sport, stated that it would be “madness” to bid for the Olympics.454

One week later, it seemed as though the bid was all but doomed, when Downing Street appeared to decant the proverbial icky liquid over the project. Doubtless influenced by the reports referred to above, and still feeling the negative impact of the failed attempt to secure the 2006 World Cup, the Prime Minister’s unease was plainly in evidence, citing the major competition which would be forthcoming from such cities as Paris, New York and Moscow. Already, IOC President Jacques Rogge had warned that any show of reluctance on the part of the Government would lead to failure. It was also reported that Downing Street had drawn up a strategy for limiting the criticism which would follow a decision to abandon the bid445. Mr. Blair seemed to confirm his decreasing enthusiasm for the project a few weeks later when he informed the House of Commons about his doubts that the bid was winnable and affordable. It should be pointed out at this stage that, even though the “Scott report” referred to earlier had made Paris the strong favourite, the French capital was actually still debating whether to submit another bid, having lost to Beijing for the staging of the 2008 Games446.

The next day, Culture Secretary Tessa Jowell, addressing the same House, also seemed to be laying the foundations for a rejection when the Cabinet was to meet on the subject at the end of January448. She once again emphasised the cost factor. Although the Government-commissioned Arup report, which considered the financial implications, claimed that the actual bid would cost £13 million, Ms. Jowell claimed that the cost would be closer to £200 million, given that at least one key venue would need to be built, including a 50-metre swimming pool409. This followed a meeting that very morning of the relevant Commons Select Committee, in which Chairman Gerald Kaufman once again damned the bid and all its works, and left its members extremely reluctant to back it – even after a dramatic bravura performance from British Olympic Association (BOA) Vice President Sir Steve Redgrave, who emphasised his enthusiasm for the bid by brandishing the gold medal he had won at the Sydney Olympics. The final nail in the coffin seemed to have been imparted by Chancellor of the Exchequer Gordon Brown the very next day, when he stated that the Government would only give support to the bid if the latter were funded by London’s taxpayers447.

About turn: the Government changes its mind (Mark II)

Little over a week later, however, in one of those inexplicable reversals of fortune, the position had changed completely when the said Select Committee backed the bid, describing it as “clearly desirable in principle”. It appeared that the negative comments made earlier by Chairman Gerald Kaufman had produced the mistaken impression that his sentiments represented the majority view held by its members. This now proved to be extremely wide of the mark, and there appeared to be an extremely wide range of opinions represented within the Committee, with even those who were sceptically minded being open to persuasion – as was the case with two prominent members, Julie Kirkbride (Conservative) and Rosemary McKenna (Labour)445. What may also have encouraged the Committee members was a statement, made a few days earlier by IOC President Jacques Rogge, that there were no “unseen hurdles” which could impede a London bid445.

The report reiterated suggestions made in previous reports that strong central control should characterise any bid, and should even be in the hands of a Minister appointed for the purpose. It was also critical of the fact that only a 12-page summary of the 400-page cost-benefit analysis had been made public – indeed, the excessive secrecy which surrounded the entire process was strongly condemned. Thus at a certain point the BOA submission on the subject had asterisks inserted where it named the sites in the East End of London which had been chose as a possible Olympic village409.

The momentum behind the bid now seemed unstoppable, and was reinforced the very next day when Britain’s top Olympians presented letters of support to the Prime Minister. These were delivered personally to No 10 Downing Street by Matthew Pinsent, James Cracknell and Sir Steve Redgrave, the multi-medalled rowers, and the European long jump silver medallist, Jade Johnson. In an article which appeared in a leading daily newspaper445, Mr. Cracknell once again emphasised the wide range of support there was for the bid amongst those who had successfully represented this country in the Games in the past, and stressed the benefits which a successful bid would yield in terms of the long-term effect it would have on British sport in general. The bid was also boosted by a deal between the Government and the Mayor of London, Ken Livingstone, which commits the city to contributing £1.1 billion towards the estimated £5 billion overall cost of the project. Another factor which may have increased official enthusiasm was the fact that Government polls showing strong backing for the bid452, it seemed

Although the ultimate decision was somewhat delayed by the gathering crisis over Iraq453, it seemed
that the decision was inevitable that the Cabinet would back the London bid. Tessa Jowell delivered an extremely positive assessment of the impact which any successful bid would produce to her Cabinet colleagues ahead of the crucial meeting on the issue, with the projected benefits extending far beyond the sporting effects, in that it would boost Britain’s profile on the world stage by showing that it was a “can-do nation”\textsuperscript{554}. The effect of these positive words was almost negated a few days later when it was learned that a Cabinet decision on the matter had been delayed yet again, once again citing international developments as a reason\textsuperscript{555}. However, a welcome boost to bid supporters materialised with just days to go before the meeting, when it was learned that Dr. Brown had, after all, dropped his objections to it, and that he was satisfied over its financial aspects\textsuperscript{556}. However, history repeated itself yet again almost immediately afterwards when the decision was put on hold indefinitely – until the resolution of the Iraq crisis\textsuperscript{557}.

It would seem, however, that there was an awareness in Government circles of the dangers presented by this eternal prevarication, since Sports Minister Richard Caborn decided to prepare the ground for London’s possible bid by courting potential votes within the IOC. He started by carrying the Olympic message to Copenhagen, where sports leaders and Government ministers were gathering for a world anti-doping conference (see also below, p.118). He indicated that he was working particularly hard on securing Commonwealth support, and there appeared to be a ready-made forum for such a canvassing exercise in 2004, when the Government will be chairing a meeting of Commonwealth sports ministers to coincide with the Athens Olympics\textsuperscript{558}. However, even in this respect the Minister’s performance was far from blameless. First of all, it emerged that Mr. Caborn had failed to attend recent congresses organised by the IOC, thus passing up golden opportunities to mend fences with the world of sports administration over the Wembley and Picketts Lock fiascos\textsuperscript{559}. Then it was also learned that he had asked for support from the motor racing lobby, more particularly from Max Moseley, the President of the sport’s world organising body FIA, and, incredibly, from Bernie Ecclestone, the Formula One leader. This seemed a particularly ill-advised source from which to tap support, in view of the storm of criticism which the Prime Minister had earned as a result of the £1 million donation which Mr. Ecclestone had given to the Labour Party in return for an exemption on the ban on tobacco advertising\textsuperscript{560}.

There remained, however, some concern at the delay in the Government’s decision on the bid, and it was aired in Parliament when John Whittingdale, the Conservative spokesman on sport, expressed his worry that indefinitely postponing the bid could damage London’s chances. Although Mr. Caborn replied by pointing out that the deadline for the bids was not until July, and that none of the main rivals had yet submitted a bid, this did not entirely allay concerns\textsuperscript{561}. There was a feeling abroad that an early decision would certainly help, and would in any case do something to reduce the air of hesitancy which had bedevilled the entire operation from the outset. Moreover, the time seemed extremely appropriate to back the bid, since there were other developments which were assisting its credibility – not least being the fact that the World Indoor Athletics championships, held in Birmingham in mid-March, had been hailed by all those concerned as a rousing success\textsuperscript{562}.

Finally, however, the Government did announce, in mid-May, that it was giving its support to the bid, with Mr. Blair stating that the “time is right” to bring the Olympics to the UK, and claiming that “we have always been string supporters of the Olympic movement”\textsuperscript{563}. This claim was decried as “hypocritical” in some quarters, with some asking the question why, if the Government cared as much about sport as it claimed, it had allowed such disasters as the Wembley fiasco, the saga of Picketts Lock which lost this country the World Athletics Championships, and the fact that at present, London can boast only one Olympic swimming pool. Writing in The Independent\textsuperscript{564}, James Lawton points out that the outstanding results achieved by some of our athletes in the 2000 Olympics owed more to the perseverance in the face of adversity on the part of the athletes than to any support emanating from the Government, since the relevant Lottery funding – itself a somewhat dubious foundation for any serious endeavours in this regard – was often far from guaranteed.

The financial implications

Who pays? This was always going to be one of the more intractable issues to be dealt with in relation to any serious bid to stage the Games. In late January, Culture Secretary Tessa Jowell opened discussions with Camelot to investigate the possibility of launching a special Olympic lottery in order to assist with the funding of the bid. The sheer size of the cost involved, assessed at £2.5 million, was always going to be an enormous drain on the public purse, and any initiative which stood to offset this cost was obviously welcome. In fact the financial implications for the Government had already started to look less daunting when Mayor Ken Livingstone had stated that he was prepared to commit the London taxpayer to contribute up to £120 per head for seven years in order to finance the project\textsuperscript{565}.

In fact shortly afterwards it was announced that a
deal had been struck on the manner in which both the cost of the bidding process and the staging of the Games would be divided. It was agreed that, if the cost of the Games reached an overrun which was projected as a worst-case scenario, London would pay £1.1 billion, with half the funds coming from the council taxpayer and half from the centrally-funded London Development Agency (LDA). The LDA would spend its allocated share on purchasing land, from which it might subsequently make a profit. The Lottery would be required to raise between £500 million and £1.5 billion depending on the total cost of the Games. The lottery would be promoted by sporting stars and some of the cash raised would be spent on providing Olympic stars of the future. There remained a good deal of scepticism amongst some Ministers as to whether the lottery could in fact raise the amounts in question. Nevertheless, the Government gave the go-ahead for this new Lottery in early May.

Another method of raising at least part of the cash required which was considered by the Government was the levying of a £550 million rate on businesses. This would have taken the form of a supplementary charge. This notion, however, was later abandoned as there would be insufficient time to consult the business world, given that the bid had to be submitted by 15 July and the Government had conceived this idea in May.

Once the Government had decided to back the bid, details emerged of the lottery scheme designed to assist with its funding. If the bid is successful, there will be a daily lottery draw with tickets costing as little as 1p. The Lottery organisers, Camelot, also plan a weekly game with three draws — gold, silver and bronze — and prizes ranging from £20 to £200,000; Olympic themed scratchcards, a television show, and a twice-yearly "mega draw" with a prize fund of over £27 million, plus 25,000 other incentives such as Olympic holiday packages.

However, it would be a mistake to view an Olympic bid solely in terms of expenditure, since hosting the Games can bring considerable financial benefits. This was very much the case for the city of Munich, which played host to the Games in 1972, and, to a lesser extent, Barcelona (1992) and Sydney (2000). At the most conservative estimate, the benefit to the city over the following 30 years has been in excess of £5 billion. Since that year, the city's Olympia Park has hosted over 7,500 sporting, cultural and commercial events which have attracted 246 million people. According to a study performed by the Business University of Hamburg, that, apart from the purchase of event tickets, the incidental expenditure of these people amounted to a sum between 50 and 120 DM per day, which had yielded a financial benefit to the city of £5-10 billion.

Who heads the bid?

With so much at stake, in both sporting and political terms, it was obvious that whoever was to lead the bid would need to be chosen with the greatest of care. The initial favourite for the position was Lord Simon of Highbury a former Chairman of BP who was lured out of the world of business by Prime Minister Blair to become Trade and Industry minister in the House of Lords. He left the Government in 1999 in order to concentrate on a campaign urging Britain to join the euro, although he remained an adviser to the Cabinet Office. However, this was largely a matter of speculation since it was not even known yet exactly how the selection was to be conducted. Months later, it emerged that Sir Christopher Meyer, a former British ambassador to the US, was expected to be named as Chairman of the bid. It appeared that recruitment consultants Saxton Bamfylde had been discreetly searching for a suitable candidate for two months, even though candidates could not be officially approached until the London bid was announced, which was still a few weeks away.

Once the bid was official, one might have expected a little more glasnost to govern this matter, but this was not to be the case. Once again, the press had to rely on unattributable sources to inform the public of any progress in this respect. "Sources involved in the selection" stated that an "informal shortlist" of four had been agreed, consisting of Meyer, Simon, Vodafone chief executive Sir Christopher Gent, and Sir Christopher Bland, the BT Chairman. However, the same sources added that the shortlist might be expanded to include advertising executive Kevin Roberts, Denise Kingsmill, the Chairperson of the Competition Commission, and Barbara Cassani, the former Chief Executive of budget airline Go. Shortlisted candidates were to be interviewed by Culture Secretary Tessa Jowell, Mayor Ken Livingstone, and Craig Reedie, the Chairman of the British Olympic Association (BOA). Then, just as mysteriously, it emerged that a shortlist of two had been drawn up, consisting of Christopher Meyer and Charles Allen, the Chairman of television group Granada, who was not even on the "extended informal shortlist". Then it appeared that the Prime Minister's wife, Cherie Booth, was also being considered, although it was not explained how she had not been mentioned by any of the "sources" hitherto mentioned.

The following month, the confusion became even more impenetrable. Essentially, the interviewing panel first spoke to a man who claimed not to be interested in the position, and then tried to change the mind of a man who did want the post but believed that he would not have the time to devote to the role. The first-named was Gerry Robinson, the Chairman of the Arts Council.
hitherto not mentioned in connection with the post. He had made it clear even before he met the panel that he did not want the post because of lack of time. He was followed by Charles Allen, who also said he lacked the time but was believed to be open to a change of mind. It was then proposed that Allen should work in close co-operation with Barbara Cassani, whose main “defect” was that she was a US citizen and therefore may lack conviction when heading the bid for a different country. Incredibly, Cherie Blair was also interviewed, but told that she did not have “all the skills required” to be considered as a bid leader.

At the time of writing, the firm favourite appeared to be Barbara Cassani.

Where? (Incorporating the “ghost of Wembley”!) Almost as important as the question of where the finance was to come from, was the issue of the Games’ location should the London bid succeed. The main area earmarked for the Games would be the area surrounding and including the London Stadium; once lauded as the finest greyhound racing stadium in the world, but now a dilapidated and rusting site, which has been derelict for eight years since an ill-fated scheme to open a nightclub there collapsed. There is, however, sufficient land there to build an 80,000-seater stadium, costing up to £400 million, for the opening and closing ceremonies, as well as the field and track events. It is hoped at the same time that the area in question, from the Greenwich peninsula in the South to Hackney to the North, will be transformed by the construction of sports facilities, transport infrastructure and an athletes’ village. This regeneration is apparently sorely needed, as Hackney is one of the poorest areas in England, with unemployment running at 35 per cent on some estates.

As for the other venues, the British Olympic Association (BOA) wrote to 48 clubs and stadiums in its attempt to identify up to six grounds to host the various events. It emerged that Wembley – if it ever gets built – was earmarked to host the football final. But here again – as is nearly always the case whenever that two-syllable name gets mentioned nowadays – a storm of controversy broke out. Given that the nation was about to fork out a little matter of £750 million for the privilege of erecting this new showpiece of English football (see Journals passim) would it not be an idea to attempt to utilise it in as many ways as possible, in order to maximise its profitability? This perfectly legitimate question was asked during the various hearings of the Culture, Media and Sport Select Committee on the London bid, which has already been referred to earlier. It was the arrival at the hearing of Roger Draper, the acting Chief Executive of Sport England, which lit the fuse. The £120 million of lottery money which was allocated to the Wembley project and the fate of which remains uncertain (again, Journals passim) has always been a very sore point with the Committee Chairman, Gerald Kaufman MP.

Apparently Michael Cunnah, the Wembley Chief Executive, had written to Mr. Draper, informing the latter that his stadium would be available for whatever uses were deemed appropriate – including that of “centre piece stadium” as per the stadium’s obligations under the funding agreement with Sport England (a reference to the £120 million referred to earlier). The Lottery grant had been awarded on condition that the stadium would house the Olympics if the London bid were successful. It also pointed out that the stadium can be configured for athletics. This letter assumed a central significance during the hearing. One of the members asked why there needed to be one Olympic village rather than dispersing the athletes round the country, thus saving a good deal of money. John Scott, of UK Sport, replied that a winning bid required a coherent strategy which included having a village near the main athletics stadium. Mr. Kaufman retorted that the village in Manchester was some considerable distance away from the main stadium, and expressed his consternation that this juxtaposition of village and athletics stadium had become such a central feature of the bid, and concluded that he had been “conned”.

There have been calls for an independent inquiry into this matter, but thus far no-one seems to have felt inclined to press for one.

Wimbledon (All England Law Tennis Club) was the obvious choice for the tennis event, but at the time of writing there is some doubt as to whether this will remain the case, given that the Wimbledon management were asking no less than £13 million in rent for the privilege. Various other grounds considered include the East London Aquatic Centre (swimming and related events), the Millennium Dome and the nearby Excel Exhibition Centre in Greenwich, and West Ham United’s ground at Upton Park (hockey).

The other bids
It has already been noted earlier (p.66) that one of the factors which initially inhibited official enthusiasm about supporting the London bid was the quality of the cities widely regarded as the most likely rivals. From a very early stage, Paris had set out its stall for the 2012 Games, even before any decision was made on whether actually to enter a bid. As has been mentioned earlier, one of the main considerations spurring on the French capital is what many of its citizens regarded as a humiliation when it lost out to Beijing for the 2008 bid.

There appear to be several significant differences between the London and Paris bids which may make
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the latter a better prospect. First, as has been mentioned before, the infrastructure required to host the Games is generally regarded as infinitely superior to anything London can offer. Second, the manner in which the bids were approached also reveals significant differences. First of all, there appear to be no financial constraints which cause any hesitancy, as was the case in Britain. Secondly, the liaison between Mr. Chirac and the Mayor of Paris, Bertrand Delanoë, seems to have been much better on this issue than the relations between Messrs. Blair and Livingstone\(^\text{586}\). However, the French may have done their chances no good by the attempts they engaged in to rubbish the London bid because of its alleged lack of facilities and infrastructure, since hubris and arrogance seldom go down well, even in the exalted circles of the international Olympic movement\(^\text{587}\). Paris formally launched its bid on 21 May, amidst much glitz and fanfare\(^\text{588}\).

A few days after the London and Paris bids were launched, Moscow entered the fray – the second time it had done so, since it had submitted an earlier, mistimed, bid in July 2000 – even before the Sydney Olympics had started. (Moscow’s bid, however, seems to be even more slipshod than the London effort, since its Olympic website has not changed in content since 2001\(^\text{589}\)).

Less noticed has been the bidding process for the 2010 Winter Olympics, a decision on which is to be made in July 2003. At the time of writing, the South Korean city of Pyeongchang was said to be the favourite\(^\text{590}\).

**Wembley: still no end to the saga in sight**

*The story so far*

When this Journal last went to press, it seemed that, at long last, the fate of the project to build a new showpiece centre for English football had been sealed. In spite of the controversies over the inordinate cost of the project, the many fits and starts to which it had been subject, the fact that many involved in the game no longer actually wanted a national stadium, and the controversial nature of the seating arrangements, it definitely seemed as though the project was going ahead, with the demolition of the old stadium having been completed and the last financial details having been settled\(^\text{591}\). However, as its incidence on the London Olympic bid shows only too clearly (above, p.65) there appears to be a curse on the place which ensures that it remains forever dogged with controversy.

**Renewed doubts on financial viability of the project**

In late February 2003, leading financial institutions once again cast doubts on the wisdom of pressing ahead with the scheme, mainly because of the cash crisis currently afflicting the Football Association (FA) (see also below, p.74). This had led to warnings that the FA should abandon the project or face financial ruin. This was contained in a secret report compiled after consultation with a number of major investment banks, including Bear Stearns, Barclays and UBS. It also emerged that the FA were already £50 million short on a payment towards the new stadium which had to be made by May 2003, and £40 million short in raising the money for the National Football Centre at Burton-on-Trent, whilst they could only raise £4 million of the £20 million due to the Football Foundation. It transpired that the FA were negotiating additional loans to meet those commitments, as well as borrowing against future television and media deals in order to raise the cash for Wembley – a highly dubious method, according to some observers. There were also suggestions that the FA’s revenue calculations for the new stadium were based on an optimistic 90 per cent capacity for the 20 years for which they have guaranteed to play England matches and Cup finals at the stadium. This caused concern amongst many in the game, who pointed out that England rarely achieved 90 per cent capacity at the old Wembley\(^\text{592}\).

In spite of these dire predictions, the FA announced that it remained “100 per cent” committed to building the new stadium, and that this commitment would be unaffected by the arrival of a successor to Adam Crozier, whose departure as Chief Executive occurred in extremely controversial circumstances – in part related to the FA’s financial crisis\(^\text{593}\). It stated that the cost of not going ahead would be far more damaging legally, in view of the financial commitments already made\(^\text{594}\).

In mid-May, a further development occurred which may have implications for the Wembley finances. Robin Saunders, the high-profile financier of the stadium project (and of Formula One motor racing) failed to win the unequivocal support of her employer, WestLB, as it launched an investigation into her unit. WestLB is the Wembley project’s main financial backer, having provided a loan of £426 million as a contribution towards its total £750 million cost. Speaking from his Düsseldorf base, Chairman Jürgen Sengera would commit himself to no more than saying that it was appropriate to “wait for the end of the investigation” and then make a statement. He was not specific about where the losses had been incurred, but they were widely believed to relate to Boxclever, the former Radion Rentals retail chain\(^\text{595}\).

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

However, it has been learned since this development that WestLB could end up owning Wembley Stadium if the latter experiences financial difficulties. The German bank could demand immediate repayment of the loan if Wembley National Stadium Ltd., the FA subsidiary set up to manage the stadium, were unable to meet its staged
payments. That was one of the features to emerge from an official inquiry into the money which the Government had invested in the project, which is described in the next section.

**NAO report on use of Government money for the project**

In early June 2003, the National Audit Office (NAO) issued its report following an investigation into the use of £161 of public money for the long-delayed project. It was prompted by the decision by the Department of Culture, Media and Sport to plough £20 million of Government money into the project in September 2002, in spite of a critical report into the manner in which the project had been run. Inevitably, it also brought into focus once again the fate of the now-infamous £120 million of lottery money already invested in the project.

Sir John Bourn, the Comptroller and Auditor-General, concluded that the Department engaged in a "well-managed risk" when it decided that the money should be invested after WNSL failed to persuade the City of London to fund the stadium in December 2000. Without City funding the project faced collapse, even though £120 million of lottery cash had already been spent by WNSL on purchasing the site. However, Sir John added that Government plans to attempt to rescue the project by removing athletics from the stadium and requiring WSNL to repay £20 million in December 1999 were not handled very well.

It should be stressed, however, that Sir John's 40-page analysis is concerned only with the manner in which the Department and Sport England, which made its largest single grant when it awarded £120 million to the project, protected their investment rather than whether the project itself represented value for money...

**Mixed fortunes in finding future tenants**

It is obvious that a project as costly as the new Wembley sets out its stall – and its prices and the Football League, regular use by any club of the Wembley premises would be in breach of such planning rules. A council spokesperson added that to alter the terms of the planning permission to accommodate the possibility of accommodating a permanent football club would be inconsistent with Brent's ambitious plans for the regeneration of the entire area surrounding Wembley, and would not be "in the interests of local people".

Although this was a serious blow for Mr. Carter, he did not lose heart about the plan, and returned to it in early March the following year. During his first press conference as Sport England chairman, he reiterated his support for an approach by a club, but added that the planning conditions imposed by Brent council were naturally a barrier to this. In the meantime, Arsenal had started to experience problems with finding the money for their new stadium at Ashburton Grove. However at the time of writing there was no indication that Brent Council were about to alter their position.

Better news, however was forthcoming in mid-January from an unlikely source when the Rugby Football Union (RFU) announced that football's most famous shrine is earmarked for the staging of four Tests should the bid by the RFU to stage the 2007 World Cup prove successful (see also below, p.138). One of these matches would be a World Cup semi-final. This would obviously be of benefit to both the new Wembley and to the RFU, since the 90,000 capacity of the former would seriously increase the revenue-raising potential of the Cup.

**The new Wembley sets out its stall – and its prices**

Clearly deciding that a modicum of public relations might not come amiss after all the mishaps which have bedevilled the project since its inception, the Wembley management launched a mock-up display of what the new stadium will look and feel like. Visitors to the display are taken for a filmed tour of the vast concourses (the width of a four-lane highway) as well as the many restaurants and cafés. There is also the inevitable website. This was accompanied by a raft of assurances from the management that the project was "on budget and on or ahead of schedule", in the words of WNSL Chief Executive Michael Cunnah, who went on to predict that this would be the "only financially self-sustaining stadium in the world" – words which may return to haunt him one day given that, as has been described above, there remains doubts about the soundness of the financial basis for the Wembley project.

Mr. Cunnah's brave words are also at odds with some of the doubts which have arisen over the marketability of the "corporate section" of the ground. This will include corporate boxes costing £210,000 for the largest, holding 20 people for 19 events, and premium seats costing between £16,100 for a ten-year licence and £5,450 per
season at the top end, and £3,900 for a licence and £1,350 per season at the lower end. Some commentators echoed the sentiments aired in the last issue of this column on the question whether there is in fact such a large demand for corporate hospitality facilities of this nature. One of the reasons for this is the critical lack of car parking space. The size of the development, being a kilometre in circumference, means that there is no room on the FA-owned land for parking. Space for just 3,000 vehicles has been agreed with Quintain Estates and Development, who own the remaining 44 acres of the old Wembley plc land. The FA will surely come in for a good deal of criticism for not having purchased the entire site, which would have cost a mere £48 million extra.

Mr. Cunnah explained that it was the Government’s desire that the new stadium should be less of a car-driving venue, and that there would be a full set of other options, including a park-and-ride scheme, special train services and vastly improved underground train facilities. There are some doubts, however, whether all this will impress the corporate hospitality clientele – which is after all the market which is being targeted for the purpose for selling the inordinately expensive boxes and seats referred to above. One senior executive who speaks with the benefit of a lifetime’s knowledge of Wembley and of selling to the corporate market commented:

“What they are trying to achieve is sheer madness. They’re living in a dreamland. Anyone paying such huge prices will want the choice of going by car. It’s not a pleasant experience going by train or tube, surrounded by the undesirables who attach themselves to the England side.”

The WNSL marketing have been attempting to sell their packages by comparing them to those which are on sale at venues such as Wimbledon, Ascot or Twickenham. Quite apart from the fact that this will hardly endear the project to the football heartlands, critics have their doubts about this strategy purely in terms of marketing effectiveness. The view was that Rugby and tennis are entirely different markets from football and attract a more up-market audience with greater spending power, which once again leaves some doubt as to exactly how much custom they will attract. Nor was it a very optimistic sign that the bankers financing the project (see above) have not been convinced by guarantee provided by selling agents IMG that £30 million will be made per annum from these “super seat” sales. They have insisted that the project be underwritten by Credit Suisse First Boston Bank.

Quite apart from the business viability of these “super seats”, their prominence in the entire scheme has been viewed with dismay by representatives of the ordinary football supporter, particularly as their number has turned out to be significantly higher than that which they were led to expect. Alan Bloore, of the Football Supporters’ Federation, commented that initially, the Federation was told to expect maybe 14 per cent, but that figure has crept up to exceed the 20 per cent mark. He added:

“There was talk of this stadium holding 100,000 people, but the bigger premium seating areas and hospitality boxes reduce the space for real fans. The ordinary fan certainly can’t afford £20,000 to watch England play and to see a couple of Cup finals. It is interesting Wembley are not releasing the ticket prices for the other seats in the ground. We were led to believe the cheapest would be around £20 or £25. We will have to see if the Wembley bosses now keep to that promise”.

Chris Herriott, a spokesman for the Sunderland AFC Supporters’ Association, also pointed out the much-neglected fact that football remains essentially a working-class game and that corporate hospitality greatly diminishes this aspect. In the end, said Mr. Herriott, “people will move on and stop watching football.”

It should also be added that, as that perceptive commentator Peter Corrigan did recently in a leading Sunday newspaper, that the bill of fare served up by the England team in recent games will not exactly prove to be a marketing executive’s dream either....

**English football’s organisational woes continue...**

**The background**

Someone once said that there is one fundamental rule which governs sport in the top flight: if you win, the performers get the glory; if you lose, the administrators get the blame. Sports administration has in fact never been the most glamorous of tasks, and always conjures up images of the blazered ex-Guardsman or retired business executive requiring something more interesting to do in their retirement than mowing the lawn. Yet as various sports have become increasingly professional, so the need for top-class administrators grows, since not only the superstructure, but also the infrastructure from which the future professional stars will rise, lies in their hands. That this is a lesson which has yet to be learned by many of those who profess to care about football has been only too evident from recent developments at the top organisational level, mainly on two subjects: who leads it, and how are its finances managed. In more concrete terms, this has boiled down to the aftermath of the Crozier resignation at the helm of the Football Association (FA), and the parlous state in which the FA finances currently find themselves. However, the FA is currently not the only institution of football administration to require some tutoring in this regard, as will be made clear later in this section.
Crozier: the aftermath and succession

In the previous issue, the sorry saga of the Adam Crozier resignation as Chief Executive of the Football Association (FA) is ample evidence of this painfully obvious proposition. It will be recalled that the prevailing view amongst a majority of commentators was that his departure was (a) an act of skullduggery of almost Shakespearean proportions, and (b) for all the Scot’s faults, a sad day for the integrity and respect for the grassroots of “the beautiful game” in this country.

It was readily accepted that perhaps he had a misguided commitment towards the new Wembley project and the inordinate £750 million price tag attached to it, the consequences of which we are now, with a good deal of regret (and a fair amount of benefit of hindsight), fully beginning to appreciate (see above, as well as Journals passim). However, he stood up to the overbearing ranks of the Premierhip officials and chairmen, whose ever-expansionist motives he rightly distrusted, and his dislike of the FA’s snail-paced Chairman, Geoff Thompson. It also needs to be borne in mind that those who were foremost in their calls for Crozier's head had, like Mr. Thomson, been as enthusiastic for the project as Mr. Crozier himself.

In addition, he succeeded in keeping England in the Euro 2000 Championships even as the hooligans were once again testing the patience of even the most Anglophile continental cities, was instrumental in getting Sven-Göran Eriksson appointed as England manager, earned the respect of the England players and transformed a governing body largely untouched since the days of hansom cabs and streets lit by gas. He also presided in a six-fold rise in commercial turnover at Soho Square during his relatively short tenure.

As a result, no agreement was reached and three new names were added to the original shortlist of five. These included Mark Palios, a former professional footballer who played over 400 League games for Tranmere Rovers and Crewe Alexandra between 1973 and 1985. Because of his experience of the game itself and in the world of finance – as an accountant with PricewaterhouseCoopers – Mr. Palios rapidly became the firm favourite. In fact, he appeared to fit in perfectly with the brief given to headhunters Russell Reynolds Associates, which was to find a financial expert who knew about football.

Many FA insiders seemed delighted with this choice, including FA Chairman Geoff Thompson. However, Mr. Thompson, showing himself once again to belong to the cervically-challenged school of chairmanship, allowed himself to be persuaded that the position should go to someone else.

Thus it was that, around two months later, it was announced that not Mr. Palios, but Peter Littlewood, a 45-year-old executive with candy manufacturers Mars, was the hot favourite to succeed Mr. Crozier. Mr. Littlewood was hardly a household name in the game (or anywhere else, for that matter) and did not even live in this country, being based in New Jersey as vice-president of Masterfoods USA (a branch of Mars). His only previous professional involvement with football was through sponsorship projects by Snickers, but this had not been his route to the top echelon of the FA.

Among his supporters was Allan Leighton, the Chairman of the Royal Mail group and a former colleague at Mars. Nevertheless, he was believed to be a fan of Tottenham Hotspur. Mr Littlewood’s appointment seemed a certainty a few days later, when the relevant subcommittee recommended Mr. Littlewood for the £350,000-per-year position. However, it soon appeared that this nominee was not to the taste of the FA Board, which meant that the issue was heading for a major showdown.
5. Public Law

Fate, however, was kind to the FA grandees and saved them the embarrassment of yet another public relations fiasco, when Mr. Littlewood – by now inevitably dubbed “the Man from Mars” – withdrew from the fray. It is understood he was unhappy with the revelation made in a daily newspaper that he had initially been first choice but that there had arisen a good deal of opposition within footballing circles to another marketing man running the FA. He was also said to be unhappy at the public scrutiny which he would have to endure in this position. As a result, Mr. Palios was offered the position and accepted. He was confirmed in his position a week later. His elevation was announced on the same day as that on which the Government backed London’s Olympic bid and the build-up to the next day’s Cup Final in Cardiff. The FA, of course, strenuously denied that news of the appointment had been sneaked out on a busy news day in order to save its blushes over Mr. Littlewood’s withdrawal. Mr. Palios, for his part, pronounced himself “very excited” at the prospect of leading the FA through this most critical time in its history. As to whether Mr. Palios’s role would differ in any way from that of his predecessor, the FA spokesman was extremely non-committal, restricting himself to stating that:

“Mark Palios will be responsible to the FA Board – just as any Chief Executive answers to his board – and will have responsibility for the day-to-day running of the FA and of its staff.”

It is obviously too early at this stage to make any assessment of the manner in which Mr. Palios is discharging his new duties. However, the commentators were rightly scathing about the shambolic process which preceded his appointment. According to former FA chief Graham Kelly, the Association seemed to have learned nothing, as he had been through very much the same process of dithering and opposition within footballing circles to another marketing man running the FA. He was also said to be unhappy at the public scrutiny which he would have to endure in this position. As a result, Mr. Palios was offered the position and accepted. He was confirmed in his position a week later. His elevation was announced on the same day as that on which the Government backed London’s Olympic bid and the build-up to the next day’s Cup Final in Cardiff. The FA, of course, strenuously denied that news of the appointment had been sneaked out on a busy news day in order to save its blushes over Mr. Littlewood’s withdrawal. Mr. Palios, for his part, pronounced himself “very excited” at the prospect of leading the FA through this most critical time in its history. As to whether Mr. Palios’s role would differ in any way from that of his predecessor, the FA spokesman was extremely non-committal, restricting himself to stating that:

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FA faces up to cash crises – and the inevitable cutbacks

That all was not well financially with the FA is something which started to emerge towards the end of December 2002, when a national daily newspaper revealed that the Association faced a shortfall of £50 million and were having to mortgage their future income to make ends meet. The FA Board had kept relatively quiet about this development, but in late February had to face up to the fact that hard decisions would need to be made. This was in spite of the fact that the Association was counting on receiving £200 million or more over four years from their FA Partners programme, which featured five “blue chip” sponsors (Carlsberg, Nationwide, McDonalds and Umbro). The Board were split as to how to make the inevitable economies, which was hardly surprising, as the crisis became a full-blown one right in the middle of the Crozier interregnum. Neither of the joint acting Chief Executives, David Davies and Nic Coward, were experts in financial matters. They would have preferred to have delayed any major decisions until the appointment of a new Chief Executive, but some members of the Board felt that action needed to be taken immediately.

In fact, a series of economies had already been initiated. In mid-January, the FA announced a delay in the construction of their planned National Football Centre at Burton. They disclosed that there was no date for completion of the building, although work on the remainder of the project such as landscaping, pitches and drainage would go ahead. The cost of the entire project was £50 million, and the FA sought to stagger the cost by aiming to complete it some time after the 2006 World Cup. A few days later, it announced that it was about to embark on a major pruning exercise at Soho Square, which would involve cutting the generous benefits awarded to staff by Mr. Crozier (which included long-service awards, a final salary pension scheme, and a generous paternity leave plan). Thus they would be able to save £10 million in the course of the following 12 months. Also, a recruitment freeze was introduced whereby staff who left were not to be replaced, thus avoiding the need for redundancies (although it added, ominously as it turned out, that these were “not ruled out”). One of the rising items of expenditure had in fact been staffing costs at Soho Square, which had leapt from £14 million to £38 million.

Other cutbacks considered were more controversial. Thus at a certain point, the FA was forced to admit at a UEFA-organised antiracism conference, no less – that its annual £75,000 grant to Kick It Out, English football’s anti-racism campaign, was being reconsidered as part of the financial review. Coming as it did in the midst of what appeared to be a resurgence of racism amongst spectators in English football, this announcement caused a good deal of embarrassment. Another potential casualty being canvassed was the Football Foundation, which receives £20 million per year from the FA for the development of the game at the grass roots level by improving pitches and changing rooms.

As time went on, the cutbacks not only envisaged, but actually carried out, became more even more controversial and bordered on the vicious – as well as being carried out with the now almost mandatory public relations disaster. In mid-April, despite its earlier assurances that it would seek to avoid redundancies, 20 per cent of the workforce – 40 staff in all – were made redundant as part of a drive to save £3 million per year. The first wave of these job losses appear to have been
made with all the tact and delicacy of a cavalry charge. Fourteen departing workers, all from the referees’ office, were informed of their fate by heads of department in the staff canteen. They were then escorted to the door of the Soho Square headquarters by other FA officials without even being given the opportunity to say goodbye to their colleagues. One of the dismissed workers commented that he was “practically marched out of the office” as if he had committed a crime.”

The cull continued a few days later when there occurred a savage round of staff cuts in the marketing and commercial department, including Paul Newman, Head of Communications and one of England manager Eriksson’s closest allies. He was one of six staff members who were informed they were being made redundant with immediate effect. Mr. Newman’s departure was said to be purely on financial grounds, his salary being in the region of £150,000 per year. However, he was also a close ally of Mr. Crozier, which may also have played a part. The FA also reduced the Chief Executive’s salary from £600,000 to £350,000 – which may also have been part of the problem in attracting suitable candidates for the position.

Finally, the FA also decided to shut down the football centre at Lilleshall, once the Association’s Midlands flagships centre, which will involve savings of about £7 million. Lilleshall was formerly the nerve centre of the England team, and the heart of youth academies, medical assistance, rehabilitation from injuries and coaching. Recently, however, it had become the focal point of the FA’s racial and ethnic policies.

Although no further cutbacks were announced at the time of writing, it is by no means certain that there are none to follow. This column will obviously be following developments in this regard very closely.

**MPs start inquiry into football’s finances**

The events and developments described in the previous section merely concerned the financial troubles currently experienced by the English game’s ruling authority. However, there can be no doubt that, in a wider sense, football’s finances are in a none too healthy state – as any discerning reader of this Journal will have become all too aware. Ever-rising player costs, the impact of transfer windows, uncertainty over future revenue from television broadcasting, and the growing gap between the leading clubs and the rest have all contributed towards this disquieting state of affairs. It is precisely in order to investigate all these aspects that, in mid-April 2003, the Parliamentary Football Group decided to commence an official inquiry into the game’s finances.

Alan Keen, the group’s Chairman, explained the concern felt at the direction taken by the game which he described as “part of the nation’s heritage”, stressing that it was not only the long-term future of professional football, but also the grass roots of the game, which could suffer if the wrong decisions are made. The inquiry, the findings of which will be published in the autumn of this year, will also consider clubs listed on the stock market in order to establish whether there are potential conflicts between the interests of the fans and those of the shareholders. The parliamentarians in the group also include Clive Betts, Lord Faulkner of Worcester, Mark Field, Roger Godsiff, Mark Hendrick, John Mann, Peter Pike, Andy Reed, Christine Russell, Lord Taylor of Warwick and Joan Walley.

**How effective are football’s corruption “watchdogs”?**

The footballing troubles described above may be disquieting, but in the main they are the product of nothing more sinister than oversize egos, spinelessness, incompetence and, it has to be admitted, unashamed greed. However, there has recently arisen a good deal of concern over another aspect of football’s finances which threatens to bring the game not only into disrepute, but also into downright illegality – i.e. corruption.

Ever since the word “bung” became an unfortunate part of the game’s jargon, politicians of all ideological colours have attempted to tackle the problem – and none more so that the current administration, which has sought to attach itself to the soccer bandwagon even before it assumed office. Whilst still in Opposition, New Labour wanted an independent regulator for football in order to deal with such matters as bribes and bungs. The first step it took on assuming office was to establish the Football Task Force, which under the controversial chairmanship of David Mellor succeeded in alienating virtually every football authority in the country. The Task Force itself then became divided. The main bones of contention were (a) did football still require an independent body, and (b) should specific legislation be introduced to deal with the problem.

The answer to these divisions was quietly to forget about proposing a Football Regulation Bill, and to propose something called the Independent Football Commission (IFC). Jack Cunningham MP was to become its first Chairman. It was intended that the latter would operate from the headquarters of the Football Association, which would also pay him. However, accused of lacking genuine independence, Dr. Cunningham was deposed on the basis that the Nolan Report into probity in public life demanded that such positions be openly advertised. As a result, the position was awarded to Professor Derek Fraser, who was about to retire as Vice-Chancellor of the University of Teesside, where the IFC is currently based. It consists of a secretary, several researchers and seven unpaid
commissioners, who are interested in football but have their backgrounds mainly in politics, business and finance.

In late January 2003, the IFC submitted its first annual report. Its main thrust was to urge all those involved in football to tackle the problem of its “unduly mercenary and uncaring” image, and to move “rapidly and decisively” towards improving its relationship with supporters. Whilst backing the introduction of Club Charters by the Premiership and the Football League, the report also states that the complaints procedure should be streamlined.

The report further voices concern over poor communication within the football community and unsatisfactory response times to complaints and delays in receiving information from the football authorities, alleging that these procedures are far from easy to understand or use – even if supporters know of their existence. This appeared to be borne out by an independent survey of supporters, which revealed that the majority criticised the football authorities and fewer than 25 per cent were aware of the “fans’ charter”. It also addresses concerns over what constitutes a fair deal for away fans and supporters buying replica kits, as well as calling for a review of ticket refund policies. In all, the report makes a total of 22 recommendations to deal with all these issues.

However laudable all these sentiments may be, they present several problems. First of all, they lack focus and seem to exceed vastly the rationale for the Commission’s creation. The IFC describes its role as evaluating “the effectiveness of football’s self-regulatory framework” and suggesting improvements. The idea was to focus mainly on those areas in which the game was rapidly sinking into a cesspool of corruption, and to establish the extent to which football’s self-regulatory system of invigilation was equal to this problem. Another difficulty, as Steve Tongue writes in an influential Sunday newspaper, is that no-one needs to take any notice whatsoever of these “suggestions”.

Even securing the co-operation of those closely involved in the game has been “variable”, to use the report’s tactful phrase, which further complains that delays in replying to requests for information have impeded progress. This is all the more regrettable because the 22 recommendations themselves are hardly likely to strike terror into the hearts of football’s rulers, concerning as they do such matters as displaying ticket prices more clearly and showing expiry dates on replica shirts.

It is true that the IFC has pledged itself to tackle some of the more contentious issues during its second year, and be considering the manner in which clubs appoint directors, and whether these appointees are properly qualified. This has apparently been prompted by pressure from supporters’ groups dismayed over events at Wimbledon and York City and others. In fact, critics have cited the case of Wimbledon’s move to Milton Keynes as an example of the IFC’s lack of teeth (it restricted itself to stating that the “issue could have been handled better”, but ruled that the Football League and the FA acted within their procedures). However, the Commission has indicated that it is discussing a possible rule change to prevent similar operations from taking place in the future. On the contentious issue of corruption, the Commission’s spokesman, Julian Wilde, stated that they were “moving onto governance” and that they hoped to meet Graham Bean, the FA Compliance Officer, and have full access to him and his team.

It is certainly to be hoped that any recommendations arising from such co-operation will be more incisive than those contained in the first report. However, there are some doubts about the likelihood of this happening, particularly as Mr. Bean himself is reported to be considering his position at the FA. His disenchantment apparently stems mainly from the lack of support he is receiving from his superiors. Particularly his relationship with acting Chief Executive Nic Coward was said to be at a low ebb. These reports have been a major embarrassment to his employers, as they raise serious questions on the extent of their commitment to excise corruption from the game. Mr. Bean has proved himself to be a skilled and forensic investigator, and his loss would seriously dent the Association’s image in this respect.

More controversy on sports funding policies...

It will be recalled from the previous issue that a good deal of disquiet has been aroused by the almost Victorian meanness with which the nation’s progress in sport is being treated by those in authority. Particularly the role of Sport England, the body responsible for the distribution of lottery funding and the development of sport, came under close scrutiny. Developments which have occurred have done little to allay these concerns.

In mid-February 2003, Sport England released a controversial report which recommended that the private sector should take over the running of all local authority sports facilities. It claims that at least £4 billion is required if local authorities wish to maintain sporting facilities at existing levels, and that one of the ways in which such money can be raised from new sources is by means of a Private Finance Initiative (PFI). This has raised fears amongst many sports bodies that they may thus be priced out of using these facilities, because smaller organisations could be driven away from the local pools, athletics tracks and leisure centres because of the private sector’s emphasis on maximising profits. Many claim that, in some areas where the private sector has already been introduced to run facilities, prices have risen and the number of people using the facilities has dropped.

5. Public Law
Most sports bodies have entered into agreements with their local authorities to provide them with subsidised use of facilities, and therefore swimming, athletics and football clubs may be particularly affected if facilities are turned over to the private sector. It was understood at the time of writing that several sports bodies are seeking urgent meetings with the Government and Sport England in order to voice their concerns and seek assurances that, even if the private sector is brought in, such subsidies will continue.

However, more tidings of financial gloom emanated from Sport England barely a few weeks later, when it was announced that the number of sports receiving Lottery and Treasury funding was to be slashed from the current 60 to as few as 18 as part of a radical cost-cutting exercise initiated by the new Sport England Chairman, Sir Patrick Carter. The identity of the winners and losers was not yet known at the time of writing, but it was virtually certain that the lion’s share of the money would be allocated to the “Big Four” – football, Rugby Union, cricket and tennis. At the other end of the scale, it was understood that pursuits such as angling, mountaineering and orienteering, as well as “dance sports”, could be amongst the most seriously affected. Boxing, lacrosse and volleyball could also be at risk.

One of the projects at risk from the Carter cutbacks is the £6.4 million National Sailing Centre at Weymouth, after three years of planning. Turning the former Royal Navy base into a centre of excellence which could form the sailing venue if London were awarded the 2012 Olympics (see above, p.65) has been a 25-year dream pursued by the governing body of the sport, the Royal Yachting Association. Britain won three gold and two silver medals in this sport at the 2000 Olympics, but now the project risks at best a delay of up to one year, and at worst being delayed indefinitely.

Sir Patrick, who took over from Trevor Brooking at the helm of Sport England in November 2002, had already announced a temporary ban on any new Lottery awards, and was also reported to be intent on recommending sweeping changes to the manner in which sport is funded once he completes his three-month “stock-take” of Sport England’s activities. This followed publication of the Government’s Strategy Unit report, which criticised the organisation’s “scattergun” approach towards sports investment. He was also forced to find substantial savings in the Sport England accounts because of a slump in Lottery ticket sales.

It is an unfortunate but entirely predictable fact that the hapless Sport England will be required to take most of the flak which will result from yet another round of belt-tightening in sport. Yet it would not be entirely fair to do so – at least according to outgoing Chairman Trevor Brooking, in his first major interview since leaving office. The former England international unapologetically castigates the Government for awarding insufficient amounts to sport, and asserted that this problem had to be seen not only in the context of improving the success rate of our sporting performers, but also in terms of public health policy. He predicted that the National Health Service would be coming under even greater pressure than is the case now, and could possibly disintegrate if young people did not become more active physically. In addition, there is a wider public policy consideration at stake here: police at all levels confirm that crime and bullying are reduced when children engage in sport. Rather than pouring more money into attempts at solving these problems when they arise, the authorities should tackle them at source and provide youngsters with opportunities which could make them healthy and teach them about rules, obedience and team-work.

Given the wider public policy considerations referred to by Mr. Brooking, it is all the more to be regretted that one of the sports which stands to lose heavily under the “Carter cutbacks” referred to above is orienteering. This is an extremely inexpensive sport, requiring little more than a compass, a map and a stretch of earth – preferably wooded. It is not only cheap, it is also healthy and educational – just the kind of pastime that any government, and particularly the current administration whose arsenal of well-used mantras includes the one about being “fully committed to sport”, would like to see more people take up. In fact, this sport was exactly the kind of activity which seemed to be envisaged by the latest of these endless policy documents which this Government seems to specialise in, i.e. the Game Plan, the intention of which is to “deliver” sport to the nation. This report was presented by the Sports Minister, Mr. Richard Caborn, to the annual conference of the Central Council for Physical Recreation in May 2002. Whether the Sports Minister will act consistently with the ideas set out in his paper and take steps to support this most wholesome of sports, rather than pouring millions into getting a tennis player other than Tim Henman past the first round at Wimbledon, is open to doubt.

And if it is success, rather than participation, which should decide the funding issue, consider the case of Dalton Grant. He is a champion high jumper who set nine successive national records between 1988 and 1991, becoming the first Briton to be ranked in the world’s top 10 since Alan Paterson in 1950. He also took the Commonwealth title in Kuala Lumpur in 1998 and earned a European silver and gold medals in this medium. Yet he has been forced to retire because of the lack of funding and the lack of competition which has resulted from it.

Not all sportsmen and women are as fortunate as the Scottish national cricket team. This sport can flourish...
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further north of the border if its top exponents can perform on a stage somewhat more glamorous than the Broughty Ferry (Dundee) ground. However, the prospect of them doing so was also in doubt amid fears that a cut in Lottery funding would compel them to withdraw from the second division of the one-day National League. However, their entry in the competition for the current year has been saved by emergency funding emanating from the International and European Cricket Councils. The two governing bodies plan to contribute towards a £50,000 grant to the Scottish Cricket Union set aside for this purpose.

One bright spot on the horizon, however, came with the news, which broke in mid-March 2003, that, under a new Government plan, England’s brightest young sports stars are to be sent to college in order to learn how to be champions under a new Government plan to establish US-style, publicly-funded sports scholarships. In fact the Department of Culture, Media and Sport are to spend £3 million per annum on up to 1,500 sports scholarships and bursaries in an attempt to reduce the number of promising sporting performers who drop out after leaving school, and to boost the nation’s standing on the international sports field. The scheme, which will enter into operation next year, will involve 600 scholarships, each costing £3,000 per year, and 900 bursaries of £1,000. The Government hopes to offset part of the cost through a high-profile sponsor.

"Big Four" back campaign to save thousands of sports clubs
As if to emphasise the extent to which the public authorities in this country may have got their priorities wrong in their funding policies, the country’s four main spectator sports, in early February 2003, called upon the Government to divert some of the cash it might spend on a possible London bid for the 2012 Olympics towards thousands of sports clubs, by giving them rate relief to stop them from going bankrupt. In a joint statement, the Football Association (FA), the Rugby Football Union (RFU), the England and Wales Cricket Board (ECB) and the Lawn Tennis Association also expressed support for an amendment to the Local Government Bill which would give 80 per cent rate relief to community sports clubs.

This comes at a time when concern is increasing amongst sports governing bodies that many community sports clubs may collapse because of the high rates which they have to pay to local authorities. According to some figures, some 40,000 clubs have already suffered this fate over the past five years and a further 30,000 are on the brink of insolvency. There was widespread dismay last year when the Government failed to give sports clubs mandatory rate relief, and chose instead to give them the option of registering as charities to gain tax relief. The majority of sports clubs maintain that the system of registering with the Charity Commission is bureaucratic and cumbersome, and that volunteers simply do not have the time to deal with the large amounts of paperwork involved.

Should MP be acting as bookmakers’ lobbyist?
George Howarth is a Labour MP and former Home Office minister, where his responsibilities included racing and betting. Apart from his MP’s salary, he also receives a payment of between £15,000 and £20,000 per annum as “consultant” to William Hill, the bookmakers, which he declares in the Register of Interests. However, in mid-May 2003 he tabled an amendment to the annual Budget proposing tougher levels of taxation for person-to-person betting exchanges, who have emerged as a major competitor to bookmakers such as William Hill.

Such practices have not unnaturally raised a few eyebrows, particularly as it concerns a member representing the party which vowed to “clean up” public life. Mark Davies, the spokesman for Betfair, one of the leading betting exchanges, made the following comment: “If it was Neil Hamilton, he (Howarth) would be splashed across the front page. This is not cash for questions, it is cash for amendments. Howarth tables an amendment to do something that the Government has rejected. It is a disgrace.”

Mr. Howarth, who spoke in the Committee debating the Budget, subsequently withdrew the amendment after John Healey, Economic Secretary to the Treasury, agreed to meet major bookmakers. This is surely unacceptable.

Mr. Howarth’s intervention is all the more regrettable because of the non-stop offensive which the major bookmakers have launched against the betting exchanges and which has all the fairness of a Roman circus. John Brown, the Chairman of William Hill, has led the denigration of betting exchanges, labouring them with innuendo about the threat which they pose to the integrity of racing and the need to keep out organised crime and money laundering. Chris Bell, from Ladbroke’s, claimed that betting exchanges made it all too easy for illegal bookmaking to become the lucrative domain of organised crime.

For an MP to lend his support in a salaried capacity to organisations which indulge in such practices is little short of scandalous. Surely a public inquiry is called for.

French Decree on diploma required to teach sport
In October 2002, the French Government issued a Decree setting out the conditions for obtaining a professional diploma for the teaching of sport. It is
Based on the general Law on the organisation and promotion of sport, which has already been extensively featured in these columns. Holders of the diploma are entitled to teach sports, to prevent the risks which result from such activities and to conduct first-aid initiatives in the event of an accident.

The Decree also considers the training which must be undergone in order to obtain the diploma where a specific environment is needed. Article 6 contains an exhaustive list of sports which are deemed to require a specific environment, such as scuba diving. All establishments offering training for the diploma are placed under the authority of the Minister responsible for sport.

**Guidance Note on recreation needs assessments**

In July 2002, the new Planning Policy Guidance Note 17, called Planning for Open Space, Sport and Recreation, was published by the Office of the Deputy Prime Minister. It recognises that open spaces and opportunities for sport and recreation are fundamental in delivering a variety of the Government's wider objectives, including urban renaissance, rural regeneration, social inclusion and community cohesion, as well as promoting sustainable development.

More particularly, it:

- stresses the need for local authorities to undertake a robust assessment of existing and future needs for their communities as regards open space, sport and recreational facilities, to underpin their development plans, community strategies and day-to-day planning;
- restates the importance of setting local standards for the provision of open space and other sport and recreational facilities, underpinned by quantitative, qualitative and accessibility considerations;
- confirms that parks, recreation grounds, playing fields and allotments should not be regarded as "previously developed land";
- provides clear guidance on the manner in which planning decisions affecting playing fields should be made, and
- encourages local planning authorities to make greater use of planning obligations to secure new or improved provision of open space, sport and recreational facilities where new development increases local need.

**Mixed tidings on playing fields policy**

In late December 2002, run-down changing rooms and club facilities used by the nation's millions of amateur footballers received a boost as the Government unveiled plans for a £60 million windfall for grassroots sport. The cash injection followed a decision by Gordon Brown, the Chancellor of the Exchequer, to set aside cash from the Treasury's capital modernisation fund in the 2002 Budget. The money is to be divided among the country's top 15 sports, with football clubs expected to take the largest share. A total of £3.4 million is to be split between football, tennis, rugby union and cricket.

The investment is designed to be spent on improving club facilities such as showers, toilets and changing rooms. Ministers hope that sports will use the funds in order to develop innovative plans for increasing the participation of ethnic minority groups at club level.

However, a few months later a less positive note was sounded on this issue. It has been mentioned before in these columns that the pledge made by the current Government to put in reverse the policy of allowing schools and local authorities to sell off their playing fields appears to have been honoured more in the breach than in the observance. This issue was once again brought to the fore as a result of the current crisis affecting the funding of our schools. It was revealed by a national daily newspaper that, far from taking steps to prohibit this practice, the Government were actually condoning the sale of playing fields by schools in order to assist the process of dissipulating the education funding crisis. This was followed by an attack on this development by the National Playing Fields Association, whose spokeswoman, Alison Moore-Gwyn, condemned what she described as the disgrace of the present government's "shameless stand".

The current administration's ineffectiveness in living up to their manifesto pledge on this matter was a tribute to "hot air, spin and broken promises". She added:

> "The last Government did nothing to stop sales, but this Government say they are protecting them when, in fact, the criteria against which they look at proposed sales are so loose that hundreds of playing fields have gone. This is bad enough, but what I dislike is the complacency which this spin engenders in the public, who really think that something is being done".

The latest figures indicate that there has been an increase of 40 per cent per year in applications to sell playing fields.

**Digest of other items (all months quoted refer to 2003, unless stated otherwise)**

**Schools' sports days.** In mid-May, it was learned that a primary school has banned parents from attending its annual sports day, with egg and spoon and obstacle races, in order to spare the children embarrassment if they do not win. One parent called this "political correctness gone mad".

**Rowing.** In April, it was announced that the British army is to be enlisted in helping Matthew Pinsent in his attempt to win a fourth Olympic gold medal next year. Pinsent and his partner James Cracknell are among...
more than 250 members of Britain’s team expected to prepare for the Athens 2004 Games by training at a special warm-weather training camp in Cyprus.  

**Rugby League.** In May, the disbanding of a newly-formed club at the Royal Military Academy, Sandhurst, resulted in a question being tabled in the House of Commons over the reported action of a senior officer in refusing permission for the team to exist even before a ball had been kicked in anger. David Hinchliffe MP, Chairman of the Parliamentary Rugby League Group, had led the campaign to remove the ban on Rugby League in the Services which was in force until 1994. He is seeking an answer from the Minister of Defence as to why Sandhurst, where the England rugby union team has trained, would not allow the other code to be played.

**Youth sport.** In December 2002, Access Sport was launched as a new charity, established in order to encourage sports participation and, in particular, to increase youth involvement in local sports clubs in partnership with companies aligning their brands with community sport. Using sport as a vehicle for the common good, the venture also aims at addressing health and social issues such as juvenile delinquency and crime by engaging young people in active sporting programmes.

**Yachting.** In March, it was learned that Trevor Mallard, the New Zealand sports minister, has pledged £1.7 million of public money in order to keep the defeated America’s Cup defenders, Team New Zealand (TNZ), together. This is a controversial move, since TNZ were a private entity which, as defenders of the Cup, barred any rival Kiwi syndicates from the competition. The funds will help to secure salaries and keep foreign headhunters at bay.

**Athletics.** Ken Livingstone’s recently-acquired interest in sport (see above, p.67) took a new turn in late January when he vowed to save Crystal Palace as the home of British athletics. Run-down and underused by top athletes, the 18,000-capacity stadium faces an uncertain future once Sport England’s 35-year lease on the property ceases in 2004. The Borough of Bromley, which has owned the site since the demise of the Greater London Council in 1986, wish to save it as an athletics stadium but lack the funds to do so. Sport England have indicated that they will be unable to keep it open as a result of a drop in Lottery funding (see above, p.77). The Mayor of London vowed to press the Government to retain it, as it could play a part in the London bid for the Olympics of 2012.

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**Public Health Safety Issues**

**SARS disrupts sporting events**

In November 2002, the first cases of severe acute respiratory syndrome (SARS) were identified in southern China. Since then, it has killed over 100 people worldwide and infected thousands others. It has caused an upheaval in many aspects of public life, and sport has been no exception, as the following cases indicate:

- In early April, two Chinese runners withdrew from the Rotterdam Marathon because of the virus, even though there was no suggestion that they were infected with the disease.
- The following day, Premiership football club Aston Villa followed Everton in pulling out of a post-season tour of China. They had been due to play in a four-team tournament (April 2003).
- The SARS scare led to a last-minute change of plan for the eight competing yachts in the Clipper Round the World race when authorities in the Philippines refused landing rights. The yachts were scheduled to join the local Hong Kong racing fleet in the 480-mile San Fernando race to the Philippines, but the race was cancelled fewer than 24 hours before the start (April 2003).
- The World Indoor Bowls Council singles championships were hit by the epidemic when the Australian team withdrew from the event, held in Belfast (April 2003).
- Fears of the disease caused the Chinese domestic football season to be postponed. Matches were due to be rescheduled for July onwards (April 2003).
- The World Badminton Championships were postponed by the International Badminton Federation (IBF), the sport’s governing body. Almost 350 players from 48 countries were expected to participate (April 2003). This move was described as “bizarre and illogical” by UK Sport.
- The World Cycling Track Championships, due to be held in China from 30 July to 3 August, were moved elsewhere because of the outbreak of the virus (May 2003).

**Now motor racing advertises anti-smoking products**

The last gasp – so to speak – of tobacco advertising in sport has been motor racing, more particularly the Formula 1 events. Now the wheel has turned full circle in that Formula One racing is now having its cars covered in advertising aimed at helping smokers kick the habit. In mid-April, the Williams team announced a sponsorship deal with Niquitin CO, the manufacturers of patches, lozenges and chewing gum designed to help those afflicted to rid themselves of their addiction. Health campaigners have welcomed this development.
Childhood asthma could be linked to swimming pool chlorine, says report
In a report published in late May 2003, researchers warned that the chlorine which is present in indoor swimming pools could be the cause of the massive increase in childhood asthma. This is a disquieting development, as children suffering from the disease have been encouraged to swim as part of a safe way to exercise without suffering breathing difficulties. Researchers from the Catholic University of Louvain-la-Neuve (Belgium) studies more than 200 primary schoolchildren in Belgium who swam regularly in indoor pools.

The results of the study of the study into the damage caused to lung cells of children were published in the journal Occupational and Environmental Medicine. It appears that destruction of the cellular barriers protecting the deep lung can make them “leaky” and more vulnerable to the allergens that cause asthma. The report accordingly calls for a move to non-chlorine based swimming pools in order to reduce the risk.

Survey shows worrying trend in failure to take part in school sports
Attention has already been drawn, both in this edition and in earlier issues of this journal, to the worrying increase in obesity amongst the youth of this country. Confirmation – if confirmation were indeed needed – of this trend came in late February, when a survey established an increase amongst those who did not take part in any school sport, showing a rise from 15 per cent in 1994 to 17 per cent in 1999 and 18 per cent last year. A worrying decrease had occurred particularly in gymnastics, regarded as a fundamental activity in the physical development of young people.

Asked to comment on this trend, the Sports Minister Richard Caborn stated that Government policy in this regard remained on the right lines, but that the measures taken would take some time to produce a discernible impact. He pointed out that 700 school sports co-ordinators had been appointed, and that this would rise to 3,000 by 2006. Government policy was to have every boy and girl in the country aged between 5 and 16 enjoying two hours of quality physical education every week. At present, only 50 per cent of youngsters have this amount of time.

These soothing noises have failed to stem the flow of criticism aimed at the Government over its policy in this regard. The Manchester United manager, Sir Alex Ferguson, although vocal in his support for new Labour in the past, has recently launched into a stinging attack on the decline in physical education lessons in the National Curriculum. Writing in a book published by the Smith Institute, an independent public policy think tank, Sir Alex stressed that physical education is a necessary part of a “rounded” education and urges a return to the “rough and tumble” of the PE lessons which marked his formative years in Glasgow. Whether this attack had any effect or not is hard to say, but the very next week education minister Charles Clarke urged every school in the country to stage a traditional sports day. He stressed that the cut and thrust of competition was essential to teach children teamwork and commitment.

French Law on private swimming pool safety adopted
In January 2003, the French Parliament adopted a Law which is to be inserted into the Construction and Accommodation Code (Code de la construction et de l’habitation). It decrees that as from 1/1/2004, all embedded private swimming baths, whether for individual or collective use, must be fitted with approved safety devices aimed at preventing the risk of drowning. This is subject to the exception where the swimming pool in question already has a device which is capable of being adapted for this purpose.

Nationality, Visas, Immigration and Related Issues

English basketball team in visa fiasco
Matters sometimes go agley even in the best-run of sports bodies. With only days to go before the England basketball team’s semi-final European Championship game against Russia in Moscow, they still lacked the visas they needed for this purpose. England Basketball, the sport’s governing body, claimed that the Russian authorities had only informed them that week of the documentation required to obtain these visas. In the event, the national team arrived in Moscow with only seven players, after officials of England Basketball had failed to obtain visas for Andy Betts, Toney Dorsey, Mike Bernard and Julius Joseph. England captain Ronnie Baker not only put the blame squarely at the governing body’s door, but even accused it of “deliberately sabotaging” the team’s chances. Betty Codona, who chairs the governing body, said she was appalled at this accusation.

World Cup bomb plotter seeks asylum in UK
In March 2003, it was learned that an Islamic militant who was jailed for his part in a plot to bomb the 1998 Football World Cup was seeking asylum in Britain. Omar Saiki, a French-Algerian, was stripped of his French nationality after being sentenced to four years’ imprisonment. He arrived in Britain in September 2002 and is believed to have stayed at the Finsbury Park mosque, which has since been closed after being
raided. Whilst staying at the house in January, he was secretly filmed by an undercover French journalist and described himself as a member of one of Algeria’s most feared terrorist groups.

Mr. Saiki later confirmed that he was seeking asylum in Britain, but denied being involved in any terrorist activities.\(^{72}\) It was not known at the time of writing whether an application had actually been submitted as yet.

**Nationality tug-of-war over World Cup skier**

Skiing champions from Africa are quite as rare as Romanian Test cricketers. However, Senegal currently has a rising star on the slopes in the form of 21-year-old Leyti Seck – or so it seemed. Mr. Seck has dual Austrian/Senegalese nationality, and both countries are now vying in their endeavours to have him represent them. He was picked by Austria for the national ski team in the Slalom World Cup in February, although he had competed for his native Senegal as the country’s lone representative on the international circuit.\(^{71}\)

When he turned professional, he contacted the skiing federation, asking how he could compete in the 2002 Winter Olympics. Although he was not eligible for the Olympics, he was spotted by the President of the Senegalese Ski Federation who was working as an instructor in France, and who registered Seck as a World Cup skier for Senegal. At the same time, he was invited to start training with the Austrian squad.\(^{72}\)

It was not known at the time of writing how this issue had been settled.

**Other Issues**

**PCC complaint by Ecclestone family upheld in part**

In August 2002, the Mail on Sunday published an article headlined “Bernie the battered husband”, referring to Bernie Ecclestone, the Formula One racing leader. This brought forth a complaint from the Ecclestone family against the newspaper concerned before the Press Complaints Commission. The article concerned was based on an interview with John Keterman, the former boyfriend of Bernie Ecclestone’s daughter. The complainants considered that this article infringed the privacy of the family from the point of view of (a) the marital relationship between Mr. Ecclestone and his wife Slavica, (b) domestic arrangements, (c) security arrangements of the family home, and (d) the intimate details of Tamara Ecclestone’s relationship with her former boyfriend. The Commission dismissed the first three complaints, but upheld the fourth, i.e. that which related to Tamara Ecclestone.

On the issue of the alleged intrusive reference made to the marital relationship between Mr. and Mrs. Ecclestone, the PCC held that it had to take into account the extent to which Mr. Ecclestone and his wife had discussed similar matters in the past and the level of material relating to their relationship which had been otherwise placed in the public domain. The Commission noted that Mr. Ecclestone had given a number of interviews in which he had referred to details of his relationship with his wife. It believed that this indicated that he had not sought to protect this aspect of his life from publicity – indeed, there had been an interview in which he had volunteered information about the “tempestuous relationship” which he had with his wife, as well as a further interview with Mrs. Ecclestone herself, which referred to the relationship in similar terms. The Commission had always made it clear that, where people speak about private matters in their own terms, they must expect that others will discuss the same or related subjects in greater depth and in terms that may be less welcome. However, the further coverage and context must be reasonably related to matters put into the public domain by the person concerned. It noted that, in the past, Mr. Ecclestone had not appeared to object to published material which touched on similar subjects written from his perspective. The Commission did not consider that the material published went beyond the material in the public domain, nor did it regard it as intrusive in terms of the Code of Practice.

Complaints (b) and (c) were not, in the Commission’s view, issues which could be pursued under the Code. However, it did uphold the complaint relating to the intimate details of Tamara Ecclestone’s relationship with her former boyfriend, in the following terms:

> “While [the Commission] noted that Miss Ecclestone had received publicity in the past on account of her lifestyle as the daughter of a very wealthy man, the Commission made clear – as it always has done – that the previous publication of matters into the public domain dealing with a person’s private life does not disentitle (sic) that person to any right of privacy. Intrusions must be justified by the newspaper concerned. The Commission considered that some of the new, personal material in the article relating to Miss Ecclestone was not validated by the fact that other matters about her private life had previously been established in the public domain. The newspaper, by making reference to some intimate details of the relationship – including an account of its sexual aspect – had, on this one point relating to a small section of the story, breached the Code.”\(^{71}\)
Civic honours awarded to various sporting personalities
The recent two rounds of Honours’ Lists have once again been generous to the nation’s sporting personalities. Those honoured include the following:

- **MBE**: Jonny Wilkinson, widely regarded as the best rugby player in the world, Ashia Hansen, the triple jumper, jockey George Duffield, Derek Dooley, a footballer whose career was cut short by injury, and jump jockey Tony McCoy;
- **OBE**: England football captain David Beckham, England wicketkeeper/batsman Alec Stewart, Sam Torrance, the captain of the winning European 2002 Ryder Cup-winning team; Steve Backley, the javelin thrower, and Henry “Bloers” Blofeld, the distinguished cricket commentator, whilst Arsenal and Liverpool managers Arsène Wenger and Gérard Houllier receive honorary OBEs;
- **CBE**: hurdler Colin Jackson and former Olympic gold medal winner David Hemery, Frances Done and Charles Allen, the leading organisational lights for the Manchester Commonwealth Games, Gerald Davies, the former Wales rugby international and chairman of the Wales Youth Agency, Bill McLaren, rugby football commentator, and Bob Murray, the Sunderland FC Chairman;
- **Knighthood**: Howard Bernstein, Chief Executive of Manchester City Council, for his services to the Commonwealth Games.

Cross purposes? Scots proposal to ban use of sign of cross in football
Religion tends to be a more potent social force North of Hadrian’s Wall than in England, to the point where it is carried into sectarian excess – even in the world of sport, as those who follow the fortunes of Celtic and Rangers football clubs are only too well aware. This is the rationale behind controversial proposals, designed to tackle sectarianism in Scottish life, made by Members of the Scottish Parliament (MSP), whereby police are advised to penalise the religious gesture of making the sign of the cross where it is used “provocatively” by players or fans to rile the opposition.

However, there are many who feel that the tradition of players blessing themselves before taking a penalty kick or following the scoring of a goal is as much a part of the global football tradition as insulting the referee, and a spokesman for the Catholic Church in Scotland dismissed the notion as “absurd”, adding that the Church would not tolerate anyone being prosecuted for using it. Donald Gorrie, a Liberal Democrat MSP who is on the relevant working group, commented that there was no intention to ban the gesture, but that it should be for the courts to decide whether someone had been deliberately provocative.

MP calls Chelsea FC “disgrace” for ignoring literacy call
In late April 2002, Education Minister Charles Clarke described Ken Bates, the Chairman of Chelsea Football Club, as a “disgrace” for having refused to join a Government-sponsored scheme to improve literacy levels amongst young people. More particularly he inveighed against Mr. Bates for refusing to set up an after-hours study centre for primary and secondary schoolchildren at his club. Since the scheme was introduced in 1997, 78 clubs, from sports including rugby, football, cricket and basketball, have opened such centres. He claimed that there was no good reason why Chelsea was not involved, and that Ken Bates was the only Club chairman who had not joined the scheme.

Mr. Bates, no shrinking violet in debate either, called his opponent “Comical Clarke” and described him as “a joke”, stating that it was he who was responsible for an education system which was in a state of collapse, and that if he did his job properly, he would need neither gimmicks nor personal abuse to hide the fact that he was a “total failure”.

Round-up of other items (all months quoted refer to 2003, unless otherwise stated)
**Crosby (UK)**. In mid-May, a schoolboy was forced to leave his private school because he insisted on playing football instead of hockey. Sam Cunia, a talented footballer who has had trials for Everton, was faced with the problem that football is not on the curriculum at Merchant Taylors’ School, Merseyside.

**London (UK)**. Continuing his recent revival of interest in sport, Mayor ken Livingstone has opened talks to bring the start of the Tour de France to London in 2006.

**Melbourne (Australia)**. In late April, the Victorian Government cast doubts on a plan to ferry 4,500 athletes on barges along the Yarra river during the opening ceremony to the 2006 Commonwealth Games. A Government source claims it would take six hours to sail down the river and cost £19.4 million to stage.
Planning Law

London’s football clubs in planning turmoil

The background

The leading football clubs of the nation’s capital have recently been faced with a considerable logistical problem. On the one hand, demand for attendance at their fixtures shows no sign of diminishing. On the other hand, the Taylor report, as well as market forces, have ensured that football grounds can no longer operate on the sardine tin principle, the older stadia are located in crowded residential areas allowing little scope for expansion, and space elsewhere is at a premium and horrendously expensive. In addition, the clubs’ location makes them a prime target for property developers. All this has made the issue of the clubs’ accommodation an extremely difficult hurdle for them to overcome. However, the manner with which they have dealt with these pressures sometimes leaves a great deal to be desired.

Arsenal FC/Tottenham Hotspur

In the case of Arsenal FC, it will be recalled from the previous issue  that, initially, it seemed as though this venerable footballing institution was experiencing few troubles in moving to new and more spacious accommodation, since the High Court had dismissed various objections to the construction of a new ground at Ashburton Grove and endorsed planning permission to that effect. Since then, however, fresh objections had been lodged which threatened to cause considerable delay to the project. As the inevitable public inquiry started to grind through its procedures, there appeared a new dimension to the entire question: could the unthinkable become reality, and the two arch-rivals Arsenal and Tottenham Hotspur join forces in a ground-sharing scheme? It did indeed seem the case that an unlikely courtship was beginning to take shape – appropriately enough close to St. Valentine’s Day.

Although officially Arsenal denied having any interest in such plans, the management at Spurs, were beginning to go increasingly public on the prospect of so doing. Daniel Levy, the Chairman at White Hart Lane, openly lauded the virtues of ground-sharing as a concept, in terms of the financial savings that stood to be made  . It has to be admitted that Spurs would stand to derive a great deal more advantage from such a deal than their rivals at Highbury. The club has clearly outgrown its 36,000 capacity ground, and local transport considerations have prevented any opportunity for expansion. Unless the local authority agree to improve the infrastructure around White Hart Lane, it appears certain that Tottenham will have no option but to cast their eyes elsewhere.

However, in the meantime fresh trouble was looming ahead for the Gunners as regards their proposed new stadium – this time of a purely financial nature. Already in mid-January, Danny Fiszman, the club’s majority shareholder, who has the task of overseeing the stadium move, admitted that the new £200 million, 60,000-capacity ground was facing a £100 million cost overrun, with rumours circulating that this figure could be even higher . Early March brought more bad news, when it was learned that the project had been hit by the apparent withdrawal of one of the major financial backers. French bank SG had been co-operating with the Royal Bank of Scotland to arrange a £317 million loan to fund the construction of the Ashburton Grove stadium. However, it was feared that escalating costs and the French bank’s involvement in the even more troubled Wembley project (Journals passim!) had led them to withdraw. City of London sources had reported that the sales memos, which detail the loan and the way it is to be underwritten, made no mention of any involvement by SG. This appeared to leave the Royal Bank of Scotland to cover the entire amount of the loan. The club, however, insisted that the process of financing the stadium was “progressing” and that the move was still scheduled for 2005.

Light was also being shed on the sheer scale of the planning issues involved. This was not only related to the problems experienced in relation to securing the Ashburton grove project, but the fate of the ground they would leave behind, which was to become the focal point of an entire regeneration project. This has involved Arsenal in Section 106 agreements and making compulsory purchase orders on properties. These are normally the preserve of local councils and the Government, and have in some cases led the club to pay well over the odds. The entire project is one of the largest regeneration plans in the UK.

The delays incurred in securing the planning permission for Ashburton Grove have also added to the financial worries besetting the scheme, and are reported to have added a £24 million to the bill. This and the amount spent on actually trying to raise the finance for the project have led the club's parent company to incur a pre-tax loss for the last financial year of £9.4 million. The club’s net debt has risen to £42.7 million, made up of £28 million bank borrowing, and in order to secure this cash, Arsenal have mortgaged their training ground at London Colney in addition to the mortgage they have settled on Highbury.

This in turn has an adverse effect on the playing side, with doubts arising as to whether the club will continue to be capable of affording the purchase and wage costs of top players. As it is, transfer fees and wage costs are also driving up the club’s debt, which is likely to be in the region of £60 million by the time the next set of figures are released . This puts the club in almost as dire a financial position as Leeds United, whose parlous position is described below (p.103).
Fulham FC
The Arsenal story detailed above may have revealed some of the lack of effective financial planning and management which is present amongst our leading football clubs. The Fulham story, on the other hand, is entirely more sinister, bound up as it is with club owners with excessive cupidity and egos to match. It will be recalled from a previous issue that the club had successfully fought off, through the High Court, objections to the planned redevelopment of their ground at Craven Cottage, and that the only problem which remained to be solved was that of where they should stage home fixtures in the meantime – which subsequently turned out to be Loftus Road, home to Queen’s Park Rangers. This seemed to augur well for a smooth return to a revamped Cottage, particularly since the House of Lords had dismissed the latest appeal brought by local objectors. But then we have to remember the identity the Fulham owner – a certain Mohamed Al Fayed, not a man known for his business acumen. Indeed, his entire statement raised more management which is present amongst our leading property developers which bought the old Harrods Depository in Brompton Road for £52 million. And we all know who owns Harrods – pure coincidence, of course. It may well have been that Mr. Fayed’s intentions were honourable, in that, however ruthless his methods, he would make more from the sale of Craven Cottage than the cost of building a new stadium on a brownfield site, and that this would therefore put the club on a more sound financial footing. However, as Richard Williams wrote in The Guardian, that generous supposition assumes that the club management were genuine about wanting to build a new stadium, as there had been many rumours that either the Loftus Road ground share would continue indefinitely, or that a scheme to share Stamford Bridge with Chelsea was being considered.

Meanwhile, Fulham’s supporters indicated that they would not let their traditional venue go without a fight, and organised a number of carefully-planned protests – including a leaflet containing the support for their action by Johnny Haynes, maybe the club’s best-known footballer of all times (with apologies to England full back George Cohen). Mr. Al Fayed expressed how “deeply hurt” he was by these actions, who, he complained, had forgotten all the money he had ploughed into the club to bring them to Premiership status. In other words, it was payback time, and fans could say goodbye to their much-loved ground, probably to become yet another nomad on Wimbledon FC lines. In what they clearly felt would be a crumb of comfort to the fans, the property development company announced that a Fulham museum would be built on the site to celebrate its former use – little realising that this was merely adding insult to injury.

A week later, broadcaster Jimmy Hill entered the debate. Mr. Hill, who had acted as Fulham chairman for 10 years from the mid-1980s, appealed to Mr. Al Fayed to work closely with Chelsea boss Ken Bates and secure a permanent home for both clubs at Stamford Bridge. This would be subject to the proviso that the profits from the Craven Cottage sale should be ploughed into the new arrangement. He revealed that in fact talks had taken place between Fulham and Chelsea for this purpose in the mid-1980s, but that these had broken down. Several weeks later, there was a strong
rumour that in fact such talks were taking place, with Fulham devoting the proceeds of the Craven Cottage sale towards the redevelopment of the East Stand... and a sumptuous new boardroom for Mr. Al Fayed. It also transpired that in October 2002 Fulham had turned down an offer to buy 9.9 per cent of Chelsea Village plc (which owns Stamford Bridge) for £15 million.

A further twist to the entire saga came a month later, when it was learned that legal proceedings were issued against Fulham River Projects Ltd and Nick Sutton, the property developer behind the Craven Cottage conversion plan. The claimant was Mr. Sutton’s former employer, Crown Dilmun, which claims that it, and not Sutton, owns the rights to redevelop the land. Sutton commented that he was “vigorously contesting the action”, the outcome of which was not known at the time of writing. Two weeks later, it was announced that Fulham had abandoned plans to build a new stadium elsewhere, and were to return after all to Craven Cottage – which would be subjected to a much cheaper redevelopment than that originally envisaged.

This seemed to be confirmed shortly afterwards by Lee Hoos, the club’s deputy managing director and company secretary, when he reported to the London Assembly’s sport committee. The club did, however, confirm that it would be playing their home games at Loftus Road for a further season (2003-4).

Meanwhile, discussions were continuing between Fulham and Chelsea about the possibility of sharing Stamford Bridge. The main obstacle, however, was a local authority planning regulation banning more than one club from playing at Chelsea’s ground. Two weeks later, however, these negotiations broke down. It appeared that Chelsea chairman Ken Bates had demanded a “golden hello” of £5 million, 50 per cent of which would be forfeited by Fulham if the deal failed to go ahead. As the club had, on that very day, announced record annual losses of £33.3 million, the collapse of negotiations on that basis did not come as a surprise.

No further details were available at the time of writing.

London Assembly wants new planning laws on clubs leaving grounds

The clubs referred to above have all been involved in actual attempts to move away from their original grounds. However, there are many more London clubs which are reported to be actively considering this option as well. Thus Brentford have indicated that it must “move or die”, since Griffin Park, its ground, has a capacity for a mere 12,000 and only has limited scope for redevelopment. It wishes to build a new stadium in Kew Bridge or Fulham. West Ham United are also said to be considering a move to the new Olympic stadium in Stratford should London’s bid for the 2012 Olympics be successful (see above, p.65). Inevitably, such moves have an effect on the communities which the clubs leave behind. This has prompted the London Assembly recently to call for new planning laws which would give fans and communities some influence over what happens to football grounds once a team leaves. It has asked the Mayor, Ken Livingston, to adjust planning rules to take account of “football heritage” and the communities, including the fans.

Although some moves have been better handled than others in this respect, there remains an uncaring attitude on the part of many clubs and their chairman towards the communities of which the clubs are an integral part. Mike Tuffrey, a Liberal Democrat member of the LA, confessed to being shocked at the attitude struck by some chairmen, who seemed not to be aware of the need to connect with their communities. This no doubt explains the interest which the Assembly has displayed in this issue recently.

Everton planned move to King’s Dock falls through

Another leading football club which has been seeking to move away from its original home is Everton. It will be recalled from a previous issue that its owner Bill Kenwright had sought to relocate the club to a new stadium in the King’s Dock area of Liverpool, but that the scheme had run into trouble owing to the difficulties experienced by the club in raising the necessary finance. These plans subsequently suffered a mortal blow in February 2003, when the club were informed by Liverpool City Council that their application had been rejected following further hold-ups in raising the funds required.

Round-up of other items (all months quoted refer to 2003, unless otherwise stated)

Norwich City FC. In late April, the Nationwide League club were granted planning permission to build a new South Stand and use part of the club’s car park for a residential development.

Gloucester RFC. The top Rugby Union club announced in December 2002 that they were finalising plans to redevelop their Kingsholm ground, which would increase its capacity from 11,000 to 15,000.

York Hall. The future of this boxing venue in Bethnal Green looked in doubt after Tower Hamlets Borough Council announced, in mid-December 2002, that it was considering knocking down the building. (See also on this issue above, p.35).

First British “Racino”. In early April, it was learned that plans had been submitted to Wolverhampton Council
for Britain’s first “racino” (a combination of a racetrack and a casino).

Duncan Ferguson. In May, the Everton Scottish international footballer applied to Sefton Council for planning permission to build a block of flats on the grounds of his luxury home. This has prompted fierce opposition from the neighbours of this quiet area, who have vowed to fight the application.

Manchester City FC. Maine Road, one of the country’s most famous football grounds, will be demolished and make way for a housing development when Manchester City FC, its previous owners, move to the City of Manchester Stadium at the end of the 2002-3 football season. The ground had initially attracted the interest of Rugby Union club Sale Sharks, but in March the club announced that it was no longer interested.

Salford Forest Park. This is a planned £65 million leisure centre, which is to have a racetrack at its heart, an equestrian centre, a 6,000-seater grandstand and an “eco-village” of about 60 chalets. Plans for this development have been opposed by protestors who maintain that it will ruin 2,000 acres of unspoilt greenbelt land in Worsley, Lancashire, which is home to rare species of birds and wildlife. The developers in question, Peel Holdings, announced in mid-December 2002 that it would submit revised plans, which would include a scheme to plant 24,000 trees to protect a colony of herons. The protesters have dismissed this as a “softening up” exercise. The outcome of this matter was not yet known at the time of writing.

Judicial Review (other than Planning Decisions)

Karate performer fails in attempt to refer federation decision to administrative court. French Supreme Administrative Court decision

In the case under review, the applicant was a karate performer who felt wronged by the decision of the French Karate and Martial Arts Federation not to allow him to take part in the Kung Fu Wushu championships for 1999. He decided to request the Minister of Sport to refer the matter to an administrative court and, in the meantime, to prevent the decision from being implemented, as is the Minister’s right under Article 17(1) of the 1984 French Law on Sport. The Minister did not reply, which constitutes an implicit refusal to entertain his application. The applicant sought to have this implicit decision set aside by the Supreme Administrative Court (Conseil d’État) on the basis of misuse of power (abus de pouvoir).

The Supreme Court decided this application was inadmissible. It ruled, essentially, that the fact of applying to the Minister of Sport did not deprive the applicant of his power to bring a direct challenge against the decision of the Federation. Therefore the Minister’s implicit refusal could not be qualified as a misuse of power. The action was therefore manifestly inadmissible.

Law on safety at football matches is unconstitutional if applied to minors. Belgian court decision

As has been the case with so many countries, Belgium has felt it necessary to introduce special legislation seeing to ensure safety at football fixtures. The Belgian Law on this subject dates from 1998. It lays down a wide range of administrative measures which may be imposed on those who endanger safety at football matches, ranging from stadium bans to fines. It was always inevitable that, at some stage or other, those under the age of majority should find themselves at the sharp edge of these measures. In one such case, however, it was claimed that the 1998 Law could not apply, as to do so would be to deprive the minor in question of certain legal and procedural guarantees awarded him/her by the Law of 8/4/1965 on Youth Protection. Accordingly the football legislation in question would be unconstitutional if applied to those under the age of 18.

The matter was referred to the Court of Arbitration, which is required to settle disputes on the constitutionality of legislation. The Court found that the 1965 legislation contained certain inalienable guarantees bestowed on the minor, such as the fact that he/she may not have any financial penalties inflicted on him/her, and that any penalties must be imposed by the Youth Courts (juridictions de la jeunesse). By depriving them of these guarantees, the 1998 Law, if applied to minor, would infringe their constitutional rights.

Other Issues

Greyhound track operator wins permission to double slot machines

In January 2003, Wembley, the greyhound track operator, won permission almost to double the number of lucrative slot machines at one of its US tracks in a move which the company’s broker believes could nearly double group profits within two years.
7. Property Law

Land Law
[None]

Intellectual Property Law

Premier League wins injunction to prevent use of lion logo. English court decision

In the case under review, the English Premier League and various clubs competing in it brought proceedings against Panini seeking an injunction aimed at preventing Panini from continuing to sell its Football 2003 Album, with stickers of players containing reproductions of the premier League’s lion logo or any club badge. The defendant argued that the inclusion of the Premier League’s logo and the club badge were “incidental” and therefore did not violate the claimant’s copyright.

The Premier League had granted an exclusive worldwide licence to Topps Limited to produce a sticker album in February 2001. The licence was granted amid strong competition, which included in particular a competitive bid from Panini. The licence enabled Topps to refer to its album as “The Official Sticker Album 2003” and to have special one-off photographs taken of players in their club shirts which bore their respective club badges. It was accepted by claimant and defendant that what collectors of the stickers valued most in an annual sticker album such as the one in question was current photographs of players in action poses – if possible wearing their current kit. The defendant was considered to be Topps’s greatest rival, and competition between the parties reflected the value of the product as well as the ability to sell in the present market.

The badges of the Premier League and of the various football clubs involved incorporated designs which were protected by copyright and therefore could not be reproduced without infringing copyright. Although the claimant reserved its position as regards the title of some of the copyright holders in relation to the club logos, there was no serious dispute about the title to the copyright in the logos and the Premier League badge. In its defence, Panini pleaded the Copyright Designs and Patents Act 1988 (CDPA), asserting that the inclusion of the various club badges had been incidental.

The judge recalled the wording of Section 31(1) CDPA, which is:

“Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme”.

The trial judge also referred to Section 31(3), which reads:

“A musical work, words spoken or sung with music, or so much of a sound recording, broadcast

or cable programme that includes musical work or such words, shall not be regarded as incidentally included in another work if it is deliberately included”

Section 31(1) had been derived from Section 9(5) of the Copyright Act 1956, which laid down that:

“The copyright in an artistic work is not infringed by the inclusion of the work in a cinematic film or in a television broadcast, if its inclusion therein is only by way of background, or is otherwise only incidental to the principal matters represented in film or broadcast”

The key term used in section 31 is “incidental”. As the judge observed, there was very little assistance given as to what the word “incidental” meant in the context of the CDPA, and this was not helped by the fact that most people would claim it to be a word which was capable of being easily understood. After referring to some of the leading textbooks on copyright, the judge concluded that the test of that which was incidental was not invariably an objective one but might in certain circumstances include subjective elements.

The judge held that, in the case under review, the inclusion of the badges was:

“self-evidently not incidental. It is an integral part of the artistic work comprised of the photograph of the professional footballer in his present-day kit that is the intent behind the reproduction of the photograph. That is what the defendant intended, and without the badge they would not have the complete picture which they wished to produce, which is (…) the footballer as he plays now”

Accordingly, the reproductions of the Premier League badge and the badges of various football clubs did amount to infringement of copyright, and the defence advanced by Panini was dismissed. Having awarded the action to the claimants, the judge proceeded to consider the question of the remedies to be applied. At this juncture, he proposed that, as there was no serious dispute as to the facts, the case should not be resolved by determination under Part 24. The Court therefore relied upon Part 24 of its own motion and made a final determination in the case, granting a permanent injunction in favour of the claimant preventing the continued sale of the defendant’s stickers incorporating club badges.

Commenting on the decision, solicitor Belinda Isaac states that the success of the claimant’s action in copyright is in stark contrast to the outcome of the earlier case involving photographs of players in their current kit, i.e. Trebor Bassett limited v. The Football Association. Here, the Football association (FA) based its claim on trade mark
infringement relying on the trade mark registrations of the various club badges. In that case, however, the court ruled that the inclusion of club badges in photographs of players on cards included in boxes of children’s sweets did not constitute “use” in relation to the relevant goods, and as a result, the trade mark registrations had not been infringed. By relying on copyright in case under review, the claimants were able to avoid a similar outcome, subject to their ability to prove title to the copyright. The case thus highlights the complementary nature of these two intellectual property rights and the importance for the rights holder of not focusing exclusively on one intellectual property right if at all possible.

Ambush marketing rules enforced with vigour at cricket World Cup

The phenomenon known as “ambush marketing” is assuming increasing importance for the organisers of sporting events. This is the practice whereby a firm attempts to create an association between itself and a sponsored person, team or organisation where no such association exists. Under legislation adopted in South Africa last year, any spectator carrying a product made by a competitor of one of the main sponsors is liable to have it confiscated. Water bottles are allowed, but the label must be removed, and T-shirts, hats and flags bearing competitors’ logos are unwelcome.

The first major international sporting occasion during which these rules could be enforced was the cricket World Cup held in early 2003. With Pepsi Cola amongst the tournament’s four “commercial partners”, the most visible sign of these rules being enforced has been the sight of stewards removing bottles of Coke from fans’ cooler bags in order to protect Pepsi’s investment. So stringent are the rules that spectators were capable of finding the police getting involved, since the legislation allows for prison terms against serious offenders. Thus a Johannesburg businessman, watching South Africa’s match against New Zealand, found himself evicted from the ground for drinking a can of Coke.

Apparently the basis for this legislation was the fact that the International Cricket Council had sold the commercial rights to the 2003 and 2007 World Cups for $550 million to the Global Cricket Corporation, a subsidiary of Rupert Murdoch’s New Corp empire. GCC then signed multi-million sponsorship deals with Pepsi, South African Airways, Hero Honda and LG Electronics. In return for their investment, the four sponsors demanded stringent regulations to prevent ambush marketing by competitors. They found a willing ally in the South African government, which passed the Merchandise Marks Amendment Act, which are currently the strictest rules on ambush marketing in the world.

Top rugby players in revolt over World Cup image rights

The disagreements which have beset the cricket World Cup as regards the players’ contracts have been well documented in these pages (see above, p.56). It now appears that something similar may be about to arise in relation to the Rugby Union World Cup to be held in Australia later this year. In May, the International Rugby Players’ Association (IRPA) claimed many leading players were seriously considering not signing the individual tournament contracts, since they allegedly will deprive the players of their right to profit from their names, images and signatures. It also demands that, as happens in similar events in football and cricket, there should be some prize money on offer.

The IRPA Chairman, Tony Dempsey, called the arrangements offered to the players as “out of step with modern global trends”, accusing the organisers of imposing employer-related obligations on the players without any financial rewards. The Rugby Football Unions of England and New Zealand had already signed the contracts, which seemed to leave the players no choice but to take action on their own. To date, however, nothing of this nature has materialised.

Newspapers heading for row with sports bodies over use of pictures and words

Normally, the relations between the press and sport, at all levels, are quite sound, based as they are on mutual need. However, this smooth relationship may be about to end, as newspapers may shortly be charged by sporting associations for the use of scores, photographs of players and even access to grounds, golf courses and tennis courts. This has caused outrage amongst many newspaper editors, who view this as a kind of censorship in the making. They point out that sporting bodies are earning a good deal from their sponsors, and that value of the publicity which newspaper coverage gives them is considerable.

The dispute could affect the British Open Golf championship which commences in mid-July, and whose organisers want stricter controls on reporters and photographers. Talks have already started with the FootballData Co. the company formed by the Premier League and the Football League to handle rights, regarding the possibility of a new contract for newspaper coverage starting next season. No further details were available at the time of writing.

Beckham asks airline to pay for his picture

In late May 2003, it was learned that England football captain David Beckham had requested a budget airline to donate £10,000 to a children’s charity for having used his photograph without his permission in a marketing
7. Property Law

campaign. Easyjet’s advertisements featured a picture of Mr. Beckham and the "cornrow" plait hairstyle which he bore for a recent England fixture. Thereupon the footballer’s management company, SFX, wrote to the airline complaining about this unauthorised use. Apparently, however there was no threat of legal action.  

Irvine wins appeal re assessment of damages in image misrepresentation case

It will be recalled from a previous issue that in early 2002, Formula One racing driver Eddie Irvine won a court action brought against broadcaster Talksport for having misrepresented his image. Talksport had embarked on a promotional campaign which included a Formula One pack containing a leaflet bearing a photo of Mr. Irvine, dressed in racing gear and apparently holding up to his ear a small radio on which the station’s logo was clearly featured. The champion driver brought legal proceedings against Talksport before the High Court, which awarded compensation of £2,000, which Irvine considered to be too low. He therefore appealed against the damages assessment made by Laddie J in the High Court, whereas the Talksport cross-appealed on the question of liability.

Before the Court of Appeal, the defendant claimed that the image on the leaflet in question was clearly intended as a joke, and that its likely effect was not such as to induce its intended recipients to believe that Mr. Irvine had endorsed the radio station. The claimant, on the other hand, asserted that, whilst the trial judge had correctly concluded that the appropriate measure of damage was a reasonable royalty, he had failed to adopt the correct approach in determining what was reasonable. The Court of Appeal awarded the action to Mr. Irvine. Lord Justice Jonathan Parker stated that the image adorning the front of the leaflet was the clearest representation that the claimant had endorsed the radio station. Neither the humorous character of the image on the front of the leaflet, nor the circumstance that the image was not a genuine photographic image, affected the question whether the impression conveyed by it was that the claimant had endorsed the radio station, or whether he had agreed to be depicted. A reasonable endorsement fee in the context of the case under review had to represent the fee which, on a balance of probabilities, the defendant would have had to pay in order to obtain lawfully that which it had in fact obtained unlawfully.

The unchallenged evidence in the case led ineluctably to the conclusion that the defendant would in all probability have been required to pay at least £25,000 in order to represent, by means of the image appearing on the front of the leaflet, that the claimant had endorsed the radio station. The figure of £25,000 would therefore replace the judge’s figure of £2,000.

Neath may lose right to call themselves “Welsh All Blacks”

Neath RFC have a proud tradition in Welsh rugby which goes back well over a century, and for all this time they have been known as the “Welsh All Blacks”. Thus far, this has merely been part of rugby’s rich folklore. However, it may soon assume a more serious dimension if Neath wish to continue using this moniker on their official merchandise. In mid-April 2003, it was learned that the New Zealand Rugby Football Union (NZRFU) have applied for a trademark which would prevent any other company from using the words All Blacks on sporting merchandise.

The Neath black jersey was adopted following the death of player Dick Gordon from injuries suffered during a game with Bridgend in 1880. His team mates decided on a black jersey as a mark of respect. It was not until the 1905 tour of England that the New Zealand team became known as the All Blacks. Neath Chief Executive Mike Cuddy has indicated that the club will fight this move “all the way”, and that details of the trade mark application have been communicated to their legal representatives.

This column will obviously follow this saga with keen interest.

Danish TV station ordered to pay licence money for boxing matches

In the case under review, TV2, a television company, broadcast eight extracts from boxing matches without obtaining a prior licence from Mogens Palle, the proprietor of television rights to the events. This led to legal action, and the Danish court awarded Palle standard equitable consideration to the amount of DKR 3,000 per extract. The Court, however, dismissed a claim in tort liability since the proprietor’s films could not be considered to have been devalued by the extracts.

Canadian Olympic body bars OLYM TIC trade mark

In the case under review, the applicant, being the SmithKline Beecham Biologicals Company, sought to register the trade mark OLYM TIC on the basis of its proposed use in Canada in association with vaccines for human use for the treatment and prevention of Lyme disease. The opponent, being the Canadian Olympic Association, claimed, inter alia, that the trade mark was incapable of registration under the Canadian Trademarks Act 1985, because of the several official marks owned by it containing or comprising the element OLYMPIC.
The Trademarks Opposition Board held that the trade mark application should be refused. The applicant had submitted that the average consumer of its wares would be doctors, nurses, pharmacists and similar people, and that such persons would associate the trade mark OLYMTIC with Lyme disease, and not with the opponent. The applicant’s mark combined the syllable LYM with the suffix TIC which denoted the means by which the disease was carried.

The Board, however, ruled that the public to be considered when assessing the resemblance between the applicant’s trade mark and the opponent’s official marks should not be restricted to the consumers of the applicant’s wares. The opponent did not rely on a family of marks and, as a result, the applicant’s state of the register evidence was of limited relevance. The possible use of a small number of third party OLYMPIC marks was not considered to have any measurable effect on the determination whether a person might reasonably be likely to mistake the applicant’s mark OLYMTIC for the official mark OLYMPIC. The applicant’s trade mark was similar in appearance and very similar in sound to the opponent’s official mark OLYMPIC. A person, as a matter of first impression and imperfect recollection, would be likely to mistake the applicant’s mark for it.

Registration of Canadian sporting merchandise trade mark amended

In this case, the Registrar of Trade-marks had forwarded a notice under section 45 of the Trade-marks Act 1985 to the owner of a registration of the trademark SCORE for clothing, footwear and sporting goods. Section 45 requires the registered owner of a trade mark to show whether the trade mark has been used in Canada in association with each of the wares and/or services listed on the registration at any time within the three year period immediately preceding the date of the notice, and if not, the date when it was last in use and the reason for the absence of use since that date. The registrant’s evidence consisted of a statement that the trade mark had been used continuously since January 1986 in Canada with all the registered wares except footwear. Attached as exhibits were a representative sample of a cloth label, catalogues marked with a trade mark, sample packaging and several representative invoices. One invoice indicated that the wares were picked up in the US, and another invoice was marked “N/C Samples”. The remaining invoices demonstrated the sale of gloves and socks, and certain other wares not covered by the registration.

The Trade-marks Senior Hearing Officer held that the registration should be amended. An allegation that a trade mark as registered was used during the relevant period, absent documentary evidence demonstrating sales of each of the wares during the relevant period, is insufficient to maintain the registration in its entirety. Catalogues showing that the wares were available for sale was not evidence that the wares therein were sold in Canada. The invoices demonstrating sales in the US or marked “N/C Samples” were not evidence of use of the mark in Canada in the normal course of trade. The evidence demonstrated use of the mark in association with gloves and socks during the relevant period and accordingly the registration was amended to specify only these wares.

Sportswear retailer fined for copyright offences. Canadian court decision

In the case under review, the retailer pleaded guilty to one charge under s. 42(1)(a) of the Copyright Act 1985, in relation to the sale of soccer jerseys and other articles of brand name clothing in which copyright existed. The Crown had proceeded by way of indictment. The matter then came before the Manitoba Provincial Court for sentencing.

The defendant knew that the articles of clothing were counterfeit. In total, 1,118 articles of clothing and computerised business and accounting records were seized. The crown sought a fine ranging from $50,000 to $70,000, based on gross revenue of $180,000 for the period covered by the charge. The defence urged a fine between $2,500 and $3,500. Counsel agreed that the computers seized were to be returned and that the articles of clothing were to be forfeited.

The Court held that the defendant should pay a fine of $45,000. It held that the amount and value of the seizure was unprecedented in Canada. Furthermore, there was a paucity of precedent relating to fines imposed under s. 42(1)(a). In view of the discrepancy between the fines proposed by counsel and the lack of precedent, it was necessary to revert to first principles of sentencing. There was no doubt that this was a serious case of deliberate and relatively sophisticated infringement of copyright. The income generated by the sale of the counterfeit clothing was by no means insubstantial. Sales were not only national but also international in scope. An inappropriate fine could potentially amount to a calculated cheaper licence fee than could be obtained from the rights holder. Therefore the fine must bear some relationship to the scope of the profit from the offending activity.

On the other hand, the defendant was a local sole proprietor and this was a first offence, with the defendant acknowledging the wrong by pleading guilty. There was already a financial penalty for the defendant caused by the seizure and surrounding negative publicity. This would militate against the likelihood of the defendant repeating the offence. Basing the fine on a percentage of known gross revenues was the most...
appropriate manner in which to proceed. In most cases the figure sought by the Crown at 30 to 40 per cent of gross revenue could be justified. However, in the instant case, a lower amount was appropriate in view of the circumstances relating to the small size of the defendant. The amount of the fine was set at $45,000, approximately 25 per cent of gross revenue generated from the infringing items.

**Intellectual property specialist firm adds to its sports client base**

In May 2003, it was learned that newly merged firm Addleshaw Goddard has added Football DataCo to its list of sports clients. Football DataCo is jointly owned by the Premier League and the Football League for the purpose of commercialising and protecting certain intellectual property rights, including fixture lists. It also acts as an agent for the Scottish Premier League and the Scottish Football League.

Other Issues

[None]
8. Competition Law

National Competition Law

BHB in breach of competition law, says OFT

It will be recalled from a previous issue 777 that the Office of Fair Trading (OFT), the body which invigilates compliance with UK competition law, had commenced an inquiry into the manner in which the racing industry operates in this country. From its initially restricted brief relating to the issue of data rights, the investigation had developed into a full-scale inquiry into every aspect of racing.

The first indication of what lay in store for the game’s regulatory bodies came in late February with a letter sent by the OFT to the various firms and personalities who had provided evidence to its inquiry. This indicated the concerns experienced by the OFT, particularly the process by which fixtures are allocated to race courses and the manner in which the British Horseracing Board (BHB) utilises its data rights. All this indicated that a Rule 14 notice was in the offing. This means that the industry concerned has been found to be in breach of competition law. This notice was duly issued on 8 April, and concluded that the rules of the British Horseracing Board infringed the 1998 Competition Act in the following ways:

- by restricting the freedom of race courses to organise their racing, particularly by determining how frequently, and at what times, they stage races, and the type of racing which they stage
- by fixing the amounts which race courses must offer to horse owners in order to enter their horses in a race
- by monopolising the supply of data relating to races and runners which are to be issued to bookmakers by foreclosing competition from alternative suppliers 779.

As a result, said the competition “watchdog”:

“the OFT proposes to require the BHB and the Jockey Club to end these apparent infringements of the Act to increase the freedom of racecourses operating under the Orders and Rules to compete and to open up the market for potential competition from alternative suppliers” 780.

A Rule 14 notice is subject to subsequent confirmation, as the indicted persons or firms are given the opportunity to respond to these allegations. This is expected to happen later this year. If these findings are confirmed, however, the BHB faces the prospect of losing its race planning powers and its ability to negotiate a price for the sport’s product, and thereby become little more than a glorified talking shop. By contrast, there could occur an enormous shift in the balance of power towards Britain’s 59 race courses which, in addition to owning the rights to live coverage of their races, would also be able to negotiate their own funding arrangements with bookmakers, and organise race meetings whenever they wish. This would mean that, for example, if Southwell wished to organise its own Derby, or races with prize money comprising just a few hundred pounds, there would be nothing to prevent them from doing so 781.

Reactions to the OFT’s initial findings were predictable. Greg Nichols, the Chief Executive of the BHB, commented that the OFT had “fundamentally misunderstood” the manner in which British racing operates as it does. The Racecourse Association, which was the chief beneficiary of the report, equally unsurprisingly welcomed its publication. However, its Chief Executive, Keith Brown, seemed to damp down expectations of the “racing revolution” when he stated that:

“courses have no interest in taking over the running of racing, but we need a greater involvement in industry decisions. We would like greater co-operation rather than the dictatorial attitude that prevails at the moment” 782.

Mr. Brown’s words were an indication and a reminder that it had been the confrontational attitude adopted by the BHB under their current chairman, Peter Savill, towards the racecourses and bookmakers which helped to bring about this OFT investigation. Indeed, it was the BHB itself which had requested the OFT in June 2000 to examine its rules and regulations so that it could satisfy itself that it was operating within the existing competition law. This move could have paved the way for ensuring that that the controversial manner in which the BHB was pricing the fees from bookmakers for data rights (see above, p.43) was built on solid foundations. Instead, the rug seems to have been pulled from underneath the BHB’s feet. What is now certain is that the Racecourse Association and the bookmakers now have a powerful tool with which to gain leverage in their dealings with Savill and the BHB 783.

Few people in the industry expected the BHB simply to roll over and accept the OFT findings without demurring, and certainly the Board came out with some fighting talk. It was particularly combative in relation to the issue of racing data, and vowed to fight the OFT in the courts, if necessary, in order to retain and utilise its exclusive ownership of racing data, currently worth £100 million per year to the sport’s bank accounts.

Chief Executive Nicholls seriously questioned whether racing’s finances would be as healthy if the BHB monopoly on the supply of data were to be broken and racecourses were allowed to utilise them. The next recourse against the OFT’s final decision is the Court of
Appeal, and the BHB has given every indication that it is prepared to take the fight to that judicial instance. Mr. Nicholls stressed that the BHB did not wish to be seen as entirely resistant to change, and intimated that there would in the future be a good deal more consultation with the racecourses. However, he maintained that the British racing industry was the most deregulated in the world, and that it was essential that the responsibility for the strategic direction of the sport should reside with a governing authority, which could balance all the interests involved in the sport.

Reactions in the media were mixed. Although many welcomed the prospect of the BHB stranglehold being weakened, others pointed out that the ruling bode ill for many of the smaller racecourses. Some predicted that, if power shifts to the racecourses, “playground rules” may come into operation, whereby the bullies prosper and the weak and weedy driven into dark corners. Country jumping courses, which are independently operated, could be most at risk and spell the end for tracks such as Hexham, set in isolated Northumberland country and attracting average crowds of 2,000. These courses may be regarded as too idiosyncratic and old-fashioned for the modern racing age, but the sport as a whole might suffer culturally if courses such as Hexham were to disappear.

Others warn of the risk that racing might come under the complete control of the bookmakers, since the moment that racecourses are allowed to race when they want and how, the betting industry will take charge of deciding which tracks should be granted which fixtures, when they can race and what kind of racing should be staged. This was the warning sounded by Peter Savill as he addressed the BHB meeting. And although the immortal words of Mandy Rice-Davies will inevitably be quoted at this stage, it has to be admitted that, on past form, this may be no idle threat, as it ties in with the danger that the OFT ruling presents for smaller racecourses. It could be argued that in this way, the OFT ruling becomes self-defeating, in that it will merely succeed in replacing one malevolent monopoly by another.

**Other implications of UK competition law for British racing**

These are momentous times indeed for the racing industry from the point of view of its lawfulness. On the same day on which the OFT issued its initial verdict in relation to the racing industry in general, it also published its preliminary findings into a 10-year contract signed in 2001 between the Attheraces betting service and the broadcasters Sky and Channel Four on the one hand, and British racecourses on the other hand. Its conclusion was that the agreement was anti-competitive and may therefore have to be renegotiated. The Attheraces service, which was launched in 2002 with the promise of revolutionising racing and generating millions from television betting, had already suffered setbacks with delays to the launching of its interactive betting service. This bad fortune was added to by the OFT, which stated that the 49 race courses which participated in this deal acted in an anti-competitive manner by selling their rights together at the conclusion of Attheraces’s fierce contest with a Carlton-backed consortium.

Earlier, some of the major off-course bookmakers were accused of operating “protectionist” policies when Betdaq, one of the leading betting exchanges, criticised the off-course “layers” for attempting to engineer a ban on racecourse bookmakers using the betting exchanges. Betdaq maintained that punters benefited from the current practice by which “board” bookmakers at the race courses hedged bets with the betting exchanges. This came in the wake of a meeting of the Levy Board, where it failed to reach firm agreement on the question whether racecourse bookmakers should be allowed to “lay-off” bets with exchanges such as Betdaq or the current market leader, Betfair. However, the indications were that, if voting patterns did not change over the subsequent months until a final decision is reached on the matter, the course bookmakers’ use of the exchanges could be banned.

It is clear that this is yet another matter which could find its way to the OFT.

**OFT start investigation into Liverpool tennis ban**

In late March 2003, it was learned that the Office of Fair Trading (OFT) had commenced an investigation into the banning of an exhibition grass-court tournament in Liverpool during the week before Wimbledon started, on the grounds that it came too close to a tour event in Nottingham. Under rules laid down by the Association of Tennis Professionals (ATP), no player ranked among the top 50 is allowed to appear within 100 miles of an official tournament. Special dispensation was given to the Liverpool event which took place last year, when the US Open champion Marat Safin was the star attraction, on the understanding that this was a once-only event. A dispute arose between the organisers of the Liverpool event, who claimed that Nottingham is 106 miles away by road, whereas the ATP considers that “as the crow flies” the relevant distance is only 93 miles.

This dispute had not yet been settled at the time of writing.

**JJB to fight OFT price fixing charge**

The issue of the prices charged by retailers for sporting performers’ replica shirts has been a fraught one for some years, as has been reported in earlier editions of this Journal. It will be recalled from the previous
that, in November 2002, the Office of Fair Trading (OFT) had issued nine companies, including JJB, with additional evidence that they were guilty of price fixing in this market. At the time of writing, no definite ruling had yet been issued. However, JJB have already pledged to fight to the last any definitive ruling to this effect. It branded the OFT as “judge, jury and executioner” and stated that it would appeal against what it saw as an inevitable guilty verdict. 

Nevertheless, the OFT performed a significant U-turn in late January, when it agreed to hold a joint oral hearing – bringing together firms such as JJB on the one hand, and the Football Association (FA) on the other hand – as part of the football shirt inquiry in question. This decision is quite unprecedented, and could create major logistical difficulties when the OFT is faced with the prospect of accommodating the management of the 10 companies involved, as well as their legal teams and witnesses, in one venue.

This dispute had not yet been settled at the time of writing.

OFT to look into football fixture rights

In mid-December 2002, it was learned that the Office of Fair Trading (OFT) are looking closely into the manner in which the Premier League and the Football League charge for the right to print football fixtures, following complaints from bookmakers that the system is biased against certain companies and infringes competition law. This dispute has the same overtones as those which characterised the OFT investigation into the BHB case referred to above. The OFT have been informed that certain betting firms are charged more than others for football fixtures, whilst newspapers and magazines pay considerably less, and that the pricing structure is generally inconsistent.

This dispute had not yet been settled at the time of writing.

Football authorities did not abuse dominant position over World Cup, ruled French court

For the 1998 Football World Cup, the world regulating authority in football, FIFA, designated the French Football Association as its agent for the tournament’s organisation. This included the sale of tickets to the various games. For this purpose, a French organising committee (CFO) was established. Its system of selecting authorised tour operators was given negative clearance by the European Commission on the basis that, although it was anti-competitive, it was nevertheless proportionate to its objectives. Seventeen operators were selected. The complainant, OMVES (a Spanish company) had been selected to service both South America and North and Central America, including the Caribbean. Under the conditions laid down for tour operators, OMVES was allocated 9,160 tickets. Tour operators could also purchase additional tickets as and when available. In the event, OMVES sold 19,779 tickets, which were sold as part of travel packages. Most tour operators were not interested in selling tickets on their own.

The tour operators bought their guaranteed tickets direct from the CFO, paying a licence fee. A 10 per cent administrative surcharge was levied on the face-value ticket prices. Eventually they were allowed to sell them in any zone subject to a maximum of four per customer, and providing information for security purposes.

OMVES complained that FIFA and CFO had abused their dominant position by allowing a parallel market of tickets sold by national federations alongside the tour operators. The sale of additional tickets had been chaotic, and OMVES had found it necessary to buy them on the parallel market at inflated prices.

The Competition Council first of all ruled that it had jurisdiction to try the case, even though it concerned a sporting event. Contrary to the view expressed by FIFA, there was a market for match tickets as part of a package tour which was separate from that which existed for the sale of tickets sold by themselves. The CFO acted under FIFA’s directions and FIFA sold the tickets to the national federations, so FIFA and the CFO were jointly market dominant. However, none of their actions could be regarded as an abuse of their dominant position, and the complaint was accordingly dismissed.

EU Competition Law

Premier League at odds with Brussels over collective selling of TV rights

The English Premier League currently negotiates television broadcasting rights for its matches collectively, and ever since its creation in 1992, it has awarded the exclusive right to broadcast live matches to BSkyB. In December 2002, the European Commission informed the Premier League that it was investigating this arrangement under its competition rules, claiming that it amounted to price fixing by excluding other channels from the arrangement. Clubs should also be given the right to negotiate their own individual deals with broadcasters. It gave the League 2½ months to reply to its objections to the £1.6 billion three-year contract with Sky.

Whilst the League were in the process of formulating their response to the Commission, there came a warning from a leading City bank that Premiership clubs would be starved of money if the Commission...
succeeded in forcing changes in the League’s television rights arrangements. Credit Suisse First Boston warned that, if the European regulators compelled the league to sell more content and to carve out rights for terrestrial-only broadcasting only, they would expect content prices to rise sharply. Although the end to exclusivity would marginally dilute Sky’s appeal to football fans, the bank considered this effect to be too little to be able to influence its ability to attract the fans to pay-TV deals. The football clubs would be the likely losers from regulatory changes along these lines, because of the likely effect on content prices. Certainly concern was rising that the smaller clubs would lose out if collective negotiating were to be banned, as the big clubs would be able to negotiate individual deals with television companies, whereas smaller outfits such as Charlton Athletic lack such broad appeal and would suffer\(^8\).

The League made its response in late March. It was prepared by Chief Executive Richard Scudamore and the League’s specialist broadcasting lawyers, Denton Wilde Sapte. It warned essentially that forcing the individual clubs to sell their television rights individually would produce a chaotic, divisive mess. Echoing the views expressed by the bank referred to earlier, it stressed that this would be to the advantage of the big clubs and work to the detriment of the smaller ones\(^7\). The initial reaction from Brussels was not promising, and Commission officials were said to be baffled as to why the Premier League restricted itself to repeating the arguments which had already failed to halt the inquiry. They were also surprised that the League had failed to propose any changes – if only to meet the Commission halfway\(^9\).

Nevertheless, two months later it seemed that both sides were close to a compromise deal, under which the Premier League would essentially be allowed to continue to negotiate television rights collectively. Competition Commissioner Mario Monti gave a clear hint that he did not intend to break up the joint-selling arrangement, in return for which more live matches would have to be made available to other broadcasters\(^10\). It was learned on the same day that the Trade and Industry Secretary, Patricia Hewitt, had started lobbying Brussels on the Premier League’s behalf\(^11\).

At the time of writing, however, no definite deal had yet been concluded.

**Commission closes Audiovisual Sport investigation**

In May 2003, the Commission announced that it had discontinued its investigation regarding the acquisition of broadcasting rights to Spanish football games by Audiovisual Sport (AVS) after it had consulted interested third parties. This followed significant changes which had been made in the past by the joint venture between the Telefonica and Sogecable firms to their jointly-held rights which had the effect of granting access to football by new cable and digital terrestrial operators, which had also been allowed to set their own prices. The decision of the Spanish competition authorities relating to the merger between the two pay-TV platforms in Spain, i.e. Sogecable and Telefonica’s Via Digital, also created the conditions for a more competitive utilisation of the country’s football broadcasting rights. Following the merger, Sogecable had agreed to buy the stake of Telefonica in AVS, thereby terminating the agreement which had been notified to the Commission. The latter pledged to continue to monitor carefully the behaviour of the companies concerned as well as that of other companies in other countries in the fast-changing media markets\(^12\).

The background to this case is that Sogecable and Telefonica de Contenidos, a subsidiary of Telefonica formerly known as Admira Media, had notified an agreement to the Commission in which they pooled forces in order to acquire and utilise the broadcasting rights to Spanish First Division football games for 11 seasons, ending in 2009, through their Audiovisual Sport joint venture. The Commission soon formed the view that the agreement amounted to an unacceptable monopolisation of the rights by the two main television platforms for a very long period, and issued a warning, on 11/4/2000, that it would impose fines unless the agreement was terminated or significantly changed.

As a result, Telefonica and Sogecable announced that they would give entrants to the Spanish cable and digital terrestrial television markets access to the football rights and accepted that such competitors would be free to set their own pay-per-view prices. Although this development immediately exerted downward pressure on television subscription prices, a number of issues remained to be settled. However, the Commission’s discussions with the parties were suspended by the announcement, made in the course of 2002, of a full merger between Via Digital and Sogecable. This merger was authorised by the Spanish authorities in November 2002, subject to conditions which were further specified in a detailed implementation plan presented by the parties to the Spanish authorities.

The conditions to which the merger was subject abolish the renewal options held by AVS to the football rights, guarantee third party access to the rights under fair, reasonable and non-discriminatory conditions, and establish that the merged entity will not have exclusive use of the new media rights. Access to the football rights will be subject to an arbitration process\(^13\).
Commission clears ticketing arrangements for the Athens Games

In late May 2003, the Commission announced that it had arrived at the conclusion that the arrangements regarding the sale of tickets for the 2004 Olympics in Athens were consistent with EU competition law. These arrangements, which had been notified to the Commission by organising committee ATHOC, make provision for various ticket sales channels for residents in the European Economic Area (EEA). For the first time, residents in the EEA will be able to purchase tickets through any of the National Olympic Committees or their appointed agents. Already at this stage, consumers could apply for tickets as the first stage of ticket sales had just started.

This investigation started when ATHOC, the organising Committee of the 2004 Olympic Games, sought reassurance from the Commission that its ticketing arrangements for the Games were in line with European Union competition rules. This was the first occasion on which the Commission had scrutinised ticketing arrangements for the Olympics. Having carefully examined the arrangements and discussions between ATHOC and the Commission aimed at protecting the consumer interest and compliance with competition rules, ATHOC changed the ticketing arrangements in relation to the conditions governing Internet sales as well as sales by National Olympic Committees in the EEA by allowing them to sell tickets below face value, if they so wish. As a result of these changes, the Commission arrived at the conclusion that, on the basis of the information available, the ticketing arrangements did not breach the EU competition rules.

Public subsidies to football clubs are justified under EU law. Netherlands academic article

Under Articles 87 and 88 of the EU Treaty, public subsidies bestowed on firms which give them a competitive advantage are in principle unlawful under EC competition law, unless they serve some socially justified purpose or in some other way benefit the public good. Inevitably, the question has arisen whether any gifts from the public purse which benefit professional sporting clubs and associations are lawful under EU competition law.

The author of this article is under no doubt that they constitute legitimate support benefiting the public good (legitiem ondersteuning publieke zaak). She opines that the rules on state subsidies should only be applied in areas where a common market has been created. There is no such common market in sport – on the contrary, the Court of Justice itself has, in the Bosman decision, ensured the maintenance of national product markets in this field. The reason for this lies in, inter alia, the specific structure of sport which, in contrast to most other industries, is based mainly on rivalry between countries. Although the various exceptions, exemption regulations, and guidelines provide ways of escaping the stranglehold of competition law, some other, somewhat artificial, solution can be found for what is essentially a local and socially-based problem.

Since there is no common market in sport, democratic legitimacy, which is the notion which applies in the United States in such cases, appears to be a consideration which outweighs any adverse effects on competition which may be produced on the national market, let alone on the European market. The relevant local authority will, taking into account its public responsibilities, need to weigh up the social benefits against the social costs of any subsidy. In so doing, concrete economic considerations will need to be taken into account, but it will also be necessary to take into consideration local, as well as national, feelings, the welfare of the football fans, the safety of the local community and its surroundings, etc. Reliance upon EU rules on public subsidies detracts from the social and economic context, both at the local and at the national level.
9. EU Law

2004 to be designated “European Year of Education through Sport"
In February 2003, the EU authorities issued a decision by which the forthcoming year is to be established as the European Year of Education through Sport.

The aims are extremely wide-ranging, and are essentially about taking advantage of the values conveyed through sport to develop knowledge and skills whereby young people in particular can develop their physical prowess and readiness for personal effort as well as social abilities such as teamwork, solidarity, tolerance and fair play in a multicultural framework (Article 2). These aims are to be promoted through meetings, European educational competitions and events highlighting achievements and experiences in this regard, voluntary action at the European level, information and promotional campaigns, and other events promoting the educational value of sport. (Article 3). It will be implemented in full co-operation with the member states (Article 4). For this purpose, the Commission is to be assisted by means of a Committee (Article 5).

Italian prohibition on cross-border bets is against EU rules, states Advocate-General
In the case under review, Mr. Gambelli and over 100 other defendants operated data transfer centres in Italy, linked by internet with an English bookmaker, and collecting sporting bets in Italy on behalf of that bookmaker. However, in Italy such activity is reserved for the State or for state-licensed bodies. Accordingly, criminal proceedings were brought against Mr. Gambelli and the others for taking unlawful bets. Mr. Gambelli argued that the Italian legislation in question violates the EU law principles of freedom of establishment and the freedom to provide services.

The case arose before the Tribunale of Ascoli Piceno, which requested a preliminary ruling from the European Court of Justice (ECJ). The Court itself has yet to pronounce itself on this issue. However, the Advocate-General, Siegbert Alber, recently issued his authoritative Opinion (which is not, however, binding on the Court).

In the Advocate-General’s view, this case went beyond the issues discussed in the existing case law of the ECJ on the state regulation of games of chance. He took the view that data transfer centres are not branches of the English (sic) bookmaker. On the basis of the case law of the ECJ, he opined that, rather, they went into business as providers of services. In the final analysis, however, the matter was one for determination by the domestic court. However, if there were a branch of the English bookmaker in Italy, the latter would have to be able to compete for the grant of a licence in the same way as Italian nationals, and the licensing system would need to satisfy the general EU law requirements for legislation of a member state restricting the exercise of economic activity. The Italian provisions did not meet these requirements because, inter alia, they were framed in an openly discriminatory manner and were not adequate for the protection of consumers and of public order.

Since the provisions which prevent organisers of bets from other member states from taking bets in Italy constituted an obstacle to the freedom to provide services in any event, they had to be capable of being justified by mandatory requirements. The Advocate-General, however, concluded that the relevant Italian legislation could not be justified in this way. The legislation of the member state of origin of the organiser of the bets (in this case the UK) already provided a sufficient guarantee of the organiser’s integrity. As far as discouraging gambling is concerned, the actual increases in the availability of games of chance facilitated by the Italian legislature in recent years belie the existence of a coherent policy of restricting gambling opportunities. For this reason, the alleged objectives, which are not (or are no longer) pursued in reality, are not sufficient to justify impeding the freedom to provide services of offerors established and duly authorised in other member states.

The feared negative financial effects on the economies of some member states arising from a relative opening up of member states’ markets for games of chance also could not serve as a justification for the legislation.

The actual ECJ decision will be included in a future edition of this Journal.

Commission proposal to facilitate issuing of visas and entry into Schengen area for members of the Olympic family
In April, the European Commission presented a proposal for a Regulation which would lay down specific measures to facilitate the procedure for applying for and issuing visas and the entry into the area covered by those member states which adhere to the Schengen Agreement on the free movement of persons for members of the Olympic family who are to take part in the 2004 Olympic and/or “Paralympic” Games in Athens. This measure comes in addition to the support provided by the European Structural Funds for the preparation of the Olympics and the initiatives which have been finalised between the European Commission and the Games Organising Committee in the field of sport and youth.
ECJ interprets EU/Slovakia non-discrimination principle in sport

In the case under review, Maros Kolpak, who is a Slovak national, has been playing for the German second division handball team TSV Ostringen eV Handball as a goalkeeper, since March 1977. He signed a contract of employment to that effect, is resident in Germany and is the holder of a valid residence permit. The German governing body in the sport, being the German National Handball Federation (Deutscher Handballbund eV – DHB), which organises League and Cup fixtures at the federal level, issued Mr. Kolpak with a player’s licence marked with the letter A, on the grounds that he was a national of a non-member country whose citizens do not enjoy the benefit of the equal treatment provisions laid down in the EC Treaty or, in identical terms, under the European Economic Area (EEA) Agreement. Under Federal rules governing competitive games issued by the DHB, teams in the federal and regional leagues may, in league or cup matches, field no more than two players whose licences are marked with the letter A.

Mr. Kolpak requested that he be issued with a player’s licence which did not feature the specific reference to nationals of non-member countries, as he considered that he was entitled to take part without any restriction whatsoever in competitions by reason of the prohibition of discrimination set out in the Association Agreement concluded between the EU and Slovakia. The dispute landed before the Court of Appeal (Oberlandesgericht) of Hamm, which referred to the European Court a request for a preliminary ruling whether the principle of non-discrimination on grounds of nationality laid down in this Association Agreement, under which Slovak workers lawfully employed in an EU member state are entitled to the same treatment as nationals of that member state as regards conditions of work, remuneration and dismissal, precludes a rule drawn up by a sports federation under which clubs are, for certain games, authorised to field only a limited number of players from non-member states which are not part of the EEA.

The Court stated first of all that, on the basis of its recent ruling in the Pokrzeptowicz-Meyer case on the interpretation of the same principle contained in the Polish association agreement, that the provision containing the non-discrimination principle was directly applicable (here again, the ECJ makes the mistake of confusing direct applicability with direct effect). Slovak nationals were therefore entitled to plead this principle before the national courts of the host member state. The ECJ then pointed out that, in accordance with the principles set out in the Bosman decision, the prohibition of discrimination set out in the provisions of the EC Treaty dealing with the free movement of workers applies not only to the measures taken by the public authorities but also to rules drawn up by sporting associations which determine the conditions under which professional athletes may engage in gainful employment. In this connection, the Court, also on the basis of the Pokrzeptowicz-Meyer decision, stated that, even though the relevant provision of the Agreement does not set out a principle of free movement for Slovak workers, the principle of non-discrimination laid down in the Agreement also applies to a rule drawn up by a sports federation such as the DHB.

Finally, the Court defined the scope of the non-discrimination principle by pointing out that the prohibition of all discrimination on grounds of nationality applies only to Slovak workers who are already lawfully employed in a member state and solely with regard to conditions of work, remuneration or dismissal. That scope does not extend to national rules dealing with access to the labour market. The Court found in this regard that Mr. Kolpak was lawfully employed under a contract of employment, that he held a valid residence permit and that, under national law, he does not require a work permit in order to exercise his profession. It also observed that, in accordance with its Bosman ruling, a rule which restricts the number of professional players who may take part in certain games does not concern the employment of professional players, for which there is no restriction, but concerns the possibility for clubs to field them in official matches, and that participation in such matches is the essential purpose of those players’ activity. Moreover, such a rule is discriminatory and cannot be justified on sports-related grounds linked to the training of young players who are nationals of the member state concerned.

Accordingly, the Court held that a rule such as that which was issued by the DHB relates to working conditions, and that a limited opportunity for Slovak players, compared with players who are nationals of the EEA member states, to take part in certain matches involves discrimination prohibited by the Association Agreement. Such discrimination could not be justified on sporting grounds. This might, however, be the case in relation to matches between national teams which exclude foreign players exclusively for sports-related reasons.

Commission welcomes adoption of new rules on recreational craft

In May 2003, the European Commission announced that it welcomed the adoption, by the European Parliament and the Council, of a new directive on recreational craft. This new directive extends its scope to include personal watercraft and complements its design and construction requirements by means of environmental standards as regards exhausts and noise emission limit values for recreational craft. The new directive meets the
requirements of the internal market and of environmental protection, whilst sustaining the competitiveness of the recreational craft manufacturing industry. As a result of the agreement reached by the Parliament and the Council, the harmonised emission limits will take effect progressively, from 1/1/2005 to 1/1/2007.

The Commission also pointed out that over 95 per cent of the 800,000 recreational craft produced each year world-wide are motor boats. These are frequently used in recreational areas in coastal zones and in lakes, where ambient noise is often a significant but scarce natural resource. Furthermore, the use of such boats is largely concentrated during the summer period, leading to high levels of local air pollution caused by exhaust gases. It is to reduce this negative environmental impact that the Commission had proposed the amendment of Directive 94/25 with a view to restricting emissions of air pollutants and noise emanating from such craft.

**European Equal Opportunities committee proposes European Parliament resolution on women and sport**

In May 2003, the Committee on Women’s Rights and Equal Opportunities with the European Parliament proposed a motion for a European Parliament resolution on women and sport. This seeks to develop a structure for tackling the question of women and sport, to develop sport in schools and sport for leisure purposes and to ensure equal rights in top-level sports. It also aims at protecting the health of female athletes and calls upon greater participation by women in decision-making in these areas.

**Newcastle United/Bacardi case ruled “inadmissible” by European Court**

It will be recalled from a previous issue that a dispute had arisen between Newcastle United Football Club and drinks manufacturers Bacardi and Cellier du Dauphin regarding the displaying of advertisements for the latter’s products at a UEFA Cup match between Newcastle and French side Metz in 1996. Newcastle had severely restricted the rotating advertisements in an attempt to comply with French legislation (Loi Evin) which prohibits alcohol advertising on television when the events are aimed at a French audience. The North-East club were accordingly taken to the High Court by the drinks companies on the basis that it had induced a breach of contract between the companies and Dorna Marketing, a British company which was responsible for selling and displaying advertising at the football club. The High Court had requested the ECJ to provide a preliminary ruling as to whether the French legislation was consistent with EU rules on the freedom to provide services.

The ECJ gave its ruling in January 2003, in which it held the request for a reference to be inadmissible. It held that it is essential for the national courts to explain, where this is not obvious from the case file, why they consider that a reply to their questions is necessary to enable them to give judgment. Accordingly, they should give at least some explanation of the reasons why they selected the EU law provisions which they requested to be interpreted. In addition, the Court must display especial vigilance where a question has been submitted which seeks to establish the consistency of legislation of another member state with EU law.

The High Court had, according to the ECJ, not provided such an explanation. On being asked to explain more fully the basis on which Newcastle United could rely on the Loi Evin, the High Court confined itself to repeating the club’s argument that it could reasonably anticipate that a failure to give instructions for the removal of the advertising in the stadium would result in a breach of French law. The High Court had not given a satisfactory answer to the question why Newcastle United could reasonably assume that it was obliged to comply with French legislation. And even if the High Court were to consider that Newcastle could reasonably make the assumption that compliance with French law required it to intervene in the contract, it was not clear why that would no longer be the case if the provision with which the club sought to ensure compliance turned out to be inconsistent with Article 49 of the Treaty on the freedom to provide services.

The ECJ therefore ruled that the request for a preliminary ruling was inadmissible.

**FIA to initiate action before the European Court against Commission plans to outlaw tobacco advertising**

In early April 2003, it was learned that the FIA, which is the world governing body for motor racing, will initiate proceedings before the European Court of Justice against the European Commission’s plan to outlaw tobacco advertising as from mid-2005. The governing body stated that it wished to restore the original implementation date for the Directive on Tobacco Advertising and Sponsorship to October 2006. It feared that the decision, taken last year, to bring forward the implementation date could lead to an exodus of Formula One events from Europe. Three of the top four teams involved in Formula 1 have signed contracts with sponsors until the end of 2006.
10. Company Law

Bankruptcy (actual or threatened) of Sporting Clubs and Bodies

Leicester City’s escape – effective, but is it ethical?

It will be recalled from the previous issue that one of the Nationwide League clubs which suffered the chill winds of economic hardship since their relegation from the rich pastures of the Premier League was Leicester City. However, rescue was on its way in the shape of a consortium headed by former City and England captain, Gary Lineker and his agent Jon Holmes. Ultimately, this consortium succeeded in lifting Leicester out of administration, thanks to an agreement reached with the creditors. A happy end to a romantic story straight out of Boys’ Own? Well, not quite. Many people are somewhat concerned at the terms on which Leicester made their escape from liquidation.

The deal which enabled the consortium to pull the club away from oblivion was worth £1.25 million. This left millions of pounds unpaid, including a colossal £6 million to the Inland Revenue (although this will rise as a result of Leicester winning promotion to the Premiership – assuming they stay there). This is unlikely to have gone unnoticed by other clubs whose finances are in an unhealthy state, and a Football League spokesman said that this could lead to an avalanche of clubs looking to eliminate their fiscal (and other) debts by going into administration816.

Leading columnist David Conn concedes that there have over the past two years been clubs which have gone into administration and which have cost over £1 million in public money as clubs have left ambulance services, police and local councils out of pocket. Ordinary staff have been dismissed whilst the players are protected, and the list of unsecured creditors has included local suppliers who are owed money they can ill afford to lose. However, until the Leicester City settlement, direct tax and VAT, being preferential creditors, were normally paid in full, which prevented administration from becoming the soft option of choice for overspending clubs. However, under the Enterprise Act which has only just entered into effect, the Inland Revenue has been downgraded from a preferential creditor to an ordinary unsecured creditor, seeking payment alongside the bankrupt’s suppliers817.

All this naturally does little to enhance the integrity of the sport. The Football League also feel that this has undermined its strict insolvency policy. This provides that the club should pay its “football creditors” (players and other clubs) in full, that preferential creditors should also have their claims met, and that a satisfactory settlement be reached with unsecured creditors, usually around 10 per cent in the pound818. John Nagle, spokesman for the Football League, now says that this Leicester City settlement with the Inland Revenue “seriously undermines” this system819. Even the new policy of points deduction and possible relegation which has recently been decided by the League in order to penalise clubs going into administration may not be sufficient to remove the temptation which this settlement had provided.

Concern has also been expressed at a certain level of discrimination which seems to operate in the settlements reached by the tax authorities with football clubs which run into financial difficulty. The deal which the Inland Revenue struck with Leicester as referred to above was 10p in the pound. However, when York City ran into difficulty, as is described below, they were asked to pay 63p in the pound. Other Second and Third Division clubs which have gone into administration have also been asked to pay higher tax bills than their First Division counterparts. This has aroused concern, not only among Football League and PFA officials, but also amongst MPs. It is understood that official representations have been made to Sports Minister Richard Caborn, urging him to rectify this state of affairs820.

English football gets tough on failing clubs

The financial travails of many football clubs at all levels of the competition in this country have been well documented in these pages. It now seems that the point has reached where the competitions themselves are prepared to take radical action in relation to such clubs. In late April 2003, Football League chairman voted overwhelmingly in favour of penalising clubs which go into administration. These will now face relegation or have a maximum of 12 points deducted. This system will take effect with the start of the 2004-5 season821.

Barely a month later, the Premier League took similar action. As from the 2003-4 season, clubs which go into administration will have six points deducted. The idea is to act as a deterrent whilst not condemning “offenders” automatically to relegation822.

Football clubs facing bankruptcy

Notts County

The oldest professional football club in the world has been faced with increasing financial difficulties. They went into administration in June 2002 with debts estimated at £6 million. Seven months later, they were given until the end of the season to solve their cash problems or risk being expelled from the Football League823. However, the immediate future of the club was secured towards the end of May, when creditors and shareholders supported a proposal by administrator Paul Finney to sell the club to one of three interested parties824. At the time of writing, it was not yet known who this interested party was.
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_Ipswich Town_

If ever there was a club which epitomised the financial turmoil currently gripping the game it is the Suffolk side. In the space of just two years, they have seen their prospects of playing Champions League football reduced to the status of Football League plodders. This has naturally not been without its financial implications, and in February 2003 the club were reported to be £30 million in the red, as well as losing £250,000 per week. In a bid to stem the worst of the financial haemorrhage, the club put several of its best players up for sale, but many of the expected departures failed to materialise. Then the closing of the transfer window at the end of January confounded all hopes of alleviating the situation until the summer. As a result, the club applied to be put into administration. Accountants Deloitte & Touche were called in as supervisors in the restructuring of the club’s debts.

However, in early May it seemed as though the club may have put the worst behind it when it took the first tentative step out of administration as creditors agreed to accept a voluntary arrangement to clear its debts. A plan to set aside 20p in every pound earned by the club was overwhelmingly endorsed by more than 98 per cent of creditors at a meeting held at Portman Road. However, no further details were available at the time of writing.

_Wimbledon FC_

The sad decline of the club which once regularly appeared in the top six of the old First Division, having not been a League club a dozen years earlier, continues, with gates slumping to record lows. In June 2003, Nationwide League Wimbledon went into administration, and immediately afterwards started investigating the possibility of a merger with Luton Town. Indeed, this may be the only option left to them, since at the time of writing it appeared that they might be expelled from the League. Certainly at the time of writing the prospect of the club being liquidated was a distinct possibility.

_Sunderland FC_

Hard times have also hit the Wearside club, who were relegated from the Premiership at the end of the 2002-3 season. Shortly before the end of that season, it announced half-year losses of £5.4 million and the prospect of having to make 80 clerical and administrative staff redundant. With a debt standing at £26 million and rising, and saddled with the seventh highest wage bill in English football, Chairman Bob Murray at one point refused to rule out the prospect of the club going into administration. No further details were available at the time of writing.

_York City_

Amidst all the doom and gloom engulfing so many other sides, a chink of light – and possibly the shape of things to come – has been in evidence at this 81-year-old club. It will be recalled from the previous issue that the club had experienced difficulties in paying their players following a Creditors’ Voluntary Agreement in November 2002. In late February 2003, it was announced that the club needed to find £60,000 or face almost immediate bankruptcy. However, there was a hopeful sign in that the Supporters’ Trust, which was set up following the asset-stripping affair described in a previous issue, and which had already donated £92,000 towards the club’s financial problems, further relief came in the shape of collections held outside the club’s Bootham Crescent ground, which finally enabled them to raise the £60,000 required and earn a stay of execution.

In what may herald a new era of Fan Power, it was learned a few days later that the club’s administrators had given their backing to a buy-out plan submitted by the Supporters’ Trust, with the prospect of the latter taking over the club within a month. However, no sooner had the celebrations over this victory for the grass roots died down, than the prospective owners had to face up to the problem which essentially had remained unsolved from the asset-stripping affair referred to above – i.e. that the club’s ground had already been sold. It will be recalled that this affair had erupted because the directors had transferred ownership of the ground to a holding company, in order to bypass a long-standing Football Association rule designed to protect clubs’ tenure of their grounds. The holding company promptly sold the ground to a housebuilder for £3.5 million, 94 per cent of which would go to the York City directors who engineered the entire deal, and only 6 per cent to the club. The FA has done precisely nothing about this flagrant abuse of its rules. In the meantime, it also emerged that the club did not even receive the 6 per cent to which it was entitled under the sale of Bootham Crescent, as a result of some treachery perpetrated by a motor-racing impresario who had bought the club before the Supporters’ Trust was established.

Courageous as ever in the face of adversity, the Supporters’ Trust entered into negotiations with the various parties concerned in order to safeguard the future of the club. This gave rise to a plan whereby the football club should leave Bootham Crescent and enter into a ground sharing agreement with rugby league club York City Knights at the Huntington Stadium, which would then be redeveloped in order to raise it to Football League standards, with an increased minimum capacity of 6,000.
However, in mid-March the valiant new owners of the club suffered a new blow following an intervention by the Inland Revenue and Customs and Excise, thus once again endangering the club’s future. In spite of the overwhelming acceptance at a creditors’ meeting to move the club out of administration and into a company voluntary arrangement, the offer of 20p in the pound owed was rejected by the tax authorities, whose support is necessary for the Football league to sanction the take-over by the Supporters’ Trust. This meant a delay in the takeover, which was highly frustrating for the Trust because this meant eating into the funds earmarked for the takeover in order to keep the club afloat over the subsequent week until a second creditors’ meeting could be arranged.

Ultimately, agreement was reached with the fiscal authorities at 63p in the pound. At the time of writing, it was not yet known whether the Trust had succeeded in paying off this amount yet. (On the subject of the size of this settlement, see also above p.101.)

**Leeds United**

That all is not well at Elland Road is a pronouncement which could be applied to virtually every aspect of the club’s being – its playing fortunes, its standing with the public, relations with its long-suffering supporters and, most important of all (and symptomatic of this wider malaise) its financial position.

It is not for this column to relate extensively with, still less pass comment on, the manner in which the policy-formation and decision-making process has gone seriously wrong at the club during the past two seasons, ending with the acrimonious exit of virtually all those at the centre of the crisis – not only Chairman Peter Ridsdale and manager Terry Venables, but also the majority of their most prized playing assets, most of them under the cloud of some controversy or other (Bowyer, Woodgate, Ferdinand et al.).

The full extent of the financial disaster to have befallen the once-proud Yorkshire club became all too clear towards the end of March 2003, when it shocked investors and fans alike with the news that its debt was close to £80 million. Figures for the six months ending December 2002 revealed falling revenues and investors and fans alike with the news that its debt was close to £80 million. Figures for the six months ending December 2002 revealed falling revenues and shareholders, bankers and bondholders in order to cut the debt burden. Several options presented themselves in order to overcome this problem, including a rights issue and a debt-for-equity swap. A bond issue was ruled out. Accountants Ernst & Young were summoned in order to save the club from collapse. It then emerged that the club was seeking to raise up to £15 million through a rescue refinancing plan in order to keep afloat. Professor McKenzie became Executive Chairman so that he could devote himself almost full-time to the problem.

No further details were available at the time of writing.

**Arsenal FC**

The financial problems resulting from the planned new stadium at Ashburton Grove have been extensively documented elsewhere (see above, p.84).

**Huddersfield Town**

This particular Nationwide League club set a bizarre precedent in late March, when it was placed into administration by its own players, who had not been paid fully for three months. This was caused by a combination of the steep annual rent which they are required to pay for the state-of-the-art McAlpine stadium and spiralling wage costs, bringing the club’s total debts to £17 million. However, there were some hopeful signs that the club may find salvation in the same way as their fellow Yorkshire side York City (see above). Almost immediately, a “survival trust” was set up, which succeeded in raising around £40,000, £10,000 of which was used to keep the club afloat during its administration period. At a public meeting organised at Huddersfield Town Hall by the Trust three weeks later, 800 people were in attendance to hear a progress report, including news of two or three groups which could be interested in taking over the side.

**Derby County**

In June 2003, it was learned that the Club Chairman, Lionel Pickering, was on the verge of selling the club, after he admitted that it was £30 million in debt. No further details were available at the time of writing.

**Oldham Athletic**

The Second Division Nationwide League side announced shortly before this issue going to press that it was “on the verge of going out of business” when the “Latics” major shareholder, Chris Moore, stated that he was no longer prepared to support the club financially. The club was operating at a loss of £50,000 per week. Payments to all creditors were suspended and the club’s bank account frozen. All Club employees were informed that they would almost certainly not be
paid at the end of the month – raising the possibility of players becoming free agents and leaving the club\textsuperscript{850}.

Obviously more will be learned of the Lancashire club’s ultimate fate during the forthcoming review period.

**Barnsley FC**

It will be recalled from a previous issue\textsuperscript{851} that this club had also been forced into administration as a result of mounting debts. In December 2002, the club was bought by Peter Doyle for £2.85 million. However, Mr. Doyle failed to have the take-over ratified by the Football League and the Football Association because he had failed to convince these bodies that he was capable of redeeming the club’s debts\textsuperscript{852}. The club were later issued with a June 2003 deadline by the Nationwide League to provide assurances about their future. It was not known at the time of writing whether this assurance had been forthcoming. However, supporters of the club took the precaution of registering a new club, AFC Barnsley with the Sheffield and Hallamshire Football Association\textsuperscript{853}.

**Port Vale FC**

This club had also already gone into administration, as was reported in the previous issue\textsuperscript{854}. Here, a web of intrigue developed as there were some who believed that the owners of Stoke City could be considering taking over their North Midlands arch-rivals. This emerged in early February 2003, when administrator Bob Young announced that football may no longer be played at Vale Park if a mystery bidder was allowed to take over the club. Speaking at a fans’ forum arranged to discuss the club’s future, he revealed the identities of four of the five parties who had submitted bids for the club, but the fifth remained unknown. This sparked reports that this was none other than the Icelandic businessman in charge of Stoke City, Gunnar Gislason\textsuperscript{855}.

The four other bidders included a supporters’ trust, Valiant 2001, who had arranged the forum referred to. He wrote to Brian Mawhinney, the Football League’s new chairman, seeking clarification on the League’s dual ownership rules. The reply was that any bid from Stoke City’s owner could not be ruled out. Stoke City themselves are not in the best of economic health, since their most recent accounts posted a debit of £13.4 million, which could be eased by a ground-sharing arrangement with Port Vale at the Britannia Stadium\textsuperscript{856}.

However, in March 2003 the supporters’ trust received the more welcome news that the bid put in by Valiant 2001 had been accepted at a creditors’ meeting\textsuperscript{857}. This followed a late and substantial cash injection from an unnamed Manchester-based businessman\textsuperscript{858}.

**Exeter City**

The West Country club have recently suffered the fate of relegation from the Nationwide League, having been on the brink of doing so for several seasons previously. The state of its finances has reflected this decline. In April 2003, six of its directors resigned when the Football Association’s Financial Advisory Unit issued a report effectively concluding that the club was insolvent, as well as highlighting practices which the outgoing directors described as “deeply disturbing”. The report established that the club had made a net loss of £312,000 for the nine months until the end of March 2003, that it owed £120,000 in PAYE tax and still owed Mowlem, the building company, the sum of £580,000. It recommended to the club’s directors that, unless new sources of finance were imminent or they were prepared to fund the shortfall themselves, they should seek advice from an insolvency practitioner\textsuperscript{859}.

Here again, a supporters’ trust seems to have ridden to the rescue. In late May 2003, it was learned that three of its members, lan Huxham, Terry Pavey and Julian Tagg, were on the verge of taking over the club, having joined the Board\textsuperscript{860}.

**Leicester City FC**

This issue has already been dealt with (see above, p.101).

**Other clubs (UK)**

**Bradford City.** This is another club which was forced into administration, mainly as a result of the ITV Digital fiasco\textsuperscript{861}. In January 2003, it was learned that the club had the administration order lifted by the High Court in Leeds. The club had received a £5 million injection the previous month to ensure their survival\textsuperscript{862}.

**Barry Town.** At the time of writing, the Welsh club, which started the season in Europe, was facing a winding-up order fewer than two months after completing a League and Cup double. The club had been bought by former Wimbledon striker John Fashanu in December 2002 with ambitions to introduce young African talent to Europe\textsuperscript{863}.

**Other clubs (abroad)**

**Monaco (France).** In May 2003, the debt-ridden French club, which had finished second in the French First Division that season, were relegated to the Second Division by the French Professional League (LFP) on financial grounds. The club, who achieved direct entry to the Champions’ League, had debts estimated at between £40 million and £65 million. The LFP’s financial committee had met Monaco’s officials the previous week, hoping for financial guarantees, but apparently...
failed to obtain them. Monaco said that they would appeal the decision. Lazio (Italy). In December 2002, it was learned that the Roman club's president, Sergio Cragno, had resigned from the financially stricken Serie A side after bank-appointed administrators took over the management of the club. Subsequently a €70 million capital increase was underwritten in order to pay overdue salaries. Kaiserslautern (Germany). In January 2003, the club's attempt to avoid bankruptcy suffered a setback when the club received a tax demand for £8.5 million. The new management of the club had been attempting to keep afloat the 102-year-old club, which has debts of €30 million. New body to assist cash-strapped clubs The various financial troubles afflicting the various football clubs referred to above have many and complex causes, but there is more than one indication that a lack of professionalism and expertise in management and business acumen have played a part in at least some of the problems involved. This is why a special body to assist Third Division League clubs manage their finances will be established as from the start of the 2003-4 season. If it proves to be a success, it will be extended to all 72 Football League clubs.

This new body will be called the Financial Monitoring Unit, and be made up of officials from the Football League, the professional Footballers' Association (PFA), accountants, business specialists and supporters' groups.

Accident Group administration may leave Manchester City without sponsor Just before going to press, it was learned that The Accident Group, the personal injury insurers, went into administration. One of its branches is financial advisory firm First Advice, most of whom have been made redundant. This meant the collapse of the firm's £4 million sponsorship deal with Premiership side Manchester City – unless a successful bid was made for the firm. At the time of going to press, none had emerged, although the club had received several sponsorship offers.

Leading sports marketing firm collapses In mid-March 2003, it was learned that World Sports Solutions, the sports marketing company whose list of customers includes Manchester United footballer Rio Ferdinand, had collapsed. The group, whose shares were first listed on the Alternative Investment market two years ago, stated that it had convened an Extraordinary General Meeting of shareholders in order to secure a voluntary winding-up of the company. Earlier, the group's shares, which traded at over 160p a year previously, had been suspended at 12p.

More courtroom trouble for Boris Becker Sometimes it seems that the law courts have become a more familiar place than the tennis courts for former Wimbledon champion Boris Becker. In March 2003 it was learned that he will once again face the bench in September following the collapse of his internet company. Administrators of his Sportbank firm are demanding damages of €1.5 million, as well as interest, from the retired player, who has not covered losses he had undertaken so to do in writing in June 2000. Sportbank went bankrupt in June 2001.

German conference on professional sport and insolvency In late March 2003, a conference exploring the various aspects of this issue was organised in Frankfurt-am-Main. The topics covered included the new German law on Insolvency, the problems presented by domestic and foreign athletes in the event of sporting clubs or federations becoming insolvent, the insolvency clause of the German Football Federation, and a review of cases hitherto decided on insolvency in football.

Formula one team Arrows in receivership It will be recalled from a previous issue that the financial fortunes of Formula One team Arrows had already taken such a downward turn that they were refused entry to the 2003 Championships. As the new year 2003 replaced the old, it was learned that the team had in fact been placed in administration, as its Chairman Tom Walkinshaw attempted to avoid liquidation following the failure of its sale to a German investment group. Creditors, led by the HSBC bank, appointed PKF, the accountant and business adviser, to salvage as much as possible of the team. Two weeks later, the team had gone into liquidation. As if this did not spell sufficient trouble for owner Tom Walkinshaw, he now faced the prospect of being sued by Cosworth for its outstanding £6 million engine bill. He also faced claims from Morgan Grenfell and Deutsche Bank.

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

Gloucester RFC "safe" despite owner Walkinshaw's financial problems Tom Walkinshaw is a man who has many interests in sports business, not all of them very successful ones. The trials and tribulations of his Arrows Formula One motor racing team have been extensively documented...
10. Company Law

both here (see the previous section) and elsewhere. This led to his motor sport group, TWR, being placed into receivership. He is also the owner of Gloucester, the highly successful Zurich Premiership rugby union side. However, Mr. Walkinshaw’s financial problems elsewhere have sparked off fears that maintaining professional rugby at Gloucester may have slipped down his order of priorities.

Accordingly, there has been pressure on Mr Walkinshaw to sell the club in order to prevent it from being dragged down the same financial road to ruin down which his other ventures have travelled. This plea came more particularly from John Hall, a former director at Gloucester, as several consortia, including a South African group and one led by former England prop Mike Burton, have displayed an interest in a take-over.

Not that the club itself is in the best of financial health. At the very time when it was striving to achieve a Cup and Championship double during the 2002-3 season, it made one third of the director’s backroom staff redundant in an effort to save up to £300,000 per year. Only that way would they be able to balance their books for the following season. Several employees also took pay cuts.

The entire issue, however, was thrown into confusion when a leading national daily newspaper revealed that Mr. Walkinshaw was not in fact the owner of the club. Ever since he purchased a majority stake in the club in 1997, it had been assumed that Walkinshaw was its owner. However, it was established by the newspaper that Try Investments, Gloucester’s parent company, is currently owned by Michael Cook, an accountant based in Hertford, and Sharon Hart, who works in his practice. According to the latest accounts filed with Companies House, Cook and Hart each own one of the two shares issued in the company, which was set up when Walkinshaw bought his first stake in the club in 1997.

The apparent contradiction stems from statements in the most recent accounts for Gloucester RFC, signed off by the board which Walkinshaw chairs, and those of one of his private companies, Broadstone Estate.

Hart and Cook confirmed to the newspaper that they each owned a share in Try Investments, and added that Walkinshaw was not the beneficial owner of their shares. Mr. Walkinshaw’s only comment was that the shareholders of Try Investments were “a matter of public record”. The latest documents at Companies House show that only two shares in Try Investments are in existence. Previously, the accounts of Broadstone Estate had stated that Try Investments was “owned and controlled by the company’s director, Mr. T.D. Walkinshaw”. However baffling this situation may appear, the Gloucester managing director Ken Nottage said that Mr. Walkinshaw would continue his role at the club regardless. He claimed that the businessman was as committed to Gloucester’s fate as ever, and pointed out that he had already ploughed £5 million into the club since he “took over”.

Mr. Walkinshaw himself confirmed his intention to stay on the very next week.

London Knights ice hockey team to fold

Professional ice hockey in Britain continues to suffer financial hardship. It will be recalled from a previous issue that this has already accounted for the Manchester Storm team, which was wound up in November 2002. The same fate has now befallen London Knights, which recently announced that they were folding. With their rink, the London Arena, closing for business on 15 July, the Knights were left homeless, and the search for a new venue in the capital proved to be fruitless. In a statement, the club said that it would be relaunched with the opening of the new Dome in Greenwich, but no date was set. That opening is unlikely to be before 2006.

Bristol RFC faced with financial meltdown – but Bath merger ruled out

West Country rugby has established a fine tradition, as the many successful clubs located in that area can testify. However, not every club has been basking in the glory of success recently, and this fate has recently befallen Bristol RFC, about whom there are currently serious doubts as to whether it can survive at any meaningful level of the game.

The club’s problems started even before the spectre of relegation from the Zurich Premiership started to haunt it. In mid-December 2002, the owner of the club, Malcolm Pearce, launched an appeal to businesses in the area to assist him with raising the £1 million he needed in order to keep the club going for the remainder of the season – failing which he would be quitting as its owner. Companies and supporters were being invited to “adopt” a player. A few weeks later, he announced that he was seeking a unique sporting partnership with Nationwide League football club Bristol City. In fact, the key local derby with Bath had already been scheduled to take place at City’s ground at Ashton Gate, and if the game attracted a good crowd there were plans for a permanent ground-sharing arrangement. Mr. Pearce pointed to the financial advantages of such a scheme, adding that Bristol City understood that Ashton Gate needed to be more fully occupied.

However, Mr. Pearce shortly afterwards appears to have lost his appetite for attempting to rescue the club, since he tried to sell his stake in the club – unsuccessfully, as it turned out. Conscious that the club would be in dire financial straits if Mr. Pearce were to leave, the former Chief Executive of the club, Nick de
Sccossa, appealed to alternative backers in an attempt to retain professional rugby in the city. The appeal was in fact an attempt to establish how much popular backing there was for the club to remain in the city. One of the factors which had led to Mr. Pearce’s disenchantment was the relatively low attendances at the club’s games.

Shortly afterwards, he repeated his warning that Bristol could lose its professional rugby team unless fans and local businesses responded, calling for 5,000 people to sign up as members for the following season in a bid to find the £1 million required by the end of April.

April dawned, and it emerged that Mr Pearce, who had lavished £9 million on the club since he bought it out of administration five years ago, could retrieve some 50 per cent of his expenditure if he sold the entire concern to Firoz Kassam, the owner of Oxford United football club. A deal to that effect was said to be on the table. Naturally, all these goings-on proved to be extremely unsettling for the playing staff, who were unsure as to where they would be playing the next season and indeed whether they would even have a full squad. Some of the best players were set to leave, and results on the playing field suffered as well.

As the season neared its end, it appeared that a new option had appeared on the table—that of a merger with neighbouring club Bath. Mr. Pearce convened a meeting to that effect with the players and staff in early May, and it was expected that a deal would be struck between the two sides the very next week. There seemed, however, little enthusiasm for this notion on the part of either club, conscious that this would probably mean the creation of a new side which neither set of supporters could back. Nevertheless, Bath’s director of rugby, Jack Rowell, pronounced himself certain that a deal had been done on the very day of the derby encounter between the two sides at Ashton Gate. A week later, Bristol finished last in the Zurich Premiership and relegation beckoned, with the merger issue still undecided.

Finally, by way of complete anti-climax, the merger failed to go ahead when it was announced that all discussions between the respective owners were at an end. It also emerged that Mr. Pearce’s bid to buy a controlling interest in Bath had also come to nothing. Alan Morley and Nigel Pompfrey, two celebrated Bristol players of the post-war era, were reported to be fronting a consortium of local businesses negotiating with Pearce in an effort to safeguard the club’s future. However, in spite of his dire threats that he would quit, made in December, Mr. Pearce indicated that if the discussions proved fruitless, he might consider continuing his support. Mr. Pompfrey bravely announced that an “innovative structure” had been put into place, and that some “outstanding people” were helping the club, thereby holding out the prospect of a new era in the club’s fortunes. Whether this materialises remains to be seen.

**Sports federations go bankrupt**

Over the past few months, two governing sports bodies have gone bankrupt.

In late April, it was learned that the World Boxing Council, which has been in existence for over 40 years, had declared itself bankrupt. The main reason for this was the £20 million in damages which the Council were required to pay after losing a court battle with Graciano Rocchigiani last year. Rocchigiani had sued the WBC as a result of winning a fight in 1998, which was sanctioned by the WBC for their light-heavyweight championship. This title had been released by American Roy Jones. However, when the latter changed his mind, the WBC backtracked and reinstated him as champion, even though sanction fees had been claimed and recognition openly given to the Rocchigiani fight.

The WBC filed for bankruptcy protection in the US Bankruptcy Court in San Juan, Puerto Rico. Although Rocchigiani’s lawyers said that they would pursue their client’s damages as vigorously as possible, it seemed as though he will only receive a fraction of the court award. In the meantime, the WBC has been allowed to continue operations whilst they develop a viable plan for settling their debts. However, this may be just a stalling operation. This leaves world boxing in a state of confusion.

Four years ago, the International Boxing Federation were discredited by an extraordinary scandal involving bribes and money-laundering, which eventually led to the disgrace of their President being sentenced to a term of imprisonment.

The following month brought the news that the President of the French skiing federation, Marcel Calvat, had resigned after filing for bankruptcy protection at a commercial court in Annecy. The federation has debts amounting to €1.3 million, and three top training staff had resigned shortly beforehand because of lack of funds. This departure had angered many of France’s alpine skiers, who immediately called upon Mr. Calvat to resign.

**Other Issues**

**Take-over fever grows at Manchester United**

It will be recalled from a previous issue that a trio of Irish businessmen have been increasing their stake holding in Manchester United, and that more than a whiff of controversy surrounded these stakeholders in view of their business past. There was also every indication that these increases would be their last attempts to increase their control over the club. In
recent months, there has been a flurry of activity in the stock market which indicates that the Irish trio are not the only ones to make a pitch for control of the club.

Perhaps the most interesting of these bids for shareholder power has been that made by tycoon Dermot Desmond, in that he was reported to be planning a move to “mutualise” the club. Under this plan, shareholders would be bought out using money raised in the debt markets, which in turn would be secured on the future revenue stream from such matters as ticket sales, television rights and sponsorship money. The fans would be given nominal “ownership” of the club, which would be operated by a set of independent directors. Its future independence would be guaranteed.

At first sight, this would seem an initiative heartily to be endorsed and encouraged in the light of the relentless commercialisation and commodification to which clubs such as Manchester United seem to have fallen prey in recent years. However, City insiders have speculated that there is more to this than meets the eye, particularly as Mr. Desmond et al are better known as “demon punters” than the kind of philanthropists who might establish a friendly society out of concern for the United fans’ wellbeing. In fact this talk of mutualisation has merely fuelled suspicion that the mutualisation plan may be little more than a light season tale – with Christmas only a few days away – planted to draw attention to the fact that the club carries a lowly valuation compared with the amount of revenue which it is likely to generate over the coming years. So there was no real surprise when the Old Trafford club issued a statement to the effect that it had not been approached with any such plan and viewed the story as a piece of kite-flying. Nevertheless, City insiders were not entirely dismissive of the idea. Taking a stockmarket-listed company private, effectively mutualising it by handing ownership to a set of non-profit-driven stakeholders and then financing the business through an issue of bonds is not apparently a complete novelty.

Two months later, speculation grew that the club could fall prey to a possible bid as the company’s advisers struggled to establish who was behind recent share dealing in the club. They had started trawling through the company’s share register to discover the identity of a new player in the long-running saga of its ownership, and came after £2 million worth of United shares were purchased by an unknown investor through a Swiss bank. The advisers were looking for any connection between the new name and the existing trio of Irish investors referred to above. A week later, the club made a pre-emptive strike against any unwelcome take-over bid when it induced Jon De Mol, a Dutch billionaire (and the brains behind the Big Brother television concept) into buying an £8.6 million stake in the club. It is understood that the club, alarmed by the prospect of a Desmond takeover, had been on an “investor roadshow” intended to market the club to potential investors. This had led to Mr. de Mol acquiring a 2.9 per cent stake in the club.

The very next day, however, there appeared a new twist in the entire saga when it was learned that the US’s leading sports tycoon had acquired a stake in the club, thus sparking off speculation that it may be facing a transatlantic takeover bid. A leading Sunday newspaper had established that Malcolm Glazer, owner of the Tampa Bay Buccaneers (the reigning American football Superbowl holders) had purchased a 2.9 per cent stake in “the Reds”. It even raised the prospect of two of the world’s largest sporting institutions forging close commercial links, or even merging. United were said to be comfortable with Glazer’s presence on the share register.

It also emerged that there had been a number of other buyers of shares who attempted to remain anonymous by using offshore vehicles, whose beneficiaries are untraceable, to buy shares but keeping their stakes below the 3 per cent limit above which they have to reveal their identity to the club. This compelled United to send out a stream of “212 letters”, which require investors to identify themselves. This is what had already happened in relation to the “Irish trio”. A few days later, there was a renewed spate of share-buying in the club, setting off speculation that John Magnier and J.P. McManus were once again increasing their shareholding in the club, placing Peter Kenyon, the club’s chief executive, and the board on full bid alert. All this did nothing to diminish the club’s share value, which climbed by 4.5p to 134.5p. The club’s wariness of any take-over by the Irish contingent was emphasised the following week with a withering assessment of the two major shareholders in question, urging United fans not to place their trust in two Irish racehorse owners who knew “absolutely nothing” about running a football business. Speaking for the first time about the rumours surrounding Magnier and McManus, United spokesman Paddy Harverson made a passionate defence of the existing club hierarchy and vehemently denied that the club would be better served under private ownership. United were responding to criticism in the local press and by supporters at the AGM that the directors were more concerned with merchandising than with football at a time when Magnier and McManus were fuelling speculation about a takeover by increasing their stake to 10.37 per cent through their Cubic Expression company.

With take-over speculation reaching fever pitch over the next few weeks, United’s directors agreed to meet
the two Irish horsebreeding billionaires. The object was to seek assurances from these two that there was no ulterior motive behind the recent increase in their shareholding. In fact they had apparently told the United board in private that they had no interest in buying the club, but had yet to make any statement to that effect to the Stock Exchange. In fact after the meeting, Mr. Kenyon said that the Irish two had convinced him that they were merely minority investors, and that their increased stakeholding was merely a “value play”.

However, this did nothing to end the designs which others had on the club. Towards the end of that same month, it was learned that Jon De Mol had also increased his stake in the club, raising speculation of a summer raid on the club. In fact the Dutch businessman had increased his holding to 3.4 per cent after purchasing a further 1.5 million worth of shares, even though United directors pronounced themselves “relaxed” about Mr. de Mol’s intentions. However, it was clear that the club’s board remained uneasy at the prospect of an unsolicited offer, and the previous weekend had strengthened their defence against a hostile approach by hiring Cazenove, the “blue-blooded” stockbroker.

That was the state of play at the time of writing. There are certain to be other stock market movements in relation to the Old Trafford club, which this column pledges itself to monitor with care.

**Boardroom turmoil at Manchester City over Keegan spending plans**

Ever since Kevin Keegan took over the accident-prone Maine Road club, the latter has enjoyed a relative run of success, climbing from the recesses of the Nationwide League to a respectable position in the Premiership. Naturally, such success comes at a price, and Mr. Keegan has made some serious investments in players such as Nicolas Anelka and Robbie Fowler. In all, transfer spending over the past two years has amounted to some £4 million. In a bid to secure European football as the next step in the club’s future, Keegan has proposed to make yet another series of forays into the transfer market. This has not been to the liking of everyone in the Manchester City boardroom.

In fact, two factions began to emerge: the one which supported Mr. Keegan plans, and based on Chris Bird, John Wardle and Dennis Tueart, the former England international, and the other, centred around Chairman David Bernstein and Alistair Mackintosh which tended to be more cautious about such big spending. Relations between the two sides, particularly between Bird and Bernstein, became increasingly fraught, until, in late February 2003, the news broke that Chris Bird, who is also the club’s chief operating officer, had resigned. The main bone of contention seems to have been the insistence of Mr. Bernstein that some players would need to be sold before more money was made available.

This led to a stormy meeting of the plc Board a few days later, at which directors demanded Mr. Bernstein’s resignation. One week later, the power struggle definitely tilted towards Keegan when David Bernstein resigned. He was immediately succeeded by John Wardle as acting chairman. However, the latter made it clear that he would not depart radically from the Bernstein approach towards transfers – at least for the coming summer, as the club prepare to move into the City of Manchester stadium.

This is merely the latest in City’s infamous boardroom spats, following the fractious battles of the 1990s and the power struggle between Peter Swales and Francis Lee.
11. Procedural Law and Evidence

Jurisdiction dispute arising from footballer’s agency agreement. Scottish court decision

Under the Civil Jurisdiction and Judgments Act 1982, a person may, in contractual matters, be sued in the courts for the place of performance of the obligation in question. Rule 3 makes an exception for certain contracts which are concluded for a purpose which can be regarded as being outside his trade or profession, i.e. for consumer contracts, who may generally only be sued in the courts of the place where he is domiciled.

In the case under review, a company sought to enforce certain rights allegedly arising from a management agreement between them and a professional footballer. The action was not brought in the court of the defender’s domicile. The sheriff (first instance court in Scotland) decided that the agreement was not a consumer contract and that therefore the Court’s jurisdiction was not excluded under Rule 3, on the grounds that the agreement in question could not be regarded as being outside the defender’s trade or profession. The defender appealed, arguing that the contract in question was for the purpose of satisfying his personal needs and that he was the ultimate consumer. To be involved in business activity required managerial activity, and by employing the management company effectively to act as a recruitment consultant he was not engaging in a managerial act where it was a matter of personal requirement that he seek employment.

The Sheriff Principal, to whom the appeal had been addressed, held that there was no justification for giving the terms “trade” and “profession” in Rule 3 a narrow or specialised meaning; that the defender was effectively in the position of a sole trader; that for the purpose of Rule 3 the defender’s occupation of professional footballer was a “trade” or “profession”, and entering into the contract in question could not be regarded as being outside that trade or profession. The appeal was accordingly refused.

Symposium on arbitration in sport (Belgium)

In November 2002, the Belgian Olympic and Federal Committee (BOIC) organised a legal debate on sporting arbitration, which was held in Brussels. The debate was led by Prof. H. Van Houtte of Leuven University.

US Federal courts have jurisdiction in domain name disputes. US court decision

In the case under review, a dispute arose between Jay D Sallen, a resident of Brookline, Mass, and Corinthians Licenciamentos Ltda, a Brazilian firm, over Mr. Sallen’s use of the domain name Corinthians.com. The US Court of Appeals was asked to establish whether Mr. Sallen, a domain name registrant who had lost the use of a domain name in a WIPO (World Intellectual Property Organisation) dispute resolution procedure which declared him to be a “cybersquatter” under the Uniform Domain Name Dispute Resolution Policy (UDRP), may bring an action in a federal court seeking (a) a declaration that he is not in breach of the Anti-cybersquatting Consumer Protection Act (ACPA), (b) a declaration that he is not required to transfer the domain name to the Brazilian company and (c) such relief as necessary to effectuate these ends. The district court had ruled that the federal courts lack jurisdiction for such claims. However, the Court of Appeals disagreed.
**12. International Private Law**

**Golf club VAT appeal dismissed**

The issue at stake in the case under review was whether the initial deduction of input tax incurred on a supply received in relation to a capital item, but invoiced to the appellant after the first interval for capital goods scheme, should be calculated by reference to the use of the item in the initial interval.

The appellant in this case had previously run a golf club. Following a considerable extension of the premises, new companies were established to operate (a) the golf club and course, (b) a health centre, and (c) a conference centre. The appellant charged VAT-exempt rent to these companies and made standard-rated supplies of management services. In spite of its partially-exempt status, the appellant failed to carry out partial exemption calculations or to restrict its input tax. This deficiency was identified by an officer of the Commissioners in the course of an inspection in August 2000. When calculating the liability, the Commissioners noted that the appellant’s VAT year ended on 31 March and that by the end of March 1999 the building work had been completed, with payments of £1,939,328 having been made to the contractor. A further invoice dated 30/4/1999 was issued by the builder to the amount of £600,000 plus VAT. Because the extension was first brought into use on 4/3/1999, the first interval under the capital goods scheme (CGS) was from that date until the end of the VAT year on 31/3/1999. The Commissioners informed the appellant that the input tax incurred on the extension after that date would not form part of the scheme adjustment in the second interval, ending 31/3/2000, but would be subject to adjustments from the third interval onwards. The appellant was entitled to recover all its input tax during the first interval, since it had made only taxable supplies during that period. However, once the premises were let, the appellant became partially exempt and the effect of the commissioners’ ruling was that a proportion of the input tax on the April 1999 invoice became non-deductible.

The appellant argued that the VAT displayed on the April 1999 invoice should not be subject to a partial exemption calculation outside the CGS. Although the invoice was issued after the end of the first interval, it was nonetheless part of the cost of the capital item and the VAT included should fall to be recovered as part of the input tax for the first interval, ending 31/3/1999. The appellant accepted that the relevant UK legislation conformed to the Sixth EC VAT Directive, but relied on Article 20 of the Directive which, it was argued, provides for adjustments to be made to the initial deduction and, in particular, Article 20(2), which makes no exception for input tax yet to be incurred, the test being that of physical use and existence. The appellant submitted that, since the extension was in existence and being used in the first interval, this met the test of Article 20 and an adjustment to the initial entitlement could be made in subsequent years.

As regards the Value Added Tax Regulations 1996, it was submitted by the appellant that the capital item was used for wholly taxable purposes for the first interval and that, therefore, the total input tax incurred on the capital item was fully recoverable under Part XIV of the regulations. The appellant relied on Part XV of the regulations and submitted that, under Regulation 114(1) the reference to “the total input tax on a capital item” meant that the total input tax on the capital item as subject to adjustment. Regulation 114(4)(e) provides that the first interval commences on the day when the owner first uses the capital item and the appellant submitted that this entitled it to include the April 1999 invoice in the first interval on the basis that the capital item was used in March 1999.

The Commissioners conceded that, although VAT of £105,000 shown on the April 1999 invoice was a direct cost of the capital item, it fell to be adjusted under the normal partial exemption calculations in the period in which the supply took place. This was when the invoice was issued to the appellant in April 1999. The Commissioners submitted that the relevant provisions are contained in Part XIV of the regulations. Regulation 99(4) provided for a longer period for the purpose of partial exemption adjustments and there was no reference in this regulation to Part XV, the capital goods scheme. Part XIV determined the amount of input tax provisionally deductible and the amount which may be deducted following the longer period adjustment, the longer period being the tax year of the business in...
question. Part XV introduced adjustments to be made to the provisional deduction of input tax under Part XIV. The Commissioners submitted that Part XV had no bearing on the question of what the initial deduction of input tax was. They further submitted that input tax incurred on a capital item after the end of the first interval was recoverable in accordance with Part XIV. This input tax, together with the balance of input tax already incurred in relation to the capital item, was then subject to capital goods scheme adjustments in subsequent intervals, as set out in Regulation 115.

In Lennartz v. Finanzamt München III, the European Court of Justice examined the scope of Articles 17(1) and 20(2) of the Sixth Directive and held that the right to deduct arose at the time when the tax became chargeable. Article 20(2) did no more than establish the procedure for calculating the adjustment to the initial deduction. It did not give rise to any right to deduct or convert tax paid by a taxable person in respect of his non-taxable transaction into a tax which was deductible within the meaning of Article 17.

The Tribunal dismissed the appeal made by the club, holding that:
(a) Article 20 of the Sixth Directive could not be read in isolation of Articles 10 and 17, as established in the Lennartz decision. Whilst Article 20(2) refers to the year in which the goods were acquired, there was nothing in Article 20 to suggest that it overrides the requirements of Articles 10 and 17.
(b) Although the extension was in existence before the end of March 1999, no VAT was chargeable until either the full payment was made or the invoice was issued by the builder.
(c) Part XV of the regulations could not be read apart from Part XIV. Part XV referred, in regulations 112 and 114, specifically to Part XIV. In addition, Regulation 115 had to be read in the context of Regulation 114 and, again, Regulation 116 made for specific reference to Part XIV.
(d) The commissioners were correct in their submission that Regulation 114(1) made it clear that any deduction on a capital item under Part XIV could only be made subject to adjustments in accordance with Part XV. There was no provision in UK law for making deductions in the appellant’s circumstances disregarding Part XV.
(e) In the Lennartz decision, the European Court had confirmed the opinion of the Advocate-General that the right to deduct input tax arose at the time when the tax became chargeable. In the case under review, that was after the first interval, which ended on 31/3/1999.

Budget brings joy for betting exchanges (UK)
The 2003 Budget was as welcome for the betting exchanges as it was unwelcome for the traditional bookmakers. Following months of heated debate over the manner in which the betting exchanges should be taxed, Customs and Excise came down in favour of a 15 per cent gross profits tax on the commission which they charge bettors. The large bookmakers, on the other hand, whose turnover has been adversely affected by the success of these person-to-person exchanges, wanted the Government to impose a tax on the profit made by punters, who act as bookmakers and successfully “lay” bets on exchanges.

Betfair, the most successful betting exchange thus far, commented that the Custom’s decision totally vindicated the company’s position.

“Wealth tax” proposed on top football clubs’ television deals
The leading clubs in the English Premier league could soon be compelled to assist their more indigent counterparts on the Football League, if plans to impose a 10 per cent levy on the top clubs’ lucrative television deals find their way onto the statute book. In mid-February 2003, it was learned that two Labour MPs were urging Ministers to impose a football wealth tax on broadcasting contracts signed by the top Premiership sides. This would raise £40 million per annum and help the smaller clubs survive the game’s toughest climate for decades.

The levy has been proposed by James Purnell MP, who was the Prime Minister’s special adviser on sport until the 2001 election, and Andy Burnham MP, who represents Leigh in Lancashire and performed the same role for Chris Smith, then Secretary of State for Culture, Media and Sport. The have tabled a House of Commons motion proposing that 10 per cent of the Premier League revenue from its deals with Sky, ITV and other broadcasters should be used to benefit the game’s less fortunate outfits. It should be pointed out that top clubs already part with 5 per cent of their broadcasting revenue to the Football Foundation, a charity which assists the game’s grass roots. Predictably, the Premier League reacted with fury to this proposal.

13. Fiscal Law
14. Human Rights/Civil Liberties

Racism in Sport

Football

Sheringham courts controversy with “black players are stronger” comment

In December 2002, veteran Tottenham Hotspur forward Teddy Sheringham caused some controversy when he broached the subject of the alleged innate superiority of black footballers. Speaking to a Sunday newspaper on the chances of his 14-year-old son Charlie becoming a professional footballer, he ventured the comment that he would need to be a better player than himself because there were more black players around who are “stronger and quicker” than the white players.525

Although undoubtedly Mr. Sheringham had touched a sensitive issue, the reaction on the part of those who have sought to eliminate racism from the game was measured. Piara Powar, the director of the Kick racism out of Football campaign, stated that the there was something in Mr. Sheringham’s observations, where he said that many of the physical attributes required to succeed in football, such as dynamic power and acceleration, could be found in people having their origins in West Africa.526 Even more significantly, former England international John Barnes, who had to stomach a good deal of bigotry during his playing career, considered it “absurd” to find anything controversial in Mr. Sheringham’s observations. He added:

“Political correctness cannot disguise the reality that blacks do, indeed, have a physical advantage in certain sports requiring speed and strength, such as boxing, sprinting and now football. To say this is not discriminatory, it is a genetic fact. And I cannot see how it helps to promote race relations by pretending this is not the case. Dishonesty can never be the true ally of racial harmony”.527

FA “reviews” anti-racism grant in round of financial cuts

This issue has been dealt with above, under Chapter 5 (Public Law), p.74.

Anti-racism conference at Stamford Bridge

In March 2003, Europe’s leading football circles were represented at a major conference dealing with racism in the game. It was jointly organised by European governing body UEFA, the English Football Association (FA) and FARE (Football Against Racism in Europe), which is the umbrella organisation campaigning against racism in the European game. Clubs from around the continent were in attendance, as were the various national associations. Among the speakers were a number of black footballers, such as Marcel Desailly (Chelsea) and Thierry Henry (Arsenal), who dealt with the negative impact racism had on the game and what should be done to combat it.

The practical outcome of the conference was the adoption of a series of guidelines relating to the measures to be adopted by clubs to combat racism, outlining not only how to deal with players and spectators who err in this regard, but also recommending that clubs should work with ethnic minority communities in their areas and organise educational programmes, with fans and players highlighting the problem.

Racist chanting disfigures England v. Turkey game

This issue has been dealt with elsewhere, under Chapter 2 (Criminal Law), p.30.

Vieira criticises “hypocritical” UEFA following Valencia abuse

Arsenal FC’s outing to Valencia for their European Champions League tie was not the happiest of occasions for the “Gunners”. Not only were they knocked out of the competition at the Mestalla stadium, but some of their players suffered a volley of racist abuse from opposing fans, with Patrick Vieira, Sol Campbell and Thierry Henry being particularly targeted. This prompted an outburst from Vieira, who did not mince his words about UEFA’s approach to racism:

“Nothing really happens, it’s just words. I do not think anything will be done. It will never change. We have to deal with it and we came to expect it”528

UEFA responded by requesting Mr. Vieira to provide evidence of racism during the Valencia game.529 As a result, Valencia were fined £9,250 by UEFA for the racist abuse hurled by their fans. However, the European governing body also fined the Arsenal defender £2,300 for the critical words he had spoken against their stance on racism.530 Media comment on the Vieira fine was generally hostile, with some even claiming that UEFA should win some kind of award for the risible nature of this decision.531

Round-up of other items (all months quoted refer to 2003, unless otherwise stated)

Jon Mackie. In mid-April, the Reading defender was banned by the Football Association (FA) for three games for racially abusing Sheffield United striker Carl Asaba. Mr. Mackie later apologised to the player over the incident and donated two weeks’ wages towards the Kick Racism out of Football campaign.532
14. Human Rights/Civil Liberties

Lucas Radebe. In April, the Leeds player and former South African captain was named as the Premier League player who had made the greatest community contribution in the past decade. Mr. Radebe works with the Leeds United Against Racism Schools project and the Leeds United Book Challenge.  

Andy Preece. In February, the Bury player-manager has pledged to stamp out racism amongst a minority of Bury fans. Mr. Preece claimed he had been the subject of racist abuse from some of the team’s travelling supporters during an away fixture against Torquay a few days earlier.  


Cricket

The Darren Lehmann affair

Thus far there have, thankfully, been few incidents of overt racism on the field of play in cricket. However, that there is no scope for complacency in the sport about the existence of such practices was brought into sharp focus by the Darren Lehmann affair, which erupted in the course of a one-day match against Sri Lanka in Brisbane in January 2003. As he walked off the pitch, the star Australian batsman launched into a foul-mouthed racist tirade aimed at the Sri Lankan team after having lost his wicket. Lehmann later apologised to the opposing team and initially escaped with merely a severe reprimand from match referee Clive Lloyd, plus an order to undergo psychological counselling by the Australian Cricket Board.  

However, International Cricket Council (ICC) Chief Executive Malcolm Speed immediately proceeded to charge Mr. Lehmann with a breach of the Council’s new code of conduct, and two days later the Australian batsman was banned for five one-day internationals – the first player to be disciplined under the new Code. Thus Lehmann was forced to miss the remainder of the one-day series against Sri Lanka. It may also have placed the future of his international career in jeopardy. However, Yorkshire, the English county side for which Lehmann acts as captain, ruled out taking any action.  

Latif cleared of racism, but says he will sue Australians

As if the World Cup played in Southern Africa earlier had not been visited by sufficient controversy (see above, p.11), it was also tainted by an unsavoury incident which occurred during the Pakistan v Australia fixture in Johannesburg. At a certain point during the game, Australia’s wicketkeeper/batsman Adam Gilchrist, reacted angrily to a comment made by Rashid Latif, his Pakistani counterpart, who was batting at the time. He then proceeded to complain to the umpire that Latif had made a racist comment to him. The issue was referred to match referee Clive Lloyd, who later stated that there was insufficient evidence to prove the charge, and that the Pakistani player was therefore exonerated.  

The matter did not end there. Immediately afterwards, Latif stated his intention to sue the Australian Cricket Board on the basis that these allegations had tarnished his image. He added that he was waiting for clearance to take such action from the team management and the Pakistani Cricket Board.  

At the time of writing, no such action had yet been taken.

“Race quotas” continue to cause controversy in Southern African cricket

The extent to which ethnic issues continue to play a part in Southern African sport is an issue which has dwelt on before in these columns. This problem once again reared its head during the cricket World Cup in relation to the Zimbabwean team. Just before their crucial Super Six game against Kenya, Andy Pycroft, a selector and former Test batsman, resigned when four of the other five selectors insisted that Sean Ervine, a white player, be dropped to make way for Dion Ebrahim in order to fulfil the side’s unstated race quota.  

The issue arose again ahead of Zimbabwe’s tour of England. Peter Chingoka, the Chairman of the Zimbabwean Cricket Union (ZCU) defended the inclusion of certain players against accusations of ethnic vetting, claiming that those who had complained were those who had failed to perform. This was in response to criticisms made by Alistair Campbell (no relation) who had been left out of the tour, alongside Craig Wishart. Mr. Chingoka pointed out that Campbell had in fact a poor average, whereas those who replaced him and other white players, such as Tatenda Taibu and Doug Marillier, had averages which were considerably higher. He added that he operated not on the basis of quotas, but on “flexible guidelines.”  

South Africa is also a country where this issue continues to arouse strong feelings. The fact that six black players were selected for the current tour of England once again raised suspicions that a quota system was at work. However, closer scrutiny has revealed that all six players presented cases for inclusion which were quite as strong as those of their white colleagues. Thus the team’s best batsman (Herschelle Gibbs), fastest bowler (Makhaya Ntini) and...
most dangerous spinner (Paul Adams) are all black\textsuperscript{347}.

**Australia stands firm over “racist” sign**

In the town of Toowomba (Queensland), there is a stadium which has a stand called the ES Nigger Brown stand. This apparently offensive name has been the target of Aborigine campaigning groups for some years now. At first they attempted to have the name removed through the domestic courts, but the case was dismissed by the Federal Court, and twice rejected on appeal. Activists then took the case to the United Nations Committee on the Elimination of Racial Discrimination, which ruled, in April 2003, that the term “nigger” was offensive and insulting, and that the sign should be removed.

The Canberra Government has yet to respond formally, but the Attorney general stated that the matter had already been thoroughly examined by the Australian courts, adding that the UN Committee’s opinion was not binding. It appears that the stand in question was named after the town’s first international Rugby League player, Edward Stanley Brown, who was nicknamed Nigger Brown, not because he was aboriginal, but because he used a brand of shoe polish, Nigger Brown, which was popular at that time.

John McDonald, the Chairman of the Toowoomba Sportsground Trust, commented that he would not remove the sign unless compelled to do so\textsuperscript{948}.

### Human Rights Issues

**Law on football spectator safety does not violate equality and non-discrimination principle. Belgian court decision\textsuperscript{949}**

Under the Belgian Law on Safety at Football Matches 1998, administrative penalties may be imposed against those who cause a disturbance in the course of a football match. These can take the form of a stadium ban or of administrative fines. These penalties may be challenged before the Police Court (Politierechtbank), which may not impose any fine which falls beneath the threshold laid down by law if mitigating circumstances are pleaded. However, the same court may, when dealing with criminal penalties, apply a different penal measure derived from special legislation where mitigating circumstances are pleaded.

According to a defendant who had received such an administrative penalty under the Law on Football Safety, this amounted to discriminatory treatment, and as such was not only contrary to the Belgian constitution, but also in violation of Article 6 of the European Convention on Human Rights (ECHR) which guarantees fair judicial proceedings. The matter was brought before the Court of Arbitration (Arbitragehof), which gives preliminary rulings on constitutional disputes.

The Court ruled that this arrangement was not unconstitutional, nor did it infringe any human rights. The reason for this related to the essential difference between administrative and criminal penalties. Thus the object of the legislation which gives the police court the option of imposing a suspended sentence is to give the guilty party a period in which he is being put on probation, and to quash the penalty if during that period his/her behaviour is satisfactory. This is in order to spare the guilty party the dishonourable consequence of having a criminal record. The legislature is perfectly entitled to assess that such measures should not apply to administrative penalties, since they are purely pecuniary in character and do not have the dishonourable implications which are attached to criminal penalties.

**Requirement that shooting associations be licensed does not infringe constitutional rights. German constitutional court decision\textsuperscript{950}**

In Germany, all those who are members of a shooting association (Schießsportverband) are deemed to meet the necessity requirements which must be fulfilled in order to be able to possess a shooting weapon. In October 2002, the German parliament enacted legislation which makes it necessary for such shooting associations to obtain official authorisation in order to be recognised as such. One shooting association which was averse to this arrangement challenged the new legislation on the grounds that it infringed their human rights of personal freedom and of freedom of association, as guaranteed by the German constitution. The Federal Constitutional Court (Bundesverfassungsgericht). The Court dismissed the complaint, on the grounds that the legislature, in seeking to prevent the abuses to which the privileged position of unregulated shooting associations could give rise, did not exceed the balance which it had to strike between the freedoms protected by the Constitution and the need to prevent the risk of certain dangers.

### Gender Issues

**Battle of the sexes intensifies on the golfing greens**

First Casey Martin, and now this! It was never like this in the days of P.G. Wodehouse’s Mr. Mulliner, when the nearest golf came to controversy was failing to count that missed stroke when your opponent was not looking. Now, momentous issues of gender equality have found their way onto the game’s agenda, on both sides of the Atlantic. A whiff of what was in store was discernible in
14. Human Rights/Civil Liberties

the last two issues of this Journal, now most of the issues raised then have developed into some of the hottest issues currently around in sports politics.

Particularly the Augusta affair has continued to flourish. It will be recalled from the previous issue that the club which every year plays host to the US Masters tournament had come under considerable pressure from the National Council of Women’s Organisations (NCWO), and its Chair, Martha Burk, to admit female members. In March 2003, the affair took on a slightly more sinister turn when a Ku Klux Klan group applied for permission to demonstrate in support of the club’s right to retain an all-male membership at the club, only to be immediately disowned by the club management.

Almost inevitably, a series of protests, and the concomitant counter-protests, were planned at the club to coincide with the staging of the Masters event, due to commence on 10 April. Top golfer Tiger Woods, who had already refused to be drawn into taking sides in the dispute, expressed his regret that this year’s event had become “tarnished” by these protests, and once again refused to take sides, arguing that he was “not a politician”. The Rev. Jesse Jackson, the Democrat politician, was obviously less reticent and placed gender bigotry on the same plane as racial prejudice, and that, although Augusta was a private club, it was supported by local government and therefore became a public company, which should not be allowed to discriminate. But still the Chairman of the club, Hootie Johnson, refused to give in.

Ultimately, the demonstrations and protests concerned were something of an anti-climax, with only 40 people turning up to hear a speech by Ms. Burk and a parallel demonstration led by Jesse Jackson attracting fewer than a dozen. All were outnumbered by the forces of law and order, who appeared to have expected a full-scale invasion. Exactly where the issue goes from here is as yet unclear.

At around the same time, a similar imbroglio was brewing around the Royal and Ancient Club, which had already attracted the interest of campaign groups earlier. The decision by the Club to award the next two Open Championships to Royal St. George’s in Sandwich and Royal Troon in Ayrshire led to a communication from Tessa Jowell, the Culture, Media and Sport Minister, in which she urged that the events around the Open should be open to both genders in spite of the men-only rule that applied at both these venues. R&A Secretary Peter Dawson confirmed that he had received the letter, but made no public comment, merely stating that he would be replying to it soon.

Not that the period under review has been a complete disaster for gender equality. In mid-May 2003, Annika Sörenstam, the best woman golfer in the world, earned the right to be the first female participant in a US professional tour event at Fort Worth, Texas. The vast majority of the Swede’s male competitors welcomed this move, although Vijay Singh remarked disparagingly that she did not belong there, and even expressed the uncharitable hope that “she wouldn’t make the cut”. Mr. Singh, however, did not quite realise the strength of the storm of controversy which he had unleashed, and withdrew from the contest the following day.

Wimbledon again turns down equality of prize money for men and women

The prizes on offer at Wimbledon have come a long way since S.W. Gore, the winner of the first men’s title in 1877, was given a bun and a cup of tea for his efforts. This year, the winner, Roger Federer, received £355,000. This was £40,000 more than the winner of the women’s title, a differential which has been maintained ever since the tournament opened its ranks to the professional players. When this was announced two months before the championship started, there was the inevitable protest from the Women’s Tennis Association (WTA) and its Chief Executive, Larry Scott, who stated that equality of prize money remained a “top priority” for the WTA Tour and its membership. The fact that the men’s game is played over the best of five sets and the women’s game over the best of three continues, however, to provide some objective justification for the differential.

British sport faced with dilemma over transsexuals

Recently, the British Government were found to be in breach of the European Convention on Human Rights (ECHR) by the European Court over its failure to award transsexuals full legal recognition in their acquired gender. This has led to proposals for legislation under which transsexuals will in effect be given a new birth certificate by the Registrar General and be allowed to re-register. This may soon have a considerable impact on the world of sport.

Almost every sport applies rules which restrict competitions to entrants of the same gender after the age of 12 or 14. Transsexuals have been barred because, under British law, they were deemed to remain members of the gender under which they were born. Some concern has been expressed amongst sporting organisations that under the change, transsexuals could gain an unfair advantage, particularly where former males compete as women. They are also concerned that the new rules could have an impact on issues such as anti-doping tests and the detection of hormones. This has led the Department for Culture,
Media and Sport to consult more than 300 sports governing bodies on this issue.  

**More sporting “firsts” for gender equality**
The case of Annika Sörenstam mentioned above has not been the only victory for gender equality in the world of sport during the period under review. In late February 2003, Kauie Hnida became the first woman to play major college American football when she appeared for the University of New Mexico against UCLA in the Las Vegas bowl on Christmas Day. A few weeks later, it was learned that a Tehran (Iran) football club had decided to allow women into its stadium to watch matches. Mahdi Dadras, the manager of the club, said that the decision was made because female fans do not use obscene chants and the women’s presence “improved team morale”.

**Other Issues**

**Manchester United disabled supporters may boycott Millennium Stadium because of poor facilities**
In mid-February 2003, it was learned that the disabled fans of leading Premiership club Manchester United may boycott the Cardiff Millennium Stadium in protest at the poor facilities on offer to them. A series of communications with the Football league had failed to result in any significant improvement in their seats for the fixture against Liverpool in the Worthington Cup final. Areas for supporters in wheelchairs are placed at the back of all three tiers of the Cardiff ground, giving rise to a problem of visibility when able-bodied spectators stand up.

Phil Downs, the Chairman of the Manchester United Disabled Supporters’ Association (MUDSA) has proposed a temporary platform which could be placed at the front of existing seats, but the Football League dismissed the idea on the basis that this would obstruct able-bodied fans behind.
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General, scientific and technological developments

**New blood-boosting drug test to be “ready for 2004 Olympics”**

There are times when all the efforts undertaken by sport’s invigilators to ban the use of performance-enhancing substances amount to no more than the “pursuit of the uncatchable”. This has certainly been the case with that particular category of drug which enables sporting performers to raise the levels of oxygen in their blood. No sooner has the anti-doping authorities succeeded in developing adequate mechanisms to deal with EPO, than it appeared that a new blood-boosting drug had made its unwelcome appearance, to wit, stabilised haemoglobins.

Rumours surrounding the drug have done the rounds for four years, and fears had started to arise that, without an adequate test, endurance events at Athens for the 2004 Olympic Games would be blighted in the same way that the reputation of cycling and running were tarnished before the introduction of a test for the blood-boosting hormone erythropoietin (EPO) in 2000. Unlike EPO, which stimulates bone marrow to produce extra red cells, stabilised haemoglobins are bovine or human red cells extracted and modified in a laboratory. They are simpler to administer than EPO, being transfused into the blood, but have a similar effect, although the boost to oxygen carrying, and hence to the athlete’s endurance, does not last as long. As is the case with EPO, the side effects of the new drug could include cardiac problems and thrombosis. One variety of haemoglobins has been withdrawn because it may have been responsible for an increased death rate during clinical trials.

Now, however, it seems that a new test to detect this latest generation of blood-boosting drugs should be in place before the 2004 Olympics, thanks to a laboratory in France which has devised an appropriate test. It has been presented to the relevant bodies, is currently being validated, and could be ready in six months’ time, according to Professor Jacques de Ceaurriz of the French national anti-doping laboratory at Chatenay-Malabry. It was Prof. de Ceaurriz who devised the test for EPO which was first applied at the 2000 Olympic Games in Sydney.

**British doping initiative frustrated by lack of funds**

In early March 2003, it was learned that a test developed by a British scientist to detect the abuse of human growth hormone by athletes is engaged in a race against time in order to be ready for the 2004 Athens Olympics because of lack of funds. This hormone, which is capable of triggering vast increases in muscle growth, has thus far remained undetectable despite having been banished since 1987. It is so popular amongst top athletes that it has been dubbed the “drug of champions”. Professor Peter Sonksen and a team at Southampton University believe that they have achieved a breakthrough by identifying indirect “markers” in the human body which can provide evidence of drug abuse.

However, the delay in receiving a grant worth $200,000 from the World Anti-Doping Agency (WADA) to fund a development programme means that it is unlikely to be available for the Athens Olympics. Prof. Sonksen claims that it would have been ready for the 2000 Games in Sydney, but funds were diverted towards developing a fool-proof test for EPO.

Doping issues and measures – international bodies

**WADA anti-doping code adopted – now the problems start**

*The background*

It will be recalled from a previous issue that the World Anti-Doping Agency (WADA) had, in October 2002, approved the draft of a global anti-doping code which was to be binding on all sporting federations and national governments throughout the world. It was officially approved at the three-day Copenhagen Summit on Doping in early March 2003, at which 65 sporting federations and 73 national governments supported the declaration for its formal adoption. One of its principal achievements is to impose a uniform two-year suspension period for any sporting performer caught using illegal substances. WADA will also have the power to challenge any ruling by an international federation on doping issues before the Court of Arbitration for Sport (CAS). In addition, national federations will be fined $100,000, and the person in charge banned for two years, where four or more of its athletes test positive for drugs in 12 months or less. WADA would also keep a database on all athletes’ whereabouts, which may be passed on to other anti-doping agencies.

To ensure uniform compliance, Jacques Rogge, the President of the International Olympic Committee, vowed to exclude from future Olympics those federations which fail to observe these regulations.
Federations have been given until the start of the Athens Olympics to ratify the code, whilst national governments have until the 2006 Winter Games to sign up \(^{275}\). The idea behind the harmonisation of penalties is to avoid several scandals of the past whereby some sports imposed far lesser penalties for drugs offences than others, as exemplified by the cases of the Italian footballers who were given six months’ suspensions for exactly the same positive tests as those which attracted two-year suspensions, as was the case with Linford Christie and Dougie Walker \(^{276}\). Indeed, some federations simply tried to sweep doping problems under the carpet. Certainly rugby union has frequently come under this suspicion, as is documented by the Ben Tune affair \(^{277}\) as well as the rash of positives in anabolic steroids in the sport a few years ago \(^{278}\).

But is it workable?

Even before the ink under the Copenhagen Declaration had dried, the Code had been subjected to a good deal of criticism from various authoritative corners. On the question of the penalties to be imposed on national federations and their leaders, the respected British sports lawyer Nick Bitel explained that most legal systems in the world abhor this kind of penalty clause, and that more particularly the English courts would be unhappy with this rule. He pointed out that if such a rule had existed in 1999, it would have led to a ban being served on David Moorcroft, the Chief Executive of UK Athletics, after five British athletes tested positive for anabolic steroids. The other problem explained Mr. Bitel, was that the national federations themselves were not actual members of WADA. Thus UK athletics is affiliated to the International Association of Athletics Federations (IAAF). It would be difficult for them to enforce something with which they have no nexus \(^{279}\).

Another focal point for criticism was the central database of athletes’ whereabouts. Michele Verroken, the director of Drug-Free Sport (the anti-doping directorate of UK Sport) and who herself had worked hard to evolve this code, voiced her reservations thus:

“**Athletes are already concerned about the use of data relating to them. We are strictly governed within the EU, but for it to be conveyed to WADA, as it must be under the Code, it falls under different legislation where it may be difficult to guarantee security. How long can it be kept? Who is able to access it? We don’t know.**”\(^{280}\)

Ms. Verroken also voiced her concern about the fact that WADA will be able to pass these data onto other anti-doping bodies – which ones? And would the fact that athletes will be required to make their whereabouts available on an almost daily basis via the Internet not constitute too much of an intrusion into their lives? The athletes, whose co-operation had been excellent thus far, may be pushed too far. She also had a good deal of criticism for the legalistic way in which the code was worded, stating that the various clauses dealing with such matters as burden of proof, no-fault negligence may cause it to become a “playground for the legal fraternity” \(^{281}\).

The problems commence...

The problems with implementing the Code had also already materialised even before the Copenhagen conference had taken place, and many of them seem to bear out some of the reservations about the new system outlined above. Thus three days before the conference, the US Anti-Doping Agency (USADA) announced that it was abandoning its rule that athletes must be prepared to be tested anywhere, at any time, and that they must inform their governing body of their whereabouts at all times in order to enable unannounced drugs tests to take place. This was the result of a legal opinion by New York lawyers engaged by some US athletes, which states that this requirement infringes the US constitution and the most fundamental rights to privacy. The New York based attorney, Edward G William, described the activities of the drugs testers employed by the Agency as:

“**taking on the cloak of a Gestapo police force with secret rules and protocol, and the ability to go unannounced to an athlete’s private home, or perhaps hotel room, to conduct a drug test.**”\(^{282}\)

This opinion was considered at a meeting of the athletes’ advisory council of the US Olympic Committee, and now USADA have agreed that athletes will only be tested between 6.30 am and 9.30 pm.

Indeed, there is likely to be a major problem with US sport as a whole in this regard. It will be recalled from a previous issue – that US Track and Field, the governing body for US athletics, had refused to name those who had tested positive during the 2000 Olympics – including one who is believed to have won a gold medal after having already tested positive in the US. (See also in this connection below, p.127.) This is inconsistent with the new Code. There is also little testing in the American professional leagues, and American football and baseball did not even send a representative to the
15. Drugs legislation and related issues

Copenhagen Conference. IOC President Rogge specifically singled out the US as being “one of the most difficult countries for anti-doping in sport” during the conference984. And that is not to mention its failure to meet its financial commitments to WADA – see below.

In fact, the notable absence of some sporting federations is a major thorn in the side of WADA. Not only US football and baseball, but also the International Cricket Council failed to send a representative985. Because these are not Olympic sports anyway – whether actual or aspiring – there did not seem to be much of an incentive for them to adhere to the Code anyway. However, there may be other, more tangible, negative effects attached to such non-compliance. Thus Richard Caborn, the UK Minister of Sport, has been making various threatening noises about recalcitrant sports, and intends to penalise them by imposing financial penalties and denying their clubs’ requests for charitable status and rate relief. This places English cricket in a vulnerable position, because of the Government help it is hoping to secure in order to face up to the compensation it will have to pay out on account of its boycott of certain matches during the recent World Cup (see above, p.13)986.

The position of cycling and football may also be jeopardised if they fail to comply with the Code. Although representatives from their respective world governing bodies, UCI and FIFA, were amongst the delegates at Copenhagen, neither body was represented by its President (Hein Verbruggen and Sepp Blatter respectively). It is thought that the stern words spoken by the IOC President about banning recalcitrant sports from the Olympics (see above) were aimed particularly at these two sports, which have a reputation for taking a soft line on drug-taking, since both sports merely impose six-month bans for first offenders. Shortly before the conference, Verbruggen had issued a statement explaining why the UCI did not agree with the length of the ban set out in the Code, one of the reasons being that it virtually puts an end to the athlete’s career987.

The difficulties facing football in this regard had already been highlighted a few months before the Code was adopted, when it emerged that two more English professional players had failed drugs tests for banned substances. The Football Association (FA), however, refused to name them, which is not permitted under the new Code. WADA President Dick Pound had already had occasion to criticise the FA for its lack of transparency. If Mr. Caborn adheres to his threats of dire financial penalties, this could spell disaster for the association, which already has plenty of financial problems of its own (see above, p.101)988.

Difficult times, therefore, lie ahead for the Code, the implementation of which will be followed with keen interest by this column.

US in default on WADA funds

Some years ago, the US was loudest in its condemnation of the International Olympic Committee that the latter was failing to take the problem of doping in sport seriously. However, its sporting authorities appear to be markedly reluctant to practice what they preach. Not only is there the resistance by many of their federations to the new anti-doping code (see above), but also it emerged, in late May 2003, that the US had once again failed to fulfil its financial commitment to the World Anti-Drugs Agency (WADA). This is the second year running that it has been in default of its obligation to remit its $4 million contribution to the Montreal-based organisation on time989.

This has left the organisation with a serious shortfall in cash, threatening its effectiveness in the fight against doping during the run-up to the 2004 Olympic Games in Athens. Countries were supposed to pay their 2003 contributions before the start of the year, but the US Government had, by the time of writing, only recently met its financial obligations for 2002, and had informed WADA President Dick Pound that it would not pay its latest debt until November 2003. Mr. Pound called such practices “totally unacceptable”, Spain, France, Italy and Canada had also yet to pay their contributions for this year990.

Doping issues and measures – individual countries

Doping offences in Finnish criminal code. Article in academic journal991

This paper examines some of the implications of recent changes in Finnish law relating to doping. In September 2002, doping offences have become part of the Finnish Criminal Code. Under the relevant provisions (Chapter, section 6 of the Code), the unlawful manufacturing, import, sale, supplying and other methods of distributing doping substances is prohibited. Even an attempt to commit such an act is punishable, as is possession for the apparent purpose of unlawful distribution.

Interestingly, however, the use of doping substances itself has not been criminalized. Moreover, the legislation in question merely covers the most dangerous prohibited substances, including synthetic anabolic steroids and testosterone (as well as their derivatives), growth hormones and chemical substances which increase the production of testosterone (plus derivatives) as well as synthetic growth hormones.

On of the fundamental issues involved in anti-doping

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policy is the extent of state involvement. Traditionally, this has been rather limited in Finland. In the 1990s, the Minister of Justice dismissed resolutions for the adoption of special anti-doping provisions in the criminal law, the main argument being that both the Criminal Code and the Pharmaceuticals Act were sufficiently extensive to deal with unlawful actions relating to doping substances.

So what finally impelled the Finnish parliament to criminalise doping offences? This is the key issue dealt with in the paper. The sporting community has received recognition and support for its work against doping. However, those who have been critical of increased intervention by the law in sports regulation have severe reservations about the new provisions. They are particularly concerned to know what is the meaning of these new offences, and their rationale from the point of view of the principles of criminal law. They also ask the question as to what is the crucial interest (Rechtsgut) protected by this criminalisation. Although the new criminal law provisions on doping have been officially justified by reference to the protection of public health, the protection of fair play in sports is an equally important reason for criminalisation, in the author’s view. The issue at hand also raises the question of the true meaning of the ultima ratio principle against the background of the fast pace of the present-day legislative process.

Garth Crooks expresses concern at drug testing methods in Britain

Garth Crooks the former Tottenham Hotspur star, is currently Chairman of the Institute of Professional Sports, which represents competitors from Britain’s 12 most important sports. In this capacity, he recently addressed a communication to Sports Minister Richard Caborn in which he expresses concern at certain aspects of drug testing in this country. More particularly Mr. Crooks is expressing the concern felt by the Professional Footballers’ Association and the Jockeys’ Association that UK Sport, which is the body responsible for drugs testing in Britain, has released details of positive test results before the full disciplinary process has been completed.

The difficulty here is that such confidentiality is not always possible, as UK Sport has adopted the practice of issuing details on a quarterly basis. The report complained of disclosed that three footballers, one of whom was known to be Chelsea goalkeeper Mark Bosnic, were facing Football Association (FA) hearings for cocaine and marijuana, and that a jockey had tested positive for diuretics. Thus far, no reaction was forthcoming from Richard Callicott, the Chief Executive of UK Sport.

Thus far, however, the complaint has been that the British sporting authorities, far from being too draconian in this respect, are too lenient. See also on this subject below on this page.

Doping issues – Football

Allegations on scale of drugs use in football – and of FA’s inadequacies

Over the past few months, concern has been rising at the mounting reports and allegations about the extent to which drug-taking is prevalent in English football – and at the footballing authorities’ inadequacies in dealing with offenders.

In mid-May, a survey carried out for the BBC showed that drugs were competing with alcohol as the favourite leisure activity of the nation’s footballers, and that a sizeable proportion of them use such substances to enhance their performances. The survey found that 46 per cent of professional players were aware of a colleague using recreational drugs, whilst the same number also believed that the sport was facing a considerable substance-abuse problem. Four per cent of players said that they had been given injections at their clubs without knowing what substances they were taking. Some – 5.6 per cent – also said they knew of other players who used performance-enhancing drugs. Translating that to the national membership of the Professional Footballers’ Association, that would translate at around 160 players, the equivalent of four full team squads. The survey was carried out by Ivan Waddington, a specialist in this area at Leicester University.

Concern at this situation is matched by an equal level of disquiet at the adequacy of the methods by which the authorities oversee the sport deal with the problem. The Football Association (FA) in principle conducts random tests after games and at training grounds. However, the survey in question also has some alarming revelations in this regard. Thus 5.8 per cent of players claimed to have advance warning of such tests. It was also revealed that players were only likely to be tested by the FA about once every three years. The FA’s director of medical education, Alan Hodson, denied that the game had a major drugs problem. It is true that, thus far, no Premiership footballer has tested positive for a performance-enhancing drug, and there have only been 46 positive tests out of 6,500 for other substances in the nine seasons in which checks have been carried out. The results of this survey must throw at least some doubt on these figures. There are, however, other indications that all is not well with the invigilation of doping in English football.

Thus only a week before the said BBC survey was
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published, a report was issued by UK Sport which revealed that football, as well as horse racing, were failing to come into line with other sports over drugs offenders. Out of 1,256 footballers tested by UK Sport, ten had failed the test, the drugs varying from stimulants to marijuana and temazepam, a prohibited tranquilizer – but the FA’s long-winded disciplinary proceedings appeared to grind on without producing many results. When results were forthcoming, some of them were rather strange. In one case, a player who took the stimulant phenylpropanolamine was strongly re-educated and his club’s medical officer was requested to re-educate him. Another footballer who was found to have a diagnostic metabolite of cocaine was suspended for three months. A player who tested positive for marijuana received the same punishment.

Controversy also continued to surround the identity of the footballer who had tested positive for nandrolone but had escaped punishment – as was confirmed by the FA in late January 2003. The player in question, believed to be from the Nationwide League, was merely warned of the consequences should he repeat the offence, and that he would be subject to target testing for two years. At the very least it demonstrates a large measure of inconsistency, particularly when considering the haste with which the identity of Chelsea goalkeeper Mark Bosnich was revealed after he tested positive.

At this point, it may be recalled (see above, p.121) that Garth Crooks had, on behalf of the IPS, complained to Sports Minister Caborn about the alleged harshness of some British drugs-testing methods. In fact, the main complaints about this process has not been that the British sporting authorities have been too draconian in this respect, but that they have not been draconian enough. Dick Pound, the president of the World Anti-Doping Agency (WADA) has, as is mentioned above, (p.120), been a ceaseless critic of the FA for their lack of transparency: The case of the said unidentified drug-taking footballer provided him with another opportunity. He stressed that there must be a deterrent effect in catching offenders out and exposing them as cheats, and that this will be conducive to establishing confidence in the system. However, the FA insisted that there were “clinical reasons” for not exposing the player. Nic Coward, then acting Chief Executive of the Association, gave the following, rather limp, explanation:

“Generally we do name players in these situations. But the Commission felt that there were good reasons why it was in the best interests that his name should not be made public.”

Whatever that may mean. In spite of these criticisms emanating from high places, Richard Callicott, the Chief Executive of UK Sport (which administers drug testing in this country), denied that the FA’s failure to take tougher action harmed Britain’s reputation abroad particularly in Italy and Spain, where they claim that the English Premiership is dope-ridden and does not carry out sufficient testing.

Regardless of whether all these allegations are true or not, it is a fact that English football, and with it the FA, will now, pace FIFA, have to fall in line with the more stringent demands of the WADA code described above, or face the full wrath of the British Government which, as has been mentioned earlier, has threatened to hit the Association in the pocket at a time when the latter can least afford this.

Inquiry into Italian football deaths fuels doping scare in Britain

That Britain is not the only country to have to contend with a doping problem amongst its footballers is obvious to anyone with more than a passing interest in the game. Some of the celebrated cases to have tarnished the reputation of Italian football have been extensively documented, both in this organ and elsewhere (see above). The full extent of the problem, however, may be vastly more serious than even the most critical observer could have surmised, and has inevitably fuelled more fears about the size of the problem in this country. It was highlighted in mid-January 2003, when it was learned that an Italian judge had commenced an investigation into the suspicious deaths of no fewer than 70 top footballers, amid fears that the drugs administered to them by their clubs may have triggered their fatal illnesses.

The judge in question, Raffaele Guariniello, who operates in Turin, is investigating the unusually high incidence of cancer, leukaemia and a rare disease of the nervous system among players who have performed for top sides such as Juventus, AS Roma and AC Milan. The investigation is based on research carried out on the records of some 24,000 professional Italian players between 1960 and 1996, as a result of which it was established that a much higher proportion of players were dying from these diseases than members of the public. Mr. Guariniello believes that the consumption of doping-style substances by players, with or without their knowledge, is a possible explanation. He began his investigation after several football widows asked him for assistance.

Intriguingly – and suspiciously? – the entire investigation was based on the Panini cards collected by football fans worldwide. The Italian football federation had no precise data as to whom had played in the Serie A and B (Italian First and Second Divisions); fortunately, Panini knew them all and have a database which is easy to access.
15. Drugs legislation and related issues

to consult. To establish which footballers were still alive, the Panini database was cross-checked against insurance company records of payouts made to deceased footballers’ relatives, as well as with tax office records. Thus over 70 suspicious deaths were identified, and MND was the most striking of the causes. Anabolic agents are high on the suspected drugs list.

The case of Gianluca Signorini makes particularly poignant reading. Signorini was a defender with various Italian clubs who gave the country some of its most spectacular footballing moments of the Nineties, but who ended up totally paralysed by a rare terminal disease. He died last year, aged 42, of the rare amyotrophic lateral sclerosis (ALS) illness, also known as “Lou Gherig’s Disease” (the rare nervous disease referred to above). His case horrified many Italians and fuelled suspicions that the leading Italian clubs may have literally driven some of their best players to death over the past 40 years by overworking them and pumping them up with drugs.

Mr. Guariniello made his name as an investigating judge specialising in conditions of employment by taking on the two best-known names in Turin. His most celebrated investigation was into Fiat’s acquisition of information on its employees, whilst in the realm of football his name is legendary for the inquiry which ended in 1999 with charges being brought against a director and doctor of Turin side Juventus for supplying 150 different kinds of banned drugs to the team’s players. The Juventus case never came to court because the Italian Olympic Committee discontinued it. However, Guariniello’s investigation into the low incidence of steroid positives in Italian football was more dramatic. He established that the country’s principal anti-doping laboratory was actually failing to test for steroids, in order to save costs. The laboratory was closed, and then reopened under new management. The rash of positive tests for nandrolone which netted Edgar Davids and Jaap Stam, referred to above, materialised soon afterwards.

All this has naturally raised some fears in this respect in other countries, more particularly in Britain in view of the findings set out in the previous section. Michelle Verroken, Head of Anti-doping at UK Sport, has contacted the football authorities drawing attention to the evidence emerging in Italy. She says that there are parallels between the diseases afflicting Italian players and those suffered by athletes in East Germany, who has drugs secretly administered to them by the authorities. Although the evidence about any health dangers for sporting figures who take drugs is ambiguous, Ms. Verroken commented:

“Stasi (East German state police) files released after the event showed the very dangerous health dangers to sportsmen who take drugs. We learnt that the regimes of steroid administration caused severe health problems – including, it appears, premature death – among runners, swimmers and other athletes in the Seventies and Eighties.”

The outcome of this case will naturally be followed with interest by this column.

The Mark Bosnich affair (continued)

It will be recalled from the previous issue that Chelsea’s accident-prone Australian goalkeeper had tested positive for cocaine, an A-class drug in November 2002, had been suspended by his club, and was awaiting the outcome of the “B sample” verification test, amidst accusations of skulduggery and involvement by the players’ union, the Professional Footballers’ Association (PFA).

Since then, the result of the “B sample test” became known, and confirmed the original verdict. It was conducted at a laboratory of the International Olympic Committee in Barcelona and showed traces of the prohibited substance. Claiming vehemently that he did not knowingly take the substance, Bosnich continued to protest his innocence, and met his lawyers in order to discuss the possibility of challenging the test result. As is reported elsewhere (see above, p.52) he was then dismissed by Chelsea, having failed to make contact with the club or attend disciplinary hearings to explain the test result.

Mr. Bosnich was inevitably charged with misconduct by the Football Association, which he vowed to fight. He was given 14 days to respond to the charge, and his lawyers informed the Association that he would be requesting a personal hearing. This was held in April 2003, and resulted in a nine-month suspension. Although this period was backdated to 23 December, which would enable the Australian to resume his career in September (i.e. shortly after the new season starts), Bosnich signalled his intention to appeal. However, the Sports Minister, Richard Caborn, criticised the leniency of the decision, which means that an appeal could run the risk of seeing the ban extended to two years, in accordance with the new WADA code (see above, p.118) which, as has been noted before, Mr. Caborn is very keen to see enforced. It was not known at the time of writing whether Mr. Bosnich had in fact lodged an appeal.

Anissa Tann banned for taking nandrolone

This has not been a good year for Australian footballers’ fortunes in the test labs, regardless of gender. No sooner had the Bosnich case reached its climax (see above), than it was learned, in late May 2003, that Anissa Trann, the country’s most experienced female international, had been found guilty of taking a protein...
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Doping issues – Racing

Jockey Club under fire as it ends UK Sport testing

Relations between the Jockey Club, which is the regulatory body for racing in Britain, and UK Sport, the body which carries out drugs testing on sporting performers in the UK, have gradually deteriorated in the course of this year, to the point where the two organs have now parted company. In the winter of 2002, Dean Gallagher, one of the jockeys found to have tested positive for cocaine during the previous quarter, was suspended for 18 months by the Club. The conditions in which this test took place aroused so much discontent within racing that pressure began to build on the governing body to withdraw from the UK Sport programme and conduct its own testing system. Senior officials in the Club had also (like Garth Crooks, seen above) been expressing concern that UK Sport was releasing information relating to positive results before the full disciplinary process had been completed.

Relations worsened over the subsequent period, especially when a report issued by UK Sport condemned the approach by the Jockey Club towards jockeys who had been caught using drugs. This report detailed how three jockeys were found to have used stimulants, and a fourth was found to have used an anabolic agent. In all four cases, the Club did nothing because its rules did not prohibit the use of these substances, contrary to International Olympic Committee (IOC) doctrine. The jockey who used the anabolic agent was under the supervision of a consultant endocrinologist and no action was to be taken. UK Sport urged the Club to sit round the table and discuss their differences, but to no avail.

The inevitable happened in mid June, when the Jockey Club announced that it was to become the first national governing body in sport to opt out of the Government-backed anti-doping programme, as it significantly increased the number of tests to be carried out on jockeys. It thus ended its agreement with UK Sport and decided instead to use a private company, Medscreen Ltd., for drug-testing. This naturally put the Club directly in dispute with the Government. It is true that, unlike other sports which receive grants from UK Sport, racing is self-funding and therefore can survive without public money. Nevertheless, the industry now faces the risk of losing millions of pounds of levy money if it continues with its action.

Relations between the Government and the Club were already somewhat frayed because of the latter’s refusal to adhere to the new World Anti-Doping Agency (WADA) code (see above), and particularly its two-year ban for serious drugs offenders. The Club’s normal “tariff” was six months.

Under the new testing system, the number of tests will be increased to around 1,000 per year. It also includes introducing an additional 2,000 breathalyser tests, with the results confirmed within a week. The move to Medscreen will also enable the introduction of target testing in competition, which is also something which the Club has wanted for some time.

Not unnaturally, this decision also came under fire from UK Sport, whose Chief Executive Richard Callcott deplored the fact that by opting out of internationally agreed testing standards, the Club was opening itself to accusations that it was no longer publicly accountable.

Doping issues – Cricket

The Shane Warne affair

It will be recalled from a previous issue that, in a little-noticed recess of the first Condon report on corruption in cricket, the Anti-Corruption Unit drew attention to a growing drugs problem in the sport; not only were cricketers using performance enhancing substances, but they were also using baggage and equipment in order to carry recreational drugs on tour. However, no senior player has been found to have tested positive for a prohibited substance since that report was issued. This state of calm changed dramatically during the 2003 World Cup in Southern Africa, when this was precisely the fact of one of the finest spin bowlers who ever breathed.

It should be noted that, in spite of this absence of high-profile drug offenders, and even though, as has been mentioned above, the International Cricket Council (ICC) failed to send a representative to the Copenhagen conference where the new WADA Code was approved (see above, p.118), it would be a mistake to believe that the cricketing authorities had been entirely complacent and lax about this aspect of sports invigilation. The ICC itself has encouraged all cricketing countries to introduce random drug tests before the World Cup. The World Cup itself featured random drugs testing to comply with South African legislation. And the Australian Cricket Board has had an anti-doping policy since 1998, which is approved by the Australian Sports Board.
Commission, and the players are regularly educated about the requirements under this policy. It was precisely under the ACB’s anti-doping rules and procedures that Shane Warne was found to have tested positive the day before his comeback for Australia in a one-day international against England on 23 January, following a month-long interruption because of a dislocated shoulder. The substances which he was found to have ingested were the diuretics hydrochlorothiazide and amiloride, banned because of their potential use as masking agents capable of disguising steroid abuse. At a press conference held shortly afterwards these findings were made public, Mr. Warne contended that he had “innocently” taken a tablet which removes excess fluid in the body, and that he was unaware it contained a prohibited substance. Given that it has become the practice of cricketers to rehydrate routinely before and during matches, he failed to explain why he experienced the need to dehydrate. Sources close to the Test spinner claimed that the tablet “had been given to him by his mother”. Under Section 4.1 of the ACB’s code, which relates to the prohibition of masking agents, states that such exceptional circumstances may exist if the player held an honest and reasonable belief in a state of facts which if they existed would mean that the player did not commit a doping offence. Just before the hearing, criticism was levelled against WADA Chairman Dick Pound for comments made to the Sydney Morning Herald which could be construed as prejudging the issue: “Poisoned by his mother? It is good, very good. It ranks up there with “I got it from the toilet seat”. I think Australia has to be very careful in a case like Warne’s. There is a long history of Australia accusing others of wrongdoing. This is not the way to deal with such matters. The ACB should have acted more decisively.”

For the head of a supposedly impartial body, who is also a QC to make such observations just before a hearing was about to open was not perhaps the most appropriate thing to do, and Mr. Pound was duly criticised for it. In the meantime, the results from the “B Sample” verificatory test had turned out to be positive also.

Came the day of the hearing, and Mr. Warne was issued with a one-year ban for doping offences. The bowler immediately indicated that he would appeal. He also indicated that he was “the victim of anti-doping hysteria”, which was somewhat lacking in grace considering that the ACB could have imposed the “WADA minimum” of two years. (In fact, a few days after the ACB decision was issued, it was heavily criticised by leading Australian sports lawyer Andrew Scott, who claimed that only two of the six reasons given by the ACB’s anti-doping adviser Dr. Peter Harcourt were relevant to Warne’s plea for the leniency which the Board ultimately displayed. ) The penalty was less than dramatic for Warne than it might appear. He had already decided to retire from one-day internationals, and he could still return in time for the next Ashes campaign. In addition, county club Hampshire, for whom he has been playing during the English season for the past few years, indicated that they were prepared to keep the position open for him to return the following year.

In the event, Mr. Warne decided not to appeal – wisely, perhaps, in view of the possibility that it presented of having the length of the ban actually extended. The text of the ACB findings also gave him little hope of success, worded as it was in the following terms: “Much of Warne’s evidence on these issues was unsatisfactory and the Committee does not accept he was entirely truthful in his responses to questions about his knowledge of the ACB anti-doping policy. Coupled with that is his vague, unsatisfactory and inconsistent evidence about the extent of using a Moduretic. The use of the diuretic was a reckless act, totally disregarding the possible consequences. He knew he was taking a chemical substance but he made no inquiry as to whether it was a banned substance.”

The bowler’s credibility was further undermined when he revealed that this was not the first occasion on which he had used fluid tablets. One month before the test which produced the positive sample, he had also shown traces of a diuretic, although not sufficient to be positive. He admitted that, at a time when he was doing wine promotions, he had consumed “too many bottles of wine” and had a few late nights, and took a tablet to remove a double chin.

### Doping issues – Athletics

#### Appointments of various tainted coaches cause controversy

Dr. Ekkart Arbeit. Reference has already been made earlier to the state-controlled doping regime applied by the former East German authorities in the 1980s as part of the country’s medal-winning campaign at various sporting...
15. Drugs legislation and related issues

events (see above, p.123). One of the key figures in this exercise was Dr. Ekkart Arbeit, a throws specialist. As Denise Lewis, the athlete who won gold for Britain in the heptathlon event at the Sydney Olympics in 2000, planned to defend her title at Athens in 2004, Frank Dick, the former British national coach who was masterminding Ms. Lewis’s campaign, invited Dr. Arbeit to form part of her team of specialists. Since the reunification of Germany, many former East German athletes have condemned Dr. Arbeit and all his works, in view of the long-term physical damage which resulted from the steroids which he administered to them. Accordingly, the choice of Dr. Arbeit was controversial, to say the least, and attracted a good deal of opprobrium.

Mr. Dick justified Dr. Arbeit’s appointment on the basis that Ms. Lewis needed the best advice available, and that the former East German trainer had been cleared by the German courts. This was only a half-truth, since Dr. Arbeit had never actually been prosecuted before the courts – a fate which he escaped only because under German law only those who actually administered the drugs could be charged, and Dr. Arbeit had “merely” masterminded the policy. It also emerged from the files of Stasi, the East German state police, Dr. Arbeit had also spied for them, and filed more than 1,000 spy reports. He once reported two doctors for refusing to administer drugs to athletes. UK Athletics, for their part, refused to commit itself, David Moorcroft, its Chief Executive, restricting himself to the comment that, although associations with drugs was “helpful” to athletics, Dr. Arbeit should be treated in the same way as any other person without any court convictions.

Ms. Lewis, in the meantime, remained unrepentant. It emerged that, far from being ignorant of Dr. Arbeit’s past and surprised at the controversy his appointment had caused, she was actually expecting it. According to Max Jones, UK Athletics’ performance director, she was made aware of the storm which Dr. Arbeit’s involvement would cause when she was introduced to him by Frank Dick. She confirmed that she would not dismiss him, and that she had received from him an assurance that he was not involved in the East German drugs programme of the 1970s and 1980s.

Her persistence with Dr. Arbeit not unexpectedly drew a host of condemnations. Michael Johnson, the US athlete with five Olympic gold medals to his credit, warned Ms. Lewis that her career faced the threat of being tainted forever by her decision to work with Dr. Arbeit. Peter Radford, the former head of British athletics, condemned the decision of his successors, UK Athletics, to seek a coaching accreditation for the German at the European Cup for Combined Events in Tallinn, Estonia, in early July.

Charlie Francis. Another controversial coaching engagement emerged at around the same time as the Arbeit controversy. It came when Marion Jones, winner of a record haul of five Olympic gold medals at Sydney in 2000, and her boyfriend Tim Montgomery, the current 100 metres record holder, decided to join Charlie Francis, the coach of disgraced Canadian sprinter Ben Johnson who was stripped of his gold medal he won at the 1988 Olympics for the use of steroids. Francis has since admitted that he encouraged Johnson to take the banned substance, and has publicly stated that no athlete can be successful without the use of drugs. He was banned for life by Athletics Canada for his part in the Johnson affair.

Although Mr. Francis has since then attempted to secure rehabilitation by claiming that he no longer encouraged or condoned the use of prohibited substances by any athlete who consulted him, the Jones/Montgomery association with Francis continued to arouse a good deal of protest. Finally, under pressure from her sponsor Nike, Ms. Jones ended her association with the controversial coach. Mr. Montgomery, for his part, made no statement on this issue, which suggested he would be continuing his association with Francis.

Linford Christie. At around the same time the the two controversial appointments referred to above were being made and debated, it was learned that Linford Christie, the 1992 Olympic 100 metres champion, had been selected as one of Britain’s team coaches. Mr. Christie served a two-year ban after he tested positive for anabolic steroids in 1999, which could prevent him from fulfilling a similar role at the Athens Olympics in 2004. Under the rules of the British Olympic Association, any athlete who has been found guilty of a doping offence is ineligible to be an accredited part of the Games team in any capacity.

Max Jones, the performance director at UK Athletics, excused the appointment on the basis that Mr. Christie was associated with four athletes with medal-winning chances in Athens, and that he “didn’t want him sitting in the stands”. He added that he did not consider Christie as a drugs cheat because he had been cleared by UK Athletics. However, the International Association of Athletics Federations (IAAF) then intervened and imposed a two-year ban – presumably that does not count as far as Mr. Jones is concerned.

Modahl revisited? Discus thrower threatens legal action after life ban

The case of Diane Modahl, the 800 metres Commonwealth Games champion who spent six years in her attempt to obtain damages following a ban for doping offences imposed in 1995, is well documented in these pages. In the process, her action contributed to the
collapse of the British Athletics Federation (BAF). It may be that history is about to repeat itself over the case of discus thrower Perriwills Wilkins.

Mr Wilkins, who holds the UK record in this medium, had been banned in July 2002 after having tested positive for steroids. It then emerged that a test taken the previous month revealed an excess of testosterone, which it had taken 10 months to produce at a hearing because of the complex nature of the case. Accordingly a three-man independent disciplinary hearing banned him from athletics for life.

The discus thrower, however, has indicated that he will not let the matter rest, and that he is prepared to mortgage his house to fund an appeal to the Court of Arbitration for Sport (CAS) in order to have this verdict overturned. He claims to have been informed by UK Athletics that his two failures would be treated as one, which would have meant incurring only a temporary ban. (This is indeed what happened in the case of Carl Myerscough, who failed three tests in the space of one month and only served a two-year ban and has since returned to athletics.) He also claims that UK Athletics held the hearing at a time when he knew he could not attend, and that the decision to post full details of his case on the UK Athletics website is proof that he is being discriminated against. He says that if he were a bigger name, he would not have been treated in this manner.

A law unto themselves? US athletics doping cover-ups controversy

Reference has already been made earlier (see above, p.119) to the fact that the US is regarded by many of those in authority as a problem nation when it comes to enforcing internationally recognised anti-doping measures and standards. In one particular case, an Olympic gold medallist had allegedly tested positive for a banned anabolic steroid and should have been suspended. In addition, US Track & Field, the national governing body for athletics, had refused to divulge the name of the athlete concerned to the International Association of Athletics Federations (IAAF). The latter unsuccessfully tried to get the US body to forward details to them in order to decide whether they had taken the correct action. Had the IAAF examined the case, it would certainly have suspended the athlete concerned. The international federation therefore took the matter to the Court of Arbitration for Sport (CAS).

In a 50-page decision which was issued in early January 2003, the CAS ruled that US Track & Field should have informed the IAAF of the athlete’s name, along with those of 12 others alleged to have failed tests. However, since the IAAF had not requested the information in the correct manner and the US body had since changed its rules to ensure this could not recur, the Court decided, in this case, that the Americans would not have to release the names. The US body had claimed that its rules which applied at the time prevented it from identifying the competitors. [However, IAAF rules already stipulated that where an athlete fails a drugs test, the national body should inform it of the name. Why the US body should have been able to plead its own non-compliance with the IAAF rules is presumably a secret between CAS judges and their creator].

The suspicion that the US systematically covers up its drugs offenders was reinforced in late April 2003, when Carl Lewis, the nine-times Olympic gold medal winner, indicated that he had tested positive for banned substances on three occasions, but that he had been let off by the US Olympic Committee. At the same time, he suggested that there had been “hundreds of others” who received the same exculpatory treatment. He claimed that his positive tests were due to “inadvertent” use, stating that “the climate was different” in those days, and that he was not concerned by the uproar caused by his revelations. This was extremely embarrassing for the US Olympic Committee, which had initially denied claims that 114 positive tests between 1988 and 2000 were covered up. It will add weight to calls by leading anti-doping officials and top athletes for an independent inquiry into the US’s record on drug issues. Round-up of other items (all months quoted refer to 2003, unless otherwise stated)

Violetta Kryza. In January, the Polish athlete was stripped of the medal she won at the Pittsburgh marathon last year after failing a drugs test. She had already been banned for two years by the Polish athletics federation the previous month.

Elana Meyer. In May, the South African athlete, who marked the return of her country to the Olympic family in 1992 by winning a silver medal in the 10,000 metres event, tested positive for an excessive amount of caffeine.

Doping issues – Rugby Union

Pieter De Villiers escapes drugs ban

In mid-December 2002, Pieter de Villiers, the South African-born prop-forward in the French national team, tested positive to cocaine and ecstasy at a routine drugs test at his club carried out by the French Ministry of Sport. He was one of 13 players tested, and his A sample showed traces of both drugs. The player protested his innocence, claiming that after his club’s victory against the English side Harlequins in the Parker Pen Challenge Cup, he partied with his fellow players...
15. Drugs legislation and related issues

and drank a good deal of beer, but ended up feeling very ill and had to go home by taxi. This happened a few days before the drugs test. He denied ever having used drugs1051.

The French national coach, Bernard Laporte, was not placated by this explanation, and de Villiers was dropped from the crucial Six Nations Championship match against England. However, the player escaped a ban by the French Rugby Federation’s disciplinary committee because the tests failed to comply with French legal safeguards.1052

WRU conduct inquiry into Penygraig drugs test refusal

After beating Pontyprip 30-25 in the Silver Ball Cup final at Llanharan, Wales, the players of Penygraig declined as a body to give urine samples for drugs analysis. It was following information provided by the South Wales Police that the Welsh Rugby Union requested a drug monitoring unit from UK Sport to test the entire team. One of the significant aspects of this strange affair may be that two of the players are serving French legal safeguards.1053 No further details were available at the time of writing.

Ben Tune affair refuses to go away

The de Villiers affair is unlikely to prompt the conclusion that rugby has a serious drugs problem. The Ben Tune affair, however, may lead to a different conclusion, particularly as it is fraught with overtones of skulduggery. It will be recalled from previous issues1054 that the International Rugby Board (IRB) had recently come under string pressure to intervene in this affair, in which the Australian winger was prescribed the banned substance Probenecid for a knee infection and drank a good deal of beer, but ended up feeling very ill and had to go home by taxi. This happened a few days before the drugs test. He denied ever having used drugs1055.

The disciplinary panel had accepted Dorahy’s explanation that he had retired and been given the new WADA code (see above) which demands a “review” penalties for those who tested positive for steroids to elude suspension, despite the new WADA code (see above) which demands a two-year ban. One of these players was Dane Dorahy, who was merely reprimanded for the use of stanozolol. The disciplinary panel had accepted Dorahy’s explanation that he had retired and been given the substance during medical treatment in his native Australia. However, far from retiring, he subsequently made a comeback. The other player had been suspended for six months after testing positive for nandrolone, but his name was not released by the RFU “on medical advice”1056. The RFL pledged itself to “review” penalties for those who tested positive for banned substances.1057

Some months earlier, there had occurred another incident which was not conducive to inspiring confidence in the seriousness with which Rugby League ought to take this problem. Gateshead Thunder, the outpost club which was struggling in their competition, had been allowed extra “foreign imports” in order to help them compete. They applied to field Peter Petrie, who is banned until 2005 for taking steroids whilst playing for Valley’s in Brisbane. The RFL had received a
warning that he might attempt to play in Britain. Gateshead coach Paul Fletcher pleaded ignorance, and claimed that if the club had known the full facts, they would not have attempted to obtain clearance for him, adding that he was no longer at the club.

However, the pall of innocence over Gateshead looked a little thin when it emerged that the side also fielded Scott MacDougall in a match against Chorley, even though he was still serving a one-year ban for avoiding a drugs test in Australia. This time, Mr. Fletcher proffered the explanation that the club “thought his suspension was over”. Incredibly, the RFL accepted this explanation, which would seem to give substance to Mr. Caborn’s reservations about the sport’s serious intent in tackling the problem.

In this context, it is useful to recall the report, mentioned in the previous issue, which revealed that Rugby League has the worst record of all sports in this country for positive drugs tests.

Doping issues – Cycling

Pantani ban reduced by CAS
It will be recalled from a previous issue that Marco Pantani, one of the cyclists caught out as a result of the drugs raids carried out on the Tour of Italy last year, had appealed against his eight-month suspension before a Federal Appeal Commission, as a result of which the ban was lifted. However, this was challenged by the sport’s world governing body, UCI, before the Court of Arbitration for Sport (CAS). The Court, in Mach 2003, reinstated the ban, but reduced it by two months. It ruled that the Italian rider should be treated as a first-time offender in accordance with the UCI’s regulations.

This meant that Pantani was free to compete in this year’s Tour of Italy. He was ordered to pay court costs of £1,300.

Round-up of other items (all months quoted refer to 2003, unless otherwise stated)
Team 2002 Aurora. In June, two directors of this team, Olivano Locatelli and William Dazzani, were arrested in an Italian doping inquiry.

Francisco Perez. In May, this Spanish rider failed a doping test during this year’s Tour of Romandie.

Doping issues – Other Sports

Fencing
In January 2003, former World Champion Loic Attely received a 10-month ban after testing positive for nandrolone at a World Cup event in Caracas, Venezuela, the previous June. He was convicted on lower levels of the drug found in a B sample because the Venezuelan laboratory which initially used the test was not accredited by the International Olympic Committee (IOC).

Golf
In early June 2003, Butch Harmon, coach to Tiger Woods, ventured the opinion that golfers should be drug-tested to prevent the temptation open to professionals of using steroids in order to keep up with the sport’s big hitters. He was reacting to fears expressed by former Open champion Nick Price that the emphasis on power play in golf will inevitably lead to youngsters “bulking up” and using steroids to become stronger.

Baseball
It will be recalled from a previous issue that concern has been expressed before about the extent of the drugs problem in this sport. Such concern was considerably increased by the death of Steve Bechler, a Baltimore Orioles player during a training session in Florida. After performing an autopsy, Dr. Josua Perper, the Broward County medical examiner, reported that Mr. Bechler had ingested a supplement which contained ephedrine, which is widely used to reduce weight. Preliminary findings indicated that the pitcher died from complications of a heatstroke which caused multi-organ failure.

Ever since ephedrine was made available over the counter, specialists have warned about its dangers, especially if the drug is taken during hot weather. At least one death of a National Football League player had already been blamed on this substance. Mr. Bechler’s death will increase pressure on major League Baseball to take appropriate measures against drug use – already the sport had been backward in banning steroids, despite the claim made by a leading player that 50 per cent of Major League players used them.

Ice Hockey
In January 2003, Jason Rushton, the Scottish Eagles forward, was banned for two years by Ice Hockey UK after having failed a drugs test. The Canadian player tested positive in a random test after a Superleague match against Nottingham in November. He admitted to taking Sudafed and Adderall, which both contain banned substances. A Class A substance, benzoylecgonine, a metabolite of cocaine, was also found.
15. Drugs legislation and related issues

Skiing
Alain Baxter, the British slalom skier who had his bronze medal removed after testing positive for a banned substance at the 2002 Winter Olympic Games, won his appeal against a British Olympic by-law which states that any person found guilty of a doping offence shall be ineligible for any future Olympics. He will therefore be eligible to represent his country at the next Winter Games.

Tennis
In March 2003, Czech player Bohdan Ulihrach was suspended by the International Tennis Federation (ITF) after testing positive for nandrolone. He failed the test at a tournament in Moscow in October 2002.

Shooting
In mid-March 2003, the Australian Olympic Committee suspended the shooter Phillip Adams for two years after he tested positive for a banned diuretic at the 2002 Commonwealth Games in Manchester. Controversially, Adams was allowed to compete at these Games after an Australian Shooting Association anti-doping tribunal found him guilty of using a banned drug, but stated that the drug, used to treat high blood pressure, would not assist the athlete.

16. Family Law

Lance Armstrong separates from his wife
It has now become part of cycling – nay sporting – legend that four-times Tour de France winner Lance Armstrong met his wife Kristin when recovering from cancer during the winter of 1996-7. His wife was a constant presence at each of his consecutive Tour wins. However, the couple have now announced that they are to separate. The fairytale ending whereby the Armstrongs would celebrate the Texan champion’s record fifth Tour win together will therefore, unfortunately, not come to pass.
17. Issues specific to individual sports

Football – Internal Rules and Institutions

Match rule changes decided
Increased use of technology and manpower has been the main feature of many rule-changes in many sports in recent years, with radio communication, video replays and light meters on the one hand, and off-field match assistants deciding many issues which previously were left to the sole discretion of the match officials.

Remarkably, for a sport which has always seen itself as being in the vanguard of modernity, football has been remarkably reticent in introducing such innovations. This is about to change, if some of the recent amendments to the rules are anything to go by.

In March 2003, world governing body FIFA decided that it would experiment with two-way radios between match officials. The rule makers of the game, i.e. the International Football Association Board (made up of FIFA representatives) approved the plan at a meeting in Belfast, and will test it during the Confederation Cup, to be held in June.

FIFA also decided that extra officials will be introduced in order to help ensure more accurate decisions about controversial incidents in the penalty area. The fourth and fifth officials, called “goal line assistants” will act as an extra pair of eyes for the referee on penalty claims, professional fouls and disputes over whether the ball has actually crossed the line. They will be used for the first time during the under-17 championships in Finland in August.

Scottish mid-season break abolished – but will it be introduced in England?
Starting from the 1998-99 season, the Scottish Premier League decided to introduce a winter break in January in order to minimise the number of games lost to the weather. This experiment has now been abandoned.

There were several reasons for this: the hiatus in the season which denied clubs gate receipts for almost a month; the strain on players’ physiques and fans’ pockets by the congestion of fixtures during the run-up to Christmas – and the requirements of international football, which saw the break abandoned for the 2002 season in order to avoid a clash with the World Cup.

Oddly enough, it is precisely at the time when the Scots are abandoning this system that England manager Sven-Göran Eriksson is urging English football to adopt it. He pointed out that many other European countries have a winter break, and that this assists them in their campaigns for the various European competitions. The season could accommodate a break by being extended further – except during World Cup years, when the season could start earlier. Otherwise, said the England coach, this country may have to wait a very long time before it has another European Champions League winner.

Home nations preserve their autonomy – but not for Olympics
One of the charming anomalies of football in this country is that, although a politically unitary state, it is represented on the football field by four different nations. This has sometimes been the subject-matter of adverse comment elsewhere, and has caused some pressure within world governing body FIFA to attempt to discontinue this state of affairs. A proposal to this effect was put to the FIFA Executive in December 2002, and had strong backing from many developing nations.

Initially, it seemed that FIFA president Sepp Blatter supported this move. However, he repositioned himself rapidly after opposition which took him by surprise – mainly from the six representatives of European body UEFA who had gathered support from among the three South American delegates. The proposal was ultimately defeated, with Mr. Blatter personally guaranteeing that England, Northern Ireland, Scotland and Wales would continue as separate teams.

However, no such concession will be forthcoming for the Olympics. If the UK wishes to enter for the football competition, it will need to do so as one, British team. Meeting have already taken place between representatives of the four Home Nations on how this could be achieved for the 2012 Olympics. Britain last entered a team for the 1972 Olympics but failed to qualify.

Wimbledon move approved
The various twists and turns taken by the attempts by Nationwide League side Wimbledon to move premises have been widely documented in previous issues.

Although the “Dons” had secured permission to move to Milton Keynes thanks to the ruling of an independent commission, there continued to fester doubts as to whether the plan would actually be realised, what with plans to re-site the club at its original venue in Merton, and the veracity of the evidence put forward to the inquiry being called into question. However, in April 2003 the Football League approved the club’s temporary move to the National Hockey Stadium in Milton Keynes, on condition that they secure a
permanent home by 2007, when they hope to move into a 28,000-seater ground in Denbigh.\textsuperscript{102}

**World Cup finals participants to increase to 36**

One of the aspects of the football World Cup which has changed the most over the years is its size. Whereas not so long 16 teams battled it out for the spoils, the 2002 tournament in Asia saw the participation of 32 teams. However, at a recent FIFA executive meeting it was proposed to increase this yet again, this time to 36. In spite of some initial hesitation, the various constituent parts of FIFA gradually rallied to the idea.\textsuperscript{103}\textsuperscript{104}.

Opposition was mainly forthcoming from FIFA President Sepp Blatter, whose objections were the expense of this increase, and how this would affect the efficient management of the tournament as well as its length.\textsuperscript{105}

Ultimately, the FIFA executive approved the increase at its May meeting. This was, however – as Sepp Blatter stressed as soon as the decision was made – contingent upon finding a formula which fitted the time frame of the tournament, adding that the Cup could not be “stretched forever”. This is bound to re-ignite the “club v. country” controversy between Europe’s top teams and football’s governing body.\textsuperscript{106}

Earlier, the FIFA Executive had decided that the 2014 tournament will be held in South America.\textsuperscript{107}

**Blatter fails to secure ban on red-card appeals**

In mid-March 2003, the English football authorities scored a victory against FIFA President Sepp Blatter when they won their fight to prevent the latter from scrapping red-card appeals. Mr. Blatter was present to see his controversial proposal overturned by the annual meeting of the International Board in Belfast. The FIFA President had decreed that suspensions for sendings-off should be automatic and immediate with no right of appeal with the exception of mistaken identity. The Football Association (FA) rebelled, and their argument was carried by the board after submissions from Chairman Geoff Thompson, acting Chief Executive David Davies and Premier League chairman Dave Richards.\textsuperscript{108}

**Changes in structures of domestic football**

As from next season, a team that finishes eighth in the Nationwide League First Division could be playing Premiership football the next, since the number of clubs competing for the play-offs at the end of the season will be increased by two to six. This was decided by the Football League in June 2003. The change has been criticised by some.\textsuperscript{109}

Outside the League, the nationwide Conference proposal to increase membership from the present 22 to 24 was accepted in principle by the FA in March 2003. This means that, for the 2003-4 season, only one club will be relegated from it.\textsuperscript{110}

**FA moves to prevent rogue switches of Cup venues**

When Farnborough, of the Nationwide Conference, were drawn against Arsenal, of the Premiership, in the Fourth Round of the FA Cup this was initially greeted as yet another David v. Goliath clash which is one of the charms of the competition. However, the romantic element was soon removed from the tie when Farnborough, attracted by the much higher earnings that would stand to be made from a visit to Highbury than from playing at their home ground at Cherrywood Road, agreed to switch the venues round.\textsuperscript{111} Officially, the reason given was safety concerns with which the 4,900-capacity ground in Hampshire may not be able to cope.\textsuperscript{112} It was feared that many ticketless fans would descend on the town and mill around, causing havoc.

However, the notion of hordes of Arsenal fans descending on Farnborough was a somewhat fanciful one, and the Liechtenstein v. England match, played in an even smaller ground than Farnborough’s did not present any dramatic security problem. Accordingly, the FA Challenge Cup Committee acted in March to close this particular loophole. If a tie has to be moved out of safety concerns, it will need to be staged at the nearest suitable neutral venue rather than the opponents’ ground. In addition, any excess earnings made from such a move will be placed in a central pool.\textsuperscript{113}

**Round-up of other items (all months quoted refer to 2003, unless otherwise stated)**

**Platini scrap Champions’ League.** If Michel Platini, the former French star, ever becomes UEFA President, he will scrap the Champions’ League. This is the message he issued in an interview with a German newspaper. Mr. Platini wishes to return to the old knock-out system, whereby the likes of Bayern Munich have to play in Georgia or Malta. The present system is only run for the benefit of a small elite of top clubs, he added.\textsuperscript{114}

**“Silver Goal” introduced.** In April UEFA scrapped the “golden goal” system for the Champions’ League, under which games which reach full-time without a winner are decided by the first goal to be scored during extra time. As from next season, the “silver goal” will apply, whereby the team leading at the end of the first half of extra time is the winner; if teams remain level at this stage, the second half of extra time is played. If the issue still remains undecided, a penalty shoot-out takes place. The system was given its first airing in the UEFA Cup Final between Celtic and Oporto in June 2003.\textsuperscript{115}
Premiership loan ban scrapped. In March, the Premier League overturned the rule whereby Premiership clubs are prohibited from loaning players to each other. The move was proposed by Birmingham City and is designed to cut costs for clubs.

Advertising extended. In March, the International FA Board approved in principle shirt advertising being extended to shorts and socks.

Wales challenge Serbia game ruling. In mid-June, Wales announced that they would challenge FIFA over the decision to consider the rearranged European Championship qualifier against Serbia and Montenegro as a friendly. This ruling means that Wales can call on their players only 48 hours prior to the match, rather than four days for a competitive fixture. The match is in Belgrade on 20 August, a date set aside for friendlies only, which is why FIFA have decreed that neither Wales not Serbia can have their players until just two days beforehand. The match was originally scheduled for 2 April but was cancelled for safety reasons. The outcome of the appeal was not known at the time of writing.

G14 block friendly call-ups. In February, Europe’s leading clubs, who meet as the G14 group, warned that they would refuse to release their players for friendly international matches unless agreement could be reached with FIFA on the number of non-competitive games which the players are expected to play each year. Top British clubs had been voicing concern over the friendly internationals to be played that month, questioning the need for these games and the impact which they have on their players at a crucial time of the season.

Football – Disciplinary cases and procedures

Ferguson “foot in mouth” disease earns him UEFA rap but no ban
Sir Alex Ferguson has never been known as the shrinking violet of football management, and his verbal volleys very often earn him the enmity of his target. However, these comments overstep the mark where they unjustifiably impugn the integrity of the game’s authorities. This is precisely what happened in the wake of the draw for the quarter final of the Champions League for this season, when he accused European governing body UEFA of rigging the draw in favour of Spanish teams. More particularly, Sir Alex delivered himself of the following observations:

“It was a nice draw for the Spanish and Italians – I think they picked it themselves. The three Italian teams have avoided each other and so have the three Spanish. How do you think that worked out? UEFA don’t want us in the final, that’s for sure. I don’t know why they have given the final to Old Trafford because they don’t want us to get there”.

UEFA spokesman Mike Lee denied this allegation, and attributed these remarks to Sir Alex’s propensity for “mind games”. However, his observations caused a good deal of anger and upset, particularly on the part of Friedrich Stickler, the Austrian FA President who made the draw and is also Chairman of the UEFA Competitions Committee. The body’s Control and Disciplinary Committee promptly announced that it would meet in order to discuss the manager’s remarks. He was informed that he would face a charge of bringing the game into disrepute. Before the hearing, Sir Alex sent a ten-page document to the Committee apologising and pointing out that he had apologised and publicly withdrawn his remarks. As a result, he was merely fined £4,500 and escaped the touchline ban which he must have realistically feared.

Bergkamp involved in several incidents
Dennis Bergkamp, Arsenal’s temperamental Dutch forward, has seen the inside of disciplinary committee rooms a little too often for his – and his victims’ – liking this season. In late December 2002, he was called for a hearing before the FA Disciplinary Committee for an alleged stamp on Blackburn player Nils-Eric Johansson. Ultimately, Bergkamp escaped suspension when the Committee decided that there was no violent intent when his boot made contact with his opponent, and therefore was a bookable rather than a dismissal offence. Barely a month later, the Dutchman was in trouble again when he was filmed on video catching West ham’s Lee Bowyer in the face in an incident which the referee did not notice. For this incident, Bergkamp pleaded guilty to a charge of improper conduct but did not request a personal hearing, so the case was heard in his absence. He was fined £7,500 for this incident.

Towards the end of the season, he was up before the disciplinary authorities again, this time over an incident in which he appeared to grapple with Simon Johnson, of Leeds, which was also caught on video. At the time of writing, no hearing had yet taken place.

Birmingham derby sparks off disciplinary action
Derby matches between the various top sides in the Birmingham area are usually played in a tense atmosphere, and none more so than in March 2003 at Villa park between Aston Villa and Birmingham City. The criminal law consequences of this encounter have
already been dealt with above (p.33). The flashpoint in an ugly encounter came four minutes after half-time when Villa’s Dion Dublin, having fouled Robbie Savage, then butted him. He was sent off and given a three-match suspension, but more was to come for him and Christophe Dugarry of Birmingham, who allegedly spat at Joey Gudjohnson. Both were formally charged by the FA several weeks later.

Mr. Dugarry escaped a charge of indecent behaviour, and was merely fined £12,500 as well as being warned over his future conduct, having accepted the French player’s admission of being guilty of improper conduct. Dion Dublin’s hearing had to be postponed, and had not yet been held at the time of writing. Unusually, Dion Dublin’s hearing had to be postponed, and had not yet been held at the time of writing.

However, Aston Villa faced no charges in spite of four pitch invasions and one Villa fan running the length of the pitch to confront Robbie Savage after the Dublin incident. In fact, the FA actually praised Villa, much to the indignant amazement of Birmingham City. The latter recalled that they had been fined £25,000 for the incident whereby a fan ran onto the field to taunt Villa keeper Peter Enckelman in the return fixture in September 2002. They accused the FA of double standards.

Steven Gerrard affair ends in grubby FA manoeuvre

Merseyside derbies are not for the faint-hearted either, and this year’s fixture at Anfield between Liverpool and Everton was no exception. At a certain point, England and Liverpool midfielder Steven Gerrard made a two-footed lunge at Gary Naysmith, which went unnoticed by the referee but was caught on video. Unusually, referee Graham Poll included the incident in his match report. This led to a violent conduct charge brought by the FA against Mr. Gerrard. At an FA disciplinary hearing, he was banned for three games.

Liverpool manager Gérard Houllier claimed the next day that the FA had offered him the opportunity to delay Gerrard’s suspension for a fortnight so that he could still play for England against Australia the following week – which would have made him miss the Worthington Cup final against Manchester United. Naturally, this did not delight Mr. Houllier, who lost no time in informing the press. This was very embarrassing for the FA itself. The latter then followed a suggestion made by England manager Eriksson that the rules should be changed so that players suspended for violent conduct when on club duty could still turn out for the national side. This change was endorsed by the FA International Committee in May. Accordingly, Gerrard could be included for the party to play South Africa in Durban. This rather grubby manoeuvre will have done nothing to earn the game the public respect it so often and openly craves.

Neil Warnock in Cup incidents

Neil Warnock, the Sheffield United manager, has made few friends in the course of his tempestuous managerial career. He was once again surrounded by controversy in January 2003 during the Worthington Cup tie with Liverpool. At the end of the match, he was involved in a bitter confrontation with Liverpool’s defender Stéphane Henchoz, who appeared to spit in his direction, whereupon Warnock responded in suitable style and had to be restrained by Anfield coach Sammy Lee. He then launched an angry tirade against referee Alan Wiley, who had earlier failed to dismiss Liverpool goalkeeper Kirkland for handling outside the penalty area. Warnock was later cautioned by the FA.

In April he was once again involved in aggravation when, after the FA Cup semi-final against Arsenal, he called upon referee Graham Poll to be banned for what he described as a one-sided performance, during which he appeared to impede United player Michael Tonge in the build-up to Freddie Ljungberg’s winning goal for Arsenal. The FA stated that they had noted what Warnock had said and that they would study it. Thus far, no action appears to have been taken – in spite of the earlier warning he had received on account of the Henchoz incident.

Colombian shirt-lifters to be disciplined

In late March 2003, it was learned that the Colombian league authorities have banned players from lifting their shirts during goal celebrations. The league will impose a fine of $560 on any player who violates this ban.

Greek club incurs heavy points penalty for financial debts

Financial difficulties experienced by professional football clubs does not appear to be something restricted to this country – nor are the measures taken by the footballing authorities to penalise this state of affairs. In April 2003, the Greek league virtually condemned First Division club Ioannina to relegation after deducting 75 points from its tally as a penalty for its debts, reported to be approximately €1 million.

Craig Bellamy’s brushes with the disciplinary authorities

Newcastle’s Welsh international Craig Bellamy is also someone who has frequently been on the receiving end of disciplinary action on the part of the game’s authorities. In mid-December 2002, he was issued with yet another three-match ban following the red card he had earned during a Champions League tie with AC Milan. In March 2003, he was in trouble again when he was charged by the FA with using abusive and insulting words towards a match official during an
incident at the end of the derby game against Middlesbrough. He was later banned for one game for this incident. Newcast le considered the possibility of an appeal against this sentence, but ultimately failed to lodge one.

**Keown escapes ban after van Nistelrooy incident**

During the Manchester United v. Arsenal game in December, there occurred an incident in which the “Gunners” defender Martin Keown appeared to swing his arm at Dutchman Ruud van Nistelrooy. Referee Dermot Gallagher missed the incident, but it was caught on video, and the FA video panel decided there was a case to answer. Keown was charged with improper conduct.

In the event, following the relevant hearing Keown was fined £5,000 and warned as to his future conduct. United manager Sir Alex Ferguson attacked what he described as the leniency of the penalty and privately believes to be favouritism shown towards the London club. Certainly the evidence that Keown pushed the United striker was quite clear, and a fine does not seem the appropriate response.

**Round-up of other items (all months quoted refer to 2003, unless otherwise stated)**

**John Gregory.** In March, the Derby County manager was issued with a five-match touchline ban and a fine of £7,500 for his behaviour during a match at Fratton Park, Portsmouth, which had included abusive and insulting language towards fourth official Steve Tomlinson.

**Carlo Cudicini.** The Chelsea net-tender had been dismissed during an FA Cup tie with Middlesbrough following a scuffle with “Boro” forward Dean Windass. Such an offence normally carries a three-match ban, but television pictures proved to be conclusive whether he had actually raised his knee to strike Windass. He therefore escaped a ban.

**El Hadji Diouf.** As a result of the spitting incident in the tie with Celtic, referred to above (p.36), the Liverpool striker was banned for two matches by the UEFA disciplinary committee.

**Michael Dawson.** In May, the Nottingham Forest defender had the red card he received during a match against Sheffield United upheld by the FA disciplinary commission. He therefore was issued with a three-match ban.

**Valentin Ivanov.** This Russian referee was banned for two months for using a video replay prior to disallowing a goal in the Russian Cup semi-final in May.

**PSV Eindhoven.** In May, the Court of Arbitration for Sport (CAS) reduced a fine imposed by UEFA on PSV Eindhoven (Netherlands) for racist behaviour by its fans at a Champions’ League fixture in September 2002. Citing the “small scale of the incidents”, the CAS reduced the fine from £23,000 to £14,000.

**Gabriele Batistuta.** In February, the Argentinian international, who plays for Internazionale Milan, was banned for two matches for a clash with Ivan Franceschini, the Reggina defender.

**Jermaine Pennant.** The Arsenal player was fined by his club in April for breaking a curfew whilst at the England under-21 training camp.

**Franck Queudrue.** The Middlesbrough left back was issued with a five-match ban by the FA in May for his third red card of the season, which he incurred against Bolton Wanderers.

**FC Kaiserslautern.** The financially stricken German side (see above, p.105) had three points deducted for the next season and fined after the German League (Bundesliga) ruled that it had infringed licensing rules. The League said it had examined documents for the 1997-8 season to the present, and found breaches of the rules regarding player licences.

**Maik Taylor.** In March, the Fulham goalkeeper lost his appeal against the dismissal which he incurred against Tottenham Hotspur. In so doing, the FA disciplinary commission disregarded the recommendations of its video advisory panel which had described the dismissal as unfair.

**Football – Other issues**

**PFA demands curbs on gambling by players**

Since England star Michael Owen made the news headlines by admitting to his over-fondness for gambling, more and more evidence has come to light indicating that this is indeed quite a problem amongst this country’s footballers. Earlier this year, Dutch star Ruud van Nistelrooy confessed to being surprised at the extent to which the gambling culture was part and parcel of the English game. He said that his team-mates could afford to lose money on their eternal card games because of the “obscene” amounts of money earned by them.
17. Issues specific to individual sports

The Deputy Chief Executive of the Professional Footballers’ Association (PFA), Mark McGuire, commented that it was unhealthy for team-mates to lose such sums at card games. However, he admitted that it would not be easy to control this habit. Drugs or alcohol could be monitored by means of techniques such as random testing, but gambling was more difficult to monitor and identify. He also recalled that the problem was already quite serious in the 1970s when he was a player.

Kenyon attacks Saturday afternoon television ban – League defends it

Under current Football League rules, no live matches may be screened on television between 2.30 and 5.30 on Saturdays. Since the police are unwilling to sanction evening fixtures at weekends, and with Champions League matches cramping the fixture list even further, this has meant that a large proportion of Manchester United’s matches, nominated for live coverage more often than any other Premiership side, have been scheduled for Saturday lunchtimes. This has caused growing resentment amongst the Old Trafford faithful, who have been complaining at the lack of traditional 3 pm kick-offs during the 2002-3 season. What with this and the increasing likelihood that many fixtures will be left for clubs to sell on an individual basis, Manchester United Chief Executive Peter Kenyon has demanded that this Saturday-afternoon ban be overturned.

However, Football League officials have dismissed these demands, claiming that showing the most popular sides in the country live on television on Saturday afternoons would have a disastrous effect on attendances below Premier League level – and even on the lower reaches of the Premiership itself. According to the League’s Head of Communications, John Nagle, it could also have negative effects on participation levels in Saturday leagues across the country.

New work on regulating football published

Regulating Football: Commodification, Consumption and the Law by S. Greenfield and G. Osborn is the latest substantial addition to the growing body of serious literature on sports law. Indeed, the contents of the book are considerably wider in scope than is indicated by the title. It opens with an assessment of the context and development of regulation and a general examination of the now-traditional issues of crowd safety and hooliganism. Chapter Two engages in a social and political analysis of the manner in which regulatory structures of the game have evolved. Chapter three monitors the development of the dynamic and changing nature of the relationship between club and player, once again from a sociological viewpoint rather than on the basis of the not inconsiderable case law which exists on the subject.

Chapter Four considers the legal regulation of the conduct engaged in by both the individual players and the clubs – here, the legal angle is explored much more extensively than is the case in the previous chapter. It highlights the key areas of legal intervention in relation to the regulation of players, and clearly establishes the principles underlying legal attitudes to football. Chapter Five reverts to the subject of spectator control, focusing on the angles of the policing of racist conduct. In the final chapter, the authors draw together the strands developed in the earlier chapters and ask the question as to when football will “finally consume itself”.

Rugby Union – Internal Rules and Institutions

“Moffett revolution” ends in agreement on Welsh regional structure

In a season when Wales yet again collected that most unwanted of sporting trophies, the Wooden Spoon, in the Six Nations Championship, the need for change in the Principality seems too obvious to require clarification. Yet the reader will know, from previous issues of this Journal, that the vested interests in Welsh rugby, particularly the traditional clubs of the Valleys, have been remarkably resistant to any proposals for change.

It will be recalled that new Chief Executive of the Welsh Rugby Union, David Moffett, had proposed a new regional structure under which four provincial teams would supersede the leading Welsh clubs, which would become subsumed into the new structure. The reason was largely the inability of the clubs in question to “let go” – coupled with a possibly justified fear that the loss of identity which the new structure would bring in its wake may drag the Welsh game down to even deeper levels. With the new year 2003 dawning, there had still been no agreement amongst the clubs on the way ahead. David Moffett decided to force the pace and insisted on a meeting in mid-January at which he expected to see “things moving”. The main difficulty seemed to be (a) the argument that five clubs, rather than four provinces consisting of merged clubs, should form the basis of the new structures, and (b) the resistance displayed by Neath and Bridgend to plans drawn up by Swansea, Cardiff, Llanelli, Newport and Pontypridd on how this five-club structure would be constituted. The latter five wished to form the core of the new system, whereby Pontypridd would link up with Bridgend, Swansea with Neath, Cardiff with Caerphilly, and Newport with Ebbw Vale. Llanelli, the
only side to have scored some successes in European competitions thus far, would remain the same. The meeting was duly held, but once again ended inconclusively. Once again, there was resistance to the Moffett plan, with Bridgend and Neath again holding out against the tide. Although Mr. Moffett retained an air of optimism and described the meeting as “cordial and productive”, the following meeting between him and the nine Premiership clubs was no more successful in securing an agreement. This time the meeting ended acrimoniously, with Mr. Moffett storming out and informing the clubs that he would go over their heads by asking the General Committee to back his plans and then put them to an Emergency General Meeting of the WRU’s 239 member clubs the following month. This shock tactic at first seemed to have worked, and the clubs requested a new meeting with the WRU Chief Executive, at which the five-club structure was once proposed – this time with the seeming agreement of the malcontents Bridgend and Neath. Alas, this peace deal lasted only 12 hours, with Bridgend and Neath once again breaking ranks. Bridgend owner Leighton Samuel called a press conference at which he stated that he wanted nothing to do with Pontypridd, whereas Neath team manager Mike Cuddy said that the WRU, which owns Neath, had forced on them a merger with Swansea and had reneged on a promise to buy out the club. Mr. Moffett promptly carried out his threat to ignore the Premiership clubs and put his proposal direct to the General Committee, which gave its approval to the proposed provincial structure. The scene was now set for the scheme to be formally sanctioned by all 239 clubs on 23 February – even though the WRU admitted that the entire plan could be scuppered if any of the clubs affected decided to challenge it through the courts. The fateful Emergency General Meeting was held against the background of the Wales team’s brave but doomed attempt to halt the England juggernaut at the Millennium Stadium 24 hours earlier. Mr. Moffett’s plan carried the day almost unanimously, with several speakers pouring scorn on those who, like Llanelli, had threatened to take the matter to court. However, Llanelli, Cardiff and Pontypridd remained defiant, with the first-named actually serving a High Court writ on the WRU. As it had itself anticipated, the WRU realised that it would not be able to steamroller the regional plan through without some co-operation of these clubs, which is why a new meeting was convened in Bridgend, where the clubs once again tabled the five-club plan proposed a few months earlier. In the event, it was this compromise deal which carried the day. Cardiff and Llanelli would continue to stand alone, whereas Neath would merge with Swansea, Bridgend with Pontypridd, and Newport with Ebbw Vale. However, this being Welsh rugby, this did not bring an end to the problems and question marks. For one, the scheme ran into flak at the European level. Barely a month after reaching agreement on the above proposals, the WRU and the clubs concerned were informed that they would only be allowed four representatives in the major European competition, the Heineken Cup, the next season. One of the trams will therefore have to play in the second-tier Parker Pen Challenge Cup. It is safe to say that this was not anticipated by either the Union or the clubs. At the time of writing, it was not yet clear how this dilemma would be resolved.

Problems also arose on the question of whom would play for whom in the new structure. Initially, the clubs had concluded a gentlemen’s agreement not to poach players who were coming out of contract. However, this proved to be a pipe dream and gave way to the unseemliest of scrambles. First of all the Pontypridd/Bridgend coalition signed the Ebbw Vale prop Matthew Jones, whose coach reacted by approaching the Pontypridd and Wales back-row forward Michael Owen (no relation). One club official admitted that “good intentions had gone out of the window” with the realisation that there simply not enough good Welsh players to go around.

To relegate or not to relegate – Premiership v. RFU stand-off continues

Most readers will by now be familiar with the continuing saga of the “Rotherhamgate” scandal, which has been extensively covered, both in these columns above, and in previous issues. It concerned suspicions that the Zurich Premiership had established a slush fund with which to bribe Rotherham, the First Division champions in 2002, to remain outside the top flight of club rugby in this country. Whether true or not, these allegations were symptomatic of a deeper malaise and a wider battle which was proceeding between the Premier League, which believes that there should be no relegation (at least not on an automatic basis) between the itself and the First Division, and the Rugby Football Union (RFU), which is inclined to the contrary view and maintain the status quo. This disagreement has continued to fester throughout the 2002-3 season.

In January 2003, RFU Chief executive Francis Baron ruled out a proposal that the Premiership should be extended to 14 teams, which would be accompanied by a two-up, two-down system of promotion and relegation, on the grounds that it would be “financially and commercially” wrong to do so at this moment. However, he did add that a choice could be made between retaining the current relegation system or...
replacing it with a play-off between the First Division hopeful(s) and the bottom team(s) in the Premiership. In fact, a play-off system is what Premier Rugby, which represents the Zürich Premiership clubs, eventually suggested a few months later to the seven-man task group debating this controversial issue. Mr. Baron, who was the RFU representative on the group, reacted coolly and insisted that Twickenham could not support any scheme which would encourage the perception that English rugby is ring-fenced in favour of the elite clubs. He added that it could not be the responsibility of the RFU if some clubs were mismanaged. One compromise suggested was that there be a play-off next year when League games clash with the World Cup, with a return to automatic relegation thereafter, although it was thought that this would not satisfy the Premiership owners who have invested a collective £150 million into professional club rugby.

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

France win 2007 World Cup

It will be recalled from the previous issue that France had become the favourites in the bidding war to stage the 2007 World Cup, in spite of strenuous efforts undertaken by English rugby for the right to stage the event. In fact, France appeared to consolidate its advantage even further when it offered a number of inducements to the Celtic nations. If France were to secure the bid, Scotland, Wales and Ireland would be allowed home advantage for all their group matches, as long as none of them involved France. To obtain this, of course, they would have to vote for France. In mid-January 2003, French Rugby Federation president Bernard Lapasset made a “whistle-stop tour” of these countries to sell this scheme to them.

The English Rugby Football Union (RFU), for its part, attempted to bolster their bid by highlighting the financial advantages which the tournament stood to gain from its involvement, certainly in terms of the corporate support which it claimed it could muster. It also made proposals to stage games at the Millennium Stadium in Cardiff and Murrayfield in Edinburgh, whilst retaining sole responsibility for the event. Some weeks later, France raised the stakes once again by casting doubts on the veracity of the potential profits which an England-based tournament would bring. The also indicated that as many as ten matches would be played in Scotland, Ireland and Wales if their bid were accepted.

An element of farce then descended on the entire process when delegates arrived in Dublin for the meeting at which the decision was to be taken, not knowing exactly what were the bids for which they would be voting. England and France had submitted two bids each for the competition, in accordance with the instructions issued by the International Rugby Board (IRB), the world governing body in the sport. However, before the delegates actually were to chose who the host country would be, they would have to decide which of each country’s plans would advance to the final selection meeting. The delegates did not understand it either, and a Rugby Union chief described the entire situation as “highly unsatisfactory”. As the day of the crucial vote approached, however, it appeared that France was gaining ground as the selection process continued, amid frantic last-minute horse-trading. The final vote was held, and the French bid was accepted by the overwhelming margin of 18 to 3. This vote was seen as something of a humiliation for England, given the time, effort and money which they had expended on the bid. The format will be as follows: (a) 20 teams will take part, (b) there will be 48 matches between 7 September and 20 October, (c) Wales, Scotland and Ireland will have three first-round matches each, plus a quarter final at the Millennium Stadium, and (d) eight French stadiums would be used, including the Parc des Princes and the Stade de France. As a consolation prize, the possibility was held out that Twickenham might be allowed to stage one of the quarter finals.

Proposals to change Six Nations format

If the last few seasons have confirmed anything in European rugby, it is that the gap between the top two, England and France, and the remainder, Scotland, Wales, Ireland and Italy (not necessarily in that order) is, barring the odd freak result, growing. And although the faithful thousands will always turn up at the Millennium for the Principality’s home international fixtures, this may be more for the spirited rendering of Cwm Rhondda and Hen Wlad Fy Nhadau than for the spectacle on the field of play. Tournaments constantly dominated by one or two teams tend to lose the interest of an increasingly fickle public, which is why various suggestions have been made to change its format.

In mid-February 2003, it was suggested that the championship be changed in such a way as to make it a two-tier competition, with the three Celtic nations plus Italy in the lower level. This suggestion was made by former tighthead prop Jeff Probyn, now a member of the Rugby Football Union (RFU), who has in fact submitted a paper on the subject to the Union. The other – perhaps more immediately achievable – was that made by French international Thomas Castagnède, is to introduce a bonus point system similar to that used in the Super 12 or in the Zürich Premiership, whereby an extra point is awarded for scoring four tries, or for losing by less than seven points.
17. Issues specific to individual sports

Rugby Union – Disciplinary cases and procedures

Stop naming bogus teams... or face disciplinary action

One of the less attractive practices which many top rugby sides have been engaged in over the past few seasons is that of naming teams for matches which bear little resemblance to those that ultimately take the field. However, this practice has now been outlawed by common agreement between the Premiership clubs. If any of them break ranks on this issue, they will be disciplined. This was decided at a meeting of the 12 directors of rugby of the Premiership sides, and was brought to a head by the decision of Warren Gatland, of Wasps, deliberately to declare a spoof line-up in order to mislead Gloucester, their opponents the next day. Premier Rugby, which represents the Zurich Premiership sides in English rugby, had launched an investigation into squad announcements following a complaint made by the Rugby Union Writers Club.

South Africa lay down the law to their players

It has been noticed by rugby followers that the South African national team have sometimes allowed themselves to get carried away into an excess of indiscipline. This was very much on display at Twickenham during their "friendly" international against England, when one particularly lamentable tackle almost put Jonny Wilkinson out of the game and secured the dismissal of Jannes Labuschagne. Commendably, the South African rugby authorities have reacted severely to this unfortunate trend. They fined some of the players involved in the fracas, and their coach Rudi Straeuli has subsequently warned his players that players guilty of indisclipline will be excluded from the World Cup. This was a welcome turnaround from the coach, who had initially defended the actions of his players at the Twickenham fixture.

Mr. Straeuli has subsequently continued his hard line on discipline. In June 2003, he banned his players from drinking alcohol, carrying mobile phones around with them and having their partners stay in the squad hotel until they had earned their place in the scrum. He has also ordered table tennis and snooker tables to be removed from the team room and replaced by computers, so that players can study their own games and those of their opponents.

Montgomery banned for two years – but is invited by Barbarians

Another South African player to have fallen foul of the game’s disciplinary authorities is Newport full back Percy Montgomery. During a match against Swansea in May 2003, he shoved a match official to the ground. He was charged by the Welsh Rugby Union, and given a two-year ban by a six-man disciplinary committee. However, 18 months of this ban will be suspended and will only come into operation if the player is found guilty of a similar offence within that period. He was also fined £15,000.

This means that Montgomery will be unavailable to his country for the World Cup campaign in the autumn. However, one selection he did not have to do without was for the Barbarians for the game against England at Twickenham, even though he had already been formally charged by the WRU. This caused a good deal of opposition in the game. Montgomery’s club justified the selection on the well-tried grounds that “a man is innocent until proved guilty”, but this was not the view taken by a famous former Welsh Barbarian, Bobby Windsor, the former Lions hooker, who called the Barbarians’ selectors “silly” for selecting someone who had that charge hanging over him.

“Instant yellow cards” for ball killers

Ball killers, in rugby terminology, are those who fail to release the ball quickly enough at the breakdown. They cause a good deal of frustration among the opposition and the paying public alike. Hitherto, players who have been guilty of this practice have first been warned by the referee before the latter takes any action. However, the International Rugby Board (IRB) decreed that, for this year’s Six Nations Championship and beyond, referees should not issue warnings but issue yellow cards immediately. Scrum-halves were also to be penalised for failing to put the ball straight “down the tunnel” into the scrum.

Gloucester benefit from unusual rule exemption

In March 2003, English Premiership side Gloucester were in receipt of a piece of good fortune when they avoided expulsion from the Powergen Cup despite having been in breach of the rules during their semi-final game against Leicester at Franklin’s Gardens. The West Country team finished the game with a makeshift front row, which meant that the last two scrums went uncontested – for safety reasons. Under Rugby Football Union rules, a team is deemed to have lost a match if, after using its front-row replacements, it calls for uncontested scrums. However, a three-man tribunal decided that the result – a 16-11 win for Gloucester – should stand because the scrums were only called off in stoppage time and did not affect the result. It also recommended that the rules governing front-row replacements and uncontested scrums be reviewed.

Gloucester requested the uncontested scrums when
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they ended up with two hookers in the front row – even though one of them, French international Olivier Azam, had started club and international matches at prop. It may have been that the Vowles decision referred to earlier, in which a makeshift front-row forward was awarded damages after breaking his neck in a collapsed scrum (see above, p.59), played a part in the RFU decision, but they could at least have ordered a reply. As it was, they put the onus on Leicester to appeal.° 2159

Three days later, Leicester announced that they would not appeal against the decision. Although the club sportingly wished both finalists well, they made plain their disaffection with the current rules on front-row replacements. In the meantime, a task group, chaired by the RFU's legal officer, Jonathan Hall, has been established in order to consider the regulations and to report to the board of England Rugby as a matter of urgency.° 2160

Grewcock runs out of luck as he is banned
In the previous issue,° 2161, it was related how England lock Danny Grewcock escaped a ban for an alleged assault on England colleague Kyran Bracken because of new evidence which came in the form of a picture taken by a freelance photographer. Mr Grewcock's luck held for his next brush with the disciplinary authorities when he was charged with striking an opponent and with "unsportsmanlike behaviour". The former charge related to an incident involving former Wasps back-row forward Buster White, and resulted in no punishment. The other charge arose from a strange fracas with former Wallaby forward Mark Connors (Northampton) which resulted in Grewcock ripping up the Australian's headguard whilst both were banished to the sin-bin. It resulted in a fine of £500, but once again, no suspension.° 2162

Mr. Grewcock's fortune finally gave out when he faced yet another disciplinary charge, this time arising from an unsavoury incident in a tough Parker Pen Cup final, in which he was seen to land a flurry of punches at the head of his England colleague Lawrence Dallaglio, who was already in a prone position. For this misdemeanour, he was banned for two weeks.° 2163

Rugby Union - Other issues

Russia expelled from World Cup.
One of the emerging Rugby nations which will not be represented at this year's world tournament is Russia. In January 2003, it was expelled form the World Cup for having fielded three ineligible players. It was prompted by a complaint from the Spanish Rugby Union that Russia had fielded three South African-born players – Johan Hendriks, Reiner Volshenk and Werner Pieterse – following a narrow defeat against Russia over two legs during the qualifying stages of the tournament. The Russian governing body claimed that all had a Russian
grandparent and had already been playing for the team for a year. This was dismissed by the International Rugby Board (IRB)° 2164.

The Russians appealed, but the IRB upheld the original decision to expel them. However, the £75,000 fine imposed on the Russian Rugby Union was suspended for three years after it was learned that this penalty could ruin the sport in Russia.° 2165

Round-up of other items (all months quoted refer to 2003, unless otherwise stated)
Martin Johnson. The Leicester and England captain is no stranger to this section of the Journal. This time he was appealing against two yellow cards he had received this season. In fact, he had already incurred three yellow cards – which would normally attract an automatic one-match ban. The first, against Worcester, was conceded by him. His appeal concerned the second, which came in relation to a technical offence at Bath in early February, and the third came with his referral to the sin-bin against Bristol. The three-man disciplinary panel upheld his appeal against the one incurred at Bath, but the one earned at Bristol was maintained. Thus did he escape a ban and was able to play in the Powergen Cup semi-final against Gloucester° 2166.

Neath RFC. The Welsh club were ordered to pay over £20,000 by way of fine and compensation for failing to beat the freeze in January, when they delayed their Heineken Cup match against Béziers by two days.° 2167

Rotherham: all's well that ends well?
The implications for corruption in sport of the affair known as "Rotherhamgate", under which it was alleged that the Zurich Premiership clubs kept a slush fund to bribe Rotherham into remaining outside the Premiership, have already been dealt with (see above, p.140). Regardless of this aspect of the matter, it remained a fact that Rotherham had not been allowed entry to the Premiership, which left the Yorkshire club with no option but to attempt once again to qualify for the top flight in rugby by winning the National League One this season – which they duly did. The question now arose as to whether history would repeat itself, or whether the "upstarts" from the North would be allowed access to the elite.

They managed it in the end, but were made to sweat for it. At first, it looked as though the club’s worst apprehensions could once again be realised as it was learned that their promotion had been put on hold until such time as England Rugby officials obtained more
17. Issues specific to individual sports

Rugby League – Internal Rules and Institutions

“Golden Point” introduced in State or Origin fixtures (Australia)

In May 2003, the Australian Rugby League Board voted to introduce the “golden point” rule for this year’s State of Origin match between New South Wales and Queensland. Under the new system, the teams will play an initial five minutes’ extra time and if scores are still level, they will continue playing until someone scores. Teams will be allowed two interchanges during extra time to help allay concerns about safety.

The Queensland coach, however, opposed the rule, saying that it risked the health of players, whilst Queensland Rugby League chairman Ross Livermore has also campaigned against the move.

Rugby League – Disciplinary cases and procedures

Round-up of disciplinary cases (all months quoted refer to 2003, unless otherwise stated)

Rob Roberts. In January, Huddersfield’s Welsh international was dismissed for disciplinary reasons. He was on a final warning. Mr. Roberts, who played for Wales against New Zealand the previous November, has a history of poor off-field behaviour and was disciplined by Huddersfield in April 2002 after having been found guilty by a Rochdale court of racial aggravation.

Stanley Gene and Darren Fleary. In March, these two Huddersfield players were banned for two and three games respectively for having struck Warrington Wolves captain Lee Briers.

Gary Connolly. In March, the Great Britain veteran, who was recently transferred to Leeds from Wigan, escaped suspension following a reckless high tackle in a game with Hull. A lengthy disciplinary hearing took account of the player’s remarkable record of never having been sin-binned or sent off for foul play in 16 seasons in the sport, and therefore restricted his penalty to a £500 fine.

Leon Pryce. The Bradford and Great Britain back was suspended for two matches in May as a result of a tackle on Castleford’s Danny Orr. The disciplinary panel stressed that the ban would have been longer if they had not ruled that the challenge was accidental.

James Lowes. In March, the Bradford hooker was suspended for one match and fined £400 for his part in a brawl during a Super League match with Wakefield.

Halifax. The Yorkshire club had not been doing particularly well this season, and had succeeded in only winning two points by the end of May. Even this paltry total was removed from them when they were docked two points for breaching the salary cap last season.

Richard Fletcher. In June, the Hull second-row forward, sent off for kicking Karl Pratt of Bradford, escaped a ban because the disciplinary committee considered that his dismissal had been sufficient punishment.

Shayne Mcmenehy. In March, the Halifax back-row was suspended for one game and fined £300 for a careless high tackle against Castleford.

Stuart Fielden. In April, the Bradford prop was suspended for two matches for “ungentlemanly...
conduct” during a match against Hull.  

Des Harrison and Mick Crane. In March, the Hull KR coaches were dismissed by Chief Executive Nick Halafihi for drinking before a match 1216.

Michael Korkidas. In March, the Wakefield prop was suspended for two games and fined £300 for the high tackle which sparked off a brawl at the Odsal Stadium against Bradford 1217.

Rugby League – Other issues

Referees told not to be too familiar with players

In April 2003, the Rugby Football League instructed referees to cease engaging in an “old pals’ act” by calling players by their nicknames. The League established that the use of referees’ microphones in televised matches has caught some officials being over-friendly, and by shouting out nicknames, they risk putting their impartiality at risk. Nicknames are commonly used by referees in Australia, but the RFL are anxious to stamp out this kind of “matiness” without wishing to seem too officious 1218.

Jockeys face mobile phone ban on course in security review

In late January 2003, it was announced that jockeys will be banned from using mobile phones on a course during racing, and trainers from laying any horse on a betting exchange, under new security rules to be introduced by the Jockey Club. The Club will assume responsibility for weighing-room security and install an improved closed-circuit television system in the stables at Britain’s 59 courses. These new measures are a direct response to the series of trials involving members of the so-called Wright gang, which ended last June, and extensively covered in previous issues of this Journal 1220. One of the revelations made during the trials was the testimony of former jump jockey Graham Bradley, who said he had supplied privileged information to suspected cocaine trader Brian Wright from within the weighing room.

Under the new rules, jockeys will not be allowed to use mobile phones anywhere on the racecourse, probably for about half an hour before the first race. A team of a dozen security officers, to be recruited and trained over the next four months, will police the rules 1221.

Not unsurprisingly, the mobile phone ban was not to the taste of jockeys. Shippy Ellis, the jockeys’ agent whose clients include Kevin Darley, stated that this rule probably infringed employment law – as not being able to use them could prevent them from obtaining employment 1222.

Jockey Club ready to hand over power

The Jockey Club has been the guardian of racing’s rules for more than 250 years. In mid-February 2003, it announced that it was ready to delegate its responsibility for regulating the sport to a new body, perhaps as early as next year. The hope is that the new regulator will be seen as a more independent and accountable unit than the current rulers, who will nevertheless retain a role as owner of many of Britain’s major courses 1223.

These proposals, which enjoy the support of Sports Minister Richard Caborn, envisage a new company being formed with an independent chairman and board to assume all the Club’s current regulatory functions. It is expected that the Board will have six members, two of whom will be Jockey Club appointees, whilst the Club’s current staff and racecourse officials will be transferred to the new company 1224.

Betfair moves to help Jockey Club monitor market

In January 2003, betting exchange company Betfair announced that it was to alert its 50,000 customers to the fact that their names and betting details could be forwarded to the Jockey Club for security investigations. The leading betting exchange is seeking
to show that its business is more rigorously policed than traditional forms of bookmaking. The move has been prompted by fears that individuals could exploit betting exchanges, which allow punters to act as bookmakers by laying horses to lose.

Stewards’ inquiries to become open
In December 2002, it was announced that British racing will undergo the most radical change in its day-to-day policing of the sport, with the opening of inquiries to the media. The time-scale for introducing the new procedure is as yet unclear, but according to Jockey Club spokesman John Maxse, it is going to happen. In fact, open inquiries are the norm in countries such as Australia, where the press have been admitted for many years.

No further details were available at the time of writing.

Radical changes planned in handicapping system
These are definitely momentous times for the racing industry. In addition to the changes referred to above, it now appears that the most fundamental change to day-to-day racing for decades will be ushered in next year, with root-and-branch changes to the handicapping system. In January 2003, Greg Nichols, Chief Executive of the British Horseracing Board (BHB), disclosed that 2004 was now a realisable ambition for the introduction of narrow-band handicaps, which will differ considerably from the traditional methods.

The new breed of handicaps will, as their name suggests, have a much narrower weight-range than existing races, with the difference between bottom weight and top weight being as little as 15 lbs – and probably 20 lbs at most. Although the focus for the new handicapping system will be flat racing, it is also expected to apply to National Hunt. It is also expected that there will be a far wider range of handicaps to cater for most standards of horses.

No further details were available at the time of writing.

17. Issues specific to individual sports

Racing – Disciplinary cases and procedures

Fall-out from racing corruption scandal investigation continues
Over the past two years, the world of racing has been rocked by a series of scandals. Investigations carried out by the Kenyon Confronts and Panorama programme, screened by the BBC in the course of 2002, played a prominent part in highlighting some of the corrupt practices involved, as readers will doubtless recall. One of the trainers featured in the programme, who seemed to corroborate the seedy goings-on which the programme sought to investigate, was David Wintle. As a result, he was fined a total of £7,200 by the Jockey Club in early January 2003. He was found to have prevented a horse reaching its best possible pacing, for bringing the sport into disrepute, and for “acting in a violent manner” towards Paul Kenyon, one of the investigative reporters involved.

Mr. Wintle had trained a horse called Seattle Alley for Kenyon, posing as a keen punter hoping to make money from betting, for about two months in early 2002. The horse raced three times during that period without success. At the hearing, the Jockey Club decided that on two of these occasions, Wintle had ensured that Seattle Alley ran in such a way that the horse would not obtain the best placing. Paul Woolwich, the producer of Kenyon Confronts, commented that this amounted to a rather “pathetic slap on the wrists.”

It will also be recalled that, in the wake of this saga, the Jockey Club had identified a shadowy figure alleged to have bribed jockeys. In January, Mr. Coleman, a tailor from Moorgate, London, was warned off for a minimum period of two years at a disciplinary hearing of the Jockey Club. He has been excluded from all premises, licensed or controlled by the Jockey Club, for an infinite period and told that no application to have the exclusion order lifted will be considered before 1/1/2005. Mr. Coleman was found guilty of rewarding the former jockey Barrie Wright from the proceeds of a successful bet based on a tip from him in 1987, soliciting and receiving information from Wright until 1988, often rewarding him with cash or suits, or rewarding other unidentified jockeys for information.

Another trainer whose relationship with the shadowy figure of Brian Wright had been brought to light by the BBC’s television cameras was Graham Bradley. (In fact, Mr. Bradley had already effectively incriminated himself during the trial of the jockey Barrie Wright (no relation to Brian), who in 2001 had been accused (but also acquitted) of drug-smuggling and laundering the proceeds. During this trial, Bradley admitted to having supplied privileged information to Wright (Brian).) This put him in breach of the Jockey Club rules. He was also found to have misled the Club licensing committee by claiming that he had never been asked by Brian Wright whether a particular horse would win and that he had never done anything wrong with him. Accordingly, he was banned for eight years. Mr. Bradley appealed against this decision before an Appeal Board of the Jockey Club, which reduced the ban to five years (although his fines were increased to £3,275) in April 2003. The hearing had been postponed from January because one of the members of the appeals board had fallen ill.

This still meant that Mr. Bradley was “warned off”
17. Issues specific to individual sports

for half a decade, i.e. that he is prohibited from appearing at any race tracks or any other Jockey Club premises. He stated that he was “devastated” by the failure of the Board to reduce the ban by only that amount, and immediately announced that he might appeal to the High Court \(^{1247}\). In fact, he applied for an injunction from the Court in late May, the day before his suspension would have started \(^{1248}\). The outcome of this appeal was not yet known at the time of writing.

**Davids Lad High Court move fails (Ireland)**

Like so many other sports, racing is increasingly finding its way in the annals of court litigation. A good example was on offer when the horse Davids Lad was banned for 42 days by stewards at the Naas racecourse. The nine-year-old had finished last of seven in the two-mile Newlands Chase. The stewards took the view that the chaser was being schooled in public (i.e. that the race was being used as a training exercise), fined trainer Tony Martin £1,000, banned jockey Timmy Murphy for seven days and the horse itself for 42 days. This would rule him out of the Grand National on 5 April \(^{1249}\).

There was a good deal at stake here, since the horse was one of Ireland’s principal hopes for the Aintree event. The horse’s owners first turned to the Appeals and Referrals Committee of the Turf Club (the Irish equivalent of the Jockey Club) but had their appeal dismissed. They then applied to the High Court in Dublin. The Court awarded the owners an injunction, thus obtaining a stay of the Turf Club’s decision \(^{1250}\). This injunction was temporarily lifted by the Court on application by the Turf Club.

The hearing resumed, but was unsuccessful for the horse’s owners, since the High Court dismissed the appeal on 18 March. The owners stated that they could now take the case to Ireland’s Supreme Court \(^{1241}\). Thus far, there is no indication of them having done so.

**Round-up of other items (all months quoted refer to 2003, unless otherwise stated)**

**Jonjo O’Neill.** In February, the former champion who has become a leading trainer was fined £6,000 for infringing the non-triers rule for the third time in fewer than six weeks. Mr. O’Neill indicated his intention to appeal \(^{1246}\).

**Gavin Faulkner.** In May, this jockey was suspended for two months by the Jockey Club, which found that he had acted in a manner that was prejudicial to the reputation of the sport. Mr. Faulkner had been quoted in a newspaper as saying that he was willing to offer to sell inside information and to arrange for a horse to be trained by his brother whilst remaining officially with another trainer \(^{1240}\).

**Simon Whitworth.** In June, this jockey failed in his appeal against a four-day ban for careless riding. He had been found guilty of this offence on Night Prospector at Redcar the previous week \(^{1242}\).

**Richard Hills.** In April, Mr. Hills was banned for 21 days for failing to ride out to the line at Newcastle. This was in spite of having dead-heated for first place in the race. Mr. Hills said he was thinking of appealing \(^{1243}\).

**Richard Hughes.** In May, this rider was banned for five days by the stewards at Goodwood under the non-triers rule when riding Summer View. The horse was also banned from running for 30 days, and trainer Roger Charlton fined £800 \(^{1240}\).

**Darryl Holland.** In May, Mr. Holland incurred a two-day ban for using his whip with excessive force at Wolverhampton \(^{1247}\).

**Tony McCoy.** On the first day of the new 2003 season, Mr. McCoy was banned for two days for excessive use of the whip at Hexham \(^{1249}\).

**Shane Kelly.** In January, this jockey was suspended for 17 days for whip offences at Wolverhampton \(^{1248}\).

**Jim Culloty.** In December 2002, this jockey incurred a three-day suspension after having been found guilty of “dropping his hands” and losing third place in a bumper \(^{1250}\).

**Dean Mernagh.** In January, Mr. Mernagh was banned from riding for 10 days by the Jockey Club after the Disciplinary Committee decided that he had deliberately struck an opposing horse across the face during a race at Southwell \(^{1251}\).

**Brian Murphy.** In February, this jockey was penalised by the stewards at Sandown after having been found guilty of improper riding on Subiacco in the Durkan Group Novices’ Hurdle. After hearing evidence from a veterinary surgeon, the stewards declared that Mr. Murphy, an amateur rider, had broken a Jockey club rule relating to “lame and exhausted horses” \(^{1242}\).

**Tarboush.** This six-year-old was banned from the track for 40 days under the non-triers rule in a race at Ludlow. The jockey, J.P. McNamara, was suspended for seven days, and Brendan Powell, the trainer, fined £1,100 \(^{1253}\).

**Richard Phillips.** In February, trainer Mr. Phillips won an appeal against a ruling by the Haydock Park stewards under the non-triers rule. He had his £1,700 fine
overturned and the horse in question had its 40 day suspension quashed. Full responsibility for the incident was placed on jockey Jodie Mogford, who was already serving a 10-day ban at the time of the appeal hearing.

Eddie Ahern. In April, this jockey received a two-day ban for whip offences at Windsor.

Racing – Other issues

“Company doctor” receives racing role
In March 2003, it was learned that David James, the company doctor credited with saving the Millennium Dome from collapse, was made Chairman of the Racecourse Holding Trust, owner of 13 British racecourses. This is a crucial appointment at a time when racing is facing a major overhaul as a result of the Office of Fair Trading report which has already been examined.

Cricket – Internal Rules and Institutions

Structure of Test cricket “under review”
In March 2003, it was announced that the structure of Test cricket was to be reviewed at a meeting of the International Cricket Council the world governing body in the sport, to be held in the summer. Several options were being studied, one of these being the introduction of a two-tier structure enabling emerging countries to prepare better before facing the leading nations. David Richardson, the former South African wicket keeper who is now the ICC general manager, outlined a possibility whereby the leading eight countries should play each other home and away over a four-year cycle with a series of what would be classified as A matches below that level.

The main reason for these proposals is that some countries recently awarded test status, such as Bangladesh and Zimbabwe, have not improved to the extent necessary to warrant their new status.

Blow to Scottish cricket as ICC cancel World Cup qualifiers
In March 2003, the ICC announced that it had cancelled the World Cup qualifying series tournament, which was due to be launched this year as part of an expanded development programme, because of a serious funding shortfall form the World Cup in Southern Africa. The decision by England and New Zealand to boycott fixtures in Zimbabwe and Kenya (see above, p.14) has contributed towards a threat emanating from television companies and sponsors to withhold money, compelling the ICC to rethink plans for the countries immediately below Test status.

This is a serious blow to Scotland, who were due to make up Division One together with Kenya, Holland, Namibia, Canada and the United Arab Emirates.

Gwynne Jones, the Chief Executive of Scottish Cricket, expressed his resentment at the fact that it was his team which was made to suffer rather than those who were responsible for the problem.

Round-up of disciplinary cases (all months quoted refer to 2003, unless otherwise stated)

Shoaib Akhtar. The Pakistani fast bowler was banned for two matches for ball-tampering during a one-day international against New Zealand in May. The incident had been brought to the attention of the third umpire, Gamini Silva, after television pictures showed close-up shots of the bowler apparently scratching the quarter seam of the ball. He was also fined 75 per cent of his match fee. Mr. Akhtar was nevertheless included in the Pakistan team to tour England in June, although the ban caused him to miss the fist of the one-day internationals to be played there.

Shahid Afridi. The all-rounder was omitted from the Pakistan team to play in the Sharjah Cup in April. He was suspended from the team after being found guilty of using inappropriate remarks (“sledging”, to use the jargon) to Virender Sehwag and Sachin Tendulkar, as well as the umpire, David Shepherd, during a World Cup tie against India.

Mark Vermeulen. The Zimbabwe opening batsman was disciplined and sent home from the England tour for “persistent misconduct”. The decision was taken because of the batsman’s insistence that he would not travel with the rest of the squad following the second day of the Test against England played at Chester-le-Street in June. A disciplinary hearing was held at the team hotel. It emerged that the player had already had several warnings about his conduct on the tour.

Cricket – Other issues

[None]
London marathon pacemaker imbroglio

Pacemakers are not an uncommon phenomenon in long-distance running, but hitherto have given rise to few controversies. All this changed during the run-up to this year’s London Marathon, when it threatened to disrupt the entire event.

In early March, the Marathon organisers ran into controversy when they decided to give Britain’s Paula Radcliffe male pacemakers. Usually the Marathon has separate men’s and women’s races, but this year, Paula Radcliffe requested the organisers to organise it as a mixed race on 13 April in the knowledge that she would be making an attempt on the women’s world record for the event which she set at the Chicago Marathon. By way of compromise, the Marathon’s Board of Directors decided to adhere to the separate race formula, whilst allowing men to pace the women’s event.

This decision, however, aroused a good deal of controversy. Istvam Gyulai, the General Secretary of world governing body IASAF, stated that, whilst this decision was not against the rules as such, it was not within the spirit of the sport to allow the participation of men who had no intention of finishing the race pacemaking the women. And Catherine Ndereba, the Kenyan considered to be Ms. Radcliffe’s closest rival, seriously considered pulling out of the race in protest.

Two days later, Mr. Gyulai announced, that if Paula Radcliffe were to set a world record at the London event using male pacemakers, this would almost certainly not be recognised by the IAAF. Race director David Bedford, in his own racing days no stranger to controversy himself, reacted by claiming that the IAAF General Secretary had “misunderstood what we are trying to do” (although most observers considered that Mr. Gyulai had understood it all too well). The matter was referred to the IAAF Ruling Council.

With a week to go before the race, the Council, meeting in Dakar, accepted the London Marathon scheme. As long as the pacemakers did not actively help the Briton by giving her water or shielding her from the wind, any time in which she completed the course would be recognised by the ruling body. Ms. Ndereba commented that she still disapproved of the system, but had no choice but to participate.
Forty years ago the Eastham restraint of trade judgment of Wilberforce J., who died earlier this year, revolutionized the contractual basis of football and the word sport. It preceded the centenary celebrations of the oldest pioneering football association in the world.

To commemorate the two occasions I contributed to the Law Society’s Gazette, now in its own centenary year, a feature article entitled “The Football Association and the Law” and with permission of the Editor, Jonathan Ames, it is reproduced here to demonstrate how legal life in sport existed before Eastham and Bosman.

The emphasis emerged on legal personalities rather than parliamentary and litigation activity which had emerged clearly before the twentieth century and the media explosion which dominates all sport today. The absence of their involvement in so many of the issues which emerged during the period 1863-1963 does not diminish the contribution which those who are identified created as much as they did on the field of play, as our own generation of lawyers are making off it in the era which has replaced the Victorian Corinthian period.

Indeed, during the year of the centenary, 1963, 100,000 at Wembley Stadium witnessed the joint Oxbridge team defeating Harwich and Parkestan in the FA Amateur Cup final, 6-0. The fixture was an oversubscribed sell-out. Today, the annual Oxbridge soccer fixture, as distinct from its rugby counterpart at Twickenham, rates barely a single line in any national sporting coverage. The name of the game is the same.

Unknown to many, the lawyers have been in the frame from its beginning. Only their role has changed, as this Journal shows in the Association’s 10th Anniversary of its creation.

Edward Grayson
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Founder President, British Association for Sport and Law

The 26th day of October, 1863, saw the foundation of The Football Association. For a century it has exerted a unifying influence upon the growth of our national winter game into the world’s most popular international sport. Generally it has reflected the nation’s social development: from the Public School Old Boys and University XI’s which contributed the bulk of its early international players and Cup finalists to its present status as a public entertainment and is a game in which ethical standards consciously pervade disciplinary control. The impact of the law on these first hundred years of organised football is not apparent to the undiscerning eye but for those who care to see, the contribution made towards the centenary by the profession and in particular by the solicitors’ branch of this profession, has not been negligible, not least of all during this Centenary Year.

The consequences and practical effects of the judgment of Wilberforce, J., in Eastham v Newcastle United F. C. and Others [1963] 3 All E.R. 139 have yet to be worked out. The players’ contract in issue at the hearing differs in certain respects from the form of contract introduced during the season 1962/63. Furthermore, the judgment did not surprise those who had cause to consider the position in advance of the action – those, for example, who had read the contributions to a discussion in The Observer newspaper during 1959. Some months before the dispute in the Eastham case arose, a letter to the Editor was published in The Observer, over the signatures of the then President of the Football Association and the then President of the Football League. This letter began: “In reply to the article ‘Q.C.’s Opinion on Soccer Contracts’, which appeared in last Sunday’s Observer, we the undersigned, think your readers should know that the Football Association and the Football League have always understood that the agreement between a club and a professional footballer is not enforceable by law”, Wilberforce, J., confirmed this understanding.

Away from the law courts, during this Centenary Year, on the field of play and in the administration of the game, three lawyers, all solicitors, assisted in no small
way towards the honours panel which appears at the end of each competitive season. M. J. Pinner (admitted 1962) achieved a playing distinction which may well be an all-time record for an amateur footballer by obtaining his fiftieth amateur international cap for England as its goalkeeper and also appearing in his third series of Olympic Games. To these experiences should be added his captaincy of Cambridge University against Oxford on his fourth appearance in the annual "Varsity Soccer Match at Wembley Stadium, and his selection for Football Association touring sides in the Far East and in East Africa, for Pegasus in The Football Association Amateur Cup Competition, and as an amateur player for the following professional clubs in the Football League competition, Aston Villa, Chelsea, Leyton Orient (with whom he currently appears), Manchester United and Sheffield Wednesday and for Queens Park Rangers in The Football Association Challenge Cup competition. These attainments are unique in either branch of the profession. On the administrative side, solicitors are represented by H. P. Hardman (admitted 1907) and J J Dunnett (admitted 1949), the chairman respectively of Manchester United, the current Football Association Challenge Cup holders, and of Brentford, the champions at the other end of the professional scale, Division IV of the Football League.

H. P. Hardman is unique among lawyers in that he alone has played for England in both amateur and full international XI's, in the days before the First World War, when he also appeared for Great Britain's successful Olympic Games team in 1908 and for both the Everton XI's which played in the F.A. Challenge Cup competition in 1906 and 1907, winning the Cup in 1906 but losing to Sheffield Wednesday in 1907. On all these occasions he played at outside left. His F.A. Cup winners' medal is a distinction shared with only one other member of the profession, a member of the Bar, J. F. P. Rawlinson, who kept goal for Old Etonians in their victory over Blackburn Rovers in 1881, the last occasion when an amateur team won the F.A. Challenge Cup. He later gained his full international cap in the days before amateur international matches began. To this he in due course added a Silk's gown in which he appeared for an Aston Villa footballer, H. Kingaby, in an action against that club on grounds similar to those in the Eastham case, but without a similar success.

Rawlinson's opponent in the front row on that occasion was Montague Shearmarke, later Shearmarke, J., an athlete acquainted with the front row under the other football code at which he had obtained an Oxford Blue. It was Shearmarke who in the first edition (1887) of Athletics and Football in the "Badminton Library" distinguished the game played at Rugby School in the early 19th century from the "more or less modified forms of the kicking game" adopted at other schools. "The Association or 'kicking' game, he claimed, "came before the world from Eton, Harrow, Westminster, Charterhouse, and other schools where something of the same style of game was played". This caused a committee of Old Rugbeians to set up in 1900 the tablet which appears on the garden wall of the headmaster's house and refers in positive terms to what William Webb Ellis is alleged to have done in 1823. I write alleged, because as H. C. Bradby in his Rugby (1900) has pointed out, the only evidence for attributing to Ellis the first carrying of the ball was hearsay: for a Mr Matthew Bloxam, who suggested it, was not an eye-witness. To complete the picture first outlined by Shearmarke, J., the modern handling code did not take shape until the Rugby Union was formed, in 1871, with the substantial assistance of Blackheath

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Football and the Law in Perspective

Football Club which, in December, 1863, had formally withdrawn from the newly formed Football Association upon its decision to omit from the first laws of the game the then current practice of hacking.

Apart from Shearman J., the only other judicial associates of the game whom I have been able to discover are two former Lord Chief Justices of England. Shortly before the First World War Lord Alverstone became an active President of the Amateur Football Association—a break-away movement from the parent Football Association, formed by many of the latter’s founder-member amateur clubs. This association became the Amateur Football Alliance (as it is today) upon its return to the fold on the eve of the First World War. More recently, Lord Goddard, a half-blue at Oxford for athletics, writing on his feelings about cricket to J. W. Goldman (admitted 1914) in a letter which appeared in that distinguished cricket collector’s illuminating Cricketers and the Law (1958), concluded with the intriguing comment, “Football was another ‘cup of tea’ altogether”.

It was certainly more than another cup of tea for a group of lawyers who did so much to create the legend of the fabulous Corinthian Football Club before the turn of the century. Solicitors were represented by W. R. Moon (admitted 1891) in goal, A.M. Walters (admitted 1889) at right-back, and C. Wreford-Brown (admitted 1897) at centre-half; the Chancery Bar by the brother of A. M. Walters, P. M. Walters, who ultimately became a Bencher of Lincoln’s Inn, and the Common Law Bar and the Midland Circuit by Tinsley Lindley. Of him it is said that his father-in-law, Sir Francis Burnand, the Editor of Punch, would ask his after-dinner guests as the port went round to recite Tinsley Lindley’s name three times—adding, “If we pass muster, we are fit to join the ladies”. Of C. Wreford-Brown it may be recalled that, in addition to captaining England’s professionals while himself an amateur, he became chairman of the full International Selection Committee of The Football Association before the Second World War. They all played regularly for England beside the professionals in the full international side, and as recently as 1939 the immortal C. B. Fry wrote of the brothers Walters, from his standpoint as a contemporary Corinthian, that “with Moon in goal they formed the best defence England ever had against Scotland”. When Moon died, The Times recalled that “in the days when charging the goalkeeper, whether in possession of the ball or not, was legal, his long reach and agility enabled him to punch out shots while attackers were rushing at him”.

There were other solicitor-goalkeepers between Moon and Pinner, in a different but no less distinguished context. G. E. Wilkinson (admitted 1906) gained three blues at Oxford, played regularly for Corinth and, at cricket, for Northumberland. D. R. Jardine (admitted 1926) is best remembered for his cricket captaincy. In 1920, however, he kept goal for the Old Wykehamist XI which defeated Old Malvernians in the Arthur Dunn Cup Final, and in 1930 H. M. Garland-Wells (admitted 1937), another cricket captain, and the first Old Pauline to receive a soccer blue-at Oxford, won his amateur international cap. During this decade, the last member of the Bar to distinguish himself on the association football field, so far as I can trace, made his appearance. J.H.A. Sparrow is now the Warden of All Souls’ College, Oxford, after a distinguished career as a Chancery Junior. In the late 1920’s he appeared at inside forward with a famous Corinthian international centre-forward, C.T. Ashton, in successive Old Wykehamist XI’s which won the Arthur Dunn Challenge Cup.

There were other members of both branches of the profession besides Wilkinson, Jardine and Garland-Wells, who achieved fame in both cricket and football. The Hon. Alfred Lyttleton, for the Bar, became, during the 1870’s and 1880’s, the first of that select band of a dozen double internationals, and although he played football against Scotland at the Oval, it is his Test Match appearances against Australia on the same ground that are remembered more readily. F.E. (better known as Sir Francis) Lacey, also a member of the Bar, kept goal against Oxford before he began his career as-to quote his obituary in The Times – “a great Secretary” of M.C.C. He received cricket’s first knighthood. Finally, the solicitors’ branch of the profession is represented by R. N. R. Blaker who played at centre-forward for Corinth in the same XI as C. B. Fry, and left still more lasting memories of his achievements as a cricketer with Kent.

The days of the amateur footballer playing alongside professionals, except from the goal-keeping position as demonstrated so ably by M. J. Pinner, are now perhaps numbered-although M. G. Tracey (admitted 1959) has
created a fresh precedent in that, after obtaining England international amateur caps and a F.A. Amateur Cupwinner's medal, he joined Luton Town and Lincolnshire City as a professional. However, on the administrative side of the game, the contribution of the profession at the highest level is exemplified by four north country solicitors, Sir Charles Clegg (admitted 1864), Charles E. Sutcliffe (admitted 1886), W. C. Cuff (admitted 1894) and Sir Amos Brook Hirst (admitted 1901), the Chairman of both the F.A. Council and of Huddersfield Town in its post-war halcyon days.

Of Clegg, The History of The Football Association records that when he was knighted in 1927 he was "the first man in history to be so honoured for his services to Association football". He played in the first match between England and Scotland in 1872; he refereed the F.A. Cup Finals of 1882 and 1892; he joined the F.A. Committee (as it was then called) in 1886; within four years he was elected a Vice-President and Chairman, and "henceforth, for forty-seven years he was to be perhaps the dominating personality in the Council Chamber. Grave of manner, though not without a sense of humour in its proper place, he was a man of few but well-chosen words, with the keen observant air of a lawyer...as solid as the oak furniture itself".

W.C. Cuff was President of the Football League at the outbreak of the Second World War. He succeeded C. E. Sutcliffe in 1936 and had already been the Vice-President of The F.A. since 1919. Cuff, writing of Sutcliffe, recalled that he first came into prominence as a referee. He will always be remembered as the referee who once sent off five players in one game (it was eventually unfinished) and in another game disallowed seven goals before allowing one. His obituary in The Times read: "Perhaps Mr Sutcliffe will be best remembered as the man who, naturally trained in law, compiled the intricate fixture list for the 88 Football League clubs". In this task he was succeeded by his son, Harold (admitted 1926), who to this very day carries on the system whose intricacies can be found described with great clarity in the judgment of Upjohn, J., in Football League Ltd. v. Littlewoods Pools Ltd. [1959] 2 All E.R. 546.

The machinery of the law has drawn back the curtain from football administration. Two examples before Eastham's case occurred in the early 1950's and mid-1930's. In 1951, under s. 168 of the Companies Act, 1948, the Board of Trade published for the first time reports by the Inspector appointed under s.164 of the same Act. These reports shareholders, pursuant to the Act, had requisitioned for the purpose of investigating the affairs of the Bristol Rovers Football Club Limited. Many findings on matters directly related to the inquiry in issue, as well as on matters of general interest, appear in the Original and Further Reports, but I have often recalled the following statement under the heading of "Propositions" (at page 34) in relation to the Inspector's suggestions for the future: that "in view of the experience of the past, too many members of the Board gave absorbed attention to the Team Manager's sphere of interest, to the exclusion of the legal, financial and administrative affairs."

Perhaps it had occurred to the directors of the Tottenham Hotspur Football and Athletic Company Limited in the mid-1930's that the same fate might befall their famous club if they could not block an attempted take-over of their own directors' shares and those of other shareholders, with the object of turning out the then Board. In fact, the directors followed the articles of association which allowed them to decline to register any transfer of shares and further provided that they should "not be bound to specify the grounds" upon which the registration was declined. The disappointed transferees purported to administer interrogatories to the company for the purpose of finding out why they had been rejected. The Master refused leave, and Crossman, J., upheld his decision. The case is reported appropriately on the back pages of (1935) Ch.718.

Today the Spurs go marching on; so does The Football Association, and also the game it has administered for a century. Today, the scope for the legal profession to make, as players, a similar contribution to the game as in the past may perhaps be restricted; but justice in the law and fair play in sport have been twin strands throughout our heritage.
Unfair Dismissal – Clubs must avoid own goals when issuing red cards

By Richard Santy
Hammonds Solicitors

It is amazing how many times the public hear about the demise of a football Manager before the Manager himself. Whilst fans are often calling for the resignation of the Manager when things are not going well, employers cannot simply use the Manager as a scapegoat in order to please the fans. The increase of litigation in this area is frightening many clubs.

Huddersfield Town learnt a painful lesson earlier this year, after its former Assistant Manager Joe Jordan was awarded £31,000 compensation when an Employment Tribunal ruled that he was unfairly dismissed from his job. He was not the only one to suffer. Manager Lou Macari was also dismissed, however, the remainder of his contract was paid in full, and he has not attempted to challenge the Huddersfield board, as yet.

Joe Jordan was on a fixed term contract that ended on 31 May 2002. The Club assumed, as many employers who employ workers on fixed term contracts do, that it would simply be the case that if they did not want to renew Mr Jordan’s contract, that was their prerogative. The Fixed Term Workers’ (Prevention of Less Favourable Treatment) Regulations 2000 dictate that it is not that simple. In order to avoid a claim, employers cannot refuse to renew fixed term contracts if they do not have a fair reason for doing so. They must always focus on the reason for wanting to dismiss the employee to ascertain whether it will fall within one of the ‘5 fair reasons’ under the Employment Rights Act 1996.

Jordan is not the first Manager to succeed in a claim for unfair dismissal. Indeed there has been a recent trend within the industry showing an increase in sportsmen realising that they do actually have employment rights the same as everybody else. In December last year, Lothar Mattheus, former Manager of Austrian Bundesliga club SK Rapid Wien, also brought a claim for unfair dismissal and lost earnings against the Club. He was sacked from his coaching post due to comments made in a magazine interview in which he referred to the Club as “a snakepit”, even though he had retracted his statement and apologised for his comments. His claim was eventually settled out of court for an undisclosed sum.

The incident at Huddersfield was not Lou Macari’s first experience of the heavy hand of the Board. Indeed, in 1999 he took Celtic Football Club to the Scottish Court of Session after being dismissed for failing to follow reasonable management instructions. After a fall-out with the new Board of Directors, Macari was asked to move nearer to Glasgow for the better performance of his job as Manager and refused. He did not attend Celtic Park any time between 20 May 1994 and 11 July 1994 and was therefore dismissed for failing to comply with a lawful management instruction, namely failing to abide by the contractual residence clause in his contract and failing to report to the Managing Director on a weekly basis. In this case the Club was successful and Macari lost his claim. This trend is not only limited to Managers. However, players do not appear to have been as successful in Employment Tribunals. In January 2003, Chelsea confirmed the decision to sack Mark Bosnich following his positive test for cocaine. Bosnich argued, unsuccessfully at first instance, that he had been unfairly dismissed after advisors had told him that Chelsea should not have acted the way they did. He is, however, appealing the decision.

If the dismissal is for a reason of misconduct rather than simply performance, it is more likely that sportsmen will be dismissed fairly. This is something that Tony Pulis found out at Gillingham and at Portsmouth, as did Dave Jones at Southampton. Similarly, back in October, Dennis Wise sued his old
club Leicester City for more than £2.3 million in lost earnings over his sacking back in August.

Wise was dismissed for breaking the jaw of a fellow player, Callum Davison, jaw during a pre-season friendly tour in Finland. Wise challenged his dismissal, however, a four man Tribunal panel ruled that Leicester were well within their rights to sack him. Wise has now commenced civil proceedings for wrongful dismissal for a similar sum, and if Leicester are ordered to pay, it would be disastrous for their financial recovery.

It is more difficult, however, for clubs to justify a dismissal for performance if a proper procedure has not been followed. How do clubs judge a player or a manager’s performance? By the amount of goals they score? By the amount of goals they concede? By the club’s league position? It is very difficult for clubs to follow a conventional disciplinary procedure.

What the public fails to see is what happens behind the scenes with football clubs who are unhappy with Directors management and players who, in their eyes, or the eyes of the fans, are not performing. Lawyers can often be called in to advise the Board as to how they can best reach a mutual agreement with the Manager, often including substantial payments to staff in order to persuade them to sign compromise agreements. It is only then that they are unable to bring claims for unfair dismissal.

The financial situation of many football clubs means that the threat of claims being made by its staff cannot be ignored. Whilst most employers feel that in today’s society it is inevitable that they will face some claims, the remuneration involved in sportsmens’ contracts means that clubs need to be increasingly vigilant in the methods they use to discipline employees. Leicester City will not be in a position to pay Dennis Wise his £2.3 million even if he is successful. Similarly, Huddersfield have had to agree a payment structure with Joe Jordan to pay his £31,000.

The bottom line is that sports clubs will no longer be able to take the harsh line with staff who are not performing. Instead they will have to ensure that adequate policies and procedures are in place to deal with any issues and legal advice in an employment context will become invaluable and essential if clubs are to avoid hefty pay-outs.

In January 2003, Chelsea confirmed the decision to sack Mark Bosnich following his positive test for cocaine. He was given 14 days’ notice that his contract was to terminate as is agreed under the Football League’s standard terms and conditions.
Salary Caps – The Legal Analysis

By Jonathan Taylor and Mike Newton

1 Introduction
1.1 The UK football industry has experienced a 20% increase in revenue each year for the past decade. However, since 1995, player salaries have increased by 30% per year.
1.2 Why 1995? That was the year of the Bosman judgment, which started the process of removing restraints on movement of players from one squad to another. The result was massive escalation in player wages.
1.3 For example, most FA Premier League clubs spend a seemingly unsustainable proportion of their turnover on player wages: 70%+ in 2001/02, compared to 60% in 2000/01 and less than 50% in 1996/97.
1.4 The wage inflation is driven by a desire to compete not only on the domestic stage but also in UEFA cross-border competitions against elite foreign clubs. The biggest clubs, driven to capture the riches of European competition, are paying players millions of pounds a year.
1.5 The pyramid system of promotion and relegation means that wage inflation also trickles down to the lower leagues. In fact, it is exacerbated, since the financial incentives of promotion to the Premier League prompt massive economic gambles. In 2001-2002, First Division clubs spent an average of 101% of their turnover on salaries (with a range of 53% to 101%).
1.6 The lure of a trophy/promotion, or more often the threat of relegation, drive very short-term thinking. Anecdotal evidence suggests that most FAPL clubs would rather do a commercial deal that delivers £1 million today than £5 million next season, because with the £1 million they can buy a striker who might score a goal that will win them the points to stay in the Premiership. If the furthest horizon is the next match, then it is easy to see why wage inflation has got so out of control.
1.7 While revenues were increasing (nearly) apace, the dangers were not so apparent. Post-ITV Digital, however, financial reality has descended, and many clubs find themselves in desperate financial straits as a result of unsustainable wage bills.
1.8 Decreasing revenues focus attention on cost controls, and in particular wage restraint. One apparent solution would be a restriction in the rules on the amount of money that each club can pay on player wages, ie a salary cap. Indeed, this is the clear conclusion and advice of Deloitte & Touche, who have developed an impressive and significant body of data on football finances over the past few years.
1.9 This paper considers the key features of some of the major capping systems in place around the world. It then looks at the practical and legal issues that would confront such a mechanism in the UK and Europe.

2 The Objectives of a Salary Cap
2.1 Proponents of a salary cap claim that it is necessary in order to (a) maintain the economic viability of teams competing in the league; and (b) preserve competitive balance between clubs.
2.2 Sport is of interest to the public, and therefore to broadcasters and sponsors, only because of the excitement and drama generated by uncertainty of outcome. Uncertainty of outcome in turn requires competitive balance. If there is a great disparity in the ability and resources of individual clubs, then the outcome of the contest will be predictable and public interest in the league will decline. Conversely, the more uncertain the outcome, the greater the interest will be in the league.
2.3 Thus, whereas economic actors in other sectors benefit from the failures of their competitors, sport clubs have a vested interest in creating an environment in which their competitors are able to present effective (and therefore exciting) opposition. Put differently, the fundamental economic principle that the public interest is best served by unrestrained competition in a completely free market environment simply does not apply in the sports sector.
2.4 The law has proved flexible enough to take this unique characteristic of professional sport as an
economic activity into account. In his opinion in Bosman, Advocate-General Lenz considered that restrictions agreed under the auspices of a sports governing body are lawful if they are necessary ‘to ensure by means of specific measures that a certain balance is preserved between the clubs’. 13 He accepted that ‘a professional league can flourish only if there is no too glaring imbalance between the clubs taking part. If the league is clearly dominated by one team, the necessary tension is absent and the interest of the spectators will thus probably lapse within a foreseeable period’. 14 He concluded by agreeing ‘entirely’ with the view ‘that it is of fundamental importance to share income out between the clubs in a reasonable manner’. 15

2.5 The European Court of Justice accepted this reasoning in its judgment in the Bosman case, recognising as legitimate objectives that may justify certain restrictions on the twin goals of ‘maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players.’ (See para 8.8, below).

2.6 The same fundamental principles have now been accepted by the UK competition authorities 16 and courts, 17 as well as by the European Commission 18, whose former Competition Commissioner has said:

Whatever type it may be, one aspect is common to all sports: in order to ensure a quality event which interests the spectator, there must be an element of uncertainty concerning the results of the competition. For this reason, a balance of forces between the adversaries, i.e. the competitive equality of opportunities, is essential. This is why, for example, certain individual sports such as golf have introduced a handicap system. In team sports, teams are divided into divisions or leagues for the duration of each sporting season. The economic aspect of sport is linked to this peculiarity, which stems from the fact that the production of a sporting event is not possible with just one team or player (the sporting event is a product which results from competition between teams, or at least between two players). This interdependence between competitors, most pronounced in team sports, is a characteristic which is unique to sport and distinguishes it from other industrial or service sectors. In effect, in industry or service sectors, the competition between businesses aims to remove inefficient companies from the market, so that only those companies which are efficient and viable remain. On the other hand, in the sports sector, clubs have a direct interest not only in the continued existence of other clubs, but also in their economic viability as competitors, with a view to maximising the spectator’s interest and as a consequence, the income from sale of the sporting event. The need to guarantee the uncertainty of the results of competitions and the interdependence between competing clubs are therefore aspects which are completely peculiar to sport which justify the restrictions on competition, but which do not exclude the existence of competition between clubs. This competition is, in any case, both singular and paradoxical because each club aims to end the season with the best score, but at the same time, each club has a direct interest that the success of other clubs of the same standard should also continue. A club cannot aim simply to maximise its financial benefits and to remove competitors from the market. The maximisation of success without any regard to the financial aspects is no more desirable either. The objective should be more that of obtaining the best results in the competitions, and thus the prestige, on condition of making a minimum profit. The profitability varies with success, and success depends essentially on the quality of the players and the synergy within the team, and all of this in a context of interdependency between clubs and the guarantee of the uncertainty of the results. In this logic of global interest, the market is unstable by nature as long as there is a financial imbalance between the clubs. This imbalance must therefore be rectified ...

2.7 The law accepts, then, that a broad playing base of competitive teams is an absolute prerequisite to an exciting and attractive sport. Therefore, if a salary cap is indeed necessary to achieve such a playing base, then it would seem to have a strong defence to a legal challenge. In the next section, we consider some of the different types of cap that have been used in professional sport. It is noteworthy that a cap may serve the stated objectives more or less directly or effectively, depending upon its features.

3 Types of Cap currently in use

3.1 The Hard Cap

(a) An absolute limit on the amount that a team is allowed to pay its squad of players per season. This may be expressed as a fixed sum, or it may be calculated as a percentage of total league income, divided by the number of teams. For example:

(i) In the US, the NBA introduced a hard salary cap in 1984, in an effort to increase player buy-in and control costs at a time when the sport was struggling to survive. It has risen from $3.6m in 1984 to over $40 million now. However, there is a major carve-out, known as the ‘Larry Bird’ rule. Boston Celtics superstar Larry Bird was out of contract in the first season of the cap, and it was felt that the strain on the system of such a superstar being available would drive teams to breach the cap before it even got going. Therefore
Salary Caps – The Legal Analysis

payments made to re-sign ‘franchise’ players are not counted towards the cap. As a result, the NBA cap is really a form of ‘soft’ cap (as to which, see para 3.2).^{20}

(ii) The NFL’s salary cap is 55% of league revenues, divided by the number of teams. It currently stands at $72.2m per season. The Commissioner has the power to levy fines of up to $3.5m for transgressions. The NFL is widely regarded as one of the most competitively balanced professional leagues in the world, although this can also be attributed to substantial revenue sharing and a stringent draft pick system. (iii) Importantly, both the NBA and the NFL impose not only a ceiling but also a floor, i.e. the players are guaranteed to receive a minimum percentage of league revenues.

(iv) In the NHL, owners’ attempts to introduce a luxury tax (see para 3.3, below) were thwarted in the labor dispute of 1994-95. In the resulting settlement, however, a hard salary cap on rookie players was introduced, starting at $850,000 in 1995, rising to $1,075,000 in 2000. In addition, any player between the ages of 25-31 may sign for another team at the end of his contract but his new team will forfeit draft picks. The current agreement is due to expire in 2004 and there are rumours that the team owners would like to impose a hard salary cap at all levels.

(v) Australian Rules football operates a hard salary cap.^{21} It includes an important player safeguard, in that only 5% of the salary cap can be made conditional upon performance.

(vi) Rugby clubs competing in English rugby union’s Zurich Premiership operate a hard salary cap of £1.925 million per season (or about 68% of turnover).^{22} This has been credited with keeping the sport afloat during the difficult early years of professionalism.^{23} However, the sport’s recent financial struggles have led to calls for players to accept wage cuts for the future of the game.^{24}

(vii) The UK Ice Hockey Superleague also operates a number of hard caps in its different divisions. Currently, the top division operates a hard cap of £400,000, but many of its members are struggling to survive. The second tier operates a cap of £120,000, and there is talk of a merger between the two leagues.

(viii) The British Basketball League operates a hard salary cap, currently set at £175,000 per team for the season 2002/2003. Failure to stay under the cap leads to a system of graded fines. Breaching the cap by up to 10% greater than the permitted sum leads to a fine equal to the excess. Breaching the cap by more than 10% can lead to a fine of three times the excess. The Chief Executive also maintains the ability to deduct league points for salary cap offences in “exceptional circumstances.”^{27}

(b) Clearly and rationally related to both underlying objectives, i.e. both competitive balance and financial survival.

(c) Inherently discriminatory. If set too high, it will not achieve competitive balance; if set too low, it unfairly penalises successful clubs and is a disincentive to further investment.

(d) Also very restrictive on competition in the market for the services of players.

3.2 The Soft Cap

(a) A relative limit on permissible salary payments, usually expressed as a percentage of the team’s income.

(i) Rugby league clubs competing in the UK’s Superleague competition have operated a “soft” cap since 1998. The cap was introduced not to create competitive balance, but to prevent rugby league from collapsing as a professional sport.^{28} No more than 50% of a club’s income (or £700,000, whichever is the greater) may be spent on player salaries. However, income (and therefore total salary outlay) varies from club to club, undermining competitive balance. The cap has therefore been “hardened” by a number of moves. In 2000, a rule was introduced that a club could pay more than £20,000 to no more than 20 players in its squad, to prevent stockpiling of players. This was followed by an absolute cap of £1.8 million for the 2002 season.^{29} Breaching these rules results in a graded level of sanctions, mainly in the form of points deductions and loss of prize money.^{30}

(b) Clearly designed to achieve financial survival, and some evidence that it is effective in doing so.^{30}

(c) Less restrictive on competition than a hard cap. Provides an incentive for all to develop business/grow revenues. This includes players: they have an incentive to perform, since increase in club revenue will lead to increase in allowable expenditure on salaries.

(d) But see Hornsby: “When broadcasting and other commercial revenues are in decline, “soft” caps may therefore prove self defeating and provoke consolidation.”^{31}

(e) Will not achieve competitive balance unless the income to which the percentage applied is common income, e.g. from central contracts, in which case it is effectively a hard cap in any case.

3.3 The Luxury Tax

(a) A team may spend whatever it likes on salary payments, but anything it spends over a certain
level is subject to a 'luxury tax', which is then redistributed to the other (less wealthy) teams. For example:

(i) After the players’ rejection of a proposed soft cap led to a labor dispute that accounted for most of the 1994 Major League Baseball season, MLB introduced a luxury tax system, imposing a 35% tax on the amount of a payrolls over a given sum: $51m in 1997, $55m in 1998 and $58.9m in 1999.\textsuperscript{33} Agreements for the next few seasons put the tax threshold at $120.5m for 2004, $128m in 2005 and $136.5m in 2006.\textsuperscript{34} No club exceeded the threshold in 2000, and for seasons 2003-06 only the New York Yankees, Texas and Los Angeles teams are likely to do so. The players’ union has recently accused the owners of colluding to restrict the growth of player salaries.\textsuperscript{35}

(b) Goes some way towards achieving competitive balance and (through redistribution of revenues) financial health.

(c) Much less restrictive than hard or soft cap.

3.4 Do they work?

(a) Gerry Boon asserts: ‘It is clear that salary capping can pave the way towards profitability (or a break-even position if that’s the goal).’\textsuperscript{36} However, he cites only the NFL example, which is a hard cap.

(b) Stephen Hornsby asserts that ‘a flat cap can assist competitive balance and all varieties of cap actually help to maintain output (in the form of financially viable clubs and leagues) which is what competition law is supposed to promote.’\textsuperscript{37}

(c) Nick Tsatsas agrees: ‘... 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.’\textsuperscript{38}

(d) See also Harris: ‘[Rugby league’s soft cap] is generally acknowledged to have contributed to a new financial discipline amongst clubs, amongst other things preventing wages spiralling out of control and dragging more clubs into the financial mire.’

4 Current proposals for European Football

4.1 In 1999, UEFA set up a task force to consider the problems of financial viability of clubs; it was reported that salary caps were item one on the agenda.\textsuperscript{39}

4.2 In May 2001, UEFA followed up by indicating that it wished to generate a public debate about the pros and cons of introducing salary caps to European football;\textsuperscript{40} and in May 2002 the G-14 clubs announced their support.\textsuperscript{41}

4.3 In Italy, AC Milan vice-president Adriano Galliani, backed by Lazio owner Sergio Cragnotti, has proposed the introduction of a soft cap for Serie A clubs of 80% of revenues, starting with the 2003/04 season.\textsuperscript{42}

4.4 In November 2002, the G-14 group of clubs announced ‘recommendations’ (to be incorporated into a ‘code of conduct’ for its members, but it hoped non-members would follow suit) that clubs aim by 2005/06 to be spending no more than 70% of annual turnover on player wages.\textsuperscript{43}

4.5 In 2002, the Football League was reported to have mooted the introduction, for the start of the 2002/03 season, of a soft cap starting at 60% of turnover, and reducing to 50% in the longer term.\textsuperscript{44}

5 Practical Issues

5.1 Those advocating a salary cap must address a number of practical issues.

(a) Setting the cap

5.2 In relation to a hard cap, the first key issue is where to set the cap. ‘If set at the level of the highest earners then the cap will have no effect since the playing field will remain unlevelled. If at the lowest, the larger teams will be badly affected and have to sell players.’\textsuperscript{45}

5.3 In relation to a soft cap, and focusing on financial viability, Deloitte & Touche have said that a salary cost of 50% of turnover represents careful management, while a salary cost of 66% of turnover is unlikely to be sustainable in the long term.\textsuperscript{46}

(b) What counts towards the cap?

5.4 In soft cap situations, it will clearly be vital to define and police what may be counted as income for purposes of determining a club’s salary cap.

5.5 In rugby league’s Superleague system, there is a rigorous definition of salary cap income that is designed to capture all income from playing and playing-related activity. ‘Salary Cap Income’ is defined to include all income generated by the club from football-related activities. This excludes profits from the sale of fixed assets, as well as transfer fees, but includes all gross profit generated by the club from commercial activities as well as all other income. Any payments that a club makes to a player, including not only contract and match bonus remuneration, but also any other payments received in his capacity as a player and any payments made to companies in which the player has a direct or indirect financial interest.\textsuperscript{47}

5.6 One specific problem for all sports, but particularly football, is payments for use of image rights. To the extent that a club pays a player not for his playing performances but for the right to use his image in its commercial programme, both parties achieve tax savings and benefits: whereas income tax and NI
contributions are deducted from salary payments on a PAYE basis, and the employer also has to pay employer NI contributions on such sums, no such deductions/payments have to be made in relation to sums paid to an intermediary service company in return for the grant of the right to use a player’s image. However, this has led to controversy as to whether a particular ‘image rights’ payment is really a salary payment in disguise, and if a salary cap is instituted then the salary cap enforcers will be following the same analysis as the Revenue. Indeed, the famous case involving Dennis Bergkamp and David Platt of Arsenal was brought because the Revenue believed Arsenal was falsely characterising payment for playing as payment for image rights in a bid to circumvent the club's strict wage structure.

5.7 Another question that Harris asks is, why stop at the players? If the backroom staff are worth having, they will affect competitive performance and thus their salary costs should count towards the cap.

(c) Transitional periods

5.8 Once the bar has been set, there is then the problem of transitional periods. To deny clubs the ability to adjust over time would result in hardship for clubs with players on big contracts, even if they had been financially sound before the cap. Maurice Lindsay, chairman of Wigan RLFC, defended the decision of the Super League to allow Wigan to exceed the cap by £500,000 in order to meet its contractual obligations. However, the ‘Larry Bird’ exception in the NBA (see para 3.1a(i)) makes a mockery of the NBA's 'hard' cap.

(d) Cross-border issues

5.9 Preserving competitive balance through the use of a salary cap has complicated implications in the European Model of Sport system, where the elite teams from different countries play each other in UEFA cross-border competitions. Any system would have to apply to all clubs throughout Europe. The English rugby union clubs have recently pointed out that in the Heineken Cup and the Parker Pen Shield and Challenge Cup they are competing against French sides (for example) who are not constrained by a formal salary cap when they compete for the services of the top players. See eg The Daily Telegraph, 28 January 2003: the impact of the industry recession on clubs is likely to see squads reduced in size and a freeze on the £1.925 million wage cap, if not a reduction. Already, Saracens have imposed a 10 per cent pay cut on their squad. 'It would seem that clubs are paying more than they can afford in the current climate.' said Peter Wheeler, chief executive of Leicester, who are one of only two clubs, Northampton being the other, to turn a profit in the Premiership. Wheeler, though, sounded a warning note to those who might look to slash the wage cap as an easy means of curbing expenditure. 'Do that and you’d pretty soon have our best players heading off to France or into Super 12 to play,' he said.

5.10 The same problems apply, of course, within the national system, to the extent that there is promotion to and relegation from the premier league. In fact, the promise of promotion and the threat of relegation are drivers of wage inflation (see paras 1.5 and 1.6, above), and yet competitive balance would be undermined if there were different wage caps from one division to the next.

5.11 There are also legal reasons why the cap would arguably have to be Europe-wide. To do otherwise would be to introduce a huge distortion into the market. Worse, the distortion would be such as to partition national markets and hinder the free movement of players. For example, let’s say the cap operated only in England. No top player from Italy would want to transfer into the English market where his wages would be artificially constrained. Thus, if only selectively introduced in national markets, one would have horizontal price constraints (that is, the fixed wages) amongst cartels of buyers (the clubs in the leagues that apply the cap) resulting in partitioned national markets (those same national leagues) and obstacles to the free movement of EU citizens (the top European players).

5.12 There are various non-sporting obstacles to institution of a Europe-wide salary cap:

(a) The first of these is that of different purchasing power. The economy in which Locomotiv Moscow operates is in very different to that in which AC Milan operates in. For a non-star player, a package in Moscow will be worth considerably more than the same amount spent in Milan. Thus a cap set to Milan’s wage-bill will be meaningless to Moscow, and the opposite unfair on a team that happens to come from an area where the cost of living is expensive.

(b) See also Gardiner and Gray: Presumably, one argument would be that salary caps would need to be set at the same level in each national league. However, there are clearly great economic distinctions between different countries and leagues in Europe. If, in the context of a European Super League, there was differentiation between leagues, and the cap was
set in Italy and Spain to accommodate the likes of AC Milan and Barcelona, it would put clubs like Dynamo Kiev or Galatasaray at a clear disadvantage. This would indeed create competitive imbalance.

(c) There is also the issue of exchange rates. If the cap is set in Euros, a UK team will be subject to fluctuations in a way that a French team will not. This could be positive or negative, but in any event even a small movement of the exchange rates will mean a big change to the budget.

(d) A further issue is differences in income tax regimes. Differences between national tax authorities in relation to the treatment of ‘image rights’ payments (see para 5.6) have already led to competitive disadvantages for clubs of particular countries in attracting leading overseas players to their shores.

5.13 Evasion of payment restrictions is not new. Possibly the earliest example can be drawn from the “shamateur” days of rugby union. Whilst nominally an amateur game (and thus having a hard cap of zero), its opponents noted the propensity to claim “expenses” from its very early days. For example, the captain of the inaugural tour to Australia in 1888 took home £200 for his time and expenses.

5.14 Harris points out: “... [It] seems likely that there would need to be some sort of transnational UEFA police force (no doubt hotly pursued by the tabloid press), charged with inspecting all the personal arrangements between clubs and players and players’ families, friends and business associates. It is hard to imagine how such a situation could be good for the players and the game.”

6 Are Salary Caps legal?

(1) The Analytical Framework

(a) Employment law

6.2 While there is some limited legal recognition of collective bargaining between employees and their employers under UK law, the products of such bargaining are not given special status in law, such as an exemption from the competition law ban on agreements that have the object or effect of distorting competition in a relevant market (see para 6.8, below). Indeed, they are presumed not even to be intended to be legally binding unless express provision is made to the contrary.

6.3 This is in stark contrast to the position in the United States (as to which, see para 7.3, below), but what it means is that there are no collective bargaining regimes or other aspects of UK employment law that would appear to impact upon the analysis of the legality of a salary cap under UK law.

(b) Free movement

6.4 A rigorous hard cap applied throughout Europe would not, on its own, restrict free movement of EU/EEA citizens within the common market. However, if a cap was applied less than uniformly, and/or if it was combined with specific restrictions on player movement, then the free movement provisions of the EC Treaty might well ground a challenge to such a cap.

6.5 However, the analysis, even under the free movement rules, would boil down fundamentally to the same issues as under competition law: are the restrictions reasonably related to a legitimate objective and are they proportionate, ie do they go no further than is necessary to achieve that objective?

(c) Competition law/restraint of trade

6.6 Salary caps amount to agreements between competitors not to compete freely with each other in the market for the services of players. They are effectively horizontal agreements between competitors as to how much they will spend on a key service that they all require in order to create their ‘product’. They could also be characterised, in certain circumstances, as an abuse of a dominant position.

6.7 As a result, by far the most important basis for legal scrutiny will be the EC and UK statutory competition law regimes, with their prohibitions of collusive conduct and abuses of dominant positions, and the common law counterpart, the doctrine of restraint of trade.

(i) The prohibition on collusion between undertakings.

6.8 Article 81(1) (ex 85(1)) of the EC Treaty prohibits ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...’.

6.9 Similarly, s 2 of Chapter I of the Competition Act 1998 prohibits ‘agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK; and which have as their object or effect the prevention, restriction or distortion of competition within the UK’ (the ‘Chapter I prohibition’).

6.10 Where an agreement is caught by EC Art 81 or the Chapter I prohibition, it will be void and unenforceable as between the parties to it. However, an agreement that falls within the scope of Art 81 may be exempted if it satisfies the
conditions set out in Art 81(3), ie if it: contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and ... does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

6.11 Similarly, s 4 of the Competition Act 1998 provides that agreements may qualify for exemption from the Chapter I prohibition, provided they satisfy the same substantive conditions.

(ii) The prohibition on abuse of a dominant position

6.12 Whereas EC Art 81 is aimed at collusive conduct by two or more undertakings, EC Art 82 (ex 86) addresses monopolistic behaviour, prohibiting "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it ... ". As the wording suggests, undertakings acting in combination may have a dominant position capable of abuse within the meaning of EC Art 82.

6.13 Chapter II of the Competition Act 1998 mirrors Art 82, prohibiting any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in a UK market that may affect trade in the UK.

6.14 Unsurprisingly, it is not possible (under either the EC Treaty or the UK Competition Act) to grant an exemption for conduct that constitutes an abuse of a dominant position. However, the factors considered relevant to the grant of an exemption under Art 81(3) (see para 6.10, above) may be relied upon to demonstrate that conduct alleged to be abusive is in fact compatible with EU competition law.

(iii) Restraint of trade

6.15 The common law doctrine of restraint of trade classically relates to a term of a contract. However, it is not limited to contractual provisions, but extends to restraints imposed by a league. A player could challenge a salary cap on the basis that it improperly restrains his ability to market his services to the highest bidder. Indeed, a club could also challenge the cap on the basis that it prevents it from competing with its rivals. Fundamentally, the core analysis is the same as under statutory competition law: broadly speaking, a contractual term or league rule that restrains an individual's ability to 'ply his trade' is prima facie unenforceable and will only be upheld if its proponent can show that it goes not further than is necessary to protect a legitimate objective. However, the focus is on the effect of the restraint on the complainant; wider issues of market definition and impact on trade are generally avoided.

(iv) Remedies for breach of competition law/restraint of trade

6.16 The parties to an anti-competitive agreement, and/or third parties who have been injured as a consequence of an anti-competitive agreement, may bring a private cause of action in the English courts for breach of the Competition Act 1998 and/or of Arts 81 and/or 82 of the EC Treaty (which have direct effect in the UK), seeking a declaration, an injunction, or possibly damages. A similar action lies at common law for restraint of trade, except that no remedy in damages is available.

6.17 An alternative course under the competition rules is to file a complaint with the European Commission under the EC competition rules and/or the Office of Fair Trading under the Competition Act. It is also possible, though it does not happen often in practice, that the regulatory authorities may initiate an investigation of their own accord.

6.18 In cases where infringements of the competition rules are established, the Commission has the authority to fine the parties involved up to 10% of group worldwide turnover. Similarly, the OFT has the power to impose fines of up to 10% of UK turnover for each year of the infringement, up to a three year maximum. In the sports sector, the power to impose fines has not been exercised meaningfully to date, which is not surprising given the complexity of applying the competition rules in this sector. However, the power to fine is a significant tool in the hands of the regulator.

7 Are Salary Caps legal?: (2) The Decided Cases

(a) The United States

7.2 Substantively, US antitrust law is very broadly equivalent to EC and UK competition law. Like Article 81 of the EC Treaty and Chapter One of the Competition Act 1998, section 1 of the Sherman Act forbids agreements between undertakings that have the effect of substantially reducing competition on the market on which they operate. Section 2 of the Sherman Act forbids the willful acquisition or maintenance of monopoly power on a market. This is the US's version of Article 82 of the EC Treaty and Chapter Two of the Competition Act, although those provisions introduce expressly
the concept of abuse of a dominant position.

7.3 As a result, it might be expected that US antitrust law would be highly illuminating when it comes to considering the potential impact of EC and UK competition law on European sport. Frustratingly, however, that is not the case. Salary caps in US professional sports have survived antitrust attack because they are deemed to be restrictions agreed as part of a collective bargaining arrangement and therefore to be covered by the ‘labor exemption’ to the antitrust laws. The players have formed themselves into associations that became labor unions that engaged in collective bargaining with the team owners under national labor law. The collective bargaining arrangements negotiated by the player associations and the team owners are exempt from US antitrust law. Therefore, salary caps, draft picks, etc. are immune from antitrust attack without the need for any analysis of market definition, pro-competitive effects, etc.

7.4 According to Professor Gary Roberts, the US’s leading sports law academic, most commentators are agreed that absent the labor exemption, a salary cap would not survive a challenge under the antitrust laws.

(a) In 1989, the NFL devised a ‘development squad’ system under which each team was permitted to sign as many as six rookies or first-year free agents who could practice but not play with the team. The NFL unilaterally imposed a standard $1,000 a week salary on players in the development squad, to ‘promote competitive equality under fiscally responsible circumstances.’ In Brown v. Pro Football, Inc., 1992 WL 88039 (DC 1992), the court granted the players summary judgment on their antitrust claim that the owners’ agreement to fix salaries was a price-fixing restraint that was illegal under the antitrust laws. It found that the rule necessarily eliminated competition between the buyers of the players’ services, and prevented the players from marketing their skills to the highest bidder. It also found that the alleged pro-competitive benefits of the cap did not even begin to outweigh the anti-competitive effects. The jury awarded the 235 developmental squad players damages of $10 million, which was trebled under antitrust statutory provisions to $30 million.

(b) This decision was subsequently overruled by the Supreme Court, but not on its merits, but rather on the basis that the salary cap, although unilaterally imposed after an impasse with the players’ union, fell within the collective bargaining exemption and therefore was immune from antitrust review.

7.5 The other relevant US decision involves Major League Soccer (‘MLS’).

(a) MLS is a fairly unique sports structure, with the league itself owning all of the teams, and investors investing in the league rather than individual teams. Although investors do then run individual teams, there is a highly centralised approach to the commercialisation of the sport, which includes a centralised approach to the engagement of players to play on the teams. The investors/team operators have agreed not to hire players directly. Rather, a player’s only option is to contract with MLS. MLS then assigns star players to specific teams, ostensibly in an effort to preserve competitive balance, and puts the remaining players into a draft open to all of the teams. Crucially, MLS rules include minimum and maximum amounts that may be paid to a player, as well as a rule capping the aggregate salaries that a team may pay to its players. The purpose of these restrictions is said to be to avoid destructive competition between the teams for the services of players, such as was blamed for the demise of MLS’s predecessor, the North American Soccer League.

(b) In order to avoid falling into the ‘labor exemption’ to the antitrust rules, the players voted not to form themselves into a labor union to engage in collective bargaining with MLS. Instead, in 1997, less than a year after MLS commenced operations, eight players, acting on behalf of all professional soccer players employed by MLS, filed suit in federal court in Boston against MLS, the nine MLS investor/team operators, and the US Soccer Federation. They alleged, among other things, that (1) MLS and the investor/team operators had conspired together, in violation of section 1 of the Sherman Act, to eliminate competition in the market for the services of players by agreeing that only MLS - and not any of the teams acting individually - would bid for players’ services; and (2) that MLS and the US Soccer Federation had conspired together, in violation of section 2 of the Sherman Act, to retain a monopoly on the market for the organisation of professional soccer in the United States, again in order to avoid competition on the market for the services of the players.

(c) The claim of breach of section 1 of the Sherman Act was dismissed prior to trial on doctrinal grounds. However, the section 2 claim went to a jury in September 2000. The plaintiffs alleged that MLS monopolised or attempted to monopolise the market for top-level soccer in the US. The players’ alleged relevant product market was that of Division One professional soccer players, and their
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alleged relevant geographic market was North America.

(d) The jury found as a matter of fact that MLS does not have a monopoly on the market on which it operates. Rather, it competes for the services of football players with both minor and indoor football leagues in the US, and professional leagues in Europe and South America, many of whom have far more market power than MLS and the US Soccer Federation combined. On the market so defined, neither MLS nor the US Soccer Federation nor the two of them combined has any substantial market power, let alone the monopoly or close to monopoly power that are prerequisites to a Sherman Act section 2 claim.

(e) On appeal, the First Circuit declined to interfere with the jury’s findings.15

7.6 The MLS decision flags the issue of market definition as an important aspect in any competition law case. Theoretically, for example, the Football League could rely on the decision in support of an argument that a salary cap agreed solely among its members does not have an appreciable effect on the market properly defined, because players who might play for Football League clubs might also play for any number of other leagues in the UK and in Europe (or even the US). It is worth noting, however, that issues of market definition are not decided by juries in cases involving UK or EC competition law.

(b) Australia

7.7 It was left open in Adamson v New South Wales Rugby League (1991) 100 ALR 479, 27 FCR 535; on appeal 103 ALR 319, 31 FCR 242, whether the salary cap in place in Australian rugby league was legal. The parties had all assumed it was and therefore there was no challenge upon which the court had to rule. However, it could be argued (for what it is worth) that the appellate judges made various remarks suggesting that if a salary cap achieved its objectives of financial viability and competitive balance then it might be deemed a reasonable restraint for ‘restraint of trade’ purposes.

(c) The United Kingdom

7.8 In Johnson v Cliftonville Football and Athletic Club Limited and Irish Football League Ltd70 the Chancery Division considered an action for a declaration that rules of the Irish Football League limiting player wages to a maximum of £12 a week were an unreasonable restraint of trade. The case was effectively brought by the Irish PFA as a test case.

7.9 The court found that the rules did amount to a restraint of trade: the player was free to sign and play for anyone, but he was not free to negotiate the terms on which he would play. The court then found that the defendants had not met their burden of providing that the restraint was reasonable. The defendants argued that the rules prevented the wealthiest clubs capturing all of the best players, and that a free market would put some clubs in serious financial difficulties. The first justification was rejected for lack of evidential support. The second was rejected on the following basis: In short, this is an argument to the effect that football boards need to be protected from their own financial folly. ... The evidence led by the defendants was quite inadequate to sustain such a case. ... It seems to me that I could not find that it is reasonable for the League to retain the maximum wage regulation for players in order to save the clubs from financial disaster unless I had had before me a general survey of the finances of the clubs in the League and an expert opinion based on that survey to the effect that such a disaster is at least a real risk.

7.10 Proponents of a salary cap might take some encouragement from Johnson. The court did not criticise the justificatory arguments per se but rather found them not to be sustained on the facts. And the facts surrounding the part-time league competition in Northern Ireland in 1984 are very different from those relating to the professional leagues in England today. The gulf between them is underlined by the fact that the court thought the contribution of supporters clubs to the finances of the clubs and the players would be a real safety net.

7.11 In contrast, the writings of Deloitte & Touche on the subject already support the proposition that, based on a general survey of finances of clubs in the English professional leagues, a salary cap is required in order to save the clubs from financial disaster. (See eg para 1.8, above).

8 Are Salary Caps legal?:

(3) Applying the Analytical Framework and the precedents

(a) Do salary caps fall within the ‘sporting exception’ to the EC rules?

8.2 The European Court of Justice has emphasised several times that ‘the practice of sport is subject to Community law to the extent that it constitutes an economic activity’.74 As this implies, rules that are inherent to the nature and/or necessary for the organisation of sport itself, as opposed to how it is exploited commercially, fall outside the scope of the EC Treaty, even if they have an incidental economic impact, provided that they are applied in an objective, transparent and non-discriminatory way and that they are ‘proportionate’, ie that they...
8.3 On first blush, a salary cap would seem to be far too economic in object and effect to fall within the ‘sporting exception’ to the EC rules. However, there is scope for debate on the issue:

(a) The Commission itself has acknowledged that ‘the interdependence and indeed the overlap between these latter two levels render the application of competition rules more complex.’ Most sports regulations have as their object the preservation of one or more aspects of sport that make it such a popular ‘product’ for consumers. Similarly, many of the perceived restrictions on the commercialisation of sport are reflections of the same regulatory objectives. For example, the ‘collective selling’ rules and ‘black-out’ rules that restrict the manner of exploitation of broadcasting rights to elite football events derive from regulatory concerns to preserve and broaden the competitive playing base of the sport.

(b) Thus, in Mouscron, the Commission stated that ‘the rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not, in principle, caught by the Treaty’s competition rules ...’

(c) For example, a transfer ‘deadline’ has clear sporting objectives, namely preserving the regularity and proper functioning of competition by avoiding changes to playing squads late in the season that would distort the course of a championship. On the other hand, such a deadline clearly restricts the ability of clubs to compete with each other, as well as freezing temporarily the market for the services of players. Nevertheless, the European Court of Justice has indicated that transfer deadlines are necessary for the proper functioning of sport and do not offend either free movement or competition principles, provided they remain ‘proportionate’ to their legitimate sporting objectives.

8.4 Nevertheless, in the authors’ view, an argument that a salary cap is inherent in the sport and therefore falls within the ‘sporting exception’ to the competition rules is unlikely to succeed.

(b) Does the ‘rule of reason’ analysis take a salary cap outside Article 81(1)?

8.5 Where a rule or practice cannot be categorised as a ‘rule of sporting conduct’, and so as falling within the ‘sporting exception’ to the competition rules, it still does not automatically follow that the rule or practice infringes Art 81(1) and/or the Chapter I prohibition. Certain arrangements that appear on their face to be restrictive may actually turn out, when considered in the broader context, to be pro-competitive and/or to improve the quality of the ‘product’ made available. Such arrangements do not infringe the competition rules.

8.6 In the sports context, this ‘rule of reason’ doctrine provides an important potential defence to a competition law challenge to a provision that has too significant an economic object and/or effect to be characterised as a mere sporting rule. Indeed, it can be argued that the doctrine has particular resonance in the sports sector, where it is accepted that certain forms of co-ordination or restraint between ‘competitors’ are necessary for the sporting ‘product’ to be created in the first place. (See paras 2.2 and 2.3, above). The two stated objectives of salary caps - financial viability of clubs and competitive balance between them (see para 2.1, above) - are particular manifestations of that.

8.7 An important example of the application of the rule of reason comes from the Commission’s decision in the ENIC case, where it was stated that the legality of UEFA’s rule on common ownership of clubs depends on ‘whether the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions.’

8.8 The European Court of Justice recognised the essential role of competitive balance in the context of professional team sports, in the famous Bosman case:

In view of the considerable social importance of social activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.

8.9 Both objectives are reflected in the justifications proposed for salary caps. Competitive balance is a direct justification, while preserving the financial viability of clubs amounts to ‘encouraging the recruitment and training of young players’ in that it expands the number of opportunities for such recruitment and training.

8.10 As a result, the law would appear to recognise as legitimate objectives (a) the preservation of clubs/credible competitions; and (b) the encouragement of competitive balance between those clubs in those competitions. Therefore, if a ‘restrictive’ sports rule or practice is necessary to achieve those objectives, then provided that it does not go further than is necessary to achieve that balance, on a ‘rule of reason’ analysis it may
be considered to be pro-competitive and not to infringe EC Art 81 or the Chapter I prohibition.

8.11 The proviso is an important one. In Bosman, the transfer rules were held to serve the purpose of both encouraging competitive balance and encouraging the recruitment and training of young players, but they were still deemed illegal because it was considered that there were less restrictive means of achieving these goals (eg redistribution of television revenues) than restricting the ability of players to move freely in the labour market.

8.12 If one focuses on the objective of preserving competitive balance, there do seem to be a number of less anti-competitive mechanisms than a salary cap to achieve that aim. Indeed, the luxury tax mechanism mentioned above (see para 3.3) seems an excellent way of preserving competitive balance without imposing overly restrictive rules on clubs.

8.13 On the other hand, if one focuses on the stated aim of a salary cap of preserving the financial viability of clubs, assuming it could be demonstrated that a cap is necessary to achieve that aim, Hornsby takes the view that a hard cap could pass the ‘rule of reason’ analysis. Provided therefore that the factual case for a “hard” cap can be made out, ie it can be demonstrated that but for the cap there will probably be no competition and therefore nothing produced in “downstream” markets, there is no a priori legal reason why the severe restriction on the clubs’ liberty under a “hard” cap should amount to a restriction of competition falling within the competition rules. ... For essentially the same reasons, a “hard” cap is a reasonable restraint of clubs’ and players’ trade.

8.14 Hornsby believes that a soft cap would not pass muster, because it would not preserve competitive balance, but would simply preclude weaker clubs from saving themselves.

8.15 Harris would accept that if a cap is required to save a league from financial meltdown, it should be defensible, but he does not accept that we are yet at that point: ‘In exceptional circumstances salary caps may be legal, but they would not be legal at this point in time in English professional football. The basic problem is that a salary cap would operate too restrictively on players and there is (as yet) no overriding imperative requiring such restrictions.’

8.16 While some might quibble with that, Harris’s next objection, that a salary cap is not the least restrictive means of achieving the financial viability of clubs, is far more difficult to resolve:

(a) ‘The legal battleground is, therefore, justification of those interferences or restraints by reference to the interests of the parties concerned, which justification is not easy to show. It is easy to envisage a case framed to highlight the direct, immediate harm to a range of players’ interests while at the same time emphasising other, less restrictive measures that would probably be less discriminatory and more effective to improve competitive balance (such as better distribution of income). In such circumstances a cap may be unenforceable. However, the situation may be very different where the cap is vital to the continued existence of the sport on financial grounds.’

(b) ‘[A]lthough a salary cap is a tool that can potentially aid in constructing or maintaining the “competitive balance”, it is too blunt a tool. It greatly interferes with individual freedom of contract/trade, and does so to a larger extent than is reasonable and necessary in the interests of the competitive balance. As such, it may well amount to a common law restraint of trade. ... A better way to prop up clubs that are performing poorly financially, if that is thought appropriate, is to provide them with more funds from other sources within the game, rather than to penalise the players who, perhaps more than anyone else, can seek to reverse the club’s sporting, and hence financial, misfortunes.’

(c) Cf Tsatsas:

Repayment sharing is not the answer. Whilst the biggest clubs are willing to share some of their revenues 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, repayment 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.

(d) As noted above (see para 4.1), in 1999 UEFA set up a task force to consider the problems of financial viability of clubs. The task force reportedly
suggested that some form of salary cap was desirable, but recognised that it could only be implemented in the context of a broader licensing system, which is now being piloted in various countries. The licensing system addresses good financial management, and may include liquidity as a criterion, ie theoretically at least it may replace the need for a salary cap.

(c) Could market definition save a salary cap?

8.17 Even if a rule or practice under challenge cannot be shown to fall outside the scope of Art 81 or the Chapter I prohibition as a rule of sporting conduct or a pro-competitive "restraint", that still does not necessarily mean that Art 81 and/or Chapter I are infringed. To establish a breach of Art 81 or of the Chapter I prohibition, it is necessary to show not simply that the rule or practice in question is restrictive (for example, as between the parties to the dispute at hand) but also that the rule or practice has an appreciable effect on competition on a relevant market. 59 Similarly, to establish a breach of Art 82 or the Chapter II prohibition, it is necessary to show that an undertaking occupies a dominant position on a relevant market. Therefore, a key element in any competition law analysis is defining the relevant market: a broad definition of the relevant market may lead to the conclusion that the rule or practice under scrutiny has no appreciable impact on competition and/or that the defendant has no dominant position, which brings the case to an end. 60

8.18 The MLS decision from the States (see para 7.5, above) flags the potentially dispositive impact of market definition in a competition law-based challenge to a salary cap. As noted above, theoretically, the Football League could rely on the decision by analogy in support of an argument that a salary cap agreed solely among its members does not have an appreciable effect on the market properly defined, because players who might play for Football League clubs might also play for any number of other leagues in the UK and in Europe.

(e) An individual exemption for a salary cap?

8.19 As noted above, even if the sporting exception, the rule of reason, and the market definition analysis fail to prevent a conclusion that a salary cap falls within the prohibition on collusive conduct under EC Article 81 and/or the Chapter One prohibition, it is possible to ask the competition authorities to grant an individual exemption from that prohibition (see paras 6.10 and 6.11, above).

8.20 Very broadly speaking, the agreement must be shown to support legitimate aims that benefit consumers and constitute the least restrictive method of achieving such aims. As such, the analysis is very similar to the rule of reason analysis (see para 8.5 et seq, above), and for that reason it might be queried whether, if the rule of reason analysis has proven unavailing, the exemption analysis under Article 81(3) will be of any further help.

8.21 As regards the sports sector, although various arrangements have been notified, there have been relatively few decisions to date. 58 However, the Commission has attempted to develop an analytical framework for assessing sports-related arrangements notified for negative clearance and/or an exemption, and has set out its views in a number of policy papers and public statements. For example, a DG Competition Paper published in May 1998, on the subject of 'Broadcasting of Sports Events and Competition Law', 59 stated as follows: The special characteristics of the sport in question have to be taken into account. These could include, for example, the need to ensure 'solidarity' between weaker and stronger participants, or the training of young players, which could only be achieved through redistribution of revenue from the sale of broadcasting rights. Such aims would have to be a genuine and material part of the objectives and ones which could not be achievable under less restrictive arrangements.

8.22 In April 2000, the Commissioner in charge of Competition (Mr. Mario Monti) commented 60 that the aim of the Declaration on Sport annexed to the Treaty of Amsterdam was to: emphasise the social significance of sport and in particular its role in 'forging identity and bringing people together'. The Commission's Helsinki Report on Sport reaffirmed this view. The Commission therefore considers it appropriate to apply the competition rules in a way which preserves sport's essential social and cultural benefits. Therefore, exemption from the competition rules of arrangements which provide for a redistribution of financial resources to (for example) amateur levels of sport may be justified if necessary to retain those benefits.

8.23 It seems, therefore, that when applying the competition rules of the EC Treaty to the sports sector the Commission is willing to take a rather different set of criteria into account than would be the case in relation to more conventional industries or service sectors. There is no reference in Art 81(3) of the Treaty to the need to preserve 'social and cultural benefits'. Nor is it immediately obvious that ensuring 'financial solidarity' between competitors is a benefit within the meaning of Art
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81(3). It appears that what the Commission is trying to achieve here is a kind of sui generis framework for analysing and assessing sports rules and structures against the background of Community competition law.

8.24 Whatever the theory, the fact is that in relation to the FIFA transfer rules, the Commission accepted a settlement (without formally granting an exemption) that included various fairly substantial restrictions on free movement of players, including narrow transfer windows as well as penalties of up to six months out of the game for breaching contractual commitments.

8.25 Therefore, while there are clearly significant obstacles in the way of the granting of an individual exemption, there may be a ray of hope to those considering proposing a salary cap to the Commission.

8.26 It would seem to be very important to have buy-in from the players’ unions, eg the PFA and/or FIFPRO. On the other hand, it would not appear to be sufficient: ‘... the presence of a collective agreement does not in itself absolve the “hard” cap or the “soft” cap. What counts is whether the agreement infringes Article 81(1) rather than its collective character. Clearly, if a “hard” cap is agreed collectively, so much the better; but the absence of such agreement is not fatal to it any more than the presence of a collective agreement exempts a “soft” cap where ... there are good grounds for it being prohibited under Article 81(1).’

8.27 The burden of proof would appear to remain firmly on the proponents of any cap:

(a) The Commission was reportedly quick to fire a warning shot across the bows of the G-14 members’ May 2002 salary cap proposal. General Manager Thomas Kurth has since been quoted as follows: We have been talking to the European Commission and the EC is aware of the problem and they are prepared to look into solutions that, maybe in the past have not been possible in Europe. But as the current laws exist, the salary cap principle is not possible in Europe.

(b) Similarly, Mike Lee, UEFA spokesman, has been quoted as follows: If there’s real desire and cooperation among the clubs [for a salary cap, the licensing system] strengthens UEFA’s ability to make it work. But if we issued regulations tomorrow, it wouldn’t stand up and we’d be taken to court.

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2 Since then, of course, the 2001 post-Bosman transfer compact negotiated by FIFA and UEFA with the European Commission have removed other restraints on player movement created by the traditional transfer system.
4 Ratios of turnovers to wage expenditure in Europe are as high as 90% in Portugal, 75% in Italy, 69% in the Netherlands, 84% in France, and 50% in Germany. Broom, ‘A time for Salary Caps - the financial case’ [2002] 10(1) SATJ 118. In Italy, Serie A reportedly managed to generate a loss of €273m on revenues of €1.72bn for the 2000-1 season. See Hornby, ‘Why there is now no alternative to salary caps and why they are probably legal’ [2001] 88(3) Sports Law Administration & Practice 1-2.
5 Broom, ‘A time for Salary Caps - the financial case’ [2002] 10(1) SATJ 118.
8 See eg ‘Predictable’ FA Cup is losing interest of fans, (2001) Spontical.com, 19 February. See also Veljanovski ‘Is Sports Broadcasting a Public Utility?’ (Paper to IEA Seminar, 18 October 2000). The appropriate analogy is handicapping in horse racing, where the natural advantages of better horses are evened out in order to increase the uncertainty of outcome and make the race more of a gamble.
9 See Re an Agreement between the FA Premier League and BSkyB [2000] EMLR 78, [1999] UK CLR 258 (Restrictive Practices Court, 28 July 1999), judgment at 98: ‘an important element in the maintenance of the quality of the Premier League competition is competitive balance; that is to say the unpredictability of the outcome of a high proportion of the matches played within the competition and thus uncertainty about which club will win the championship’.
10 See eg Re an Agreement between the FA Premier League and BSkyB [2000] EMLR 78, [1999] UK CLR 258 (Restrictive Practices Court, 28 July 1999), judgment at 99: ‘an increase in financial inequality will tend to result in a reduction in competitive balance’. See also United States v National Football League 116 F Supp 319, 323-24 (E.D Pa 1953). ‘Professional teams in a league, however, must not compete too well with each other, in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably ... The net effects of allowing unrestricted competition among the clubs are likely to be, first, the creation of greater and greater, inequalities in the strength of the teams; second, the weaker teams being driven out of business; and, third, the destruction of the entire League’.
11 ‘An important element in the maintenance of the quality of the Premier League competition is competitive balance’.
12 See Kinsella and Daly European Competition Law and Sports’ (2001) 4(3) Sports Law Bulletin 7 (‘For this reason, complete regulatory and sporting rules exist to try to make the sporting and, to a degree, economic playing field as level as possible’).
14 Id at 219.
15 Id at 223.
In 2002, the European Union introduced salary caps to control the spending of football clubs. This was in response to concerns about the growing financial disparities between clubs and the impact on the competitiveness of the game. Salary caps were seen as a way to level the playing field and ensure that results were not determined by financial strength alone.

Hornsby, in his paper ‘Why there is no alternative to salary caps and why they are probably legal’ (2001) 9(2) Sports Law Administration & Practice, 1-2, notes that a soft cap does not achieve the stated aims, while a hard cap does (and is therefore more likely to withstand legal challenge).

Gardiner and Gray, in ‘Will Salary Caps Fit European Professional Football?’ (2001) 4(3) Sports Law Bulletin 14, argue that salary caps are needed to control the spending of football clubs and ensure that results are not decided by financial strength.

Hornsby, in ‘The harder the cap, the softer the law?’ (2002) (10) 2 SATLJ 142, 143, states that a soft cap does not achieve the stated aims, while a hard cap does (and is therefore more likely to withstand legal challenge).

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70 (1984) 1 NL 9, C h-D.
72 See eg Delégue v Ligue Francophone de Judo et al, Joined Cases C-51/96 and C-191/97, [2000] ECR I-2459, para 43. See further Mario Monti, European Commissioner for Competition Policy, Commission press release dated 9 August 2002, IP/02/2111: ‘[R]ules drawn up by sporting organisations to ensure in a proportionate manner the integrity of sporting events … fall outside the scope of Community competition rules’.
73 ‘Commission debates application of its competition rules to sports’, Commission press release dated 24 February 1999, IP/99/133. See also Reding ‘Commission’s investigation into FIFA’s transfer rules; Statement to European Parliament’ (7 September 2000, DN: Speech/02/280): ‘The Commission recognises the autonomy of the sports movement to establish the “rules of the game” that are inherently necessary. The Commission accepts the specificity of sport in that the game requires a certain degree of competitive equality between players and clubs in order to ensure the uncertainty of results that is its essence. The Commission investigates only cases that have a Community and an economic dimension’.
76 See also Tsatsas, ‘Is it time for English football to adopt a salary cap?’ [2001] 9(2) SATLJ 128, 129.
77 See eg Wouters v Algemeene Raad, Case C-308/99, ECJ [2002] All ER (EC) 190, points 37 and 110 (‘not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the agreement occurs, including the underlying motives and the effect of the agreement’). Commission Decision of 27 June 2002, rejecting ENIC’s complaint under Article 81(3) of the Treaty, it is necessary to consider whether, taking account of the economic context in which it is to be applied, its object or effect is to restrict or distort in an appreciable manner competition within the common market …’ (emphasis in original).
79 See ‘Commission debates application of its competition rules to sport’, Commission press release dated 24 February 1999, IP/99/133: ‘Sports also have features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results in competitions, which could justify that sporting organisations implement a specific framework, in particular on the markets for the production and the sale of sports events’. See also Competition Commissioner Marco Monti ‘Sport and Competition’, ‘Rules of the game’ (DN Speech/01/94: Brussels, 26 February 2001): ‘It is necessary to consider whether, taking account of the economic context in which it is to be applied, its object or effect is to restrict or distort in an appreciable manner competition within the common market …’ (emphasis in original).
81 See eg Wouters v Algemeene Raad, Case C-308/99, ECJ [2002] All ER (EC) 190, points 37 and 110 (‘not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the agreement occurs, including the underlying motives and the effect of the agreement’). Commission Decision of 27 June 2002, rejecting ENIC’s complaint under Article 81(3) of the Treaty, it is necessary to consider whether, taking account of the economic context in which it is to be applied, its object or effect is to restrict or distort in an appreciable manner competition within the common market …’ (emphasis in original).
82 See also Tsatsas, ‘Is it time for English football to adopt a salary cap?’ [2001] 9(2) SATLJ 128, 129.
85 Claudio Harris, ‘What position do team salary caps play in the game of competitive balance?’, [1999] 7(3) SATLJ 31.
86 Claudio Harris, ‘What position do team salary caps play in the game of competitive balance?’, [1999] 7(3) SATLJ 31.
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Rhythmic gymnastics - doping - presumption of guilt and burden of proof - invalidity of testing procedure

KABAEVA V FEDERATION INTERNATIONALE DE GYMNASTIQUE

TAS 2002/A/386 Court of Arbitration for Sport sitting in Lausanne (President: Mr Dirk-Reiner Martens, Arbitrators: Mr Raj Parker and Mr Denis Oswald), 23 January 2003 (Reporter: MO)

Facts
1. Alina Kabaeva was a rhythmic gymnast and member of the Rhythmic Gymnastics Federation of Russia (“the Russian Federation”). While competing in the Good Will Games in Brisbane in August 2001 she underwent a random doping control test. The test was carried out by an IOC accredited laboratory and showed the presence of “Furosemide”, a prohibited substance, in her A sample. Before the offence was proved Kabaeva had the right to have her B-sample analysed.

2. Kabaeva requested the analysis of the B sample but neither she nor the Russian Federation was told of the date and time that the analysis would take place. The analysis of the B-sample confirmed the presence of Furosemide in Kabaeva’s body.

3. Kabaeva had regularly used a product called “Hyper”, a nutritional supplement, which had been approved by the Russian Federation after their testing had not revealed any forbidden substances. Shortly before the Good Will Games, Kabaeva’s trainer bought some new bottles of “Hyper” over the internet which were consumed by Kabaeva before the doping test. The new Hyper pills were much cheaper than the old ones and were a different colour and size. After Kabaeva’s A sample was analysed, the Russian Federation tested the new Hyper pills and found that they did, indeed, contain Furosemide.

4. After a hearing before the Federation Internationale de Gymnastique (“FIG”) Kabaeva was suspended for one year followed by a year’s suspension on probation and her results from the 2001 World Championships were annulled. After FIG rejected an appeal from that decision Kabaeva appealed to the Court of Arbitration for Sport.

Held (dismissing the appeal) applying Swiss law
5. FIG’s Doping Control Regulations do not constitute a regime of strict liability but require an element of fault on the part of the athlete, that is, intent or negligence.

However if a federation can establish the objective elements of an offence, that is, that the doping test has been carried out properly, then an athlete is presumed guilty. This reversal of the burden of proof is compatible with public policy (see R v IOC, Swiss Federal Tribunal, Judgment of 4 December 2000, 5P.427/2000).

6. The drastic consequences of a doping suspension make it appropriate to apply a higher standard of proof than the “balance of probabilities” and the disputed facts have to be “established to the comfortable satisfaction of the court having in mind the seriousness of the allegation” (confirmed by Swiss Federal Tribunal, Judgment of 31 March 1999, 5P.83/1999).

7. The athlete has the right to rebut the presumption by proving that the prohibited substance was not in his/her body through any intent or negligence on his/her part: A v FILA, CAS Award of 9 July 2001, 2001/AV317. Deviations from the testing procedures prescribed by the relevant federation rules will only invalidate the results where they are sufficiently material to call into question the reliability of the test: C v IPF, CAS Award of 31 July 1998, 98/188.

8. The FIG breached its testing procedure by failing to inform the athlete’s federation of the date and time of the B sample test. This was not a minor irregularity and compromised the athlete’s rights to such an extent that the entire doping test could be disregarded. However the objective elements of the doping offence were established without the need to rely on the results of the doping test.

9. The athlete was unable to show that she was not negligent. She relied entirely on her team doctor as to her food supplements despite the widely publicized fact for several years that food supplements can be contaminated with prohibited substances. Any sanction imposed must not be disproportionate and should reflect extent of athlete’s fault: C v FINA, CAS 95/141, Digest, p215, 222. In the circumstances, a 12 month suspension and 12 month probation were adequate and appropriate.

Commentary
10. The two main issues in the appeal were, first, whether the failure to invite Kabaeva and the Russian Federation to attend the opening of the B sample was an irregularity which invalidated the finding that there had been an offence, and secondly, whether Kabaeva could rebut the presumption of her being at fault for the doping offence.
11. Burden of proof and rebuttal of presumption of fault

Section 1.4 of FIG’s Doping Control Regulations provided that an athlete is “liable to sanctions” if he/she “is found guilty of doping”. The Panel took the view that this is a clear indication that an element of fault, in the form of intent or negligence, is necessary before an athlete is sanctioned. The Panel found support for such a view in recent CAS case law to the effect that rules allowing for suspension of an athlete without fault do not sufficiently respect an athlete’s right of personality.

12. This does not mean a federation needs to fully prove every element of an offence. The Panel considered that a federation need only establish the objective elements of an offence; for example, that the sample was taken properly and that there was a complete chain of custody of the sample on its way to the laboratory. It followed established CAS case law to the effect that the facts need to be “established to the comfortable satisfaction of the court having in mind the seriousness of the allegation.”

13. Despite this, the Panel said that it would put a definite end to any meaningful fight against doping if federations are required to prove subjective elements of an offence; particularly, since the federations and CAS do not have the ability to conduct their own investigations or to compel witnesses to give evidence. Once the objective elements are proved the athlete is presumed to be at fault for the doping. The athlete may then prove, for example, that the presence of the substances is the result of an act of malicious intent by a third party.

14. B sample

Regulation 4.2.7 provided that the analysis of the B sample be carried out at a time fixed by the FIG and that the date and time be communicated to the athlete’s federation. FIG admitted the breach of this provision but argued that it was merely a minor deviation from the procedure which was incapable of invalidating the test results. Kabaeva argued that the ability to be present at the B sample test is one of the fundamental rights of an athlete during a doping testing procedure because it enables an athlete to observe and follow the verification of the state of the samples, the equipment used and the analysis itself.

15. The Panel approached the issue on the basis that, as a matter of principle, even if a procedural error is unlikely to affect the result of a B-sample test, such an error can be so serious as to lead to the invalidity of the entire testing procedure. Having considered FIG’s rules, the Panel found that an athlete’s direct rights were essentially limited to requesting analysis of the B-sample and requesting the analysis be carried out by another laboratory. While the Panel thought that the FIG’s rules sufficiently (though not generously) respected the interests of an athlete, it found that the limited rights with which an athlete had been left must be followed with care so that any irregularities that are observed during testing can be used later to challenge the results.

16. The Panel took into account that Chapter 7 of the Olympic Movement Anti-doping Code specifically stated that a “minor irregularity” in a testing procedure does not include a failure to provide the athlete an opportunity to be present at the opening and analysis of the B-sample. Although the Code did not apply in this case, the Panel regarded it as an indication of a consensus in the world of sport on doping tests.

17. Since it was not possible to remedy a procedural error of the sort in this case in the course of the arbitral process, the Panel took the view that the FIG’s breach of its rules compromised the limited rights of an athlete to such an extent that the results of the B-sample and therefore the entire urine test should be disregarded.

18. Evidence of the doping offence

The Panel held that while positive A and B samples are the most obvious evidence of the presence of prohibited substances in an athlete’s body, there are other means of proving the offence, for example, where the athlete admits the facts. In this case, even without the B sample, the Panel found that there was overwhelming proof that Kabaeva had taken Furosemide. From the Russian Federation’s evidence, Kabaeva had admitted taking a version of “Hyper” that had not been previously tested and later turned out to contain Furosemide. The fact that she was unaware of this was, in the Panel’s view, irrelevant to the objective elements of the offence.

19. Kabaeva claimed that she did not know what products she took because her doctor always gave her supplements without any explanation of the ingredients. The Panel encouraged that proceedings be taken against those who are responsible for training athletes but breach their duties of care. Without such proceedings athletes would face the consequences of actions for which others should also be held accountable.

20. Despite this, the Panel found that Kabaeva could not prove that she was without fault. The Panel accepted that she did not intentionally take a prohibited substance but found her negligent. Kabaeva never questioned her team doctor yet it had been a widely known fact for several years that food supplements can be (and sometimes intentionally are) contaminated with prohibited
substances. In the Panel’s words “An athlete who ignores this fact, does so at his/her own risk. It would be all too simple and would frustrate all efforts being made in the fight against doping to allow athletes the defence that they took whatever the team doctor gave them, thus attempting to shift the responsibility to someone else”.

21. The extent of the precaution taken to reduce the risk of contamination may have a bearing on the extent of the sanction. Taking into account that Kabaeva was only 18 years old and did not act intentionally, the Panel held that the 12 month suspension and 12 month “probation” imposed by FIG was adequate and appropriate. The decision is a reflection of the “hard-line” policy in world sport against doping and the determination to place the onus on the athlete personally to prevent accidental doping. However as a matter of practice it is harsh to expect a focussed and busy athlete, who is often in adolescence, not to rely on the experts and advisors around them when it comes to often complex decisions about nutrition. This is not ameliorated by the Panel’s suggestion that proceedings be taken against culpable advisors; the athlete would still suffer the penalty. Indeed, for that reason it is unrealistic to expect there to be a motivation for such proceedings especially given that the advisor probably has a close relationship with the athlete.

22. Another unfortunate aspect of this case for Kabaeva was that she was found liable even though the tests were disregarded. She was incriminated by evidence from her own corner about the new version of “Hyper”. Anti-doping policy encourages athletes to attempt to explain how a substance came to be in their sample rather than simply denying any knowledge. The evidence was probably given in this spirit. Had it not been given, however, she would have been exonerated. Some consideration should have been given to this in relation to the penalty. As it is, the decision may encourage athletes in the future to take their chances in trying to invalidate the testing procedure. The casualty may be the heightened awareness of accidental doping that comes with the sort of investigation that occurred in this case.

POLL v FEDERATION INTERNATIONALE DE NATATION AMATEUR (FINA)

CAS 2002/A/399, Court of Arbitration for Sport sitting in Lausanne (President: Dr Martin Schimke, Arbitrators: Prof Richard H McLaren and Dr Denis Oswald)
31 January 2003 (Reporter: MO)

Facts
1. Claudia Poll was a competition swimmer who underwent “unannounced and out of competition” doping tests in February and March 2002 by FINA’s agent, IDTM. The first test was carried out on 23 February 2003. IDTM returned on 25 February 2002 to perform another test because it accepted that the first one was not valid. During this test, Poll observed that the sampling kits had no security rings. Poll selected, as she was entitled to do, one of the two sampling kits presented to her but accidentally locked it. She was then left to provide a sample with the other one.

2. In March, Poll’s A-sample was analysed and found to contain Norandrosterone, a prohibited substance. The B sample was found to contain similar levels of the substance. At a hearing before the FINA Doping Panel, Poll was suspended for four years and her results since September 2001 cancelled. Poll appealed this decision to CAS in July 2002.

3. Poll argued, among other things, that: (a) FINA could not meet its burden of proof in relation to the sampling procedure (b) the laboratory breached FINA rules and Swiss law by failing to refer to measurement uncertainty (c) FINA failed to take into account her lack of intention to use doping.

Held (dismissing the appeal) applying Swiss law
4. The FINA Doping Control Rules raised a legal presumption of guilt on the part of an athlete once a prohibited substance was found in an athlete’s tissue or fluids. FINA did not need to prove the degree of guilt of an athlete as would be the case in criminal proceedings: Baxter v IOC (2002/A/376). In this case FINA met its burden and it fell to Poll to rebut the presumption;

5. It was not for CAS to determine on a case by case basis what accredited laboratories were required to do under their accreditation rules. CAS is only concerned
with whether a departure from those rules constitutes a
gross violation which has lead to an arbitrary test result.
The laboratory in this case had not fully complied with
its accreditation rules in dealing with “measurement
uncertainty” but the laboratory had a good reputation,
remained accredited and there was no gross violation of
the rules. It was for the IOC, not CAS, to impose
requirements for “correction factors” if this was
necessary: Haga v FIM (2000/A/281);

6. The sampling procedure was properly carried out
despite the test having to be repeated, the absence of
security rings on the sampling kits and Poll having
accidentally locked one of the two available kits before
the sample. None of these matters affected the validity
of the positive test results.

7. Poll had given no explanation for the presence of the
prohibited substance in her body and therefore was to
be treated as fully responsible for the offence. The
penalty imposed by FINA was justified and
proportionate.

Commentary

8. Under the FINA Doping Control Rules, an offence is
committed once it is established that a prohibited
substance has been present in an athlete's tissue or
fluids. The Panel followed the case of Baxter v IOC
(2002/A/376) which dealt with equivalent language in
the Olympic Movement Anti-Doping Code. The Rules
raised a legal presumption that an athlete is responsible
for any substance present in his/her body. CAS had
confirmed this strict liability rule on many previous
occasions despite the similarity of doping cases to
criminal proceedings. FINA had met its burden in Poll's
case and the onus had shifted to Poll to prove that the
sampling procedure was not properly carried out or that
she had no intention of committing the offence.

9. Measurement uncertainty

The laboratory did not complete the test results in
accordance with the requirements for “measurement
uncertainty” set by the ISO/IEC and ILAC (who govern
good laboratory practice and accreditation). However
the Panel was concerned only with the question
whether the analysis was properly conducted and had
no authority to interpret or enforce the rules governing
the accredited laboratories.

10. The Panel proceeded on the basis that only a gross
violation of accreditation rules would lead to what would
be an arbitrary result and relied on the undisputed facts
that (a) the laboratory was an ISO/IEC accredited laboratory
applying IOC requirements and therefore considered by
those bodies to fulfil the standards set by those bodies (b)
the laboratory’s reputation had always been outstanding
and there was no proof that the laboratory’s accreditation
was in jeopardy and (c) the ISO/IEC and ILAC guidelines
did not expressly provide for all of the measurement
uncertainties not accounted for in the results.

11. The Panel followed the CAS case of Haga v FIM
(2000/A/281) in which it was held, in relation to an
ephedrine test, that if there was a need for the application
of a correction factor then this needed to be addressed by
the IOC and not by CAS on a case by case basis when
this involved IOC accredited doping laboratories. The
safeness of the methods used by the laboratory in this
case meant that the absence of “global certainty” did not
give the results the wrong impression of uncertainty and
were not a gross violation of ISO/IEC and ILAC guidelines.

12. Sampling procedure

The Rules provided that any departure from the procedure
set out in the Rules would not necessarily invalidate the
finding of prohibited substances unless it cast genuine
doubt on the reliability of the test results. The question for
the Panel was whether genuine doubt was cast on the
reliability of the results because (a) the sampling procedure
had to be carried out twice (b) the athlete locked by
mistake one security kit leaving only one available kit
and/or (c) the bottle did not include any security rings.

13. The Panel found that: (a) there was no provision in
the Rules which stipulated that a sampling procedure
could not be repeated - indeed during the period set for
the testing, the athlete’s urine samples could be
collected without restriction because they were for “out
of competition” tests and were designed to be random;
(b) although the Rules provided for the athlete to select a
sampling kit from a number of kits, the fact that the
athlete misused one kit is no reason to consider that only
one kit was presented to her for her selection; (c) the
manufacturer’s evidence was that security rings do not
affect the security of the sample but only prevent the kits
from accidental closure during transportation before they
are used. There were therefore no flaws in the sampling
procedure that could rebut the presumption of Poll’s guilt.

14. Intention to commit the doping offence

The Rules provided that a minimum term suspension may
be lessened if an athlete can establish how the prohibited
substance got into his/her body and that this was not due
to the direct or indirect negligence of the athlete. Given
that Poll gave no explanation but simply denied ever
taking any doping substances during her career she was
held fully responsible for the offence. Since this was Poll’s
first offence, the Panel confirmed the minimum penalty of
14. In respect of the security kits issue, the Panel’s decision was a sensible one in that it gave little comfort to those seeking to avoid a finding of guilt by technical arguments as to the testing procedure when these do not affect an athlete’s rights or the accuracy of positive results. In respect of the measurement uncertainty issue, the Panel understandably did not want to get drawn into the enforcement of accreditation requirements; especially where there was no clear evidence to put in doubt the certainty of the results.

15. In respect of the security kits issue, the Panel’s decision was a sensible one in that it gave little comfort to those seeking to avoid a finding of guilt by technical arguments as to the testing procedure when these do not affect an athlete’s rights or the accuracy of positive results. In respect of the measurement uncertainty issue, the Panel understandably did not want to get drawn into the enforcement of accreditation requirements; especially where there was no clear evidence to put in doubt the certainty of the results.

16. The Panel left it to the accrediting bodies to decide what level of certainty should be enforced. However, such bodies, in the same way as a legislature, are often moved to exercise their powers as a reaction to judicial decisions. It may be that such an issue of principle can only be fully explored in the context of a judicial proceeding. This should not necessarily be discouraged because it very often leads to an improvement in policy and, indeed, a safer conviction rate.

(2003) SLJR 3

Climbing centre - attempted rescue of climber - injury to climber - duty of care owed by climbing centre to climber - duty of care in an emergency

AFFIONG DAY v HIGH PERFORMANCE SPORTS LTD

High Court of Justice, Queen’s Bench Division, Hunt J


Facts

1. On 10 May 2000, the Claimant (who sued by her father and litigation friend Terry Day) suffered a serious brain injury when she fell from an indoor climbing wall at a sport centre in Stoke Newington operated by the Defendant (trading as Castle Climbing Centre). She sued on the basis that when the Defendant’s duty manager attempted a rescue her, the method used was inappropriate, unacceptable and caused her to fall.

2. In order to climb the wall at the climbing centre, a climber’s harness is attached to a rope attached to the top of the wall. The bottom of the rope is held at ground level by the climber’s partner (‘the belayer’). As long as the belayer keeps the rope sufficiently tight, a fall does not involve a significant descent. The attachment to the rope is the climber’s responsibility.

3. The Claimant was a reasonably experienced climber. Her climbing partner, Daniela Falcone, was inexperienced. When the Claimant reached about 30 feet up the wall she realised that she was not attached to the rope, for reasons that were not made clear. She began to shout for help. On the rope to her right, separated from her by a corner of the wall, Paul Stacey was climbing. The Claimant asked Stacey to try and tie her onto her rope but Stacey was unable to do so.

4. Meanwhile, at ground level, the Defendant’s duty manager, Peter Newton took over responsibility. He cleared the area below and checked the belayer was safe. He told Stacey to continue trying to tie the Claimant to the rope. When it was clear that Stacey could not attach the rope, Newton told him to try and grab hold of the Claimant’s harness with both hands which he tried to do.

5. By this stage the Claimant was shaking and her limbs later went into spasm. Stacey succeeded in grabbing the harness but the Claimant came away from the wall. They both then swung away from the wall and Stacey lost his grip on the Claimant’s harness. She fell about 25 feet to the ground suffering severe injuries and being left with no memory of the events.

Held

6. The Defendant owed the usual obligations of an occupier to act reasonably in accordance with the exigencies of the situation when the emergency arose and that the Defendant and Newton in particular, had to assess the risks inherent and take reasonable steps to reduce the incidence of injury.

7. In Horsley v Maclaren, The Ogopogo [1971] 2 Li Rep 410, the Court of Appeal set out the principle that there is no duty to attempt a rescue but once active steps have been taken then a duty of care has been assumed. The Court said a rescuer is entitled to be judged in the light of the situation as it appeared to him at the time and in the context of immediate and pressing emergency. In Marshall v Osmond (1983) 2 All ER 225, the Court of Appeal held that a rescuer’s actions were not to be judged on the standards which would apply if he had time to consider all possible causes of action. In Eckersley v Binnie [1988] 18 CLR 78, the Court of Appeal pointed out that a person is not to be judged by the wisdom of hindsight.

8. The Defendant’s climbing centre had a concern for safety and it tried to ensure that users of the facilities shared that concern although it did not have a harnessed floorwalker available.
9. The whole incident lasted about 3 minutes of which the first 45 seconds passed whilst Stacey vainly tried to attach the Claimant to the rope. That failed attempt was a reasonable course of action and no-one could have known that it was doomed to failure. Newton then made an assessment that the Claimant might fall in a very short time and felt that he had to try something immediately. He advised a type of overhand grip on the harness when a bear hug might have been better but a bear hug was not part of any well known or practised technique. The timing of the only other realistic alternative of an instructor putting on a harness, belaying securely then climbing the wall would have been very tight indeed to the extent that there could be no certainty it would have succeeded.

10. The failure to provide a harnessed floorwalker was not causative of the fall. With hindsight it would have been better if the climbing centre had employed a harnessed floorwalker because with hindsight it was clear that the rescue attempts adopted by the Defendant were not going to work. Even if use of a harnessed floorwalker had been the preferred option, any error on behalf of Newton, in the context of an emergency, would have been one of judgment rather than negligence.

Commentary

11. As the power, pace and goals increase in many sports, so the risk of injury increases. The harder athletes push their bodies, the more likely the risk of damage. Equally, as leisure time (and the use of leisure time to chase new experiences) increases, the number of inexperienced participants in sport increases. So hand-in-hand with the development of sport, is the implementation of procedures both to minimise the risk of injury and to maximise the care given in the event of an injury.

12. For organisations responsible for safety at sporting events, this decision provides reassurance in affirming long-standing principles in relation to rescuers and emergency situations. The choices made by a rescuer are not to be judged with the benefit of hindsight. Whether the Defendant’s duty of care had been breached could only be decided when the rescuer’s decisions were placed in the context of the desperate situation that had developed. On the facts, time, or rather the lack of it, proved the most important factor.

(2003) SLJR 4

Guarantee - Overdraft facility - Agreement - Letter of comfort

MORGAN GRENFELL DCS LTD & OTHERS v ARROWS AUTOSPORT LTD

High Court of Justice Chancery Division, Pumfrey J
(2003) EWHC 333 (Ch), 28 February 2003 (Reporter: IP)

Facts

1. The Third Defendant, Mr Walkinshaw, had been involved in the motor racing world for many years. In 1996 he acquired all the shares in the Second Defendant, Arrows Grand Prix International Limited ("AGPI"), which owned and operated the Arrows Grand Prix Formula One racing team. Mr Walkinshaw then incorporated the First Defendant, Arrows Autosport Limited ("AAL") and transferred his shareholding in AGPI to AAL.

2. To run a Formula One team is very expensive. There is substantial expenditure on cars, especially the engines, spares, drivers, the necessary support services, travel and so on. Income is derived from the sale of television rights and from sponsorship by advertisers. The income from the sale of television rights is obtained centrally and distributed among the Formula One teams under the provisions of an agreement known as the Concorde Agreement. The Concorde Agreement regulates the appearance of teams owned by racing companies at Grand Prix races. If the Arrows team owned by AGPI failed to appear at any race, then AGPI would immediately lose its rights to participate in races.

3. The First Claimant, Morgan Grenfell Development Capital Syndications Limited ("Morgan Grenfell"), agreed to provide an overdraft facility to AAL of £5million, which was subsequently increased to £13million. To secure its position Morgan Grenfell obtained a debenture and guarantee from AAL and AGPI, and an indemnity from Mr Walkinshaw in respect of half the sums advanced by way of overdraft from Morgan Grenfell.

4. Between 1999 and 2001 the Arrows team was extremely short of cash, caused by a deficit in sponsorship income and the need to change racing car engines. Several attempts were made to re-finance Mr Walkinshaw’s companies or to find a purchaser for AGPI. The attempts were unsuccessful. Eventually, Morgan Grenfell began proceedings to enforce the debenture and guarantee against AAL and AGPI, and the indemnity given by Mr Walkinshaw.
5. In his defence, Mr Walkinshaw argued that by a letter dated 11 July 2001 the parties had agreed that Morgan Grenfell would release its securities and indemnity in relation to Arrows, in order to enable AGPI to attract outside equity investors. Further, or in the alternative, Mr Walkinshaw sought to argue that it was a condition precedent to the enforcement of the indemnity that a third party investor in AGPI was found.

Held (granting judgment for the claimants)
6. The letter of 11 July 2001, on which Mr Walkinshaw laid great stress, did not represent a concluded enforceable agreement at the time it was made.

7. In reaching this conclusion, Pumfrey J relied on the principles stated in the judgment of Toulson J in Spectra International plc v Tiscali United Kingdom Ltd [2002] All ER (D) 209 as follows:
   (1) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. This is the ordinary “subject to contract” case.
   (2) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.
   (3) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word “essential” in this context is ambiguous. If by “essential” one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by “essential” one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by “essential” one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound, and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [Bingham J] “the masters of their contractual fate”.

According to these principles, the controlling factor is the intention of the parties, which means their intention as evinced by them or as may be reasonably inferred.” The principles as to agreements in principle set out by Toulson J in Spectra v Tiscali were themselves a summary of the principles found in the decision of the Court of Appeal in Pagan v Feed Products Ltd [1987] 2 Lloyds Rep 601, 619.

8. The starting point in ascertaining the intention of the parties is the document alleged to contain the agreement. Despite the fact that a representative of Morgan Grenfell had written on the letter of 11 July 2001 “agreed and accepted”, Pumfrey J held that the letter represented, at best, a “letter of comfort” for anyone contemplating an investment in Arrows, setting out how a new investor could expect Morgan Grenfell to react and the general structure of any deal which Morgan Grenfell could be expected to accept. The letter could not be seen as a binding agreement, because of a number of factors, including the reference in its opening paragraph to an “agreement in principle”, the fact that if the agreement had the effect suggested by Mr Walkinshaw it would have substantially reduced Morgan Grenfell’s security with no corresponding hope of improvement in Arrows’ position, the lack of documentation to support the effect contended for by Mr Walkinshaw, and the incompleteness of the alleged agreement.

Commentary
9. This is a useful reminder of established principles of English law determining how the courts react to the not uncommon situation where one party alleges that there is a binding contract because the parties have reached agreement on all the terms necessary for a valid contract. The parties are “the masters of their contractual fate”. The court’s task is to review what the parties said and did and from that material decide whether the parties’ objective intentions, as expressed to each other, were to enter into a mutually binding contract: see the reasoning of Bingham J (as he then was) in Pagan v Feed Products at 610.

10. In determining what were the parties’ intentions, the court is always required to be sensitive to the facts of the particular case before it. There is a great difference between a case where both parties are advised by lawyers and are involved in a long drawn out series of negotiations, and the case where the parties are professional businesspeople engaged in the same business and negotiating through a rapid fire exchange of communications. Reading between the lines of Pumfrey J’s decision, the court was certainly influenced by the fact that it was inherently unlikely that, whereas the parties had previously ensured that their original financing documents were drawn up by their professional advisers in very extensive contracts, the “agreement” of 11 July 2001 was a one and half page letter, with no contemporary attempt to involve the solicitors, nor was the agreement followed by any instructions to the parties’ respective solicitors to carry the agreement into effect.
Facts
1. In January 1998, the Claimant Richard Vowles was injured during an amateur rugby match between Llanharan 2nd XV and Tondu 2nd XV. The Claimant was playing as hooker for Llanharan. The game was tightly contested on a very muddy pitch. During the first half, the Llanharan loose-head prop was injured. After discussions between the referee and the 2 team captains, the Llanharan pack leader Christopher Jones, who had been playing as flanker, took the injured prop’s place in the front row of the scrum.

2. In the fourth minute of injury time, the referee ordered a scrum near the Llanharan line. The front rows failed to engage properly and when they parted, Vowles collapsed to the ground. He suffered a sustained dislocation of the neck with resultant permanent incomplete tetraplegia leaving him wheelchair bound.

3. Vowles sued the referee, David Evans, in negligence. The Welsh Rugby Union Limited accepted vicarious liability for Evans. The Claimant also claimed in negligence against the chairman (Davey) and the honorary secretary (Taylor) of Llanharan Rugby Club.

4. At the trial (reported in (2002) SJLR 6), it was held by Morland J that the referee was negligent in not ordering non-contested scrums long before injury time having regard to the history of repeated and increasingly numerous bad contested scrumpages. The referee and the Welsh Rugby Union Limited (WRU) appealed.

Held (dismissing the appeal)
5. The test for a duty of care enunciated by the House of Lords in Caparo plc v Dickman must be applied. No issue was taken either as to the proximity of relationship between Evans and Vowles or as to the reasonable foreseeableability of the injury if Evans failed to exercise reasonable care. The debate centred on whether it was “fair, just and reasonable” to impose on an amateur referee a duty of care towards the players in the game refereed.

6. On behalf of the appellants it was submitted that the Judge’s public policy argument (that the WRU should insure itself and its referees) was not supported by any evidence. The Court concluded that the availability of insurance could bear on the policy question but that issue had not been explored before the court. The Court accepted the Judge had not based his opinion on any evidence but nevertheless concluded the Judge had made a reasonable assumption.

7. The Court referred to its earlier decision of Smolden v Whitworth & Nolan [1997] PIQR 133 in which it had held that a referee was in breach of his duty of care when a 17 year old hooker broke his neck in a collapsed scrum. The Court refused to distinguish Smolden on the grounds that it involved younger ‘colt’ players. However, the Court made clear that it could make its decision without the need to rely on any previous decisions in relation to rugby. Taking into account that rugby is an inherently dangerous sport with rules specifically to minimise the inherent dangers, the Court concluded it was “manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care” in performing his role as the enforcer of such rules.

8. As to the standard of care, the Court affirmed that the threshold of liability must be high since a referee of a fast moving game cannot reasonably be expected to avoid errors of judgment, oversights and lapses. Evans owed Vowles a standard of care of the ordinary skilled man exercising and professing to have that special skill.

9. The Judge was held to be correct that Evans had breached his duty of care. Evans had failed to ask the Llanharan captain whether or not his team had another player suitably trained to play in the front-row. When Jones had volunteered to play there, Evans had not asked him whether he was suitably trained or experienced. Evans had abdicated his responsibility to decide whether the situation was such that it was mandatory to insist upon non-contestable scrums. The Court stressed that the decision had been taken when play had stopped thus allowing Evans to take a more considered view of the circumstances. If a decision was made during play, “very different considerations would be likely to apply”.

10. The crucial finding of fact related to causation - what happened in the set scrums once Jones took over as prop forward? Jones played in the scrum for nearly an hour before the accident. If the judge was wrong to conclude that the scrums started to go wrong once Jones joined them, then there was no basis to conclude that Evans’ breach of duty caused Vowles injury. The Court of Appeal identified that on Evans’ own account, there was
evidence that greater difficulties were experienced once Jones entered the scrum but that evidence was not such as to suggest the scrums were so unsatisfactory that he should have ordered non-contested scrums. Other witnesses who gave evidence reported more disrupted scrums and more frequent collapses and provided the foundation for the Judge’s finding on causation.

11. The Court referred to Assicurazioni Generali Spa v Arab Insurance Group [2002] EWCA Civ 1642 and the warning therein as to the dangers of an appellate court interfering with findings of primary fact based on oral evidence. The Court therefore upheld the Judge’s finding on causation since he had heard oral evidence from those best placed to convey their overall impressions of the match and the accident.

Commentary
12. In comparison to the first instance decision, the Court of Appeal was required to give more consideration to policy arguments. The result was the same with the Court having little hesitation in upholding the decision from the court below.

13. The most interesting policy element is in the postscript to the judgment. The appellant had submitted that the decision to find against the referee would mean that volunteers would no longer serve as referees. The Court said there was no weight to such a policy argument since it would be very rare that the same combination of the failure to implement a law designed for safety and a resulting serious accident would occur. Serious injuries are an inherent risk in the game although happily rare. The more remote risk of a claim in negligence was not expected to discourage those who take their pleasure in the game by acting as referees.

14. The Court’s conclusion that referees would not be discouraged is debatable. Although the risk of the same combination of serious injury and failure to implement a safety regulation would be very rare, the Court of Appeal’s decision provides the basis for claims to be brought against referees to test just what combination of seriousness of injury / breach of rule is necessary to establish liability. Even if such claims eventually fail, amateur referees will find themselves faced with potentially prolonged and draining litigation (even if that litigation is conducted through their insurer). In those circumstances, it would not be surprising if referees are discouraged.

(2003) SLJR 6
Sportsman’s image rights - passing off - false endorsement - assessment of damages

IRVINE & OTHERS v TALKSPORT LTD

Court of Appeal (Civil Division), Schiemann, Brooke and Jonathan Parker LLJ, [2003] EWCA Civ 423, [2003] All ER (D) 05
1 April 2003 (Reporter: ST)

Facts
1. The Defendant was the operator of the commercial radio station, “TalkSport” (formerly Talk Radio). In 1999, it acquired the rights to cover a number of significant sporting events, including the Formula One Grand Prix Championship. Talksport promoted these rights to potential advertisers by a series of humorous boxed marketing packs.

2. The Formula One pack was sent to about 1,000 recipients, selected using an industry-standard marketing tool. These individuals were advertising executives in commercial organisations or agencies. The box which they received bore the legend “All the smells … all the noise” and contained a pair of boxer shorts bearing the representation of a skid mark “such,” observed Lord Justice Jonathan Parker, “as would be made by a racing car braking sharply.” The leaflet featured the pictures of several identifiable Grand Prix drivers and on the front there was a photograph of the Claimant, Eddie Irvine.

3. The photograph of Mr Irvine, which had been obtained perfectly properly from a photographic agency, originally depicted Mr Irvine speaking on a mobile ’phone. This image had been manipulated for the purposes of the leaflet, replacing the mobile ’phone with a radio bearing TalkSport’s logo. Mr Irvine had not been aware that any use would be made of his image and he had not authorised it. Having been sent a copy of the leaflet by a contact, he and the companies through whom he conducted his endorsement business brought an action for passing off.

4. Before Laddie J at first instance, it was alleged on Mr Irvine’s behalf that he had built up valuable goodwill and reputation in his name and image; and that Talksport’s use of it was calculated to deceive, leading members of the public to believe (contrary to the fact) that he had endorsed TalkSport. This, it was said, constituted a passing off and caused loss and damage to Mr Irvine.

5. Laddie J agreed. Relying in part upon the Australian authority of Henderson v Radio Corporation Pty Ltd
[1969] RPC 218, his Lordship found that English law protects image rights where there is a substantial reputation or goodwill therein. This aspect of the judgment on liability, [2002] EWHC 367 (Ch), has been reported in [2002] 1 WLR 2355, [2002] 2 All ER 414 and [2002] FSR 943. It was not challenged on appeal.

6. Laddie J reserved the assessment of damages to himself and fixed a short period for the preparation of evidence. There was no direction for cross-examination. The Defendant produced evidence as to the costs of producing the Formula One pack. Placing emphasis upon the limited distribution among a narrowly-defined class of persons, the Defendant demonstrated that the total cost of the promotion was £11,400, of which the boxer shorts were the most expensive item at £3,341. In that context, no reasonable person in the Defendant’s position would agree to pay more than £0.50 per item, or about £500 across the whole promotion. Anything more would have been a disproportionate sum to pay for just one of many pictures featured in the leaflet, which was itself only one part of the promotional pack.

7. Mr Irvine gave evidence of a number of other endorsement deals into which he had entered in 1999. He had allowed Oakley sunglasses to use his image for about a year without restriction, for which he received £25,000 plus £10,000 of free sunglasses. Similarly, with Hilfiger clothing he had agreed to appear both personally and in advertising material for about a year, for which he received £94,500 plus £31,500 of free clothing. Evidence was given of other deals of a similar nature.

8. Mr Irvine stated that he was relatively keen to endorse products, but would not do so below a certain price, because he would not want to be known that his endorsement fee was a low figure. That, he said, would devalue his image. In 1999, he estimated, he would not have agreed to an endorsement for less than about US$40,000 or US$50,000. As his counsel put it, Mr Irvine would not get out of bed for less than £25,000. That was a crucial piece of evidence.

9. Mr Irvine’s statements were supported by those of four expert witnesses with experience of the negotiation of promotional contracts for sportsmen and Formula One in particular. Between those witnesses, Laddie J found a “pleasing uniformity in the figures”. Two suggested US$50,000 as an appropriate figure; two suggested £50,000.

10. Laddie J did not accept that the expert evidence was conclusive, notwithstanding that it was uncontradicted. He felt that Mr Irvine might have entered into an endorsement deal for less than £25,000, even though he did not in fact do so in 1999. The fact that Mr Irvine had only entered into large deals did not mean that he might not have entered into a small one. Mr Irvine’s past success in obtaining large deals did not mean that the Court had to select a large fee in respect of a small deal. The Court had to assess the reasonable fee which two willing parties would have agreed upon. Neither side could exercise a veto, whether by saying that it would not have paid more than a certain sum, or that it would not have accepted less than a certain sum.

11. Laddie J felt that the Defendant’s figure of £0.50 per pack was too low, but that Mr Irvine’s suggestion, which amounted to £50 per pack, was quite unrealistic. He awarded damages of £2,000, which he felt was “errring ... on the generous side”. The Claimants disagreed and appealed. The Defendant brought a cross-appeal on a question of misrepresentation.

Held (allowing the appeal and dismissing the cross-appeal)

12. The approach to damages for passing off is that set out in the context of patent infringement by the House of Lords in General Tire and Rubber Company v Firestone Tyre and Rubber Company Limited [1976] RPC 197. In that case, Lord Wilberforce identified three categories.

(1) In the first category, the infringer’s exploitation of the patented article diverts sales away from the owner of the patent. The measure of damages is therefore the profit which the owner might have made if the sales had been his.

(2) In the second category, the infringer exploits an invention which the owner normally licenses to legitimate users for a fee. In that case, the measure of damages is the sum which the infringer would have had to pay in order to obtain a licence. That in turn was a question of evidence. In the third category, it is neither possible to prove a loss of profit or the “going rate” for a licence.

(3) In those cases it is for the Claimant to produce evidence to guide the court, for example by producing expert evidence as to practice in the same or related trades. Concrete evidence as to going rates for relevant licences must be given greater weight than such hypothetical evidence.

In conclusion, Lord Wilberforce held, each individual case required a judicial estimation of the available indications.

13. Irvine argued that Lord Wilberforce’s second category was the closest analogy. The judge should
have determined what licence fee the Defendant would have had to pay and in doing so he should have had regard to Mr Irvine’s ‘going rate’ as well as the expert evidence on trade practice. It was emphasised that Mr Irvine’s evidence on comparators and market practice was unchallenged.

14. The Defendant submitted on the other hand that the judge was right to consider what a hypothetical fair bargain between Mr Irvine and TalkSport would have been. Account had to be taken of the very limited distribution of the promotional material, not just because it was small in scale, but because it affected a very small proportion of Mr Irvine’s goodwill. His capacity to endorse other products to the general public was substantially unaffected. The process of identifying a hypothetical fair price involved consideration of comparables, but should not include the right to set an arbitrary minimum. It was not open to a successful Claimant to ascribe to his claim “any fancy sum which he says he might have charged”: AG fur Autogene Aluminium Schweissung v London Aluminium Co Ltd (No 2) (1923) 40 RPC 107.

15. TalkSport argued that the present facts fell into the second and third categories identified in the General Tire case. Although in theory comparators were relevant, those produced by Mr Irvine were not directly comparable by reason of their much greater use of Mr Irvine’s goodwill and the more substantial exposure to the general public which must have resulted, reducing his capacity for further endorsements.

16. Giving the judgment of the Court, however, Jonathan Parker LJ held that Laddie J was not entitled to conclude that £2,000 was a reasonable endorsement fee. The Judge was right to find that the fee that TalkSport could or would have afforded was irrelevant. However, the question whether the small and limited nature of the campaign would on the balance of probabilities have affected the fee was a matter for evidence. It had to be borne in mind that the potential revenue from even a single advertiser was likely to be substantial.

17. There was no reason to doubt Mr Irvine’s statement that he would not have entered into a contract for less than £25,000. His other deals in the relevant year supported that evidence. Nor should the supportive expert evidence be lightly dismissed. All the available materials led to the conclusion that TalkSport would have had to pay at least £25,000, and that was the right figure for the award of damages.

Commentary

18. This decision of the Court of Appeal provides considerable comfort for celebrities, deterring small-scale infringements of an image right by using the potential of a very substantial liability in damages. This may be desirable, considering that many small infringements may be as damaging to goodwill as a single large one.

19. In theory, infringers will be protected by the strict requirement that a reasonable fee must be established by evidence. However, it may be asked whether this is a sufficient protection; and whether this decision does not result in the injured party recovering more than he has in fact lost.

20. In the present case, Mr Irvine could never in reality have obtained such a small deal for such a large fee. It would have been entirely uneconomical, given that most of the promotional packs were thrown straight into the bin by their recipients. The promotion does not appear likely to have affected Mr Irvine’s goodwill or his ability to obtain endorsement deals. No evidence was adduced to suggest that it had such an effect.

21. This case was in a sense a poor factual basis upon which to develop such a nascent area of the law. Mr Irvine’s expert and other evidence was not contradicted or tested in cross-examination and it may be that it would have been difficult to do so. Although the evidential background provided a ready means to arrive at a very substantial award, the Court as a result was not compelled to address with sufficient directness the relevance or otherwise of injury to goodwill.

22. TalkSport might have made a lot of money if it gained only a small number of new advertisers from among the 1,000-odd recipients of its promotion. Can it really be the case that an image of Mr Irvine used in a context less likely to generate substantial funds, and distributed to a mere handful of people, should nevertheless command a minimum fee of £25,000? That any actionable infringement, however minor, should be subject to that minimum?
Welsh Rugby Union Administration - Promotion Disputes - Unincorporated Associations - Contract - Constitution of WRU

ABERAVON & PORT TALBOT RFC v WELSH RUGBY UNION LTD

Facts

1. The Claimants ("Aberavon") played the 2000/2001 season as part of the First Division of the Welsh Rugby Union National League. The Defendant, the Welsh Rugby Union Limited ("WRU") is the body which organises and controls rugby within Wales and is the corporate successor of the Welsh Rugby Union, an unincorporated association. All rugby clubs in Wales were previously members of that association; and all rugby clubs in Wales are now members of the limited company, by way of each holding a voting share.

2. At the end of the 2000/1 season, Aberavon finished top of the First Division. In common with many other league systems, this would have entitled Aberavon in the past to promotion to the Premier League of Welsh Rugby. The Premier League at that time consisted of the Celtic League and the Welsh Scottish League. As ever, participating in the Premier League provided greater opportunities for fame, renown and financial success than participating in the lower leagues.

3. In August 2000, WRU changed the promotions arrangements for the Premier League. As part of the then general reorganisation of the Premier League (different from the current reorganisation) it was decided to reduce by two the number of clubs playing at the Premier League. This involved relegating two clubs from the existing Premier League and most importantly for Aberavon not allowing any promotion from the First Division.

4. Aberavon sued in contract, alleging that at a special general meeting of the old Welsh Rugby Union on 6 April 1997 a promise was made which created an obligation on the WRU enforceable by any club and in particular by Aberavon. WRU applied for summary judgment.

5. Aberavon’s evidential case, which was assumed to be true for the purposes of the summary judgment hearing both at first instance and in the Court of Appeal, was that the then director of rugby, Mr Cobner, assured all the clubs attending at the meeting that the WRU would give 12 months’ notice to the member clubs of any future changes in the League structure. This assurance was given at a time when the meeting was considering a resolution to reduce the number of clubs in the Premier Division from twelve to eight.

6. Aberavon said that as a result of this assurance or promise they incurred expense in trying to come first in the First Division believing that they would be entitled to promotion if they succeeded. The only way it was possible to achieve this was by long term planning and therefore if there was to be any change in the League Structure the 12 months’ notice that would have to be given must be 12 months’ notice before the start of the season at the end of which promotion might take effect.

7. The argument turned on the impact of the constitution and by-laws of the unincorporated association. By-law 12 gave the Committee of the WRU a virtually unfettered power in relation to the running of Welsh Rugby (essentially anything apart from the selection of International and Trial Teams). WRU’s case was that any requirement to provide 12 months’ notice before instituting a change would have to take effect as an amendment to the constitution and by-laws. Such an amendment could only take effect if it was approved by two-thirds of those present or voting at an Annual General Meeting or a Special General Meeting convened to consider a proposal put forward by the Committee. This supposed change was not approved in that way.

8. Aberavon argued that this was to take an unrealistically formal approach to what was a professional sport. The assurance by Mr Cobner did not involve a change to the Constitution and By-laws but even if it did it was open to the Committee to decide to limit their discretion by agreeing not to introduce change without 12 months’ notice. The Rules should be interpreted purposively and it would be absurd if no assurance given by the Committee could ever be binding. The right to promotion was fundamental to a sporting league and should be treated as a contractual right.

Held (for WRU against Aberavon)

9. Both the judge at first instance (HHJ Chambers QC) and the Court of Appeal agreed with WRU. Any fetter on the power of the Committee of the type suggested (ie not to make any changes without 12 months’ notice) would require an amendment to the constitution. Any such amendment would have to comply with the Rules in order to be effective. WRU was entitled to summary judgment on the issue.

Commentary

10. The case was not concluded by this judgment.
Aberavon had already been given leave to amend their particulars of claim to plead an implied term that the Committee would not act capriciously or arbitrarily in changing the structure relating to promotion. Acting contrary to the assurance said to have been given by Mr Cobner was a breach of this implied term. WRU accepted that this was a viable cause of action that was entitled to go to trial.

11. So the existence of a "right to promotion" is not dead yet. Otherwise the decision is a further example of sport not being a special case. Just because the dispute involves professional sport does not mean that basic legal principles, such as the construction and application of the rules of an unincorporated association, should be treated in any special way.

(2003) SLJR 8
Personal injury insurance - football injuries - definition of professional competitive game - reserve team status
HOWELLS V IGI INSURANCE COMPANY LIMITED

Court of Appeal (Civil Division), Potter, Mummery and Arden LJJ, [2003] EWCA Civ 03
13 May 2003 (Reporter: JR)

Facts
1. The appellant ("H") was a regular member of Southampton Football Club's first team in the Premier League. While playing in the first team he sustained a knee injury on 24 October 1998. H was rested but his knee steadily improved during December 1998 and by New Year 1999 he had returned to full training and he played in a number of matches for Southampton reserves to complete his rehabilitation. However, having been twice selected to play for the first team H did not appear to be fully recovered and was moved on loan to play for Bristol City in the First Division where he played about ten matches for the Bristol City first team.

2. H returned to Southampton for pre-season training in advance of the 1999/2000 Premiership season with a view to rejoining the Southampton first team. Unfortunately on 23 July 1999 H suffered further pain in his knee as a result of which he was required to undergo 2 arthroscopies in the course of the following week. After a second period of rest H resumed rehabilitation by training with the first team and playing in a number of reserve games. Between 19 October and 13 December 1999 H played eight reserve team matches for Southampton but at the same time the management and medical staff of Southampton Football Club concluded that H would never be fit enough to make a return to fulltime Premiership football in the first team.

3. Accordingly on 15 December 1999 the Southampton team manager informed H that he would not be picked for the first team in the future and that he should retire. H accepted this conclusion and after six months' notice of termination he retired from his career as a footballer.

4. H was insured against injury by IGI Insurance Co Ltd ("IGI") under its Professional Sports Protector policy. The policy covered H against total disability to compete in his occupation as a professional footballer. Condition 11 of the policy provided that in the event that H participated in five or more games during the period of twelve months from the commencement of his total disablement or before the end of the season immediately following the season in which he became totally disabled (whichever period was the longer) H would be deemed conclusively to have been fully rehabilitated and no claim would be payable under the policy.

5. H issued proceedings claiming that his relevant injury occurred on 24 October 1998 and that his total disablement occurred on 23 July 1999 and continued for a period of twelve months. IGI issued an application for defendant's summary judgment under CPR Part 24 on the grounds that on a true construction of the policy there was no prospect of H succeeding in his claim. In particular IGI relied on Condition 11 contending that H had subsequently participated in five or more games during the twelve months from the start of total disablement because he had played in eight games for the Southampton reserves between October and December 1999. It was further argued by IGI that the only sensible meaning to be given to the word "game" in condition 11 was any competitive professional football game – which included reserve team games.

6. In response to the application for summary judgment H argued that the word "game" in condition 11 should be construed so as to mean a game at the level at which he normally played prior to his injury and/or that any game played as part of his rehabilitation should not be included.

7. At first instance Lloyd J held that:
(a) as H had played eight games for Southampton reserves he was fully rehabilitated and no claim was payable under the policy;
(b) the word "game" meant any competitive football game;
(c) it was not possible to imply a limitation to the word “game” so that it was restricted to refer to a game at the level of pre-injury participation.

H appealed.

Held (dismissing the appeal)

8. For the purpose of determining whether H had been rehabilitated there was no reason for excluding consideration of reserve team matches. In approaching the question of construction of the policy, it was clear that the insurance provided was against permanent disability from a career as a professional footballer with no requirement or suggestion that such career be pursued at a particular level or with any particular club. The Judge was correct in the conclusions he had reached since there was no reason for excluding games played for rehabilitation purposes. Whatever the purpose, the reference to participation in condition 11 of the policy was intended to be treated as a test of whether the injury had ended the player’s career.

Commentary

9. This decision highlights the nature of risks associated with a career as a professional footballer. One of the considerations taken into account in upholding the Judge’s construction was that footballers cannot always be expected to participate at the same level. Not only are they susceptible to injury but they may lose form or be part of a team that is relegated.

10. The Court of Appeal took into account the fact that the playing life of a Premiership footballer tends to be short and injury may occur just after the player is coming off the peak of his performance so that there is a question of whether the disablement is caused by injury or a natural deterioration in a player’s performance is to be expected with age. Equally, the Court recognised that following injury a player may well be capable of pursuing his career to make a living albeit at a lower level. Bearing in mind such aspects of a footballing career the Court of Appeal found it impossible to accept H’s arguments.

11. This decision may seem harsh on H who was a regular first team member at the time of taking out the policy and no doubt intended to continue to play first team football in the Premiership. However by realistically taking into account the pitfalls of being a modern day sportsman, it explains why disability insurance policies often include definitions and deeming provisions aimed at laying down a test of ascertaining whether an injury has in fact ended a sporting career.

(2003) SLJR 9
Football merchandising - Trade Marks - implementation and interpretation of ECJ decision by national courts - the test for Trade Mark infringement

ARSENAL FOOTBALL CLUB PLC v MATTHEW REED

Court of Appeal (Civil Division), Aldous, Clarke and Jonathan Parker LJJ, [2003] EWCA Civ 96, [2003] All ER (D) 289, 21 May 2003 (Reporter: TP)

Facts

1. As reported at (2002) SLJR 7, Laddie J held that the ECJ had exceeded its jurisdiction in making findings of fact inconsistent with his own findings of fact at the trial; and accordingly, he was obliged to ignore those inconsistent findings of fact and, applying the law as defined by the ECJ to the facts as found at trial, the claim by Arsenal FC in trade mark infringement should fail. The Court of Appeal has now overturned the decision of Laddie J, and awarded Judgment in favour of Arsenal FC.

2. By these proceedings, Arsenal Football Club ("Arsenal") sought to restrain the sale by Mr Reed (and by others, if the action succeeded) of "unofficial" Arsenal merchandise, souvenirs and memorabilia.

3. The detailed facts and the three decisions of Laddie J at trial, the ECJ on a reference by Laddie J following trial, and the subsequent decision of Laddie J are considered in detail at (2002) SLJR 7, and it is not intended to repeat those details. In summary, Laddie J held at trial that the case on trade mark infringement would depend upon the issue of whether, in order to establish trade mark infringement, the alleged infringing use had to be use in a trade mark sense, that is, use denoting trade origin of the goods or services. If it did, then he found that the use by Mr Reed was not use denoting trade origin of the goods, in which case Mr Reed would succeed. If there was no such limitation on the issue of infringement, Arsenal would win.

4. The learned Judge concluded that, since the law on the point was not settled, and as the final result of the case depended entirely upon the decision on this point of law, it was appropriate to make a reference to the ECJ on the following point of law:

"1. Where a trade mark is validly registered and (a) a third party uses in the course of trade a sign identical with that trade mark in relation to goods which are identical with those for which the trade
5. The decision of the ECJ (CASE C-206/01) was given on 12 November 2002 by the Advocate General. The Conclusion of the Court was set out in paragraph 62: “In the light of the foregoing, the answer to the national court’s questions must be that, in a situation which is not covered by Article 6(1) of the Directive, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor is entitled, in circumstances such as those in the present case, to rely upon Art 5(1)(a) of the Directive to prevent that use. It is immaterial that, in the context of that use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor.”

And the Court therefore ruled accordingly in favour of Arsenal FC.

6. Following the decision of the ECJ, the case was referred back to Laddie J for final Judgment (4 December 2002, [2002] EWCH 2695 (CH)). Arsenal invited the learned Judge to give judgment in their favour. However, Mr Reed objected, on the basis that the ECJ had exceeded its jurisdiction and the High Court should not, indeed could not, follow its direction and find infringement (para 6). It was argued on behalf of Mr Reed that the ECJ made finding of fact, which it is not entitled to do, and further, that these findings of fact were inconsistent with the findings of fact made by Laddie J in his initial Judgment.

7. Laddie J considered the limits on the jurisdiction of the ECJ on a reference from a Member State. He found that on such a reference, the ECJ cannot make findings of fact nor reverse the national court on them (para 9). The role of the ECJ is to interpret the meaning of the legislation. Laddie J found that on the question of law the ECJ had agreed with the submissions put forward by Mr Reed, but that it had purported to disagree with his own findings of fact. He held that the ECJ had exceeded its jurisdiction and that the English Court was not bound by the final conclusion of the ECJ. He held that he was only bound to follow the guidance of the ECJ on the law as to the facts found at trial. As he had found at trial that the use of the Arsenal Signs on Mr Reed’s merchandise would not be perceived by the public as indicating trade origin, given the guidance of the ECJ on the point of law, he had no option but to dismiss the Claim in trade mark infringement (para 27). He held that the national court simply cannot cede to the ECJ a jurisdiction which it does not have (para 28).

8. It was submitted by Arsenal that Laddie J should remit the matter back to the ECJ, but the Judge disagreed. He held that the only option available to Arsenal would be to appeal to the Court of Appeal against his findings of fact (para 29). It was submitted by both parties that the ECJ may well have intended to interpret the Directive in some way between the narrow and wide interpretations put forward by the parties. They could not agree on what this intermediate construction might be, and Laddie J was of the view that this was not the effect of the ECJ’s ruling on the law. In the circumstances, Arsenal’s claim in trade mark infringement was dismissed. Arsenal appealed.

Held

9. In the Court of Appeal, Arsenal made 3 submissions:
(a) the ruling of the ECJ was a ruling of law and binding on the national court - thus the Judge’s conclusion was wrong.
(b) the Judge had misunderstood the reasoning of the ECJ Judgment - Arsenal submitted that what had happened in the ECJ was that the Court had reformulated the questions referred to it by Laddie J, so that the questions were not simply capable of a “yes” or “no” answer. Arsenal submitted that what the ECJ decided was that it was sufficient (for infringement) if the use complained of was liable “to jeopardise the guarantee of origin which constitutes the essential function of the mark.”, and that no reasonable court could reach a different conclusion from the ECJ on this issue - for this reason, it was immaterial that the trade mark was perceived as a badge of loyalty.
(c) the Judge had wrongly held (in his first judgment) that the use of identical signs by Mr Reed were not such as to indicate trade origin, i.e., a connection in the course of trade between the goods bearing the mark and the trade mark proprietor.

10. On the first issue (is the ECJ ruling binding ?), Aldous LJ (with whom the other members of the Court of Appeal agreed) held that as a matter of interpretation he was entitled to interpret the ECJ ruling in the light of the reasoning set out in the ECJ Judgment. He noted that (i) the ECJ held that registration of a trade mark gave the
propriety a property right (section 2 of the 1994 Act)
(ii) the relevant consideration was whether the use was
liable to damage that property right or, as the ECJ put
it, was it liable to jeopardise the guarantee of origin
which constitutes the essential function of the mark
(iii) the answer to that question did not depend on
whether the use complained of was trade mark use
(iv) the reformulated question looks at the interests of
the proprietor and whether that interest is likely to be
affected, whereas Mr Reed’s argument depended upon
considering the nature of the use
(v) the ECJ was not concerned with the question
whether the use was trade mark use, rather the
question is whether the third party’s use affects or is
likely to affect the functions of the trade mark
(vi) uses for certain descriptive purposes will not
infringe because they cannot affect the registered
proprietary rights.

11. At para 40 of his Judgment, Aldous LJ also noted that
the ECJ had given two reasons why Mr Reed’s use
of the signs identical to the trade marks was liable to
affect one of the functions of Arsenal’s registered
marks - it had stated:
“Having regard to the presentation of the word
“Arsenal” on the goods at issue in the main
proceedings and the other secondary markings on
them, the use of that sign is such as to create the
impression that there is a material link in the course of
trade between the goods concerned and the trade mark
proprietor...That conclusion is not affected by the
presence on Mr Reed’s stall of the notice .... [as] there
is a clear possibility in the present case that some
consumers, in particular if they come across the goods
after they have been sold by Mr Reed and taken away
from the stall where the notice appears, may interpret
the sign as designating Arsenal FC as the undertaking
of origin of the goods...Moreover, in the present case,
there is also no guarantee, as required by the Court’s
case law ... that all the goods designated by the trade
mark have been manufactured or supplied under the
control of a single undertaking which is responsible for
their quality...The goods at issue are in fact supplied
outside the control of Arsenal FC as trade mark
proprietor, it being common ground that they do not
come from Arsenal FC or from its approved resellers’’

12. Aldous LJ rejected the submission that these
passages contained findings of fact inconsistent with
the first Judgment of Laddie J - rather, they contained
reasoning and explanation based upon agreed facts, and
he concluded at para 45:
“The ECJ looks at the function of a trade mark not
whether its use is trade mark use. Unchecked use of
the mark by a third party, which is not descriptive use,
is likely to damage the function of the trade mark right
because the registered trade mark can no longer
guarantee origin, that being the essential function of a
trade mark”

13. Aldous LJ also rejected Laddie J’s conclusion that
the rationale behind the ECJ decision was that it had
concluded that Arsenal should win because Mr Reed’s
use was such as would be perceived by some
customers or users as a designation of origin (para 47).
He held that the reason why the ECJ thought Arsenal
should win was because it considered that the right
given by registration was likely to be affected by a third
party use, i.e., when the use complained of is liable to
jeopardise the guarantee of origin. He further held that
the ECJ had reached a finding of fact that the use
complained of was liable to jeopardise the guarantee of
origin, which he held was an inevitable finding in the
circumstances.

14. The decision of the Court of Appeal on the third
issue - whether Mr Reed’s use of the signs was or was
not trade mark use - was strictly obiter as it had already
decided that this was not the relevant test. Aldous LJ
noted that, if the use of the word “Arsenal” on
merchandise did not indicate trade origin, there would
not have been any need for Mr Reed to put up a
disclaimer on his stall (para 68). He reviewed the
evidence before Laddie J, and concluded that the use
of the trade marks did denote the origin of the goods.

15. Finally, although there was no appeal on the issue
of passing off, Aldous LJ (citing the “extended” passing
off cases) indicated that he disagreed with the rationale
and conclusion of Laddie J on the issue of passing off.

Commentary
16. Subject to an appeal by Mr Reed (a Petition to the
House of Lords has been filed), the Judgment of the
ECJ as interpreted by the Court of Appeal, redefines the
correct approach to the issue of infringing use under
section 10(1) of the 1994 Act. The old question of
whether the use was trade mark use (considered in
various authorities in the UK Courts after the passing of
the 1994 Act) is no longer a relevant question. The
focus has switched to a consideration of whether the
use complained of is likely to jeopardise the guarantee
of origin of the goods - i.e., whether the property right
enjoyed by the proprietor is likely to be damaged.
Unless the use can be said to be descriptive, there is a
greater likelihood now that the use complained of will
amount to infringing use.
17. The Judgment is likely to be seized upon by football clubs and other trade mark owners in the sporting field to strengthen their grip on the lucrative area of merchandising. It remains to be seen what attitude the clubs will take to the proprietors of “unofficial” merchandising stalls outside football clubs up and down the country. Will new licensing arrangements be imposed, will the clubs turn a blind eye or will I never have the opportunity of buying a scarf bearing the legend “CHELSEA FC - EUROPEAN CUP 2003-2004” anywhere except the official Club shop at the official club shop price.
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