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BRITISH
ASSOCIATION
FOR SPORT
AND LAW
LIMITED

Sport and the Law Journal





**BRITISH
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FOR SPORT
AND LAW
LIMITED**

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Editorial

By Raymond Farrell

Editor

Much has happened in relation to the Association and the world of sport and the law since the previous edition of this Journal appeared. The Annual Conference was held on October 22nd 2003 at Lord's Cricket Ground and was an outstanding success. Thank are due once again to Fraser Reid and the hardworking sub-committee who organised the event. The AGM was held on the same day during which the necessary resolutions were passed enabling the Association to become a company Limited by guarantee with effect from January 1st 2004. Also at the AGM the members elected Murray Rosen QC as Chairman. He succeeded Nick Bitel who had served in that office for three years. Fortunately, we shall not lose Nick's unique experience and knowledge (and personality!) as he was co-opted back onto the committee at a meeting held in December. We can now look forward to making further progress under Murray Rosen, Head of Chambers at 11 Stone Progress Buildings, Lincoln's Inn, who has already set about the task with great enthusiasm. We wish him well.

I am also pleased to announce that Maurice Watkins has accepted an invitation from the committee to continue in the office of President for a further three years. In view of his increasingly arduous commitments – senior partner at James Chapman & Co; director of Manchester United; director the Rugby Football League; director of Coutts & Co.; governor of Manchester Grammar School, to name but a few, we are indeed fortunate to have persuaded him to remain as President.

Following the success of the Annual Conference two further events were held in December – one in Manchester and one in London on December 9th, in conjunction with James Chapman & Co., we organised a seminar at Old Trafford to consider the issues surrounding the broadcasting of reference to the contract agreed between B Sky B and the FA Premier League. Maurice Watkins, Alasdair Bell of Olswangs, Paul Harris of Monckton Chambers, Mike BloXXX of Chapman's and Richard Parrish of Edge Hill College made contributions to a lively debate.

Within a few days of this event it was announced that the European Commission had reached an

agreement with the FA Premier League and BSkyB that BSkyB's monopoly of live broadcasting would end with eight matches per season being broadcast live by a free-to-air broadcaster. At the time of writing it is not known how this will impact on the price to be paid by BSkyB who will lose their exclusivity. It would appear that this may be substantial. The European Commission obsession with ensuring maximum coverage of Premier League matches at the expense of clubs which actually play in the Premier League is difficult for some observers to understand. No legal challenge is expected following the Commission's announcement. This is entirely understandable view of time and cost factors involved but it is unfortunate that the ECJ will not get the opportunity to analyse the whole situation.

On December 11th an event jointly organised with King's College, London considered the new World Anti-Doping Code and attempts to harmonise the approve to the regulation of drug use in sport. Our thanks are due to Jonathan Taylor who organised and chaired the event. Richard Pound Chairman of WADA, was the main speaker. Other speakers included Francesco Ricci Bitti; President of the ITF; David Sparkes, Chief Executive of British Swimming; Michelle Verroken, UK Sport and Adam Lewis of Blackstone Chambers.

The relevance of this event was self-evident but within the next few weeks the issues involved had claimed spectacular casualties. Arguably, the most significant was Michelle Verroken who was reported to be on "gardening leave" for reasons which have yet to be explained in public by UK Sport. Whether these had anything to do with the problems surrounding Rio Ferdinand, of Manchester United and England can only be speculated upon.

Ferdinand was, of course, banned for eight months for failing to submit to a drugs test to be carried out by testers from UK Sport. As soon as his name became known he was withdrawn from the squad to face Turkey in an important European Championship qualifying match. At the FA hearing into his alleged failure his legal team led by Ronald Thwaites QC and Maurice Watkins failed to convince the panel members that he should not be banned. Enormous pressure had been exerted by

FIFA and UEFA to deal harshly with Ferdinand (unlike the way which other footballers in England and Europe had previously been dealt with). The eight-month ban ensures that Ferdinand will miss the European Championships to be held in Portugal this summer. Some critics, including Richard Pound, believe that the ban was too short and he believed that a two-year ban would have been more appropriate. This, of course, is the period which WADA wishes all sports bodies to adopt as a minimum for failing (or failing to take a test).

At the time of writing it had just been announced by the FA that Ferdinand would appeal against the ban. One factor to consider is that the period could actually be increased to two years. Further references to the Court of Arbitration and Sport and the UK Courts remain more distant possibilities.

The suspicion remains that had the forgetful Ferdinand not been involved, but rather a virtually unknown player from, say, Manchester City then the penalty would have been less severe. Nonetheless, the message would appear to be clear. In the new climate, high level (and, maybe, even low level) players can expect lengthy bans if they infringe the drug testing regulations. England's Swedish head coach and Manchester United's Scottish manager may rile against a perceived iniquity but for whatever reason Ferdinand may live to regret that he forgot to comply with a request made by UK Sport officials. Memory training may now become as important as physical training.

No sooner had the Ferdinand saga receded from the headlines when the next bombshell hit the headlines. Greg Rusedski; for many years the no.2 ranked British tennis player behind Tim Henman was reported to have failed a drugs test. He vehemently denied any wrongdoing and accused tennis officials of pursuing him when the fault lay elsewhere. This particular issue may well be set to run for longer than that involving Ferdinand. Rusedski is represented by Mark Gay from Denton Wilde Sagte who he formidable record in such cases whether defending a prosecuting. Interestingly, he prosecuted in the Ferdinand case at the FA hearing. The defence, which he mounts for Rusedski, will command the maximum interest.

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.

First Brazilian Conference on Sporting Law and Justice

This event was organised by the Instituto Brasileiro de Direito Desportivo (IBDD) in conjunction with Parana Esporte, an official sports body based in Parana, from 4 to 6 December 2003. It featured eight topics and 26 of the most eminent specialist sports lawyers of Brazil, including Marcilio Krieger, Heraldo Panhoca and Alvaro Melo Filho. It also witnessed the participation of Dr. Ricardo Frega Navia, an Argentinian lawyer with many years of experience in the field of sports law, both in his native country and in Spain¹.

European Sports Forum

This event took place in Verona (Italy) between 21 and 23 November 2003²

It featured workshops on the following topics:

- Sport as a means of social integration
- The role of European sport in an international context
- Sport and media literacy

Obituaries

Philip Heslop

The death, at the too early age of 54, was recently announced of Philip Heslop, a top barrister who was an expert in unravelling the complexities of the financial scandals besetting the City of London in recent years. It was this particular knowledge, as well as his wider experience of the corporate world, which benefited the then owner of Premiership club Tottenham Hotspur Alan Sugar in his dispute with Terry Venables, extensively documented in these columns and elsewhere. These qualities also enabled him to assist Ken Bates in relation to an attempted takeover of Chelsea Football Club³.

Althea Gibson⁴

The first black tennis champion to win a singles title at Wimbledon and the US Open recently died at the age of 76. She succeeded in breaking the "colour barrier" which beset the world of tennis until relatively recently. Her fast service and remarkable rapidity round the court made her a leading figure in the women's game of the 1950s, whereas her unassertive manner disguised her success in overcoming the segregation which applied in many areas of US sport at that time.

The hurdles which she had to overcome in the process were enormous. Thus even though black players had already taken part in US Lawn Tennis Association (USLTA) indoor events before she won the

1950 Eastern Indoor Championships, the Association refused to invite her to outdoor national events unless she first played in a major outdoor event. Ultimately, a campaign led by former Wimbledon and US champion Alice Marble ensured her participation in the US Open at Forest Hills, where she almost accounted for the defending Wimbledon champion Louise Brough. Ms. Gibson went on to win the French Open in 1956. The following year she defeated Darlene Hard to win the Wimbledon singles title, and Louise Brough to carry off the US Open. She repeated this remarkable double feat the following year.

In later years, she not only became a distinguished golfer, but also served in various sporting positions in the New Jersey State government.

Adrian Shelford⁵

Struck down at the untimely age of 39, Adrian Shelford will be remembered not only as a fine Rugby League prop forward, but also as the subject of an intense legal struggle between two of Britain's leading clubs.

Mr. Shelford was already a front-row forward representing New Zealand in 1987 when Lancashire club St. Helens announced that they had acquired his services. However, a few weeks later arch-rivals Wigan made a similar claim, thus plunging relations between the two clubs to even greater depths. In December of that year, a High Court judge ruled that Mr. Shelford had not entered into a binding commitment to play for St Helens, which gave him the freedom to commence his Wigan career. The latter never had any cause to regret having struggled so hard in order to procure his services, since his arrival coincided with the start of their long period of supremacy over the Challenge Cup, gaining a winners' medal in each of his three seasons with them.

He remained in Britain and trained as a teacher after his playing days were over. He died of a suspected heart attack.

Stephen Pearson⁶

The world of Rugby League lost another important figure with the passing away of Stephen Pearson, the acting Chief Executive of the Halifax club, at the age of 47 after a long battle with lung cancer.

It will be recalled from a previous issue⁷ that the "Blue Sox" were facing grave financial difficulties which threatened their continued existence. Mr. Pearson, a lifelong Rugby League fan, was instrumental in ensuring that the club avoided closure. The advisory group which was chaired by him saved the club from their spiralling debts. Mr. Pearson also assisted in brokering a deal which led to the establishment of the Calderdale Community Stadium Ltd, which enabled the redevelopment of the club's ground at The Shay to continue.

1. General

Mr. Pearson was also an influential political figure, representing the Liberal Democrats on Calderdale Council from 1990 to 1998, as well as becoming Calderdale's youngest-ever mayor.

Robert Kardashian⁸

Robert Kardashian was a US lawyer who was a friend of footballer O.J. Simpson, the subject of one of the most sensational murder trials in North American history. He played an enigmatic part in this affair, in that a good deal of speculation surrounded the clothing bag which he carried out of Mr. Simpson's home in Los Angeles on the day after the latter's former wife and a local waiter were found stabbed to death in the summer of 1994. Under California Bar Association rules, lawyers are bound to take their client's confidences to the grave, so unless Mr. Simpson himself decides to break silence over this matter, the contents of this bag, suspected of including the murder weapon, will remain a secret.

Lawyers in sport

Busy time for London's lawyers ahead of the London Olympic bid and Athens Games

The various issues surrounding the bid by the nation's capital to host the 2012 Olympics will be dealt with in full elsewhere in this issue (see below, p. 000). At this point, however, it is appropriate to report on various developments within London's legal community in preparation for this bid.

In the first instance, there is the appointment of leading London firm Farrer & Co as the official partner of the British Olympic Association (BOA) in its bid to achieve this goal. This firm has a long-standing association with the world's greatest sporting festival, predating even the last occasion when London hosted the event in 1948. The links between the two organisations were further strengthened by the arrival at Farrer's of Robert Datnow, the BOA's former in-house lawyer⁹.

Obviously there are also busy times ahead for the person who replaced Mr. Datnow, being Ms. Sara Friend. Interviewed by the Law Society's Gazette¹⁰, she revealed that much of her time has been spent on the bid company (BidCo). This is the corporate vehicle which will organise staging the bid once it has become fully operational in conjunction with the other key stakeholders in this venture, i.e. the Government and the Greater London Authority (GLA). This work has involved a mixture of property deals, joint venture agreements and trademark and domain name protection issues. Her role has also expanded to include duties in the public sector. Thus she will assist an all-party Olympic group in Parliament, and will probably continue

to be part of various working groups behind the bid, assessing the establishment of an organising committee and a potential Parliamentary Bill aimed at dealing with an Olympic lottery.

Although the spotlight is currently on the London bid, Ms. Friend hastens to remind us that the Athens Olympics are now less than a year away. In this connection, she has been working on the draft team members' agreement, and the qualifying standards agreements have been negotiated by the technical performance experts with whom she co-operates. She has also been drawing up and finalising agreements for the British team's training centre in Cyprus.

She also points to some of the acute legal problems ahead, with some signs of "ambush marketing" and illegal ticket sales and promotions raising their head. The ticketing issue is causing particular concerns, particularly in view of the EU rules which prevent any prohibition on ticket sales to citizens of other Member States, which will make it extremely difficult to ensure observance of the ticket quotas which have been allocated to the various EU countries.

However, it is not only the capital's legal profession which has been foremost to the provision of professional assistance in matters Olympic. Leading Manchester firm James Chapman & Co. has been given the task of marketing some of Britain's best swimmers ahead of the Athens Games after securing twelve of them as clients. The firm has been engaged not only to provide the athletes concerned – including recent World Championship medallists Becky Cook, James Gibson and Karen Legg – with legal assistance, but also to act for them as marketing agents. They have been given a brand identity by the firm (they recently met in Manchester to launch "Team H2O") so that they can be marketed as a collective brand as well as individually. In fact, one of the swimmers concerned, World Championship gold medallist James Hickman, is a consultant with Chapman's¹¹.

London firm appointed as BTA personal injury lawyers

In the autumn of 2003, London firm Leigh Day & Co were appointed by the British Triathlon Association (BTA) to provide a personal injury service to its members after the Department for Constitutional Affairs registered the Association as a prescribed organisation for the purposes of Section 30 of the Access to Justice Act 1999. The Association will now be able to recover legal expenses from a losing opponent to reflect the provision of legal assistance with which it provided the member in question¹².

1. General

Eddie continues quest to become legal eagle

In a previous issue¹³, it was reported that the anti-hero of the 1988 Winter Olympics in Calgary, Canada, Eddie "The Eagle" Edwards, had decided to enter the legal profession by enrolling on a law course at Leicester De Montfort University. On this occasion, Mr. Edwards actually qualified and has since been accepted on the University's Legal Practice Course (LPC). He is reported to be seeking a training contract with a Bristol firm in order to be near his wife¹⁴.

Former Wallaby L'Estrange to help reform lawyer/client relations

During the 1970s, one of the many touring parties organised by the Australian Rugby Union to this and other rugby-playing countries contained Queenslander David L'Estrange. The former Wallaby then became a successful lawyer in his home state, who later developed an increasing concern about the dwindling reputation of the legal profession. This led him to seek employment with the Queensland Law Society's Client Relations Centre, where he is working hard to remedy this state of affairs¹⁵.

Digest of other sport journals

Recent issues of sister German journal

In the third issue for 2003 of the *Zeitschrift für Sport und Recht*¹⁶, the author Peter Heermann, under the title "Sport and European Anti-Trust law" (Sport und europäisches Kartellrecht) concerns himself with the extent to which the particular characteristics of sport need to be taken into account when applying competition law. The article is prompted by a resolution passed by the International League for Competition Law (LIC) to this effect, which has ventilated both issues of principle and detailed questions. Having been discussed by various working parties, these issues have now been communicated to the European Commission. The special characteristics in question, which come to the fore in such issues as broadcasting rights and state aids to sport, both at the professional and at the amateur levels, through to anti-competitive agreements and the abuse of dominant position perpetrated by federations operating at the international and supranational levels. Maintaining restrictions on access to national teams and the new FIFA regulations are also part of the recommendations made by the resolution in question to the European Commission.

Another topic to be featured prominently in this issue is that of the legal issues raised by the use of video evidence in football, which is the subject-matter of a contribution by authors S. Götze and Kathrin Lauterbach. The increasing commercialisation of football and the

serious financial consequences for clubs of match results are increasingly rendering erroneous refereeing decisions unacceptable. This has given rise to demands for improved invigilation of such decisions and even for giving football clubs the opportunity to claim compensation from the federation in question. The authors raise the issue of restrictions on the provision of evidence laid down in the federations' rules, and the closely connected question whether the clubs should be given the opportunity legally to require the federations to make use of various technological facilities in this regard during sporting competitions. These issues could be settled by using not only remedies available under the law of associations, but also public law remedies.

The author T. Hausch replies to a contribution made in an earlier issue by M. Schamberger¹⁷, in which the question of whether it should be lawful for professional sporting performers' contracts of employment to be concluded on a temporary basis was examined on the basis that the position of sporting performers was comparable to that of actors and other stage performers. The author questions this comparison, and advocates a solution based on the unsatisfactory performance of contracts which is often noted amongst sporting professionals, particularly in view of the fact that unsatisfactory performance constitutes grounds for dismissal under existing German employment law.

In issue 2003/4¹⁸, the authors C. Lampe and M. Müller, in their contribution entitled "Sports management and employment placement practices" (Sportmanagement und Arbeitsvermittlung) examine some specific new features introduced by the Law on Employment Promotion in Professional Sport (*Arbeitsförderungsgesetz für den Profisport*), more particularly the issues of professional counselling, sports management and employment placement practices. Now that the Federal Employment Agency (*Bundesanstalt für Arbeit*) involves itself in the field of employment placement, a number of changes have taken place in this area which are explained by the author.

In a further contribution, H. Rüth examines the question whether salary caps are consistent with existing employment protection laws. In his conclusion, he answers this question in the negative. The author Frank Bahners examines the same issue from the point of view of European competition law, and concludes that this notion is inconsistent with both Article 81 (anti-competitive agreements) and Article 82 (abuse of dominant position) of the EC Treaty. The authors Götze and Lauterbach continue the examination, commenced in the previous issue, of the legal questions arising from the use of video evidence in professional football.

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

1. General

Sport and International relations

Report by UN Sport and Development for Peace task force

This report, which was issued in September 2003, analyses in detail the potential contribution which sport could make towards achieving the United Nations Millennium Development Goals (MDGs). It provides an overview of the growing role which sporting activities are playing in many UN programmes, as well as the lessons learned. It also includes recommendations aimed at maximising and mainstreaming the use of sport.

The Task Force accordingly makes a number of recommendations¹⁹:

- (a) Sport should be better integrated into the development arena;
- (b) Sport should be incorporated as a useful tool for development and peace;
- (c) Sport-based initiatives should be included in the country programmes of UN agencies where appropriate, according to locally assessed needs;
- (d) Programmes promoting sport for development and peace need greater attention and resources by Governments and the UN system;
- (e) Communications-based activities using sport should focus on well targeted advocacy and social mobilization, particularly at the national and local levels;
- (f) A final recommendation of the Task Force is that the most effective way to implement programmes that use sport for development and peace is through partnerships.

Sportswear boycott over Burma links²⁰

Football supporters are currently being urged by campaigners to boycott the Kappa sportswear firm, which supplies some of the leading teams, following allegations that many of its products sold in this country are manufactured in Burma. Campaigners for democracy in that country claim that such teams are unconsciously assisting the brutal military dictatorship there by purchasing products manufactured in that country.

The current Burmese regime has been bitterly lambasted for its appalling record on human rights. Textile exports are one of the most substantial sources of revenue for the regime, which is believed to have killed thousand of Burmese citizens in its suppression of democracy. Campaigners allege that, in the course of 2002 alone, over £50 million worth of textiles were imported into Britain from Burma. Recently, the Burma Campaign, a pressure group campaigning for democracy in Burma, scored a victory when JJB Sports, the largest sports retailer in this country, agreed to withdraw stock bought from Burma.

Kappa, for its part, claims to have discontinued

manufacturing in Burma, and that it no longer has any business links with that country. However, Burma Campaign members claim to have found Burma-produced goods in a London West End shop in September 2002.

Kenyan athlete's attempt to switch nationality to Qatar could backfire²¹

Saif Saeed Shaheen, an athlete formerly known as Stephen Cherono, recently aroused considerable outrage in his native Kenya when he decided to change his allegiance to Qatar for financial reasons, and subsequently finished ahead of his former team-mates to win the 3,000 metres steeplechase at the world championships held in Paris in September 2003.

Kip Keino, the former Kenyan middle distance runner who currently chairs the national Olympic committee of his country, announced that he would be raising with the International Olympic Committee the question whether Shaheen is in fact eligible to represent his new country at the Athens Games next year. He claims that under IOC rules, Shaheen cannot represent Qatar. He cites as a precedent the case of Wilson Kipketer, the 800 metres runner, who left Kenya to assume Danish nationality. He won the 1995 title, but was forced to be idle at the following year's Olympics in Atlanta because he had as yet failed to complete the necessary qualification period.

No further news about this case was available at the time of writing.

Sven (and Nancy) seek to achieve world peace...

Peace in the dressing room tends to be the maximum aspiration for most football managers, but this is clearly too unambitious for England manager Sven-Göran Eriksson and his glamorous consort Nancy Dell'Ollio. With the support of some of the country's best-known football names, the couple have formed a charity bearing the name Truce International. Its objective is to use football as an inspiration in order to discontinue world conflict. As a symbolic gesture to that effect, Mr. Eriksson has presented a football (the one with which England were eliminated from the 2002 World Cup) to United Nations General Secretary Kofi Annan²².

England captain David Beckham, one of the sponsors of the charity, appeared in a television special the week following the launch, set in the couple's London mansion. Truce International will use the international language of football as the inspiration to halt world-wide violence²³.

Ex-soldier sets out on football mission in Afghanistan

As has been reported in earlier editions of this organ²⁴, various prominent personalities, mostly in the political arena, have made attempts to restore "the beautiful

1. General

game" to this war-torn Asian country. From the British end, the Football Association (FA) have recently backed a four-month initiative aimed at establishing a new structure for the game in Afghanistan. On this occasion, the assignment is led by a former British army major who served in Kosovo, Michael Moriarty. Although not a footballer himself, Mr. Moriarty was believed to possess the necessary skills of diplomacy and organisation to make a success of this assignment²⁵.

British basketball player victimised in US for opposing Iraq war²⁶

As has been the case for most aspects of North American society, sport has joined in the nationalistic fervour which accompanied the invasion of Iraq by US-led troops in April 2003. Basketball has been no exception, as witness the fact that, with a few days to go before the invasion, the teams emerging from the dressing rooms into the arena for the Phoenix Suns v. Utah Jazz fixture chanted "USA" to the echoes of Bruce Springsteen's paean *Born in the USA*.

This attitude was very much to the annoyance of John Ameachi, who hails from Stockport, Cheshire. Until recently, he played for Utah Jazz and was the most successful Briton ever to play in the NBA championship. He has since proudly publicised his anti-war views, but has had to pay a heavy price. Since the outbreak of hostilities, he has not been selected for his team, and has received many threatening emails from basketball "fans" instructing him to "go home" and "stop taking American money". One particular member of the Jazz coaching team accused the player of hating white people, hating US citizens, and of thinking that he is smarter than anyone else.

Mr. Ameachi has now returned to Britain, doing what he loves best, i.e. coaching youngsters and taking part in psychology work (in which subject he is studying for a PhD degree).

Choice of Vancouver for Winter Games seen as snub for peace – both internationally and nationally

In the summer of 2003, it was announced by the International Olympic Committee that Vancouver, Canada, would be the site of the 2010 Winter Olympics. The implications of this choice for other Olympic bids will be discussed later. Here, we examine the controversy in terms of international relations which this choice has provoked.

The choice for the 2010 Games essentially boiled down to a contest between two venues: Vancouver and Pyeong Chang, South Korea. The latter had pitched itself as the peace candidate. It was felt that, with the world in its present turmoil, bringing the Games to the

very border of the US president's "Axis of Evil" would constitute a gesture of reconciliation. Vancouver, on the other hand, sold itself as the "safety and security" candidate, making much of the fact that, the world being in its current troubled state, it is best to hold the Games in a location where it can almost be guaranteed that nothing will happen to disrupt them. For appearing to take the safe option at the expense of one which had some potential to improve international relations, the Olympic movement has incurred some criticism from certain quarters.

However, the choice of Vancouver has also had implications for the relations between Canada's ethnic communities. As the cultural critic Naomi Klein reports²⁷, a good deal of opposition has been forthcoming to the planned construction of the Cayoosh Ski Resort, on Mount Currie, near Whistler, which is the heart of the planned competitions. Mount Currie is currently pristine wilderness, a habitat for bears, deer and mountain goats, and is used as a hunting ground for Canada's Natives, as well as a source for teas, berries and medicines for 11 Native groups.

The objections raised by many Native communities are not so much against the Games as such, but against their role in transforming the British Columbian economy. With traditional industries such as fishing and logging in crisis, the Games are being positioned as a two-week globally televised commercial for the "new economy" in British Columbia, i.e. winter tourism. Much of the development expansion which this requires will reach into land claimed by British Columbia's First Nations, claims which have never been ceded. According to Taianeke Alfred, Director of the Indigenous Governance Programme at the University of Victoria, tourism can be "as disruptive as logging and mining". Mountains are carved up for ski runs, wildlife is driven away, and urban areas are transformed into parking lots with specialist restaurants. The big money appears to be in "speculative real estate", to which this expansion is admirably suited.

For all these reasons, ski resorts have become one of the most explosive issues in British Columbia. Three years ago, the "Li'lwat Nation" community held a referendum on the question whether it approved the Cayoosh Ski Resort, and 85 per cent voted in the negative. In order to block construction, activists have erected a protest camp on the mountain, supported by all 11 chiefs of the St'at'imc Territory. A proposal to expand the Sun Peaks resort from 4,000 to 24,000 bed units has encountered even fiercer opposition. The various protest actions in question are bound to increase in number and intensity now that Vancouver has won the Olympic bid²⁸.

1. General

Cricketing relations with Zimbabwe continue to cause ructions

The previous issue of this Journal extensively covered the controversies and disruptions which attended the 2003 cricket World Cup in connection with the participation in the event of Zimbabwe, whose rulers, led by President Robert Mugabe, have increasingly earned themselves the obloquy of the world community because of their appalling record on human rights and on providing their citizens with minimum subsistence levels²⁹.

It will be recalled that this episode exacted a heavy price from the game in general, and English cricket in particular. Not only did England's ultimate withdrawal from the fixture against Zimbabwe ensure that they failed to qualify for the "Super Six", but it also left the relations between the game's authorities and the players in ruins, undermined the position of Tim Lamb, the Chief Executive of the England and Wales Cricket Board (EWCB), and left the latter isolated within the International Cricket Council, as well as facing a multi-million fine for failing to take part in the fixture. The toll taken of the game became even heavier at the start of the 2003 English cricket season, as protestors campaigned at the hallowed gates of Lord's as a politically vetted Zimbabwe team opened the international summer. The resignation, during the subsequent Test series against South Africa, of England captain Nasser Hussain could also be included in the fatality count, since he himself confessed to have been hollowed out by the stress caused by this saga.

Any hopes, however, that the end of the 2003 cricket season would enable this issue to be put to rest were brutally dashed when it was learned that it could cost the EWCB its most important sponsor. It appears that, in the course of the World Cup, top executives at the Vodafone company attempted to persuade the England team to complete the contentious fixture whilst at the same time donating the match fee to humanitarian causes within Zimbabwe. As we know, these wishes were defied. Moreover, Lord MacLaurin, the Chairman of Vodafone, has since made it even clearer that any connection with the Mugabe regime is bad for English cricket and for the Vodafone sponsors. In late September 2003, he announced that Vodafone may not renew its sponsorship if the England team set out on their tour of Zimbabwe, scheduled for the winter of 2004³⁰.

This has left the EWCB facing a potentially catastrophic shortfall in revenue. Vodafone currently pours £4 million into the game, which benefits the game at all levels, from the payment of the salaries of international players bound by central contracts to the financing of women's and schools cricket. In addition, there are serious doubts as to whether the next television deal to be concluded with the EWCB, which

is due in 2006, will come close to matching the current amount of £49 million per annum emanating from Channel 4 and BSkyB. This is money which English cricket can ill afford to forfeit. On the other hand, if the winter tour does not go ahead, this will once again place the EWCB in direct confrontation with the ICC. An EWCB source is reported to have said that, if Mugabe was still in charge of the country by the time that the first match on the planned tour is due to start in November 2004, England would not be playing. It is only to be hoped that, whatever decision is made, it is not left as late as was the case with the World Cup, when Nasser Hussain carried the English flag at the opening ceremony still uncertain as to whether the Zimbabwe game would proceed³¹.

Rwanda v. Uganda fixture descends into ugly violence, but heals domestic wounds

The central African republic of Rwanda is an area which during the past few decades has been the theatre of some of the most brutal conflicts ever known in the course of human history. In 1994, matters reached such a pitch in the age-old conflict between the Hutu and Tutsi tribes that Hutu militiamen, with the active encouragement of their Government, massacred 800,000 Tutsis in 100 days. Football has become one of the few factors capable of healing the wounds of a nation, as was proved by a recent fixture against Uganda – even though the match itself descended into violence³².

The fixture took place in the context of an African Nations Cup qualifying tie. The first leg, played in Rwanda, ended in a 0-0 draw, and had already stoked up bad blood because of the Ugandan players' conviction that the Rwanda goalkeeper, Mohammud Mossi, was using the powers of juju witchcraft in achieving the miraculous saves which kept his side in the game. Relations were not improved by the fact that the return leg, in Kampala, kicked off over two hours late because of a traffic jam which immobilised the Rwanda team coach. When the match eventually commenced, Mossi inflamed passions further by holding up his gloves to his opponents and informing them that on the day he was possessed with powers of "electric juju". Some great early saves from the keeper did nothing to allay this claim, and all hell broke loose when some Ugandan players attempted to tear off his gloves. The match nearly had to be abandoned, but eventually resumed, with Gatete, one of the players injured in the fracas, scoring the winning goal.

This win appears to have united both Hutus and Tutsis in a wave of rejoicing, led by the president, Paul Kagame, who is himself a football fanatic. The same scenes were repeated when Rwanda beat Ghana 1-0 to secure a place in the African Nations Cup finals for the

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first time in its history. The “beautiful game” may be tarnished by commercialisation and bad behaviour at times, but in this case it appears to have been a force for peace³³.

Tour de France in compact with Basque separatists

With weeks to go before the start of this year’s Tour de France (cycling), the organisers of this key event on the cycling calendar made an agreement with the banned Basque separatist organisation Batasuna. Under this pact, the 16th stage, which went through the French Basque country, starting at Pau and finishing at Bayonne, would be run on bilingual lines, with race announcements being made in Basque as well as in French. The organisers hoped that this would serve to avoid any protest action marring the race. This turned out to be the case³⁴.

Afghanistan reinstated by IOC

In late June 2003, Afghanistan, which had been suspended from the Olympic movement under the Taliban regime, was reinstated by the International Olympic Committee. The suspension had been imposed in October 1999 because of the Taliban’s ban on the participation of women athletes³⁵.

Other issues

Is there such a thing as global sports law? Article in leading journal³⁶

In a recent journal article, University of Warwick lecturer Ken Foster focuses on the question as to how international sporting federations can be regulated by law. He asserts that this question is analytically dependent on a narrower question, i.e. whether there is a definable concept called “international sports law”. The article makes the distinction between “international sports law” and “global sports law”. International sports law can be applied by the domestic courts; global sports law, by contrast, implies a claim from immunity from national law. Conceptually, it is a cloak for continued self-regulation by international sports federations, as well as a claim for non-intervention by national legal systems and by international sports law. It thus serves to prevent the rule of law from regulating international sport.

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Corruption in Sport

Cricket corruption scandal – an update

These are early days, but it does seem as though the various measures adopted by the cricketing authorities, both at the national and at the international level, seem to have had some effect. The establishment and operation of the Anti-Corruption Unit (ACU), under former policeman Lord Condon, had played a considerable part in this achievement. Even though, as has been frequently reiterated in these columns, there is some reason to believe that cricket betting, both official and illegal, may continue to tempt some into corruption, the scope for their doing so has been dramatically curtailed by the various measures which have now been put into place to prevent and detect any untoward activity in this regard³⁷.

However, there continue to surface periodic indications that the problem has not gone away entirely. Thus in July 2003, the Pakistan cricket captain, Rashid Latif, published, on a website, an open letter urging the International Cricket Conference (ICC) “to take immediate practical steps” to prevent match-fixing. He claimed that, whilst matches were no longer being rigged, the ICC had an obligation to eliminate “fancy fixing”. He was particularly concerned about run-scoring during the first 15 overs of one-day internationals, when he claims that the fielding restrictions give opening batsmen the opportunity to score fewer runs than expected. He therefore urged the ICC also to retain fielding restrictions throughout one-day matches.

Although at first Latif seemed to have opened up yet another can of worms for the game, it appeared that he was “pushing at an open door”. The practice known as “fancy fixing” had, in fact, already been acknowledged by the ACU in Lord Condon’s original draft report which appeared two years ago³⁸. He described certain corrupt incidents occurring during matches as “occurrence fixing”, and listed nine specific aspects, from the outcome of the toss to the number of wides being bowled in a designated over³⁹.

The ICC greeted the letter with expressions of considerable surprise, particularly as Mr. Latif at all times has the opportunity to voice his concerns in a more appropriate forum, to wit the international captains’ meeting which was to take place shortly afterwards. They insisted that they had not dropped their guard on this issue. His comments, however, had to be taken seriously because of his commendable stance during the 1990s when it is widely believed the practice was widespread among members of the Pakistan team.

An equal degree of embarrassment was experienced by the Pakistan Cricket Board, whose officials were entirely unaware that Latif had written

and published the letter. They accused the cricket captain of dredging up an issue which was “dead and buried”, and hinted at disciplinary action. Thereupon Mr. Latif issued an apology. Whether this was sufficient to spare him any disciplinary action was not yet clear at the time of writing⁴⁰.

Nevertheless, some issues which were raised by the various investigations following various allegations of match-fixing continue to reverberate. It will be recalled that the former Indian test captain, Mohammad Azharuddin, had, in late 2000, been issued with a life ban for his participation in these corrupt practices⁴¹. Mr. Azharuddin has since gone to law in order to get this ban overturned. Thus far, his efforts have been spectacularly unsuccessful. In late August 2003, a lower court dismissed his action. The former Test batsman indicated that he would appeal to a higher court⁴².

Racing corruption scandal – an update

Racing is another sport which has recently had to contend with accusations and allegations of widespread corruption. It will be recalled from previous issues⁴³ that suspicions of malpractice on and around the racing tracks had reached a climax with two investigative television programmes, i.e. “They stop horses’ don’t they?” in the Kenyon Confronts series, and “The corruption of racing” as part of the long-standing Panorama programme. There had also been certain unsavoury revelations to that effect in court and in the autobiography of the former jockey Graham Bradley.

The Panorama programme had even gone so far as to describe British racing as being “institutionally corrupt”.

Naturally, some response was required from the sport’s regulatory authorities, hence the establishment, by the Jockey Club and the British Horseracing Board (BHB), of the Security Review Group (SRG), which conducted a five-month investigation into the state of the sport. As was the case with cricket’s Anti-Corruption Unit (ACU), discussed above, the Group was headed by a former senior police officer – in this case Ben Gunn. The findings of the SRG were made public in early July 2003. In its report, the Group goes to considerable lengths in refuting the allegation of “institutional corruption”, stating that:

“The nub of the allegation is whether sufficient urgency and determination has (sic) been displayed by the Jockey Club in exercising its powers as the regulator of racing. The Security Review Group is satisfied that where evidence was available to take action against those accused of corrupt activities, it was done”⁴⁴

In order to safeguard the integrity of racing, however, the report makes 36 recommendations, of which the

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following are the most significant:

- The Jockey Club should review the position of a trainer where the jockey in question has been found in breach of the rules on “non-triers”. Consideration should be given to the possibility of creating a “strict liability” offence as well as more severe penalties, including suspension in serious cases;
- Trainers, owners and jockeys licensed by the Jockey Club, and who own an account with a bookmaker or a betting exchange, should register this fact as a condition of licence;
- The Security Department of the Club should liaise with betting exchanges to combat current threats and identify emerging risks;
- An additional post of Head of Intelligence should be created in order to co-ordinate the entire intelligence function.

Some of the recommendations shed some light on the current state of the Jockey Club’s investigative capabilities, where it is urged that the Club should develop a computerised database for the benefit of the Security Department. The report explains that the system currently in place consists of 17,500 paper files, none of which are searchable other than by surname. Nicknames, addresses, telephone and car numbers are only retrievable by a physical search, which is virtually impossible⁴⁵. So some changes in this system appear to be long overdue.

The report has now gone forward for consideration by the Club and the BHB, and already some action has been taken to implement its recommendations. Thus in late July the Jockey Club introduced rules banning owners, trainers and stable staff from laying their horses to lose on betting exchanges. They entered into effect on 1 September⁴⁶. (See also under the heading “Issues specific to individual sports”, below p. 000)

This column will monitor details of any other follow-up to the recommendations.

Savill calls for public investigation into betting exchanges

Although not directly connected to the accusations and revelations on corrupt racing practices detailed above, the issue of betting exchanges has been a thorn in the side of the racing industry ever since they came into existence. Betting exchanges are gambling services which enable bettors to lay bets between themselves, usually offering longer odds than the eventual starting price, with the exchange earning a commission on winning bets. In early October 2003, Peter Savill, the Chairman of the British Horseracing Board (BHB), made a speech at a conference on gambling laws in London entitled “The Impact of Betting Exchanges on

Horseracing”. In it he described what he saw as the dangers for the integrity of racing, and the official action which should be taken as a consequence⁴⁷.

Mr. Savill is not a man known for mincing his words, and this characteristic was once again very much in evidence in this address, in which he claimed that nothing less than the future of the racing industry was at stake. He was particularly concerned that bettors using exchanges are able to make a profit out of horses losing rather than just by backing them to win, and saw this as a major threat to the integrity of the sport. Pointing out that the Australian government had been prompted to establish a National Task Force to investigate this phenomenon, he added:

“It is hard not to conclude that there are unresolved issues relating to betting exchanges. Their threat to integrity has not been properly reviewed. Betting exchanges have, for the first time ever, suddenly and immediately enfranchised 30 million-plus people in Britain to make money out of horses losing races”⁴⁸

However, speaking at the same conference, Mark Davies, a spokesman for leading betting exchange Betfair, refuted any suggestions that the impact of betting exchanges had not been thoroughly investigated already. In the process, he even abandoned the speech he originally intending to make in order to correct some of the points made by Mr. Savill. Mr. Davies claimed that there had occurred three independent inquiries – two of them by Customs & Excise, the other by the Department of Culture, Media and Sport, which took 18 months. They all pronounced themselves satisfied that betting exchanges involved nothing untoward⁴⁹.

It remains to be seen whether any further official action will be forthcoming.

In a separate development, the off-course betting organisation traditional bookmakers and TAB (which is the Australian equivalent to the Tote) called upon betting exchanges to be banned. However, there is considerable doubt as to whether any such ban would be capable of enforcement⁵⁰.

Allegations of corruption within FIFA refuse to die down

It may be recalled from a previous issue⁵¹ that a national newspaper had made various allegations to the effect that the Antigua football chief was implicated in the black market sale of tickets for the 2002 World Cup. Since then, the press has continued its investigation into the activities of this and other figures in the murky world of Caribbean football, and found evidence that FIFA funds had been misused.

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The investigative reporter concerned, Andrew Jennings, discovered how, three months after the auditors of the world governing body in football had reported that a \$1 million grant had been misused and the federation's financial rules ignored, no action had as yet been initiated in order to assess or recover the missing funds. Only after four months of procrastination did FIFA decide to despatch a delegation to the Caribbean island in early September 2003⁵².

The man at the heart of the present controversy is Chet Greene, Antigua's Commissioner for Sport and until recently head of the Antigua and Barbuda Football Association, as well as being a close ally of FIFA President Sepp Blatter, himself no stranger to controversy. Mr. Greene had been the beneficiary of a five-star, four-week all-expenses-paid trip to the World Cup finals in East Asia, having been selected to carry out "special duties". Apparently he spent some of that time attempting to arrange second-hand car deals with a Yokohama company, whilst receiving \$200 per day from FIFA by way of "allowances". It was also disclosed that, for the 1998 World Cup in France, the tiny Antigua association bought a remarkable 621 tickets. None of the Antiguan officials interviewed by Mr. Jennings appeared to know what happened to these tickets, whilst FIFA tended to brush any questions on this issue aside.

However, the two-year investigation conducted by the newspaper in question into corruption in world football produced evidence, contained in a confidential report, of the most "serious mismanagement", abuse of power, negligence, financial irregularities and possibly even criminal activity. The story began when the first instalment of FIFA's \$1 million grant to the island arrived in 1998. Mr. Greene assigned control over the money to a bogus accountant, who diverted most of it to his personal account and embarked on an unauthorised round of major spending. This saga, however, only began to unravel in December 2002. Mr Greene had lost control of the Association's annual meeting when it emerged that his supporters had failed to pay their membership fees and were therefore unable to vote. This caused FIFA to step in and ban elections within the Association⁵³.

When concern started to grow about the whereabouts of the grant, Mr. Greene claimed that the relevant financial records had disappeared as a result of a burglary – a crime which he unaccountably neglected to report to the police. Having been prohibited from electing new leaders, the Association appointed a three-man interim committee to investigate the matter. The latter discovered a series of deceptions, financial irregularities, as well as the misappropriation of FIFA funds. Thus it was discovered that:

- Greene and his "accountant", Raymond Doorgen,

had ignored the budget agreed with FIFA;

- One of the largest items in the budget was Greene's salary, the latter having arranged in secret to be paid \$4,000 per month (plus perks) for a part-time position;
- Greene was unable to produce any records of monies paid, whereas a \$ 3,000 cheque for Antigua's share of World Cup television rights which had been sent to him had disappeared;
- An air-conditioning unit purchased for the Association was installed in Mr. Greene's home;
- Certain questions had arisen on the purchase of a new Mercedes car for Greene.

To Mr Greene's ill-concealed fury, the Interim Committee refused to approve his expenses claim for over \$150,000 for want of appropriate receipts – a sum which the Association would be unable to pay anyway, since the Association was by now in a state of total financial ruin. In the face of all this evidence, however, FIFA stubbornly insisted on maintaining its warm relationship with Mr. Greene and refused to communicate with the Interim Committee. Also, in spite of a damning report submitted to FIFA by leading auditors KPMG, Mr. Greene continues to enjoy Sepp Blatter's total support. Some good news seemed to be forthcoming when it emerged that the world governing body would in fact investigate this major corruption scandal – until it was learned that the man in charge was to be none other than Jack Warner, the Deputy Chairman of the Finance Committee who, even after the truth about the "accountant" Doorgen emerged, informed Greene officially that his Association had not only followed all the relevant guidelines, but, incredibly, "represented a model for the rest of the region"⁵⁴.

It is unclear at the time of writing whether there will ever be any serious attempt at getting to grips with this unsavoury issue.

English football transfer corruption – an update

It will be recalled from the two previous issues of this journal⁵⁵ that the Football Association, acting mainly through its compliance officer ("bung-buster") Graham Bean, had embarked on a series of investigations into certain dealings in the transfer market involving the former Aston Villa manager John Gregory and the Proactive sports management group. However, just as it seemed as though the inquiry could produce tangible results, it was learned that FA officials had met to discuss Mr. Bean's role, and had offered the former Yorkshire policeman a financial settlement. It had become an open secret that Mr. Bean had become extremely disillusioned with the lack of support which

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he felt was forthcoming from the English game's governing body. In addition, at £43,000 per annum he felt distinctly undervalued⁵⁶.

In fact, Mr. Bean did eventually accept the deal and left in late September 2003⁵⁷. His departure has generally been regarded as a regrettable one for English football – not only because he has left a gap which it will be hard to fill, but also because of the cases which were left unresolved at the time of his leaving. There can be no doubt that Mr Bean had produced some awesome results in difficult circumstances, as has been documented in these pages. The penalties imposed on Boston United, Chesterfield and certain Leicester City players stand testimony to his thoroughness and uncompromising commitment to the cause. It remains to be seen whether a new compliance officer will be appointed to succeed him and continue the good work⁵⁸.

More particularly it would be most unfortunate if the Gregory and Proactive cases were now left to wither on the vine. Bean was understood to be within approximately two months from bringing formal charges against Mr. Gregory, who is currently awaiting a High Court writ from his subsequent employers Derby County over the alleged irregularities which caused his dismissal the previous season. Gregory continues to insist that he has acted lawfully throughout, notably over the transfers of Bosko Balaban and Juan Pablo Angel for a total of £16 million. As regards the Proactive case, Mr. Bean had spent some considerable time conducting a high-level investigation into the agency and its chief executive Paul Stretford. He had also met several Danish journalists for further talks concerning allegations which surrounded several transfers, including that of Peter Schmeichel to Manchester City before the 2002-3 season⁵⁹.

Fashanu/Grobbelaar affair resurfaces....

One of the controversies to have shaken the world of football in recent years was that which resulted from allegations of match-fixing made against several players, including John Fashanu and Bruce Grobbelaar, in the mid-1990s. It will be recalled that these two players, as well as Wimbledon goalkeeper Hans Segers, had been accused by *The Sun* of taking bribes from East Asian bookmakers in order to fix English Premiership fixtures. In spite of video pictures appearing to show money changing hands, all three were acquitted. Grobbelaar subsequently won a Pyrrhic court battle against *The Sun* as a result of which he won just £1 by way of damages. There the matter seemed to rest.

However, some recent developments have once again brought unwelcome attention for Fashanu and Grobbelaar. In July 2003, John Fashanu, the former Wimbledon and Aston Villa striker, was once again the

subject of a newspaper "sting" when the Sunday paper, the News of the World, alleged that he set up and fixed the result of a charity match between a World XI and an unspecified Arab national side, and then fixed the result by paying three players up to £70,000 each. Fashanu's payment was reported to be £40,000 as well as a new Mercedes car⁶⁰. The Metropolitan Police and the Football association (FA) reacted by indicating that they would examine these allegations.

Nor was this all. In transcripts of alleged conversations between Mr. Fashanu and the reporters in question, the former striker appeared to admit that he had fixed a Premiership match in 1994, that he had some of the leading players in the game on his payroll, that he worked on behalf of Chinese betting syndicates, that he collected £5 million by way of insurance money when a knee injury discontinued his career, and that he used his charitable foundation to avoid paying income tax. The paper also alleged that a leading footballer arrived for a meeting with Fashanu the previous Friday and requested £20,000 by way of advance payment for his co-operation.

Mr. Fashanu countered these accusations by claiming to have been well aware that he was being set up for a "sting", and that he had exaggerated his influence and accepted the £5,000 offered in order to provide the police with evidence. He claimed that as soon as he had received the cash payment, he took it to Hounslow police station in West London and made a statement. The police confirmed that Mr. Fashanu had made a statement but, crucially, added that it had not been made until 9.00pm on the Saturday, which is after the News of the World had confronted him with its allegations⁶¹.

One of the immediate results of these allegations was the organisation of an inquiry into the possibility of match-fixing organised by the Nigerian Football Association (NFA). Taiwo Ogunjobi, the General Secretary of the NFA, claimed that Mr. Fashanu, who chairs its League Committee, had certain questions to answer⁶². The relevant meeting had not yet taken place by the time this issue went to press.

By some odd coincidence (?), Bruce Grobbelaar's role in the match-fixing scandal of the mid-1990s also resurfaced at around the same time as the new allegations being made against Fashanu, with the appearance of the book *Foul Play* by David Thomas. This work is centred on the Fashanu/Grobbelaar trial. It described not only the trial itself, but also its background and aftermath. More particularly it centres on a character named Chris Vincent, a Rhodesian Army veteran, adventurer and businessman, who was keen to set up South Africa's finest safari camp. Grobbelaar became acquainted with Vincent when he too was in the army during the civil war of the late 1970s which brought about the end of white rule. Vincent persuaded

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Grobbelaar to join him in some of his more dubious business ventures, and when the latter fell apart turned against his compatriot and former business partner. Thus it was Vincent who organised the original “sting” involving The Sun in 1994 which led to the criminal trial referred to above⁶³.

One particular reviewer somewhat maliciously described the book as a “wonderful primer for the drama to come”⁶⁴, referring to the fall-out of the News of the World allegations. Whether this proves to be prophetic is a question which this column pledges to follow with diligence.

Greek football faces bribery enquiry

In mid-September 2003, it was learned that UEFA, the body governing the European game, had launched a formal investigation into certain claims that Greek football officials had attempted to bribe Armenia into deliberately losing a qualifying fixture for the Euro 2004 championship. UEFA stated that it had appointed a disciplinary investigator in order to examine allegations made by Ruben Hayrapetian, the President of the Armenian Football Federation. The match ended in a close 1-0 victory for Greece.

The accusations appear to centre around Ervand Sukiasian, a former Armenian player now residing in Greece, and the President of the Hellenic Football Federation, Vasilios Gagatsis⁶⁵.

No further details were available at the time of writing.

Gaming group chief indicted on bribery charges

In September 2003, it was learned that Nigel Potter, the Chief Executive of the track-based gaming group Wembley, had been indicted on bribery charges by a federal grand jury in the US state of Rhode Island. Indictments were also issued against Wembley’s US subsidiary Lincoln Park and its chief executive, Dan Bucci⁶⁶.

The indictments allege that intended payments of up to \$4.5 million to the law firm McKinnon and Harwood constituted a conspiracy to influence improperly the actions of public officials. The indictments also allege that these payments were aimed at assisting Lincoln Park obtain authorisation for the installation of coin-operated slot machines at its Rhode Island dog track, and various other gaming ventures⁶⁷. Mr. Potter resigned from the company as director, but would continue to receive full pay in spite of the indictment⁶⁸.

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

Italian football fraud investigation intensifies

In mid-August 2003, there were signs that Italy’s inquiry into allegations of football fraud was intensifying when two officials of the game’s regulator, Covisoc, were placed under investigation. AS Roma, Napoli, Cosenza and Spal are currently facing an inquiry after they presented what investigators believe may be forged bank guarantees as part of their registration for the coming season.

Hooliganism and related issues

General contributions on tackling hooliganism

Not only the public authorities, but also football’s invigilators, have at times been accused of not doing enough to prevent and/or penalise hooliganism in this sport. Writing in a professional periodical⁶⁹, Nick Coward, the Football Association’s director of corporate and legal affairs, seeks to allay such concerns by explaining the efforts undertaken by the game’s authorities to eliminate this cancer from the sport. He points out to the efforts undertaken by the FA to liaise with the police and the careful monitoring of the England Official Supporters’ Club have produced a number of positive outcomes in this regard. He also states that the football authorities need the support of the magistrates in ensuring that appropriate use is made of banning orders.

In another judicial periodical⁷⁰ Alec Samuels, of Southampton University, examines the wide range of remedies available to the public authorities in order to tackle this problem. He emphasises that prevention must be given preference to the various other remedies such as arrest, detention and prosecution, which have all proved themselves to be extremely troublesome instruments for the police to handle.

In a contribution which examines the Scottish angle, author Robert Shiels examines the principle to be applied in prosecutions arising from sporting events such as public disorder and players’ criminal actions, the Lord Advocate’s instructions to Chief Constables giving guidance on action to be taken, and sentencing policy⁷¹.

Hooligans and the authorities prepare for a new season... (UK)

As the new football season was about to kick off, the Home Office revealed that a “new generation” of football thugs was behind a sharp rise in hooligan arrests last season. Football-related offences increased by 19 per cent to 4,793, giving rise to fears that middle-class families could be driven away from the game by a

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return to the thuggery displayed by some of the game's followers in the 1970s and 1980s⁷². Of the total number of arrests made, 3,695 took place in the Premiership, which is the highest figure in eight years. There were 1,886 arrests for public disorder, 1,216 for alcohol-related offences and 439 for violent disorder. Unsurprisingly, Manchester United had more fans arrested than any other club with 186, followed by Sunderland with 185. Charlton Athletic had the best record with a mere 17 arrests. The number of banning orders against hooligans, which prevents them from attending matches, increased by over 50 per cent, from 1,149 in August 2002 to 1,794 in August 2003⁷³.

In all, the figures represent a 19 per cent increase on the previous season. This has been the result of increased surveillance of known troublemakers, and low tolerance policing. In addition, police intelligence is pointing towards an "emerging new generation of troublemakers". There appeared to be some evidence that a younger generation of hooligans are taking part in violent acts, very often organised by older troublemakers⁷⁴.

Most of the arrests were for public disorder offences outside the football grounds. Thus the relevant figures continue to reveal that the trend is for football-related violence to take place away from the grounds, often in town centres or on the way to or from matches. The figures also highlight concerns that racism is on the increase, since arrests for race hate chants rose by 57 per cent over the same period. In addition, Piara Powar, of the Kick It Out campaign against racialism in football, averred that these figures barely scratch the surface of the problem⁷⁵.

With Britain's national squads preparing for next year's Euro 2004 tournament, the fourfold increase in arrests of English fans last season has also given rise to particular concern. (On this subject, see the next section below, p. 000.) A further dimension, which may make the coming season a very violent one, emerged when available intelligence revealed plans by the worst hooligans to attack rival gangs. Here, the focus is not so much on the Premiership as the First Division, with senior police officers believing that the hostility between hardcore elements attached to clubs such as Millwall, Cardiff City, Stoke City, Nottingham Forest and West Ham will make clashes inevitable. Thus it emerged that the Stoke Young Casuals, who take some 600 hooligans to some away matches, have already hatched plans to confront West Ham and Sunderland supporters. Police have responded by taking such measures as rescheduling fixtures with a view to reducing the risk of alcohol-related disorders⁷⁶.

Home Office minister Hazel Blears, for her part, responded by announcing yet another summit, involving police and prosecutors, to ensure that hooligans are not

able to evade banning orders. She also pledged the sum of £5 million over three years for police operations against hooliganism⁷⁷.

As part of these anti-hooligan measures, it was announced a few days later that undercover police were to infiltrate known gangs of hooligans in an attempt to root out the worst troublemakers ahead of England's expected qualification for the Euro 2004 tournament in Portugal. Twenty-one forces have commenced operations against troublemakers, with the intention of obtaining banning orders against individuals in order to prevent them from following England abroad. Plainclothes officers had already begun to infiltrate football crowds in order to gather evidence, and officers were also in the process of gathering informants⁷⁸.

A glimpse of the nature of the problem facing the authorities with the emergence of the "new generation" of hooligans referred to above was provided by a report featured in a national daily newspaper by a brave journalist who had succeeded in penetrating the inner reaches of a particularly unpleasant gang styling themselves "Diamond's Army" and giving their unwanted support to Wolverhampton Wanderers FC⁷⁹. It appears that this newer generation make up for their lack of experience by being better organised, less concerned about being involved in serious violence, and even less concerned about being caught. The person round whom the gang operates, "Diamond", had only been an active hooligan for two years, but had already been banned by magistrates from attending any sporting events in the country for 11 years, and had recently been sentenced to three months' imprisonment for attacking a Manchester City fan after an incident had been caught on CCTV. Almost all the other members of the gang have also received banning orders ranging from five to 11 years, but this has done little to curb their activities.

What was also disturbing was their relationship with the older generation of hooligans surrounding Wolverhampton Wanderers, known as the Subway Army. Although mostly over 30 and mostly married with children, and therefore less likely to become directly involved in violent incidents, they nevertheless were there behind the scenes and worked closely with their younger protégés. More particularly they arranged a number of violent incidents thanks to their contacts with rival gangs at other clubs⁸⁰.

However, it is not even necessary to risk life and limb by associating physically with the troublemakers to establish the dangers which new generations of hooligans pose for the game. Thus a cursory visit to the websites of some of the more notorious gangs gives a flavour of the size of the problem, with its tidings of coordinated confrontations and orchestrated taunts.

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Particularly the websites of the Millwall and West Ham hooligan gangs just before the two teams met in the First Division was instructive⁸¹. It described in graphic detail the type of mayhem which it was intended to visit upon West Ham's ground, coupled with the general instruction to "teach them a lesson".

The cost of policing anti-hooligan campaigns is an issue that preoccupies former sports minister Kate Hoey, writing in a leading national daily newspaper⁸². She stresses the importance of the role played by the police in combating the hooliganism that takes place outside the ground which, as has been noted earlier, is the kind of football-related violence which is on the increase. She deplores the attitude by both the clubs and the game's authorities towards the cost of these operations, which is that, as long as they relate to the violence taking place outside the stadiums, this is nothing to do with them. Ms. Hoey comments that this is entirely wrong:

"No other governing body of sport would refuse to take responsibility for the behaviour of their supporters. But then no other sport has to be policed in large numbers to prevent public disorder. The football authorities need to be challenged (....) The fairest way would be to protect a small percentage of the income from the television contract so a policing fund could be established, out of which the police could be paid. In that way, smaller clubs would be protected but the public would receive a fairer deal"⁸³

She also calls for better standards of behaviour on the pitch, more particularly the constant questioning of refereeing decisions by players and managers, as she believes that this can contribute towards the atmosphere of aggression and intimidation which surrounds most football fixtures.

... with particular reference to Euro 2004 qualifying fixtures

In the previous section, mention was made of the apprehensions experienced by the authorities involved in combating hooliganism as regards the Euro 2004 tournament, in view of the rise in the numbers of travelling England "fans" arrested abroad. These apprehensions were particularly justified in view of the fact that, in order to qualify for that tournament, England had yet to play a number of important fixtures. Regardless of the result on the pitch, any serious misbehaviour by English spectators could have serious consequences for the team, and even cause them to be banned from the tournament.

In fact, European governing body UEFA had already started to issue dark threats to that effect before the

season started⁸⁴. The new Chief Executive of the Football Association (FA), Mark Palios, announced that halting hooligan violence was one of his main priorities. He backed a controversial initiative, drafted in Italy and due to be debated by the EU in the autumn, under which information on suspected troublemakers would be circulated to police forces throughout Europe with a view to having them banned from any fixture. Although there were some concerns about the legality of such moves, Mr. Palios backed the plan in principle⁸⁵.

The first of these qualifying fixtures during the new 2003-4 season was the away match against Macedonia in early September. In order to minimise the risk of any trouble, the Football Association (FA) had refused its ticket allocation for this fixture and requested fans not to travel. (It ultimately decided to give its ticket allocation to deprived local children of Skopje, where the fixture was to be held⁸⁶.) However, police sources informed the press that between 500 and 1,000 supporters were expected to travel to Macedonia nevertheless, whilst over 1,000 troublemakers were making plans to travel to Istanbul for the match against Turkey⁸⁷.

In the event, the Macedonia fixture passed off without much trouble. However, it was England's next away fixture which was the subject of the greatest concern, involving as it did playing Turkey in Istanbul. There had in recent years arisen a sequence of events which had caused relations between English and Turkish football fans to reach a nadir of mutual antagonism, none more so than the killing of two Leeds United supporters in Istanbul in April 2000 on the eve of a UEFA Cup tie with local side Galatasaray. As early as July 2003, the Football Associations of the two countries had met at UEFA headquarters in Switzerland in order to co-ordinate tactics and policy in relation to this fixture. The outcome of that meeting was that internet sales of tickets for the match, due to be played on 11 October, were banned, and that any England fans who attempted to purchase tickets on the black market would not be allowed to enter Fenerbahçe's ground, where the match was due to be played⁸⁸.

In addition, all leading personalities involved in the fixture played their part in attempting to dissuade England fans from travelling to the match. With two weeks to go before the fixture, the England manager, Sven-Göran Eriksson, issued an impassioned plea to fans to stay away from Istanbul⁸⁹. The FA also took its campaign to the pages of match programmes, and every Premiership, Football League and Conference club carried an appeal from the FA to that effect in their programmes. The appeal was also featured on a number of club websites⁹⁰. Graeme Souness, the Blackburn Rovers manager, who spent some time managing Galatasaray, also contributed towards the

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“peace” effort by urging respect for Turkish supporters (although his club conspicuously refused to ban its own fans from Turkey when it was due to play Genclerbirliği in the IEFA Cup in late September)⁹¹. There also took place a goodwill visit by a group of English football ambassadors, including former internationals Gary Mabbutt, Ian Wright and Bryan Robson, to Turkey which featured various football clinics, visits to schools and a gala Turkish FA dinner⁹².

The Turkish authorities themselves seemed to leave nothing to chance. Such was the intensity of the security with which it was planned to surround the fixture, that any English fans planning to attend it would be facing an unprecedented ring of steel, whilst anyone succeeding in breaking through the triple police cordon around the stadium would be cast into distinctly unfriendly cells. Spot checks were to be made at Istanbul airport, with any suspected England fans being put on an aeroplane returning home. Anyone penetrating the border controls and succeeding in purchasing tickets was to face unprecedented security in and around the Fenerbahce stadium, with only fans able to display a Turkish identity card being allowed in⁹³. With a few days to go before the fixture, riot police staged ominous crowd control exercises in and around the stadium, with 5,000 officers being deployed. Alcohol sales near the stadium were also banned for the day⁹⁴.

In the event, the match proceeded without being marred by undue violence (at least off the pitch – see below, p. 000). It had been feared that many England supporters would succeed in circumventing the ban, particularly as, just a few weeks earlier, a reporter had been able to buy tickets for the match within minutes of arriving at Istanbul⁹⁵. Merely a handful of English fans succeeded in gaining access to the stadium, with the overwhelming majority having heeded the calls to stay away⁹⁶. (Rather embarrassingly for the FA, some members of England’s Official Supporters’ Club had refused to accept the Association’s travel ban and organised their own trips to the match⁹⁷.) Fears expressed by the police that around 300 of the most ruthless hooligans planned to defy the travel ban proved groundless⁹⁸. However, 30 English fans were arrested and detained by Turkish immigration authorities at Istanbul’s Ataturk airport on the day of the fixture. They were all deported on the first available flights. British officials had given the Turkish authorities a list of 1,800 individuals who are currently banned from attending football matches, and a further 500 people suspected of football-related disorder⁹⁹.

Individual football incidents – UK

Aberdeen v. Rangers match descends into violence

Relations between Aberdeen and Rangers have been particularly acrimonious over the past two decades. It will be recalled from these pages¹⁰⁰ that, two years ago, riot police were forced to intervene after missiles were thrown at Aberdeen player Robbie Winters, which was followed by a pitch invasion by fans from both sides. This mutual antipathy once again spilled over into violence at a meeting between the two sides at Pittodrie in the Scottish Premier League at the beginning of the current season – both on and off the pitch.

After the Glasgow side had taken a decisive 3-1 lead in the 58th minute, an Aberdeen “fan” raced onto the pitch and attempted to attack Fernando Ricksen, a Rangers player singled out for particular obloquy from Aberdeen fans. Prompt police action, however, prevented the attacker from reaching his target. Later, the players from both sides also engaged in a mass brawl amongst themselves¹⁰¹.

Bramall Lane to close two sections after crowd trouble

In July 2003, increasing incidents resulting from crowd disturbances prompted the Football Association to order Nationwide League side Sheffield United to close down two sections of its Bramall Lane ground for the duration of the current season. More particularly Blocks G and H of the Laver Stand may not be reopened until CCTV facilities have been improved. One of the charges laid against the club concerned an incident during the local derby against Sheffield Wednesday in January 2003, during which distress marine flares were fired, injuring a spectator.

The Yorkshire side were also issued with a £100,000 fine which was suspended until the end of the season¹⁰².

Edinburgh derby marred by violence

The rivalry between Edinburgh sides Hearts of Midlothian and Hibernian is nothing like as intense as that between the Glasgow teams of Rangers and Celtic. Nevertheless, the local derbies between the two sides have sometimes produced some very ugly scenes indeed. The same problem resurfaced at the relevant fixture which took place at Easter Road early in the season – by some unfortunate coincidence on the same day as the unsavoury scenes at Pittodrie recorded earlier.

The first significant incident took place at half-time, when a Hibernian “fan” lunged out from the main stand and was prevented from assaulting referee Stuart Dougal only through the combined efforts of his assistants and the Hearts goalkeeper Tepi Moilanen. At the final whistle some local supporters gave vent to their

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delight that their side had won by an injury-time goal by invading the pitch and taunting opposing fans, who were held back by a line of security officers and the police. Trouble then spilled over in the adjoining streets¹⁰³.

Dunfermline incidents cause police investigation

Yet another sorry chapter in the history of Scottish football was recorded in early August 2003, when trouble erupted at East End Park in a fixture between Dunfermline and Celtic. Trouble started when Celtic's Swedish star Henrik Larsson was hit in the face by the ball thrown to him by a local fan, and after the final whistle fighting broke out between rival groups. The police commenced an investigation into the various flashpoints which punctuated the trouble¹⁰⁴.

Individual football incidents – abroad

Turkish fans riot – in France and at home

Turkish football supporters did their already fearsome reputation no good at all over the summer of 2003. When their national team took part in the Confederations Cup in France, scuffles broke out between supporters and French stewards at St. Etienne as Turkey knocked Brazil out of the competition. Turkey had already been warned about their behaviour earlier in the competition after Cameroon manager Winfried Schaeffer had been pelted with marbles and bottles. US players had also complained after Turkish fans booed their national anthem¹⁰⁵.

Several weeks later, there was more trouble, this time in the country itself, when a man was killed after rival fans of the two Izmir clubs, i.e. Karsiyaka and Goztepe, clashed¹⁰⁶.

Violence mars Greek victory

Several incidents occurred during the European Championship qualifier in Athens between Greece and Northern Ireland, which took place in mid-October 2003. The Northern Ireland manager Sammy McIlroy was spat upon and pelted with sandwiches, and missiles rained down on Danny Griffin as he prepared to take a corner. However, it was the visiting goalkeeper Maik Taylor who found himself the main target for the fans' attention, and was within inches of being struck by a mobile telephone thrown from the stands¹⁰⁷.

Romanian fans find new way of rioting

No-one expected the local fans to be delighted when Romania were eliminated from the European Championships following a 2-2 draw with Denmark. However, the form in which they vented their displeasure took the authorities by surprise when fans threw their televisions out of their windows. Officers in

lasi were alerted by a number of explosions after the match ended. They found that five people had ripped their television cables from the wall and hurled the sets into the street below¹⁰⁸.

Newcastle fans riot in Breda (Netherlands)

English "fans" once again brought shame on their country in mid-October 2003, when riot police had to arrest over 80 Newcastle United supporters after fighting broke out in the Netherlands city of Breda before the start of a UEFA Cup tie. Police carrying batons and shields charged drunken fans as they rampaged through the narrow streets and market areas of the town for over two hours. Police horses were employed in order to round up the thugs, who were hurling bottles, chairs and tables. Windows of bars and restaurants were smashed and shoppers compelled to flee. At one point more than 150 police confronted Newcastle supporters in the central areas of the city.

The Breda police reported that they had made 90 arrests, 83 of them being Newcastle fans¹⁰⁹.

Manchester United fined for fighting in Madrid

More shame was visited upon English football when Manchester United fans rioted on the occasion of the return fixture in the European Champions League tie with Real Madrid last season. As a result, the Manchester club were fined £13,500 by European governing body UEFA. There were the usual protestations of innocence and accusations of police brutality from the English side; however, none of this cut any ice with UEFA, which decided that the fans caused the disturbances¹¹⁰.

Other issues

Retrial for Turk accused of killing Leeds fans

Mention has already been made earlier to one of the incidents which have served to poison relations between Turkish and English fans, being the killing of Kevin Speight and Christopher Loftus, two Leeds United fans in Istanbul on the eve of a UEFA Cup tie between the Yorkshire cup and Galatasaray in 2000. It will be recalled from a previous issue¹¹¹ that Ali Umit Demir was jailed in May 2002 for this crime.

However, in late June 2003 the Turkish Court of Appeal quashed this sentence after doubts had arisen over the evidence presented by the prosecution. In the original judgment, the three-judge panel had agreed unanimously that Demir had murdered Mr. Speight, and voted 2-1 that he had murdered Mr. Loftus. Demir's knife was smeared with Speight's blood, but it was unclear whether it also had Loftus's blood on it, which was necessary to secure the double conviction, the

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Court of Appeal ruled¹¹².

Mr. Demir's defence lawyers had also claimed that insulting and inebriated behaviour on the part of other Leeds fans had given rise to the fighting. The Court held that the original verdict had failed to take account of the levels of provocation involved, ruling that the sentence should have been reduced accordingly. The case must now be retried¹¹³.

Brother of murdered fan spared match ban

The brother of one of the murdered Leeds supporters referred to in the previous section was recently spared an order banning him from attending football matches after a court was told that his fear of the media had prompted him to lash out at a news cameraman. Andrew Loftus, the brother of Christopher, admitted attempting to punch the member of a television crew prior to the England v Turkey match in Sunderland in April 2003. The court was told that Mr. Loftus had not taken part in any organised troublemaking, but had reacted spontaneously when the camera crew had "jumped out at him". His lawyer pleaded that Mr. Loftus had experienced this as an invasion of his privacy, and simply snapped. He expressed his client's remorse at the incident. He was issued with an 18-month conditional discharge and ordered to pay £95 in legal costs¹¹⁴.

Harrison lays blame for Hide riot on BBC

In the previous issue¹¹⁵, it was reported that boxer Audley Harrison's victory over Matthew Ellis at York Hall had been marred by a riot sparked off by an incident between himself and rival boxer Herbie Hide. Mr. Harrison subsequently blamed the BBC for this incident, accusing the Corporation of having ignored the advice given by Simon Block, Secretary-General to the British Boxing Board of Control and insisting that Mr. Hide should remain at the ringside. He explained:

"If Herbie was not at the ringside this whole sorry affair would not have occurred. When conflict is apparent the BBC must listen to the organisers and controllers of the sport and make decisions based on the image of boxing rather than television controversy and drama"¹¹⁶

The Olympic gold medallist also criticised the BBC's ringside reporter Garry Richardson over the outbreak of violence, which led to £1,000 fines for Harrison and his promoter Jess Harding, and a £500 fine for Hide. The BBC pronounced themselves surprised by Mr. Harrison's comments, and stood by their decision to have Mr. Hide at the ringside¹¹⁷.

German accessory to 1998 World Cup assault jailed

In late July 2003, a 28-year-old German was jailed for three years and four months for having been an accomplice in an assault on a French police officer during the 1998 World Cup. The policeman in question, Daniel Nivel, was left severely disabled as a result of the attack by four German hooligans in Lens. They were jailed for terms ranging from three-and-a-half years to ten years in 1999¹¹⁸.

Hooliganism mars water polo final

Any sporting fixture between representatives of the nations of the former Yugoslavia is likely to stir up strong passions in view of the wars which disfigured the region in the course of the 1990s. This is the case even where the sport is the hitherto innocuous one of water polo. The occasion was the European championships in Kranj, Slovenia, in mid-June 2003. It was one of the few occasions on which Serbs had been pitted against Croats since that armed conflict. The authorities were caught unawares by the trouble, which commenced as Serb fans got into the press box and the pool and began taunting their Croat counterparts with three-fingered salutes. Thereupon Croat fans stormed the press box as well as the VIP compartment¹¹⁹.

Although the Serbs won the encounter 9-8, they were denied the relevant medals because of the trouble. In addition, as news of the disturbance reached the Serbian capital Belgrade, fans attacked the Croatian embassy and tore down a flag. In another town, Novi Sad, riot police fired shots in order to restore order after a McDonalds restaurant had been ransacked¹²⁰.

England v Pakistan cricket international once again marred by crowd trouble

It will be recalled that, in the course of 2001, the one-day internationals involving England, Australia and Pakistan were marked by many an unpleasant crowd disturbance¹²¹. When England and Pakistan were scheduled to meet once again at Old Trafford, Manchester, during the last cricket season, the relevant authorities were full of forebodings about the possibility of crowd violence erupting once again. In anticipation of the worst, stewards had received special training and restrictions had been placed on tickets bought by individuals in order to prevent large groups collecting in once place. Spectators were also only allowed to occupy the seats allocated by their tickets, in order to stop people migrating between stands and gathering in large numbers. All items such as banners and flags, as well as alcohol, were strictly prohibited¹²².

In spite of all these precautions, some trouble erupted during the fixture. Mercifully there were no

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disturbances whilst play was in progress, but after Pakistan had won by two wickets, supporters of the Asian side invaded the pitch in spite of the threat of a £1,000 fine and loudspeaker announcements in Urdu. England captain Michael Vaughan called for urgent action for such incidents to be prevented, predicting that some day a player would be injured in the process¹²³. English cricket officials took this opportunity to renew the pressure on the Government to make pitch invasions a criminal offence. The England and Wales Cricket Board (EWCB) insist that current legislation on the subject is inadequate. Thus far, Sports Minister Richard Caborn has resisted calls for such legislation, contending that as matters stand at present, spectators may be fined up to £1,000 for aggravated trespass. However, David Clarke, the EWCB Events Manager, claimed that there was increasing confusion as to whether that legislation was appropriate¹²⁴.

Muslim leaders urge moderate language at football matches

In early September 2003, it was learned that Turkey's religious leaders urged Muslims to refrain from using foul language at football matches. Instead, imams invited the devout to use phrases such as "may Allah preserve you" to encourage their teams¹²⁵.

"On-Field" Crime

Article on need for better child protection against sports coaches¹²⁶

In this contribution, the author, a welfare in sport researcher at the University of Wales, Aberystwyth, examines this problem in the light of some recent well-publicised cases, some of which have already been featured in these columns¹²⁷. The media publicity given to the case of Amy Gerhing, the young Canadian teacher acquitted of the charge of having a sexual relationship with two of her pupils, stands in marked contrast with the lack of interest displayed in the later cases of Gary Hinds, John Glyn Jones, Mike Edge, Matthew Pedrazzini, Paul North, Frank Slatterthwaite, George Ormond and others, all sports coaches who have been convicted of sexually abusing the children trained by them. This lack of interest is, according to the author, reflected in the recently published report by the Department for Culture, Media and Sport, and Sport England, entitled Final Report of the Coaching Task Force, being a document which sets out recommendations for the future of coaches and coaching in English sport. Amongst the report's 84 pages, only one sentence makes any mention of the protection of the children who are potentially in the care of these 3,000 coaches.

The article in question briefly discusses the proposals made by the Report, the current state of child protection in sport in England and Wales, and argues that, with the advent of publicly funded professional coaches recommended in the Report, the time has come for sport to be made subject to more child protection measures than is currently the case.

Action taken against potential stalkers at this year's Wimbledon

One of the less welcome developments in the modern game is the unwanted attention which some of its top stars have attracted from obsessive admirers known as "stalkers". In one particular case, that of Serb champion Monica Seles, who was knifed on court in Hamburg by one such person in 1993, nearly had fatal consequences. It will also be recalled that, at last year's Wimbledon tournament, a German stalker of Serena Williams was arrested outside the house where she was staying, and prankster Karl Power leapt onto a court with an associate immediately after a match involving Ms. Seles¹²⁸. This incident gave rise to serious concerns amongst the players about security standards.

This is why, at this year's tournament, spectators arriving for the tournament were subjected to body searches for the first time, and record numbers of police officers and security guards were on duty. Also, patrols around the club were increased and contingency plans made to deal with any terrorist attack. Immigration officers also worked closely with the police, screening contractors and staff at the Championships¹²⁹.

Guilty couple in riding school tragedy escape custodial sentence

In August 2003, a couple who operated a riding school where an unsupervised 13-year-old girl died after falling from a pony walked free from a criminal court in England. Rachel Crosby had been riding bareback in the school's concrete stable yard in April 2000 when the tragedy struck. She died in hospital five days later. The couple, David and Susan Compton, the owners of the Phoenix Equestrian Centre in West Yorkshire, admitted having breached the Health and Safety Act by failing to provide adequate supervision. However, Judge James Spencer sparked controversy when he stated that he did not have the power to impose a custodial sentence on the couple because the offence merely carried a fine. He was unable to inflict even this penalty because the couple had been made bankrupt after losing their business and their home. They were issued with a conditional discharge.

Rachel's mother subsequently described the outcome as "disgusting"¹³⁰.

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Silverstone intruder sentenced to prison

The British Grand Prix in motor racing this year seemed to have woe upon woe heaped upon it. Already fighting for its very existence (see below, p. 000), it suffered a further blow when a spectator succeeded in scaling the trackside fence and running onto the track. Competing cars were forced to swerve in order to avoid him, and a fatal outcome was avoided only after a marshal had wrestled him over the verge and dumped him at the side of the track. It was the kind of publicity Silverstone could well do without¹³¹.

The man in question, 56-year-old Neil Horan, was then charged with aggravated trespass¹³². In September, he was given a two-month prison sentence, but freed because he had already served six weeks on remand¹³³. Mr. Horan was a former Catholic priest, and claimed that it was divine intervention which saved his life that day¹³⁴. It also emerged that he had warned ITV commentators beforehand that he was going to do "something which will get you talking about me". The commentators had consigned the letter to the wastepaper basket¹³⁵.

Security "not up to scratch" at British Open

This year, the British Open golf championship took place at the Royal St George's club. Several complaints were made about the standard of security. It appeared that Tiger Woods had been subjected to "severe jostling" as he left the 18th green, and Nick Faldo was also manhandled by a gang of teenage autograph hunters. Marshals pledged themselves to improve standards¹³⁶.

Boston police "may bring charges" for Red Sox/Yankees fight

The baseball encounter between Red Sox and the New York Yankees appears to have been a very stormy one this year. After a brawl in the bullpen during the ninth inning of game three, Paul Williams, a member of the Red Sox ground crew, spent several hours in hospital before leaving in a neck brace. His club alleges that he was assaulted by two Yankee players. Police said they were considering bringing charges in connection with this incident. No further details were available at the time of writing¹³⁷.

Tennis dad convicted of drugging opponent – and may have poisoned 30 more

"Tennis parents from Hell" have become such a regular feature of the sport at the top level that they now seem an unmissable part of the sport's folklore. However, their activities sometimes assume a dimension which brings them into contact with the criminal law. This was certainly the case with Frenchman Christophe Fauvau, who was charged with manslaughter after having drugged an opponent of his son Maxime, who later died

after losing control of his car when driving home¹³⁸. The outcome of this case was not yet known at the time of writing. However, investigators informed the press that Fauvau was also being suspected of having poisoned 30 opponents of his daughter Valentine, one of France's most promising young players¹³⁹.

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

"Off-Field" Crime

The "Grosvenor House Rape" affair

Background and developments

Already the subject-matter of much soul-searching, the reputation of the nation's top footballers seemed to take yet another nosedive with a new potential scandal with profound implications for players, administrators and indeed society as a whole.

In late September 2003, the news broke that police had begun an investigation into a claim made by a 17-year-old girl that she had been raped by a group of Premiership footballers at a West London hotel, believed to be the fashionable Grosvenor House. The complaint was examined by officers attached to Operation Sapphire, the Westminster police unit which deals with sexual offences¹⁴⁰. More particularly it was alleged by the complainant that she had agreed to go to a room with one player and that, whilst she was there, other players joined them. The alleged attack then took place. Detectives embarked upon a forensic examination of the room where the incident was said to have occurred, and the girl was medically examined¹⁴¹. CCTV footage was viewed, and a forensic search made of the rooms where the attack was alleged to have taken place¹⁴². The police were cautious not to release any information capable of leading to the players being identified.

It was later learned that the footballers thus accused had been questioned by police and requested to provide DNA samples, in order to establish whether they matched samples taken from the girl in question. According to one newspaper, the complainant, a sixth former attending a Catholic school, had claimed that the players laughed as they assaulted her, and was said to have shown members of her family bruises proving that she was held down during the attack. She also claimed to have recognised one of the players as appearing for the team which she supports, adding that he had taunted her whilst attacking her. It also emerged that one football club chairman could be questioned by police as a witness in the run-up to the assault¹⁴³.

It soon became clear that the police believed the girl's claims to be credible and worthy of further investigation. They proceeded to appeal for witnesses to the alleged

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assault to come forward, and announced that everyone who was at the Grosvenor House hotel during the weekend in question. Police spokesman John Yates warned that some considerable time could elapse before any charges could be brought or the case dismissed¹⁴⁴. The weekend following that of the alleged assault, it emerged that police had interviewed a new witness who had provided them with crucial evidence¹⁴⁵. This turned out to be a person called Nicolas Meikle, who described himself as a “party organiser”, and claimed that two footballers were among those who slept with the 17-year-old. They had done so in a room which had been booked in the name of an England star, but Mr. Meikle emphasised that the latter was not in any way involved in the assault. He also claimed that the girl had consented to sex with him and three others, and stayed for breakfast the following day prior to leaving the hotel at 2.30 pm¹⁴⁶. Three days later, Mr. Meikle was himself arrested in connection with the affair¹⁴⁷. He was later released on bail¹⁴⁸. It also transpired that he had been paid £10,000 by a tabloid newspaper for his story¹⁴⁹.

The girl in question and her family had, in the meantime, done the natural thing one does in such circumstances, which was the hire the services of publicist Max Clifford in order to manage her side of the story. Mr. Clifford, who specialises in selling stories of stars’ indiscretions to the tabloid newspapers, was quick to stress that his involvement was about protecting the girl and providing the family with guidance and advice. Somewhat defensively he added that this was “not about kiss and tell”¹⁵⁰. Mr. Clifford claimed that the girl totally refuted Mr. Meikle’s version of events. More particularly he claimed that she consented to having sex with one person only, and that she denied having had breakfast with the men. He also denied Mr. Meikle’s allegation that there were only four men involved in the incident¹⁵¹.

Further arrests followed. A 27-year-old man was arrested and bailed over the claims, although it was not clear whether he was a footballer or not¹⁵². The next day, however, two Premiership footballers, aged 22 and 19, arrived by appointment at London police stations, were arrested, interviewed under caution, and requested to provide DNA samples before being released on police bail¹⁵³. A week later, it was learned that a group of Premiership players from a Northern club were being questioned as part of the investigation by Scotland Yard rape investigators, who travelled to the North of the country specifically for that purpose. The police, however, refused to state how many players they would be interviewing, or how long the questioning would last¹⁵⁴.

That was the position in this matter at the time of writing. No doubt further significant developments will have occurred by the time the next issue goes to press.

Legal issues surrounding the identity of those involved

The legal battle for the control and protection of the identities and civil liberties of those accused commenced almost immediately. The Attorney-General, Lord Goldsmith, proceeded to warn the nation’s newspapers that increasingly fevered coverage of the allegations could prejudice any court proceedings which might result. In his guidance to editors, he stated his concern that evidence in this case should not be distorted by “potentially prejudiced reporting”. That this intervention was extremely timely is demonstrated by the fact that the pornographic magazine which masquerades as a newspaper, the Daily Sport, had published the name of the club of which it claimed that it found itself at the centre of the investigation¹⁵⁵. Lawyers acting for some of the players also indicated that they were ready to initiate libel proceedings if their clients were named¹⁵⁶.

However, it was recognised by lawyers and police alike that even these dire warnings and threats would fail to prevent a crowd from chanting the names of at least some of the players involved, or from holding up placards featuring their names. This sent the alarm bells ringing at the headquarters of television and radio stations broadcasting matches, who feared facing legal action for repeating a slander if such chants or placards were noticed by viewers or listeners. For ITV, which screens highlights of Premiership matches, this was a relatively easy editing task; however, the live broadcasters were faced with a more serious problem presented by the immediacy of live broadcasting. BSkyB and Radio 5 Live indicated that they were prepared to switch off their atmosphere microphones in order to prevent chants from being heard. Producers on Radio Five Live’s football phone-in programme, 606, were also warned that callers might attempt to name players and/or clubs¹⁵⁷.

As it became clear that the police were taking the case extremely seriously and proceeded to arrest various people in connection with it (see above), the intensity of the media interest in the identity of those concerned grew. At a certain point, Lord Goldsmith took the extraordinary step of intervening by demanding undertakings from newspapers that they would not name those arrested. In addition, a judge was put in standby to issue an injunction against any media organisation which chose to defy this instruction. This was not only in order not to prejudice any resulting prosecution, but also because the men in question could be needed to participate in identity parades as part of the investigation¹⁵⁸.

The case also raised concerns at the Home Office on the subject of media regulation. David Blunkett, the Home Secretary, was known to be keen on avoiding legislation in this regard, and, in this particular case, he

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was reported to be concerned at the fact that, if the footballers' names did become widely known, this could be cited by MPs known to favour legislation aimed at restricting that which the media are able to report in such cases¹⁵⁹.

The allegations made against the footballers, which followed recent police investigations into claims of sexual offences by such media celebrities as Matthew Kelly and John Leslie, neither of whom was charged, could also have implications for the Sexual Offences Bill making its way through the House of Commons at the time of writing. Both the Home Affairs and Culture, Media and Sport select committees have proposed an amendment to the Bill which would make it unlawful for the newspapers to publish the name of anyone being investigated for a sexual offence until such time as they have been charged. Before the case arose, Mr. Blunkett had instructed officials to attempt the construction of a compromise. He was particularly concerned about the role played by the police in the naming of the players in this case. He had already attempted to enlist the assistance of the media, and in the course of the summer the Home Office had written to Les Hinton, the Chairman of the Press Complaints Commission's Code of Practice Committee, seeking a hardening of the voluntary code which governs newspaper journalists¹⁶⁰.

The extent to which media attitudes need to change in such matters was revealed by comments emanating from Paul Gilbert, a media lawyer at Finers Stephens Innocent, in which he intimated that a rapid conclusion to the police investigation was crucial both to the fair treatment of the individuals concerned and to the interests of justice. He added:

"The longer this goes on without the police either bringing charges or dismissing the girl's allegations the more likely it will be that the names will leak out. The papers, particularly the tabloids, will not give up on it, and the longer the police leave it, the less chance there is of a fair trial being held. If the speculation goes on for a while and charges are brought the defence will be able to show the judge a pile of newspaper cuttings and claim he will not get a fair trial. That is not in the best interests of justice"¹⁶¹

The implication of Mr. Gilbert's remarks seems to be that the police and prosecuting authorities should gear their investigations to the manner in which the media chose to report the matter. Surely if the defence can plead prejudicial reporting in the media, that is the latter's fault for not respecting the accused's civil liberties, and not that of the police for not bringing a case quickly enough. Previous cases in which the authorities appear to have acted under media pressure, only to be compelled to

abandon the case, should stand testimony to this.

Another legal issue which this case has highlighted is the role of the internet and the extent to which it can be brought to heel when such accusations are being made. The fact that many fans were aware of the (alleged) identities of the accused to the point of chanting them at football grounds was due almost exclusively to the fact that they had gleaned these names, either directly or indirectly, from the cyberspace. At an early stage of developments in this case, solicitors acting for one of the footballers concerned succeeded in tracking down the source of an e-mail naming some of those allegedly involved. The sender, who works for a large company, was advised that he could face a libel action as a result, that he would be compelled to communicate details of all those to whom he had sent the message in order to identify the source of the claim, and that the matter could be forwarded to the Attorney-General as a possible attempt to pervert the course of justice¹⁶². As a result, several websites closed down their message board facilities after becoming inundated with postings relating to the case. Thus rivals.net, which operates unofficial club sites, closed all its message boards after many fans had sent emails speculating about the identity of the players¹⁶³.

In fact the Internet Service Providers Association has been calling for a change in the law to make those who circulate rumours via the internet liable for legal action rather than the internet service providers (ISPs) which host the material. As matters stand at present, ISPs are viewed as the publishers of the material, thus making them liable in spite of the fact that they have no control over that which is posted on their sites. It may be recalled that last year, David Beckham attempted to get to grips with internet gossip when he issued an injunction against a website which had carried allegations that he was having an affair. In spite of the warnings issued by the Attorney General about the possibility of prejudicing a fair trial (see above), interest in the allegations had not waned, and the internet was seen as a safer channel for ventilating suspicions as to the identity of those involved¹⁶⁴.

Sex assault claim made against Leeds United player

As if the events detailed in the previous section had not done enough to tarnish football's image further, allegations of another sexual assault were being made whilst the investigations into the Grosvenor House affair were proceeding. In early October 2003, a Leeds United footballer was arrested for questioning in connection with an alleged assault on a 20-year-old woman near the city. Another man was also arrested over the same incident. At that stage, neither man was named for legal reasons¹⁶⁵. A third man was also helping police with their inquiries,

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although he was not arrested. West Yorkshire police closed off a lay-by on the A58 leading from Leeds city centre to nearby Collingham, a village where a number of Leeds United players live. A fingertip search was conducted by a team of officers in the fields surrounding the lay-by and leading to the village. The alleged victim was questioned by police and tested for DNA samples¹⁶⁶.

The player, as well as the second man arrested, were later released on bail. The player was identified by some newspapers although the police had called for restraint on this issue, thus once again raising the concerns about privacy and civil liberties raised in connection with the Grosvenor House affair¹⁶⁷. The next day Jody Morris, the midfielder transferred to Leeds from Chelsea the previous summer, was suspended by the club. The Leeds directors had met to discuss the case and were said to have been concerned that if they took no action they could face negative publicity for failing to take the allegations sufficiently seriously¹⁶⁸.

No further details were available at the time of going to press.

Seth Johnson escapes jail sentence for drink driving

These are unhappy times indeed for Yorkshire's most famous football club. Hard on the heels of the Bowyer/Woodgate affair and the club's increasingly parlous financial position, some of their players seem intent on making life even more difficult for its administrators and followers. Quite apart from the allegations made against Jody Morris, which remain as yet sub judice, some of the other playing members of the club have recently been living at the edge of society's toleration. This was certainly the case with Seth Johnson, an England international, who can count himself fortunate to have escaped a custodial sentence, despite having been found guilty of driving at 135 mph whilst more than twice over the drink-drive limit.

Police had observed his Porsche 911 playing a seven-mile "cat and mouse" game with a Mini Cooper, and proceeded to arrest the player. Mr. Johnson already had two previous convictions for speeding. He was fined £1,500 and banned from driving for two years – reduced to six months for attending a drink-drive course. He must also complete 100 hours of community service. Kevin Clinton, of the Royal Society for the Prevention of Accidents, commented that Johnson could have been jailed for a maximum of six months for his "horrendous driving"¹⁶⁹.

Liverpool player shot in bar after argument

Concern has been rising over the past year at the frequency with which guns of all types are featuring in criminal activity in this country. Such concerns were heightened by an incident in which a Liverpool FC

footballer was the victim of a shooting in a bar in the city centre. It emerged that Jon Otsemobor, aged 20, was shot in the buttocks whilst out drinking with friends. An 18-year-old man was also shot in the hand, and a 24-year-old in the leg. Only the latter was detained in hospital for further treatment¹⁷⁰.

The next day, some disturbing details of the case emerged. It appeared that the shootings had taken place over two stages. The first accounted for Mr. Otsemobor and the 18-year-old man. However, the gunman returned to the bar later in spite of the police being 100 yards from the scene, and then turned his fire on the 24-year-old. The player's mother emphasised that her son did not go out to drink very often and that this kind of experience was totally alien to him. There had been a series of violent incidents in the city's nightlife area over the previous weeks, including the detonation of a car bomb outside the Club 051, and a nail bomb thrown into a pub¹⁷¹.

Bellamy fined after nightclub brawl

Craig Bellamy is not the most uncontroversial of footballers, either on or off the field, and over the past year seemed determined to retain this reputation. In early July he was charged with three racially aggravated offences as a result of an incident which occurred in Cardiff in late March. The event took place after the Wales international squad, of which Bellamy is a member, had assembled in preparation for the Euro 2004 fixture against Azerbaijan¹⁷². It was alleged that he had used abusive and insulting words or behaviour which were racially aggravated¹⁷³.

The case was heard in October. It emerged that Mr. Bellamy had been to the Jumpin' Jaks nightclub during the early hours, where door staff explained that he could not be admitted at that hour. There was a confrontation which involved Bellamy attempting to get past the door. He was then pushed down the stairs leading to the club, from where he continued to shout towards the staff and became involved in exchanges with the public. He was fined £750, with £75 costs. His solicitors issued a statement whereby the footballer apologised for the incident, but maintained that he had been the victim of "severe provocation"¹⁷⁴.

George Best questioned by police over assault claims

Former Manchester United and Northern Ireland star George Best added yet another chapter to his chequered relations with the forces of law and order after a scuffle at a pub near his home. He appears to have taken umbrage at the sight of a reporter and photographer from a tabloid Sunday newspaper, indicating that he wished to punch him. A few minutes

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later he confronted the photographer, claiming that the latter had taken pictures of him without his permission, and grabbed his short in the process. The two were separated by bystanders¹⁷⁵.

No charges appear to have been brought against Mr. Best over this incident.

Yorke exploits legal loophole

Dwight Yorke, the Blackburn Rovers striker, seems to be blessed with the Midas touch as far as any attempt to convict him for speeding offences is concerned. It may be recalled that, two years ago, he eluded a conviction for this offence on the grounds that a certain certificate had not been produced at the hearing¹⁷⁶.

In the summer of 2003 he succeeded in darting through another loophole in the law in relation to a speeding charge for which he had initially been fined £350 with £1,000 by way of court costs after a speed camera had caught his Porsche 911 turbo travelling at 61 mph in a 40 mph zone. However, this conviction was set aside in the High Court after it was found that Mr. Yorke did not personally complete an official form indicating that he was the driver. Owen J observed that the magistrates in question had established a prima facie case against the former Manchester United star on a mistaken basis¹⁷⁷.

Mr. Owen admitted that the ruling could have considerable implications given the prevalence of the use of laser and photographic technology in order to check the speed of vehicles. The question may have to be resolved in the House of Lords¹⁷⁸.

Darlington chairman investigated over "threats" to local newspaper

In late October 2003, it was learned that George Reynolds, the chairman of Nationwide League club Darlington, had become the subject-matter of a police inquiry after allegedly having issued a series of threats to the editor of a local newspaper. The editor concerned, Mr. Peter Barron, has had panic buttons installed at his home following a series of threatening statements from Mr. Reynolds which were allegedly pushed through his letterbox whilst he was on holiday. His neighbours also reported to have been questioned about Mr. Barron's whereabouts by Reynolds and his associates. It appeared that the threats concerned made references to his wife and children¹⁷⁹.

In fact it later emerged that Mr. Reynolds had been the subject of a BBC documentary which highlighted the latter's habit of confronting at their homes those who levelled criticism at the manner in which he operated the Third Division club. He defended his visits to Mr. Barron's premises on the basis that he and his family were adversely affected by the paper's coverage of a mass walkout of Darlington players from a

supporters' meeting the previous year following comments made by his wife Susan about "games being thrown deliberately". Mr. Reynolds has served time in Durham prison for safe-breaking¹⁸⁰.

Accountant must repay stolen £100,000 to Arsenal footballer

High-earning footballers sometimes find themselves the victims of fraudulent practices, and this was precisely the fate of former Arsenal star and Swedish international Anders Limpar. Mr. Limpar believed that he had given Marc Geppert funds to settle his own tax bill. Instead, the 46-year-old accountant channelled the money into a series of overdrawn bank accounts whilst purporting to negotiate with the Inland Revenue on the player's behalf. By the time Limpar noticed something was amiss, the money had been spent. Eventually, he felt he had no alternative but to pay the amount owed in tax a second time. Mr. Geppert was convicted of theft and issued with a two-year suspended jail sentence, and ordered to pay £103,399 to Mr. Limpar¹⁸¹.

Kobe Bryant in court on rape charge

The procession of cases involving misdemeanours by top US sports stars shows no sign of abating. The latest figure to achieve this unwanted notoriety is basketball superstar Kobe Bryant, who in August 2003 was charged with sexual assault by a court in Eagle County, Colorado¹⁸². Hearings commenced two months later, and featured graphic details of the alleged assault. Giving evidence, detective Doug Winters said that the alleged victim, a 19-year-old woman from Colorado, had informed police that the basketball player had grabbed her round the neck, bent her face first over a chair and then raped her whilst she wept. The hearing was to decide whether Bryant would stand trial next year¹⁸³.

Tyson arrested again over alleged brawl

Former heavyweight boxing champion Mike Tyson once again found himself facing a tussle with the criminal authorities in the summer of 2003, when he was accused of taking part in a brawl outside a New York hotel. He entered a plea of not guilty before a Brooklyn court. He is facing a charge of assault, disorderly conduct and harassment, which combined could land him a jail sentence if convicted¹⁸⁴. Two others were charged with threatening conduct¹⁸⁵. The trial had not yet been held at the time of writing.

Rugby League players jailed after street brawl

Some of Britain's top sporting performers appear to have a serious problem with behaving in a civilised manner in the vicinity of nightclubs these days. In the summer of 2003 there was not only the case of footballer Craig Bellamy (see above), but also that of four Rugby League

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players involved in a fracas in Leeds city centre. Chev Walker, Ryan Bailey and Dwayne Barker (Leeds), and Paul Owen (Rochdale) were caught on camera brawling outside a nightclub. The judge remanded the four players in custody after having studied the video and heard mitigating statements on their behalf¹⁸⁶.

The court heard that the incident commenced after Mr. Owen had been tricked into handing over his mobile telephone to an unidentified woman. As he attempted to recover it, the Leeds players believed that she was being assaulted and set about Owen. The video showed how the Leeds players traded blows and kicks with Mr. Owen. At one point the latter was seen to punch Mr. Barker to the ground and, as he struggles to regain his feet, he is kicked in the head and knocked out¹⁸⁷.

At the conclusion of the trial, three of the four players were given jail sentences. Walker was sent to a young offenders' institution for eighteen months and Bailey for nine months, whereas Owen was given a fifteen month jail sentence. Barker was ordered to perform 150 hours of community service. Sentencing the players, the judge commented that their actions had been "mindless, dangerous and drunken" and symptomatic of violence which had occurred all too frequently in Leeds in recent times¹⁸⁸.

Quivering with indignation at this sentence, Leeds Rhinos chiefs expressed their surprise at the length of the sentences and pledged themselves to stand by Walker and Bailey¹⁸⁹. In the event, Bailey was released two months later¹⁹⁰.

Tennis stars' sister shot dead in Los Angeles

The family of tennis stars Serena and Venus Williams is known to be an extremely close-knit one. One can only therefore imagine the anguish which they experienced at the news that Yetunde Price, a sister of the two stars, had been shot dead whilst driving through the suburb of Compton, an impoverished area of Los Angeles. The shooting took place after what was described as a confrontation with some local residents¹⁹¹. Police later surrounded a house where three men believed to have been involved in the shooting were apparently hiding, but no arrests were made¹⁹².

Police later issued a statement to the effect that a man had been arrested in connection with the killing. He was identified as Aaron Hammer of Compton, and was held in custody without bond pending further investigations. Also in custody was the man who was in Ms. Price's company in a white sports car at the time of the shooting¹⁹³. No further details were available at the time of writing.

Roscoe Tanner extradited on fraud charges

It will be recalled from a previous issue¹⁹⁴ that former

Wimbledon finalist Roscoe Tanner was wanted by the US criminal authorities on fraud charges, but that his whereabouts were uncertain at the time. This uncertainty came to an end in the course of August 2003, when he was extradited from Germany to "face the music" in his native land¹⁹⁵. It is alleged that Mr. Tanner swindled a yacht owner out of £22,500 over the purchase of a boat, and that he owes over £50,000 in child support payments to a New Jersey woman. He had been living in Karlsruhe with his new wife and made an appearance at the Leipzig Open championship, even though he was aware of the attempts being made by the US authorities to catch up with him¹⁹⁶.

According to court documents, Mr. Tanner is alleged to have bought the yacht from a local company, Gene Gammon & Associates, for approximately £23,000, drawing a cheque on an account which had no funds. He then apparently used the yacht as collateral in obtaining a loan worth \$10,000, which he later paid off by using a cheque displaying the proverbial flexibility when dropped. When the boat company demanded payment, Mr. Tanner produced a receipt under the letterhead of the State Attorney stating that he paid the relevant money into the firm's bank account. It subsequently emerged that this communication was forged. Tanner eventually returned the yacht to Gene Gammon & Associates, but it was later repossessed by the company with whom Tanner had taken out the loan. The US authorities are alleging that Mr. Tanner fled to Germany in 2002 for the purpose of avoiding not only an investigation into the purchase of the yacht, but also child maintenance payments to one Connie Romano, who had his daughter subsequent to a brief affair ten years ago¹⁹⁷.

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

Top golfer's wife accused of involvement in drug and gambling ring

Golfer John Daly has long been regarded as an example of early promise which failed to deliver, having burst on the scene by winning the US Open in 1991, but achieving little of note thereafter save for the British Open four years later. Not unlike a certain Northern Irish footballer mentioned earlier, his later career has been notable more for the turmoil of his private life than for any prowess on the sporting field. Over the years he has, *inter alia*, been charged with assaulting his second wife, been treated for alcoholism, trashed a hotel suite, and incurred massive gambling debts. This ill fortune now seems to have transferred itself to his closest family, since, in early August 2003, his wife was arrested on charges of laundering drugs and gambling money¹⁹⁸.

More particularly, Sherrie Daly, along with her father Alvis and her mother Billie, is alleged to have been part of a conspiracy to buy and sell cocaine,

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methamphetamine and marijuana, and to have paid for them using cash from previous drugs sales. It is claimed that the three in question made a total of forty-seven bank deposits amounting to just under \$10,000, which is the limit for reporting federal cash transactions. Mrs. Daly faces a maximum twenty year jail sentence on each of the two counts if found guilty¹⁹⁹.

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

Motocross riders jailed for armed robberies

The world of motocross racing was shaken in early August when three of this country's best riders were each jailed for nine years after being found guilty of participating in a series of armed robberies and car jackings. The men in question were part of a gang responsible for two car jackings and 12 other violent raids. They attacked shops, off-licences, a petrol station and a post office over a period of eight weeks. The three men jailed were Matthew Dove (20), Gareth Davies (21) and Thomas Chesterman (19). Two others who were jointly charged with them were cleared²⁰⁰.

The horrific nature of the crimes in question was fully ventilated in court. In one particular robbery, a store manager was slashed across the face by a knife being waved in front of him and the till rammed into his wife's stomach, sending her sprawling into a display. In another incident, a gun was held to the head of a terrified shopkeeper, who was told to hand over his money or be killed. Victims were threatened, kicked and pushed to the ground whilst others were left cowering behind counters. Detectives said that the gang believed themselves to be untouchable. The gang also targeted two women drivers in expensive cars, dragging one of them by the hair before making off in her £26,000 car which was used hours later in another raid. None of this prevented the defence counsel from saying that they were "hardly Al Capone – more like Westlife with a hangover"²⁰¹.

The crime spree commenced in December 2001 and included raids in the towns of Weybridge, Sunbury, Englefield Green, Shepperton and Windlesham (Surrey) and Harmanswater and Wraybury in Berkshire²⁰².

Warne may face fresh scandal

The winds of controversy have swirled round Australian Test spinner Shane Warne for some time now, but hitherto this has been confined to a ban from his sport for one year based on the use of unauthorised drugs²⁰³. Recent allegations, however, threaten to land Mr. Warne in more serious trouble, at least if the relevant prosecuting authorities develop an interest in the matter.

Mr. Warne had already admitted making lewd telephone calls to a British nurse, when in mid-August 2003 he sought legal advice after Helen Cohen Alon,

from Johannesburg, claimed that she was offered money by an associate of Warne to keep quiet about their relationship. Some days later, the media reported that a woman had come forward with allegations about the bowler, whilst a former employee of Cricket Australia alleged that the organisation received regular complaints about the bowler's behaviour. The employee added that this had been going on for "several years". In addition, a Sydney agent who represents celebrities told an Australian television channel that a 38-year-old Melbourne woman was prepared to make her story public in sympathy with the South African woman²⁰⁴.

Regardless of any action the authorities may take against Warne, the case had already produced criminal law consequences in that, at around the same time as these allegations came to light, one Christopher Kent, 46, was committed to stand trial on charges that he blackmailed Cricket Australia over an alleged incident in which Warne passionately kissed Mr. Kent's 16-year-old niece²⁰⁵.

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

Boxing champion under police protection following kidnap plot

There appears to be a disturbing tendency for top sporting performers to be targeted by the criminal underworld, and yet another example of this trend was in evidence in late August, when it was revealed that boxing champion Johnny Nelson had been under police guard for four months after a plot to kidnap him had been discovered.

This threat made against the current World Boxing Organisation (WBO) cruiserweight champion, who is married with two children, was linked to a drugs gang in the North-West, although South Yorkshire police refused to confirm this. A group from Sheffield had apparently contacted a criminal gang involved in drug smuggling in Manchester and its surroundings, and are believed to have indicated that they wanted Mr. Nelson kidnapped or harmed. At first, the boxer made light of the threats when these were reported to him by the police, but he soon realised the seriousness of his position when he noted the measures being adopted by the police in response. The security measures put in place at his home include cameras and panic buttons valued at £10,000, as well as having police officers assigned to him. A rapid response team of eight armed officers was also on standby²⁰⁶.

The massive inconvenience to which this has put Mr. Nelson and his family includes having to cancel visits and call off arrangements with friends and relatives without being able to explain what was the cause of it all. The only person whom the boxer was allowed to inform was the headteacher at his children's school.

A police investigation into the threat was proceeding at the time of writing²⁰⁷.

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Attorney-General rules that newspaper did not commit contempt of court over Beckham "kidnap" affair

The bizarre saga of the arrests which followed allegations that a plot to kidnap and hold to ransom Victoria Beckham, the wife of England football captain David Beckham, as well as the couple's two children, has been extensively documented in the last two issues of this journal²⁰⁸. The case eventually collapsed at Middlesex Guildhall Crown Court, and the bizarre circumstances of the case prompted the judge, Simon Smith, to refer to the Attorney-General the News of the World for contempt of court. The newspaper had issued a tip-off to Scotland Yard alleging the plot, as a result of which five innocent men spent seven months in prison²⁰⁹.

The following week, the Attorney-General decided that the newspaper had not committed contempt of court by paying Florim Gashi, a Kosovan convicted conman £10,000 for the story relating to the alleged kidnap. He also announced that he would be writing to the Press Complaints Commission (PCC) about this case, since the latter had indicated earlier that it would allow itself to be guided by the Attorney-General's ruling on this matter²¹⁰.

(For the PCC's ruling on this matter, see below under the heading "Public Law", p. 000).

Eubank arrested following Iraq protest at No. 10 Downing Street

That some – if not many – sporting performers are less than ecstatic with the invasion of Iraq by US and British troops earlier this year is evident from the John Ameachi affair which has already been referred to (see above, p. 000). However, any protest action undertaken by them has remained within the rule of law – at least until mid-October 2003, when boxer Chris Eubank fell foul of the criminal authorities over his particular way of making his point.

In an extraordinary one-man protest, the former world middleweight boxing champion was first issued with a ticket for careless driving after having blocked the gates near No. 10 Downing Street with his ten-wheel truck. He was later arrested for reversing the truck into a delivery van and for possessing a bladed instrument. Later, a Scotland Yard spokeswoman said that a man in his 30s had been bailed on suspicion of causing criminal damage to a vehicle²¹¹. Before his arrest, Mr. Eubank said:

"The military occupation [of Iraq] doesn't work. All it does is cause more terror. If I come into your house with a gun, people will react against me. It's called terrorism"²¹²

Later, a spokesman for the boxer said that Mr. Eubank felt he needed to make a statement. His

feelings about the Iraq invasion were so strong that he was prepared to be arrested²¹³.

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

Rugby fans lose thousands each in World Cup fraud

Unfortunately, the 2003 World Cup has not escaped the attentions of the criminal fraternity. With two weeks to go before the tournament kicked off, news broke that rugby fans the world over had been swindled out of hundreds of thousands of pounds in a ticket fraud. They had sent money for various packages in response to newspaper and internet advertisement, but received precisely nothing in return. Police reported that buyers from as far afield as South Africa, Nigeria, the US and even Switzerland, along with British fans, were amongst those cheated by the operation. None of the money lost had been traced at the time of writing, and the company in question, The Rugby World Cup 2003 (UK) Ltd, has been liquidated leaving many with the prospect of losing all their money – particularly those who paid by cheque²¹⁴.

The advertisements first appeared in November 2002, offering packages including tickets for all matches to be played in Sydney. They offered a £2,000 deal for adults, £1,500 for children under 16, as well as a family deal of £6,500. One buyer paid over £10,000. The others paid a minimum of £390 for flights, accommodation and tickets, but failed to receive anything. More than 70 groups contacted the police about this matter. The company in question claimed to be working in co-operation with the International Rugby Board (IRB); however, the latter denied ever having heard of the company, which was not one of the 13 British-based licensed agents. The company was served with a compulsory winding-up order on 30/7/2003.

A woman in her 30s was subsequently arrested and bailed on suspicion of having obtained money by deception²¹⁵.

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

Football

Neil Macnamara. It will be recalled from the previous issue²¹⁶ that this former bodyguard of Cardiff City owner Sam Hammam had been accused of setting off a hoax fire alarm at the Celtic Manor hotel, where a rival team were staying before a fixture with Cardiff City. In August Mr. Macnamara was banned from football matches for five years by Abergavenny magistrates for this incident²¹⁷.

Titus Bramble. In October, this Newcastle United player was convicted in his absence for speeding and breaching the terms of his driving licence. He will,

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however, be given the opportunity to plead not guilty at another hearing²¹⁸.

Wayne Rooney. In the previous issue²¹⁹ it was reported that the young England star and his family home had been the victim of a series of acts of wanton vandalism. Concern at the targeting of Mr. Rooney has not been allayed since then, with his agent, Paul Stretford, claiming that his client has become a target for gangsters on Merseyside and in London. More particularly Mr. Stretford indicated his concern that Mr. Rooney faced a great deal of danger in the shape of an extortion plot seeking to obtain a proportion of his earnings. His club, Everton, has been holding meetings with Mr. Stretford over these concerns²²⁰.

Sir Bobby Charlton. It may be recalled from the previous issue²²¹ that in April 2003 thieves had raided the home of England and Manchester United legend Sir Bobby Charlton and made off with a number of articles of priceless memorabilia. In early August, these were retrieved from a dump after a tip-off received by Greater Manchester police. Sir Bobby pronounced himself "delighted" at the news²²².

El Hadji Diouf. In our previous issue²²³ it was reported that, during a UEFA Cup tie with Celtic at Parkhead in March, the Liverpool and Senegal striker spat at a spectator after having been patted on the head by him. For this incident, the striker was fined £5,000 by Glasgow Sheriff Court²²⁴.

Frank Worthington. In June, the former Bolton and England striker was banned from driving for having caused a motorway pile-up. It appeared that he had tailgated motorists at 70 mph on the M62 road, flashing his lights and sounding his horn. When one driver in a Peugeot car failed to move out of the way, Worthington performed a manoeuvre which caused the driver to swerve to avoid him. The Peugeot then hit the central reservation before bouncing back into the path of two other cars, causing a serious pile-up. One of the Peugeot passenger claimed that she subsequently suffered severe whiplash. A passenger in another car involved in the altercation said that she "thought she was going to die". Mr. Worthington was fined £500, with £250 costs, and disqualified from driving for six months²²⁵.

Basketball

Patrick Dennehy. In late July, a body discovered in an overgrown field near Waco, Texas, was identified as that of Patrick Dennehy, the Baylor University basketball player who was reported missing six weeks earlier. Carlston Dotson, Mr. Dennehy's room mate and team-

mate at Baylor the previous season, had already been charged with his murder a week earlier. Dotson was arrested making an emergency telephone call stating that he needed help because he was "hearing voices"²²⁶.

Rugby Union

In late September, a dinner aimed at raising funds for the benefit of former England international Alistair Hignell, who suffers from multiple sclerosis, ended early after a fight broke out. The organiser of the event – held at the same hotel which featured the alleged rape by Premiership footballers reported earlier – said that there was a scuffle after a disagreement between English and Scottish guests²²⁷.

Motor racing

Nicole-Nadine Frentzen. Whilst Heinz-Harald Frentzen, the German driver, was guiding his Sauber round the circuit at Magny-Court, his 14-year-old sister Nicole-Nadine was taking their mother's Mercedes for a spin round the streets of Mönchengladbach. She was detained by police after having been caught driving the car with her sister Samantha and a friend as passengers. Her father later excused her actions because she had "petrol in the blood"²²⁸....

Bernie Ecclestone. In June, the Formula 1 boss was the victim of a theft when the left wheels of his prized silver Mercedes were stolen from outside his Chelsea mansion²²⁹.

Cycling

Lauri Aus. In mid-July, it was learned that the 32-year-old Estonian champion cyclist was killed by a drunken driver whilst training on a rural road²³⁰.

Swimming

In mid-May, Graeme Smith, who won the bronze medal at the Atlanta Olympics in 1996, was attacked and viciously beaten in a Manchester street as he was returning from a night out with friends²³¹.

Other issues

Boring Arsenal...

In late August 2003, a football fan was prosecuted because he fell asleep as his team, Middlesbrough, lost 0-4 to Arsenal at home. Adrian Carr had worked an early shift and met up with some friends for a drink before watching his team's unfortunate performance. Stewards attempted to wake him at the end of the game before he was arrested for being drunk in a sporting arena²³².

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Media Rights Agreements

BBC regains “jewel in crown” under new FA media deal

In July 2003, it was learned that the BBC regained a much-prized broadcasting asset when it won exclusive rights to screen all home England internationals live. The Football Association (FA) had confirmed a new domestic television deal with the BBC and BSkyB to cover England and FA Cup matches. The BBC will have first choice of the FA Cup matches, with the final being screened on BBC and Sky. Sky Sports, on the other hand, will show highlights and delayed broadcasts of home England internationals. The new four-year agreement, which runs from the start of the 2004-5 season, is worth approximately £330 million. (The current deal is worth £345 million over three years)²³³. This reduction in value reflects the worldwide slump in sports media rights and the fading lustre of the FA Cup. This slump in television revenues will add to the financial trouble faced by the FA (and which have been extensively documented in this journal²³⁴). The FA currently has a £400 million commitment towards the building of the new Wembley and has pledged £50 million towards the building of the National Football Centre in Burton-on-Trent²³⁵.

Niall Sloane, Head of Football at the BBC, pronounced himself and the Corporation to be delighted at the deal²³⁶. No such enchantment was registered at the headquarters of the FA's five principal sponsors. The deal came as a disappointment to them because of their fear that, with the majority of the coverage being on the BBC, their ability to advertise during the build-up to the matches and during commercial breaks will be severely restricted. Each of these sponsors pays the FA £20 million. Andrew Marsden, the UK Head of Britvic, which distributes Pepsi Cola (one of the “big five”) in the UK, commented that:

“the BBC's priority is not going to be showing our commercial properties and we will be talking to the FA about a number of items concerning exposure that are in our contract”²³⁷

It remains to be seen whether these firms will review the terms of their sponsorship – or indeed its very existence – as a result of this deal.

Pub landlords – and MPs – in revolt over increase in Sky subscription charges

When the news broke over the summer that Sky Sports intended to raise its subscription fees by 22 per cent for the next season, it went down with the nation's publicans like the proverbial weighted dirigible. Over 30,000 public houses across the land subscribe to the sports channels in question in order to attract more

custom, and football is the main draw. The average pub paid around £300 per month last season, with some of them forking out as much as £1,000. Many publicans immediately declared that they would not be able to afford these increases. Besides the annual subscription fee, they have to pay extra to screen pay-per-view matches – which it was also proposed to increase, from £200 to £400 during the forthcoming season²³⁸.

As the new season drew near and there was no sign of BSkyB relenting its stance, the publicans turned to their elected representatives, and lobbied their MPs to protest at the planned increases. The enigmatically-named All-Party Parliamentary Beer Group, which has over 300 members, played host to a delegation from the licensed pubs and clubs trade which had been in high dudgeon over the proposals. The Association of Licensed Multiple Retailers, which was present at the meeting, maintained that the prices charged by BSkyB had increased by a staggering 239 per cent since 1996 to the current level of £4,980. To put the matter in perspective, the BBC licence fee had merely increased by 30 per cent over the same period. Earlier that day, Martyn Jones, labour MP for Clwyd South, tabled an Early Day Motion warning that many pubs and clubs in Britain would discontinue their showing of live football if the increases went ahead. BSkyB, on the other hand, issued a statement to the effect that they offered football “at a very fair price and value”²³⁹.

Rugby League television rights deal with BSkyB – an update

It will be recalled from the previous issue²⁴⁰ that the five-year television rights deal between British Rugby League and BSkyB was about to expire, and that negotiations had begun in earnest about any future deal. The broadcaster made a proposal which was more generous than was generally anticipated, but by mid-June the Super League clubs remained uncertain as to whether they should accept, the main bone of contention being the manner in which the money was to be shared out.

The following week, the League decided to turn down the £53 million proposed five-year deal. It opted for more coverage on terrestrial television – i.e. the BBC – rather than the satellite broadcaster's hard cash, deciding that the latter came with too many strings attached. It was a decision fraught with enormous implications, particularly for the seven smaller Super League clubs, which had voted in favour of accepting the deal. That would have meant an increase in their annual television revenue to around £850,000 (from the current £650,000)²⁴¹.

BSky B wanted to televise Great Britain internationals as well as the Super League, and refused a BBC request

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to move the Challenge Cup to a later date in the summer season. The BBC for its part announced that, on that basis, it could cut its coverage of the Cup to the semi-finals and final only when its current deal ran out during the 2003-4 season, meaning that only three matches per season would be screened on television. Having refused the BSkyB deal, the League was free to accept a new BBC offer which would include the Cup and the internationals. It was understood to be worth £5 million per year, compared to the £10 million which was on offer from Sky. The clubs were gambling on the prospect that terrestrial coverage would prompt increased attendances, and that Sky would return with a new offer for the Super League alone²⁴².

In short, the situation was fluid. This did nothing for the short-term financial stability of the Super league clubs, who complained that the prevailing uncertainty over the television contract had made budgeting for the new season impossible, giving the Rugby Football League a fresh headache over salary caps. Richard Lewis, the former Davis Cup player who currently chairs the League's Executive Committee, emphasised that it was important to get the television negotiations right even if this meant some short-term uncertainties²⁴³.

As the new season approached, however, BSkyB showed no signs of coming back to the League with an improved offer. In fact, it reduced its original bid from £53 million to £48 million because of the decision to play the BBC-broadcast Challenge Cup throughout the summer season, with a final in August rather than the traditional date in the late spring. The League therefore admitted defeat and urged the Super League clubs to end the prevailing uncertainty by accepting a new offer – which in the meantime had been nudged back to a figure slightly above the £50 million mark²⁴⁴. It also represented another victory by Sky over the BBC, following hard on the heels of the BBC losing Rugby Union's Heineken Cup to the satellite broadcaster – as is explained in the next section²⁴⁵.

This was the position at the time of writing.

Sky captured Heineken Cup (Rugby Union)

The League code has not been the only branch of rugby to have experienced difficulties over its broadcasting rights of late. Rugby Union's main European cup competition, the Heineken Cup, was established in 1995, and initially its policy was to sell the broadcasting rights exclusively to terrestrial television in order to promote the sport. Accordingly, European Cup Rugby Ltd (ERC) concluded a succession of four-year deals with the BBC, the most recent one being worth £20 million. However, as the date of expiry of the old agreement loomed, the BBC indicated that it was cutting its investment in sports broadcasting, in line

with the general downturn in the sports television market noted earlier. This prompted ERC to turn its attention to BSkyB²⁴⁶.

Negotiations continued for two months with both media organisations. ERC were demanding £7 million per year for the broadcasting rights, which was £2 million more than the BBC considered that the deal was worth, the latter describing the current situation as a "buyer's market". The BBC had also indicated that, if it did acquire the rights, the matches in question would be shown on Channel Five, to whom it would sub-licence the deal²⁴⁷. Ultimately, though, it was Sky which succeeded in winning the contract, not only for the Heineken Cup but also for the second-tier competition, the Parker Pen Challenge Cup. Thus was the exodus by top club rugby from the terrestrial channels complete, following the loss of the Zurich Premiership²⁴⁸.

World Rally television coverage faces legal challenge

In mid-October 2003, television coverage of the World Rally Championships was threatening to turn into a legal tangle after Channel 4 was accused of having breached its contract by showing highlights of the event after midnight. The commercial rights holder for the sport, David Richards, indicated that he was considering such action after the San Remo Rally slipped down the schedules two weeks previously²⁴⁹.

When it was learned that Channel 4 planned to show all its main highlights of the sport after the witching hour, this considerably angered the organisers, who wanted the channel to adhere to its professed intention to popularise the sport. Early evening audiences were claimed to be up to 1.5 million, but this figure was disputed by Channel 4, which claimed that the true figure was 900,000, with some 500,000 viewers after midnight.

Added interest to this dispute was provided by the news that ITV was thought to be interested in stepping into the breach and using rallying as a partner sport for Formula One racing, showing the two motor sports on alternate weekends. Executives from the channel had apparently visited the San Remo rally and were impressed by its potential to attract mass audiences. They are likely to make a major bid when the Channel 4 contract ends next year²⁵⁰.

No further details were available at the time of writing.

Netherlands Football Association not entitled to share in media rights of its clubs. Netherlands Supreme Court decision²⁵¹

There arose a dispute between Feyenoord, one of the Netherlands' top sides, and the Netherlands Football Association (Koninklijke Nederlandse Voetbalbond –

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KNVB) as to whom actually owned the broadcasting rights for match extracts. The Association claimed that it was entitled to part of the income from this source.

The Supreme Court (Hoge Raad) rejected this claim. It admitted that, in a previous decision, it had ruled that the KNVB and the clubs could, on the basis of the rights which they derived from the ownership or user rights of the stadiums where the matches were being played, object to television and radio broadcasts in the sense that they may demand a fee for such broadcasts. However, this did not mean that the KNVB was entitled to a share in the broadcasting rights of the matches played by these clubs. The reason was that, in that same decision, the Supreme Court had ruled that the fact of the KNVB organising a competition, and the clubs and players competing in these matches under the direction of the referees, assistant referees and official observers, taken in conjunction with the performance by these clubs, does not entail that the KNVB is entitled to a share in the relevant broadcasting rights. The services performed by the KNVB and the clubs cannot be placed on the same footing as those which justify the awarding of absolute intellectual property rights. There was no reason to depart from this part of the previous decision in this case.

BSkyB Premiership broadcasting deal under threat from European Commission

This issue will be dealt with below, under the heading of EU Competition Law (see below, p. 000).

Legal issues arising from transfer deals

Bosman and the new FIFA transfer rules. Article in professional journal²⁵²

This contribution examines the extent to which the new rules on international transfers prompted by the Bosman decision, extensively documented in these pages, followed the recommendations made in that decision by the European Court, and to explain any deviation from them. He explains that Bosman was a decision which affected vested interests, and that the natural course of events produced an antithesis – i.e. the club ownership of players. Therefore, although Bosman may remain the leading case in this area, subsequent events have made it inappropriate to refer to it as the definitive guide to the new transfer system.

Football transfer market in turmoil

Are transfer windows a threat to lower League clubs?

Football clubs in the first, second and third divisions of the Football League are currently in financial difficulty

because they have lost a large amount of their traditional income from selling players since transfer windows commenced last year. This is the conclusion of a report issued by the Football League on the manner in which its 72 clubs have been affected by the introduction of two set periods of the year during which they may buy and sell players²⁵³.

According to Sir Brian Mawhinney, the League Chairman, clubs in the lower reaches of the League are being unfairly penalised by their inability to dispose of players whenever they need to. He added that the transfer window system decreed by FIFA had allowed the Premiership sides to purchase league players at bargain price.

Other points to emerge from the research were:

- the income obtained by the lower league sides from selling players to Premiership clubs has dropped sharply; having reached £52.2 million in 1999-2000, this had fallen to £33.2 million last year, which represents a 36 per cent drop in three years;
- the value of players sold from one Football League club to another has fallen dramatically;
- transfers within the Premier League involved just £52.5 million last season, compared to the £80 million average recorded between 1997 and 2002;
- the total amount expended by all 92 clubs buying players on the market dropped to £90.4 million last season, representing a drop of nearly 50 per cent on the 1997-2002 average of £169.5 million.

Major downturn in transfer market during summer of 2003

Normally, the month of July is a frenzied one in the transfer market. This has not, however, been the case in 2003. Whilst some major deals, such as the Beckham, Kewell and Ronaldino moves, seemed to drag on indefinitely, those involving their lesser renowned colleagues seemed to be caught up in a general stagnation of the transfer market over the summer. According to the Professional Footballers' Association (PFA), 586 players, 122 of whom competed in the Premiership the previous year, effectively joined the dole queue as their contracts expired and no new deals were forthcoming. In spite of a market flooded with such available talent, many top sides were extremely reluctant to add to the previous season's squads. Significantly, only three of the 29 deals completed during the first week of July and involving English teams involved a transfer fee. This prevalence of free transfers was explained by leading commentators by the fact that clubs' wage bills had absorbed all their income. The situation was so desperate that some clubs were attempting to save on a few weeks' salary by waiting until the last moment to sign up players²⁵⁴.

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The downturn in the transfer market was confirmed by the report commissioned by the Football League referred to in the previous section.

Long-term loans should be banned, says footballers' union

The loaning of players to other clubs is a practice which, in principle, should give rise to little controversy. However, some recent developments in the transfer market have aroused concerns about such transactions. The current season (2003-4) is the first in which Premiership clubs have been allowed to loan players to each other. Because of the economic downturn in football's fortunes, loans have become an attractive alternative to transfers, and indeed, on the day when the transfer window closed, much of the traffic was in footballers borrowed from clubs' rivals.

One of the events which raised some eyebrows in official circles was the fact that, only two days after arriving at Chelsea from French club Bordeaux for a transfer fee of £3.45 million, Alex Smertin, who captains the Russian national team, was loaned to newly-promoted Portsmouth until the end of the 2003-4 season. This came hard on the heels of other loan deals involving the Stamford Bridge club, since they already had ceded Dutchman Boudewijn Zenden on loan to Middlesbrough and Swedish international Mikael Forssell to Birmingham. Elsewhere, Danny Mills had joined Middlesbrough from Leeds United, having played for the latter the previous weekend, and Arsenal striker Francis Jeffers rejoined his former club Everton on loan for the remainder of the season. These events sent the alarm bells ringing at the headquarters of the players' union, the Professional Footballers' Association (PFA), whose deputy Chief Executive, Mark McGuire, made the following comment:

"We could have a situation where a senior player could score a goal or give away a goal which affects the team he has come from. This deal has taken things further and, for me, it doesn't seem to be in the spirit of what the Premiership is all about. While it's not flaunting (sic) the regulations technically, it has given Portsmouth an advantage over all the other clubs who couldn't afford to buy a player"²⁵⁵

Mr. McGuire went on to state the view that what was once seen as a last-resort measure for teams has become a tactic which is used far too readily. Clearly the authorities governing the sport will need to take a closer look at these deals, as they seem heavy with potential conflicts of interest.

FA under pressure to audit every transfer

That a good deal of sharp practice has infiltrated the transfer market is no longer a secret amongst the

game's practitioners and administrators. Ever since the "bung" allegations made against former Scotland international George Graham proved to be correct, it has been recognised that a good deal of corruption and sleaze attends this aspect of football's commercial side. In response, the Football Association (FA) decided, four years ago, to establish a compliance unit headed by former policeman Graham Bean, in order to monitor breaches of the relevant regulations both on and off the pitch. However – as has been reported earlier (see above, p. 000) – Mr. Bean has shaken the dust of Lancaster Gate off his feet, frustrated at what he regards as the lack of support from his superiors. This episode has led many to question the FA's appetite for tackling this form of corruption.

It is in response to these concerns that the FA have recently decided to audit every transfer in the game in order to attempt to eliminate such sharp practices. In the words of its Director of Legal Affairs, Nic Coward:

"Promoting transparency is one of the key objectives of the compliance unit. As part of that we have initiated an audit of transfers to ensure that procedures are being adhered to. Whilst transparency is desirable, the unit deals with extraordinarily complex cases where a degree of confidentiality is necessary for them to be properly concluded. There is no way we are ducking our responsibilities. We will investigate every case that is reported to us, but we are not the police, we are not the Inland Revenue. There is a limit to what we can do"²⁵⁶

According to many observers, the most sizeable obstacle to effective regulation of agents and the transfer market are the professional clubs themselves. In common with so many other self-regulating industries, football is vulnerable to the charge that its main regulatory bodies labour under a conflict of interests. The clubs which regularly deal with agents play a major role on the board of the FA, which is the chief regulator. They are also the key constituents of the Premier League and the Football League, which are the other potential fora for reform. According to some insiders, the competitive nature of football often prevents clubs from acting²⁵⁷.

(On the attempts made to improve transparency amongst football agents, see under the heading "Sporting Agencies" – below, p. 000).

The Alan Pardew affair

When West Ham United were compelled to haul their former star player Trevor Brooking from the television commentary box into the manager's hot seat, it was clear that this would the ex-England international would only do so on a caretaker basis. The East London club

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therefore had to seek out a long-term replacement, and seemed to have found the right candidate in Alan Pardew, then manager at Reading. Mr. Pardew appeared keen to take up this new challenge, and tendered his resignation at Reading in early September 2003, with the new season barely under way. This gave rise to an acrimonious tussle between the two clubs which at one time threatened to end in a long drawn-out judicial battle.

The situation was made particularly acute by the fact that both sides had well-founded ambitions for promotion to the Premiership. As a result, the Reading chairman John Madejski initially turned down Mr. Pardew's resignation, stating that the club was holding their manager to the stated period of notice required by his contract. Pardew was in principle tied to the Berkshire club until the conclusion of the 2005-2006 season after having renewed his contract with them in early 2003. Although Reading must have entertained few hopes that they could force Mr. Pardew to remain, they were at least hoping to emerge as winners in a compensation battle, from which they were expected to net some £500,000 in compensation²⁵⁸.

A week after Mr. Pardew's offer of resignation, Reading applied to the High Court for an injunction which would prevent Mr. Pardew from taking up employment at Upton Park. Lawyers acting for Reading had argued that any move by Pardew to West Ham would constitute breach of contract, the latter only allowing him to approach Premiership clubs. It also appeared that Mr. Pardew's contract actually contained a specific clause stipulating that he may not leave to take up employment at a "rival club". This threatened to involve both clubs in a protracted legal wrangle, and Trevor Brooking indicated that if this affair dragged on for too long, the club could be compelled to look elsewhere for a permanent incumbent²⁵⁹.

Finally, and following further negotiations between the parties involved, Mr. Madejski withdrew the threat of legal action for breach of contract, subject to two conditions: (a) the payment of a compensation fee of £380,000 and (b) Mr. Pardew was not to take up his new position until a month later, i.e. 18 October at the earliest. Until this time, Mr. Brooking would remain in post²⁶⁰. It emerged that initially, Reading's starting point for negotiations on compensation had been a staggering £18 million, which represented the loss which they allegedly would suffer if Mr. Pardew departed and the East London side failed to win promotion to the Premiership. West Ham's barristers had successfully bargained them down to a more sensible figure. As part of the deal, West Ham had also agreed not to take on any of Reading's players or backroom staff until after the current season. Following the conclusion of the deal, there occurred the rare sight of a manager giving his welcome speech

outside the High Court rather than at his new stadium²⁶¹.

Mr. Brooking expressed his relief at then outcome of the affair. He called it a "score draw", since there were a number of possible alternative outcomes which could have very different consequences for the various parties involved. The first was the immediate dismissal of the application for an injunction, in which case Mr. Pardew could have taken up his post immediately; the second was a full hearing which would have taken a further week, and thirdly for the courts to award the application to Reading, which would have resulted in a court battle taking months to resolve²⁶².

Manchester United enmeshed in legal tussles over transfers

The current Premiership champions have over the past few years experienced some legal difficulties as a result of transfer deals in which they have been involved. The reader may recall the problems which they encountered over the transfer of Dutch defender Jaap Stam to Italian club Lazio²⁶³. In mid-October, the club reached a compromise over the transfer to Old Trafford of Sunderland forward David Bellion, rather than relying on an independent tribunal to determine the compensation payable. This put an end to what threatened to become an extremely bitter tussle.

Following nine months of often acrimonious negotiations, the disagreement between the two clubs was due to be heard by the Football League's Appeals Committee on 16 October. At the last moment, however, it was decided to reconvene discussions. The outcome was that Manchester United would pay an initial £2 million, with a further £1 million being payable subject to first-team appearances and international call-ups by the French striker. The Sunderland Chairman, Bob Murray, lost no time in proclaiming his satisfaction with the deal, which included a sell-on clause from which the Wearside team would benefit should United in turn transfer Mr. Bellion. However, senior officials at the Football League were somewhat bemused by United's change in approach, being of the opinion that in the process, the club had overspent by around £1 million²⁶⁴.

Exactly what had motivated the Old Trafford club's change of tack was an equal mystery to others, particularly since they had previously offered to pay only 50 per cent of Sunderland's initial valuation of £3 million. The club's supporter groups were equally mystified why their side should spend so much on a player who thus far had succeeded in making only three starts for Sunderland (even though the latter had offered the player a three-year extension of his contract, accompanied by a staggering 500 per cent pay increase²⁶⁵). The answer may lie in the somewhat murky background to the deal. Sunderland had already

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accused Manchester United of making an unlawful approach for Mr. Bellion, which the latter club had denied. It may just be possible that Old Trafford agreed to pay the full amount demanded by Sunderland out of reluctance to have the full details of the transfer emerge during a tribunal hearing. This suspicion was fuelled by the fact that, if the matter had gone to a tribunal, several factors would have been in their favour. Since the player had not yet reached the age of 24, he was not eligible for a Bosman-style free transfer, which meant that the tribunal would have had to base compensation on the period for which Bellion had been at Sunderland and on the extent to which the latter had been instrumental in furthering his football education. In view of the fact that Mr. Bellion had joined the Wearside club from Cannes barely two years previously and was a peripheral player, the tribunal might not even have required United to pay a seven-figure sum²⁶⁶.

The Old Trafford side have also been in the wars over the impending departure of their brilliant but unpredictable goalkeeper Fabien Barthez, also a French national. Mr. Barthez had not made a first-team appearance since that unfortunate night in April 2003 on which he conceded three goals during the quarter-final Champions League tie with Real Madrid. As a result, both club and player seemed keen to facilitate a move to a new venue. In mid-October, French club Marseille claimed that they had secured a deal allowing Barthez to rejoin his former club on loan with a view to a permanent move. Initially, manager Sir Alex Ferguson had planned a quick sale, but it quickly became clear that, in a deflated transfer market, United would have to contemplate not only a loan deal, but also the prospect of continuing to pay at least some of Barthez's £70,000-per-week earnings whilst he was playing for another club. Hence the proposed deal with Marseille²⁶⁷.

In spite of the French club's claims that a deal had been struck, it appeared that certain aspects of the deal had not in fact been agreed, including even the player's consent. In addition, both clubs would be required to make out a convincing case to world governing body FIFA if the deal was to be allowed to go through before the next transfer window opened²⁶⁸.

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

Controversy surrounds Proactive once again over Bischoff transfer deal

It may be recalled from previous issues of this journal that concern has been rising about the role played by certain players' agencies in the transfer market. One name which has increasingly come to the fore in this connection is that of Proactive, whose role in the deals concluded by John Gregory whilst the latter was

managing Aston Villa has come in for particular scrutiny²⁶⁹. The agency's activities were once again the subject of controversy in mid-July 2003, more particularly over the move of Danish under-21 international Mikkel Bischoff from AB Copenhagen to Manchester City.

According to documents seen by a leading national English newspaper²⁷⁰, City had agreed to pay Proactive Scandinavia, which is part of the Cheshire-based Proactive group, the sum of £350,000 on top of the agreed £750,000 fee after signing him from Copenhagen 12 months previously. This amount was the largest paid to Proactive for its role in the transferring of several Danish players to various European clubs from September 2001 to July 2002. The Bischoff deal was all the more extraordinary since the Dane made only one appearance for City during the 2002-3 season, and had only made 19 appearances for his previous club.

The size of this fee compared to the player's overall transfer value led to calls from the Danish football federation for an investigation by world governing body FIFA into the potential for conflict of interest, given the involvement of leading football figures with the Proactive group. Gordon Taylor, the Chief Executive of the Professional Footballers' Association (PFA), the players' union, also expressed his concerns in the following terms:

"This is a very high fee for a transfer that's only £750,000. Sadly, this does not surprise me. We have said that we are prepared to be part of a monitoring body to oversee transfers and ensure that they are transparent. The whole transfer system needs to be more accountable and transparent. We know of cases where agents are making more profit than the clubs they are dealing with. The whole situation needs to be monitored properly and this is something that both the FA and FIFA must do"²⁷¹

It is a fact that the City manager Kevin Keegan owns 200,000 shares in Proactive, although there is nothing to suggest that Mr. Keegan has engaged in anything illegal. Proactive is operated by Paul Stretford, one of the most influential football agents in this country, and whose name has graced these pages before²⁷². The company confirmed that they had agreed the £350,000 fee with Manchester City, but added that this sum represented a percentage of Mr. Bischoff's earnings over the five-years covered by the contract which he had signed. Proactive also commented that the fee was to be paid over a certain period and not as a lump sum. They added that the entire deal was entirely within FIFA and FA guidelines. The FA declined to comment²⁷³.

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Role of agent in Kewell transfer under scrutiny at FIFA

As part of the economy drive at Premiership club Leeds United, prompted by the dramatic downturn in their recent financial (and footballing) fortunes, one of their most successful players, Australian international Harry Kewell, was transferred to Liverpool during the close season for the sum of £5 million. This deal had a number of question marks over the manner in which it was concluded.

More particularly the role played by the agent who facilitated it has come under scrutiny, particularly because the person in question, Bernie Mandic, is not an officially licensed FIFA agent. It appeared that Mr. Mandic was employed by a company called MaxSport, of which there is an Australian-based subsidiary entitled Sports Corporation International for whom his brother Nikola works, and it is he who is recognised by FIFA. Mr. Mandic's involvement in the deal should have been nothing more than purely administrative, yet it was the latter's signature which appeared on the correspondence between MaxSport and Leeds United chairman John McKenzie. Given that MaxSport obtained £2 million from the transfer, this development prompted a number of allegations against Mandic. The latter dismissed any suggestion of impropriety, saying:

"If people want to make an issue of this, then fantastic. Considering some of the most corrupt deals that have even been conducted have involved licensed FIFA agents, then I find this latest episode quite hilarious"²⁷⁴

At the time of writing, FIFA had not yet made any pronouncement on this case.

Cricket to enter transfer age

The sport of cricket is one which, with varying degrees of justification, has been regarded as one of the more conservative strongholds of professional sport. Although transfers of players between professional teams have become a well-established practice in the game, they have hitherto been governed by more severe restrictions than has been the case in most other sports. In addition, moves between clubs were not subject to transfer fees. This has given rise to a number of long drawn-out disputes between English county sides, of which the John Crawley affair, extensively documented in these pages²⁷⁵, was but the most visible example. This situation is about to change, according to the draft rules governing the first-class game in England, which have already been endorsed by the First Class Forum, and were expected to be ratified as soon as the county clubs had agreed a standard form of contract with the Professional Cricketers' Association. It

was in fact the latter which had successfully lobbied for the said restrictions to be removed from List One players, pleading restraint of trade²⁷⁶. The new system will include an acceptance that money can change hands for players. The impetus for change had been the liberalisation of employment law within the European Union on the free movement of persons.

The England and Wales Cricket Board (ECB), however, are keen to avoid the free-for-all which prevails in professional football. Players will still be expected to honour contracts, and the EWCB will merely sanction in-season transfers in exceptional circumstances. Where these do occur, the purchasing county club will need to guarantee any new player a deal for the following season. Clubs will need to follow a strict written procedure and be liable for fines between £20,000 and £50,000 if they breach the rules. Informal approaches, whether they emanate from club officials or fellow-players, will not be allowed. Provision has also been made for an arbitration procedure where a player believes that his relationship with his employer has broken down. He will be able to request the EWCB to appoint a mediator, and should this avenue provide no solution, an arbitration panel, which will also have the power to determine compensation if a player is allowed to leave his club before his contract has run to term²⁷⁷.

Other aspects of the new rules are that:

- county clubs will be restricted to two overseas players per county, but there will be no limit on the total number of overseas players used. Previously, clubs were allowed four overseas players each. Temporary replacement are to be allowed for injured overseas players;
- transferred players will be cup-tied for the remainder of the season if they have already appeared in the Cheltenham & Gloucester Trophy or Twenty20 Cup for his previous county.

Whether this will be beneficial or detrimental to the sport remains to be seen. Certainly as soon as the new rules were announced, some commentators foresaw potential for a "rich man/poor man" division. It is possible to envisage a situation whereby the best clubs cream off the best players and the lesser lights are used as little more than feeder clubs. However, the experience of the previous three-and-a-half years, which had seen a loan system of which precious few clubs have taken advantage, suggests that its replacement, the full-blown transfer system, may have less impact than might initially be expected²⁷⁸.

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Employment Law

Tennis players' dispute continues

In the previous issue²⁷⁹ it was reported that such was the disenchantment felt by the leading male tennis players with their conditions of employment, and the response to these by their official union, the Association of Tennis Professionals (ATP), that some of them were seriously considering the formation of a breakaway trade union. Industrial strife has continued in the world of tennis, and reached a pitch as this year's Wimbledon tournament was getting under way.

The bone of contention on this occasion was, ironically, a dispute between the organisers of the Grand Slam tournaments (which includes Wimbledon) and the ATP, in which the trade union demanded a larger slice of the tournaments' profits. Thus during the French Open this year, Mark Miles, the ATP Chief Executive, had requested that \$50 million from the Grand Slam events' profit be diverted towards a player compensation deal, but was rejected. This gave rise to a threat expressed by the ATP that there was a possibility that the following year, players such as Tim Henman, Lleyton Hewitt and André Agassi may be asked to boycott the leading events in the sport, including Wimbledon, in favour of rival tournaments which the ATP would organise throughout the world if it did not win this dispute²⁸⁰.

This produced an angry reaction from the International Tennis Federation (ITF), in particular its president Francesco Ricci Bitti. He expressed his surprise that the men, having broken away from the ITF 14 years ago, were now requesting his organisation for help in improving pay and conditions. In 1989, the ATP left the ITF to organise its own tournaments, whereas the leading Grand Slam titles remained loyal to the ITF. Mr. Ricci Bitti indicated that the Federation was not inclined to meet the players' demands, describing them as "unrealistic"²⁸¹.

It was not yet known at the time of writing whether the rebels were maintaining their threat.

Clubs are bound by "trust and confidence" clause as much as players. Article in professional journal²⁸²

In this article, the author, Sean Dempsey, a solicitor with leading London firm Lewis Silkin, examines some of the iniquities which still attend footballers' conditions of employment. He points out that, pace Eastham and Bosman, professional footballers remain subject to restrictions as to their mobility of labour. Before they may take part in any recognised competition, they are required to be registered with their governing body by their club. When a player wishes to be transferred to another club, not only does he need an offer of

employment from the new club, but he must also have his registration transferred to that club. The said Bosman and Eastham decisions may have brought about some improvement in player mobility, but even the transfer window system falls a long way short of the free movement of labour which is taken for granted in the majority of other professions.

These restrictions are normally justified by the vast sums which are currently being earned by many footballers. Nevertheless, the author feels that players should have more control over their choice of employer. This is particularly the case because the clubs often demand standards of loyalty and professionalism which they themselves fail to display towards their employees. Thus he points to the well-established principle in every contract of employment which requires the parties involved not to conduct themselves in such a way as to cause serious damage to the relationship of trust and confidence which should prevail between an employer and an employee. He argues that Manchester United, by making it clear to David Beckham that he was no longer welcome at Old Trafford, had breached that implied term of trust and confidence, which could have serious implications for the side. If Mr. Beckham had successfully sued for constructive dismissal, United would no longer have been his employer and would accordingly not be entitled to claim the transfer fee from Real Madrid – or whichever club the England captain chose to join.

John Gregory sues Derby County for £2.1 million

It will be recalled from our previous issue²⁸³ that, having been dismissed by Nationwide League side Derby County for "serious misconduct", their former manager John Gregory instantly announced his intention to sue the club for compensation. In mid-July, Mr. Gregory proved true to his word, and issued a High Court writ against the North Midlands club claiming the sum of no less than £2.1 million. In the document filed with the Court, it emerged that his contract of employment with Derby included a salary of £900,000, rising to at least £1.1 million for the 2004-5 season, pension contributions at an average of £100,000 per year, the use of a Mercedes S500 costing over £18,000 per year, a monthly mobile phone allowance of £185, and medical insurance for both himself and his family. A court defeat for County would increase their debt by 10 per cent, but the club's authorities remained defiant, announcing that they would defend the action with vigour²⁸⁴.

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

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Fulham lose industrial dispute with Jean Tigana

Readers of the past few issues will have gathered that Fulham FC is far from a happy place these days. Not only have they been beset by the uncertainty over their future venue²⁸⁵, but some of their more unfortunate forays into the transfer market, particularly the Steve Marlet affair, have involved the club in further controversy²⁸⁶. The last-named issue was one of the factors which soured relations between the club and the man who had done most to lift them from the nether regions of the Nationwide League to their current respectable position in the Premiership, to wit the former French World Cup player Jean Tigana. This was in spite of the fact that Tigana was at no time found guilty of any misconduct in this affair. The fraught relations between the two culminated in Mr. Tigana's dismissal from the club in April 2003. This prompted the former manager to make a claim for £2.5 million by way of unpaid wages and bonuses²⁸⁷.

At the end of September 2003, the relevant employment tribunal ordered Fulham to pay their former manager the sum of £455,000, having ruled that the club had unlawfully withheld wages after dismissing him. The tribunal ruled that Mr. Tigana should have remained on its payroll until his contract, worth £125,000 per month, terminated on 30 June 2003. Fulham had failed to pay him these two months. The tribunal also ruled that the club had also withheld a £200,000 bonus for winning a place in the UEFA Cup for the team²⁸⁸.

However, the dispute is far from over, since the former manager and French international is also suing the club for the sum of £2.1 million in bonus shares, and with claims by the club that, under his stewardship, they paid too much in the transfer market²⁸⁹.

This promises to be an interesting legal battle, which this column pledges to monitor with the keenest of interest.

Paul Gascoigne could be sued

The flagging fortunes of this once-great England international continue to attract the headlines for the wrong reasons. In late June 2003, he was faced with the threat of legal action with his Chinese club Gansu Tianma, where he is employed as player/manager. He has not been seen in China since its football league was suspended because of the SARS epidemic. And the club threatened to take action under what it described as "international legal norms". Mr. Gascoigne issued a statement to the effect that he had failed to return to the club because of a pay dispute. At the time when the controversy arose, Gascoigne had six months of his contract still to run²⁹⁰.

Mr. Gascoigne's whereabouts, however, were known

all too well and followed all too familiar a pattern. He had returned with his former wife Sheryl and the children after a holiday in the US which followed 35 days in an Arizona rehabilitation clinic²⁹¹.

No further details were available at the time of writing.

Hughes wins compensation battle with Birmingham

The Northern Ireland football international Mark Hughes recently emerged victorious from a dispute with the Midlands club over his claims that they went back on a pledge to sign him from Wimbledon in the course of 2002. Mr. Hughes had played three games for Birmingham whilst on loan from the London club in the course of March 2002, but became injured prior to the club winning promotion to the Premiership, as a result of which the deal did not go ahead. However, Wimbledon refused to take him back, which meant that Hughes was unpaid by either club for the duration of the following season whilst the dispute over which club held his registration dragged on. Eventually he succeeded in joining Crystal Palace²⁹².

The battle for compensation was settled following an independent arbitration hearing in London, at which Hughes and his legal team were present. It ended with the player accepting Birmingham City's offer of an undisclosed "satisfactory settlement"²⁹³.

Fitness trainer claims gender discrimination after being dismissed from Gillingham FC

That footballers' wives have an influence on what occurs on the field of play can be gauged from a certain television series. However, hitherto their influence has not extended to getting staff members of their husbands' clubs dismissed. But this is exactly what happened to Laura Church, who found herself without employment because her presence was allegedly making the players' wives jealous. Matters came to a head when Ms. Church sent a text message to a married player at midnight congratulating him on his performance (on the field, that is) in order to "boost his confidence". She insisted that the text message was part of her strategy to motivate players, but was dismissed from her post for "unprofessional conduct".

Ms. Church alleged that this amounted to gender discrimination, because the text message would not have resulted in dismissal had she been a man²⁹⁴.

It was not clear at the time of writing whether or not Ms. Church intended to take any legal action in support of her allegation.

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Rugby World Cup pay disputes settled

In the previous issue²⁹⁵ it was reported that rumblings of discontent had been noticed amongst certain Rugby Union international players about the pay and conditions which would attend their participation in the 2003 World Cup in Australia. The national Unions had already signed the deals, which left individual dissenters no choice but to take action on their own account. At a certain point, this is exactly what seemed to be happening, with barely a few months to go before the big event.

The discomfort was particularly noticeable in the New Zealand camp. The New Zealand Rugby Union (NZRU) had offered the All Blacks bonus payments of £17,500 per man if they won the World Cup. The team members, however, wanted more than double that figure to mirror similar deals concluded by rival nations. In spite of warning issued by the NZRU that failure to secure the players' signatures could result in the country being barred from the big event, no deal had as yet been struck with less than a week to go before the deadline²⁹⁶.

Earlier, the England²⁹⁷ and the Australian²⁹⁸ team – the latter having been the most militant in dismissing the terms on offer – had already accepted the relevant offers. This increased the pressure on the All Blacks, who ultimately signed the deal.

Now England's hockey players threaten to strike...

First the rugby players, then the cricketers, now the hockey players seem to have caught the bug as well. In mid-October 2003, it was learned that discontent was festering among the stick-wielders in a dispute which threatened to throw the sport into further disarray. The main bone of contention seems to be the head coach, Mike Hamilton. Seven internationals claimed that they would refuse to play under him, because of his allegedly aloof and capricious character. Whether they will carry out this threat remains to be seen²⁹⁹.

Football club held liable for partial disability suffered by a player. Italian Supreme Court decision³⁰⁰

In the case under review, a professional footballer had sustained two fractures in the metatarsal bone during a game, and as a result had been operated on, as a result of which his foot was inserted in a metal clamp. The clamp was removed, but not entirely, since a small part of it had remained underneath the skin. Before returning to the competition, the footballer had been visited by a representative of the Turin Sports Medicine Institute, which pronounced him fit to return to active football. However, barely two weeks after this visit, the footballer sustained a third fracture in the metatarsal, resulting in his being declared unfit for any further competitive

football and incurring a 12 per cent permanent disability. The player brought an action against the club before an industrial court (Pretore di lavoro).

The court dismissed the action. The footballer appealed against this decision before the "Tribunale", overturned this decision and ordered the club to pay compensation to the player. The Supreme Court (Corte di Cassazione) confirmed this decision, thereby dismissing the application for review made by the club. It did so both on the basis of the ordinary rules of industrial law and on the basis of specific legislation on the subject of medical care in sporting matters. More particularly the Court held the club's actions to be tortious because (a) it had failed to inform the Institute of the footballer's clinical history, thus abetting the error committed by it in its diagnosis, and (b) in any case the club should have carried out its own medical checks on the player's condition during the pre-championship period, the more so because the player was returning from two serious injuries.

Injury sustained by teacher during ball game with pupils is an accident at work Danish court decision³⁰¹

In this case, a hygienist who also gave instruction to foreigners in health care studies arranged a ball game with her pupils in which she took part, and in the course of which she slipped and sustained an injury in the form of a double fracture of her right ankle. The Industrial Injuries Compensation Board (Arbejdsskadestyrelsen) refused to regard this injury as an injury which resulted from accident at work. However, the High Court (Landsretten) overturned this decision. It held that there was nothing to indicate that she had made any unusual movements in the course of the game; regardless of whether she knew that the grass was wet, the slipping motion which caused the accident was an involuntary action, and the wet grass had a sudden and unavoidable effect on her body. The injury was therefore covered by Article 9 of the Law on insurance for accidents at work.

Footballer brings action for breach of contract against West Ham

In mid-September 2003, Titi Camara began proceedings against Nationwide League side West Ham United for alleged breach of contract. He made just seven starts for the East London club having been transferred for £2.2 million from Liverpool in December 2000. His contract was reportedly terminated by mutual consent following West Ham's relegation from the Premiership³⁰².

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

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Sponsorship agreements

Formula One boss abandons £100 million court action

In early August 2003, it was announced that Eddie Jordan, the Formula 1 racing chief, had dropped his £100 million court action accusing Vodafone of renegeing on a sponsorship agreement. Jordan Grand Prix Ltd. declared that it was discontinuing its action and offered to pay the mobile phone company's costs, with just a few hours to go before a High Court ruling was going to be made public, and two days after the ending of a protracted trial. Jordan then applied for the judgment to remain confidential, a move criticised by Mr. Justice Langley. The judge found that Jordan had made some serious allegations against Vodafone in pursuit of millions, adding that the company was entitled to know the court's conclusions; the media also had a legitimate public interest in being informed of the outcome³⁰³.

Initially, Jordan had claimed that it had suffered large losses as a result of Vodafone going back on a £100 million sponsorship agreement. Mr. Jordan, the company's Chief Executive, was allegedly informed by telephone "you've got a deal" by David Haines, the global branding director of Vodafone, in March 2001. Although the latter agreed that it had held discussions with several F1 teams, it denied having committed itself in any way before eventually signing a deal with Ferrari. Thus, said the judge, Jordan had effectively accused two senior officers of Vodafone that they were lying³⁰⁴.

Later, the court, when making the costs order, lambasted Jordan for bringing what was a "contrived and unsustainable" action. He criticised the F1 boss for a number of manifest inaccuracies and said that, when these were exposed, Jordan was reduced to an embarrassing silence. He went on to describe Jordan as a "wholly unsatisfactory witness", whose evidence was in many instances in stark contrast with the available documentation³⁰⁵. Jordan was ordered by the Court to make a provisional payment of £1 million towards Vodafone's legal costs. Jordan had offered to pay £600,000 interim costs pending an assessment of Vodafone's legal expenses³⁰⁶.

concerned at the role played by agents in the commercial side of football. They have come to play a key role in many deals, and, operating without borders and awash with money, they represent the oil that greases the wheels of the transfer system. Players employ them to maximise their earnings from a brief career full of uncertainties; clubs use their services to find talent, broker deals and – according to some insiders – do their dirty work for them³⁰⁷.

It has been noted before³⁰⁸ that there are more agents operating in the English game than in that of any other country. World governing body FIFA, which licenses them, lists 220 in England, being nearly as many as operate in Italy, Germany and Spain combined. The largest agencies represent more than 200 players each. They are listed on the Alternative Investment Market (AIM) of the Stock Exchange and subject to the latter's rigorous financial rules. According to the latest available details, the three largest agencies had a combined turnover of over £16 million. Estimates of the total amount of cash generated by agents vary. Privately, one expert on the finances of the "beautiful game" assessed the amount obtained from players alone at 5 per cent of the latter's earnings. In the Premiership, for the 2001-2002 season, that represented a figure of more than £32 million. As has been noted earlier in the Harry Kewell case (see above, p. 000), the percentages paid to agents on individual deals can reach truly staggering proportions³⁰⁹.

The main difficulty in obtaining accurate estimates of the amounts generated by agents, and providing a framework for effective regulation of the transfer market, is that much of their work is performed in secret. Under FIFA regulations, agents are prohibited from representing more than one party in any deal. However, there have in recent times arisen so many rumours of transgression that they must be true in at least some cases (see the Steve Marlet affair, documented in earlier editions³¹⁰).

Another common practice is that of agents endeavouring to insert themselves into deals, this being an allegation which formed the basis for a recent complaint made by Brazilian club Atletico Paranaense to FIFA. When the club started to search for a buyer, Leeds United and Newcastle were at the top of the list of interested parties in England. Before any meaningful negotiations could commence, both Atletico and Leeds reported that they found unlicensed agents attempting to insert themselves into the deal. The former were so incensed that they instructed lawyers to warn off two men who had been reported to FIFA. Both men claimed that they had been authorised to act on behalf of the club, in one case by a former Brazilian international who had links to Atletico. David Walker, a member of the Leeds board until earlier this year, alleges that the Yorkshire club also received unsolicited attentions³¹¹.

Sporting agencies

Kleberon affair (et al!) places football authorities under pressure to keep tighter rein on agents

From the section devoted to the legal issues arising from transfer deals, both in this contribution and in earlier editions of this journal, the reader will have noted that many people both inside and outside the game are increasingly

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Predictably, the agents dismiss much of the criticism, and Phil Smith, a founder of the AIM-listed agency First Artists, commented that agents were convenient scapegoats for the system, adding that agents were more user-friendly and open than ever, with the more established agencies having a bona fide role in the game who have earned the right to act as a great deal more than merely intermediaries³¹².

The football authorities have naturally come under pressure to do something in order to remedy this state of affairs. Attention has already been drawn earlier (p. 000) to the intentions of the Football Association (FA) to audit every transfer deal. The Football League has also decided to take action in relation to agents, and plans to publish the amount of money paid by clubs to agents. Proposals to that effect have been put forward by the League's chairman, Brian Mawhinney, and will require clubs to declare all payments made to third parties during transfer deals. At present, the only requirement is to inform the League about the fee remitted directly between clubs, and about his salary details³¹³.

The FA has also started to make moves to keep a tighter rein on agents. Towards the end of September, it announced details of a blueprint to that effect, which followed discussions which had been proceeding for the previous 18 months involving representatives of the Premier League, the Football League, the FA and the managers' and players' associations. Under the proposals, the League would publish twice-yearly figures which reveal how much cash has been paid out by every club.. They will also seek to impose penalties on clubs using unlicensed agents, ensure that all managers' agents are registered (in an attempt to reduce conflicts of interest and eradicate nepotism). They would also follow the Football League's lead in requiring that all payments are accounted for³¹⁴. (In late September 2003, the League agreed in principle to a plan to publish a list of spending by individual clubs on players' agents every six months³¹⁵.)

It is understood that the new Chief Executive of the FA, Mark Palios, has taken a personal lead on this issue. This much was evident from a speech which he made to Lancing College Old Boys as far back as March 2001 in which he made public the fact that only £2 million had been paid to Juan Pablo Angel's former club River Plate after his £9.5 million transfer to Aston Villa. The balance had been pocketed by rogue agents³¹⁶.

The decision to release this document was particularly welcomed by the players' and managers' associations. The Chief Executive of the Professional Footballers' Association, Mick McGuire, expressed his gratification that some concrete action seemed to be on the cards at last, and stressed the need to marginalize the rogue agents and protect the good ones. Equal approbation was forthcoming from the League Managers' Association (LMA)³¹⁷.

Other issues

Leading law firms advise in sporting deals

The following leading law firms have recently been advising in a number of important sports-related deals (all months quoted refer to 2003, unless stated otherwise):

- London firm Gordon Dadds have advised the Kendal Group on its purchase of the Zoggs group, a producer of swimwear, which involved the acquisition of group companies in the UK and in Australia. Sydney firm Clayton Utz advised on Australian law. Buckinghamshire-based BP Collins advised the seller, and Scottish firm Lindsays acted for the funding institution, the Bank of Scotland³¹⁸.
- Collyer-Bristow advised Sport England in a recent deal providing funding for a multi-site public-private partnership leisure transaction under the auspices of Bexley Council³¹⁹. The same law firm was involved in advising the management of the Fast Track Group in its buyout of Fast Track Sales from the Sports Resource Group. The latter was advised by Norton Rose. The deal was part of a wider arrangement whereby Hegira, advised by Addleshaw Goddard, acquired the Sports Resource Group³²⁰.
- Freshfields Bruckhaus Deringer advised Cinven on the real estate aspects of its £204 million recommended cash offer for Fitness First. The latter is one of the leading operators of fitness clubs throughout the world, having over 300 clubs and 700,000 members in the UK, Continental Europe, the Far East and Australia³²¹.
- Liverpool firm Hill Dickenson represented footballer Harry Kewell in his recent transfer deal from Leeds to Liverpool (which is dealt with elsewhere in this issue – see above, p. 000). Leeds United were advised by local firm McCormicks³²².

Road toll hike for Golf Open preliminaries infuriates organisers and spectators

The underlying principle of the law of contracts is the "freedom of the parties to contract". This principle is sometimes undermined by the shameless manner in which some operators take advantage of their powerful position to impose unfair contract terms. To a certain extent, the Unfair Contract Terms Act 1977 has provided a remedy to those who feel aggrieved by some of these exploitative tactics. However, even this legislation did not prevent what can only be described as glorified ransom money, as certain residents of a well-known golf club charged extortionate amounts for access to the preliminary stages of the Open Golf

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Championship of 2003, held at Royal St. George's, Kent.

Organisers of the event reacted with fury after residents of Sandwich Bay, an exclusive cluster of large seaside homes close to the golf course in question, raised the toll charged for driving along the ancient highway between Deal and Sandwich from £5 to £10. This toll affected spectators travelling to see Ian Woosnam and others attempting to qualify for the Championship at the Prince's Golf Club, which lies halfway along the road and borders the Royal St. George's club. Despite having received £20,000 from the Royal and Ancient Club (R&A) golfing authorities for improvements to the road in anticipation of the championship, and a £25,000 "facilities fee" which the same authorities believed would entail the elimination of the toll altogether for the duration of the championship, residents increased the price for travelling on the Kings Avenue for play in the qualifying tournament³²³.

This affair was also a major embarrassment for the R&A, which had advertised the qualifying tournament as being free of charge. Open Championship Secretary David Hill had contacted the Residents' Association secretary, Michelle Parnell QC, in Moscow where she was on business, but was rebuffed³²⁴.

Sir Alex heading for court battle over "stud fees"

The appetite which the Manchester United manager, Sir Alex Ferguson, has developed for the Sport of Kings has become almost legendary. At the time of writing, there are signs that his enthusiasm might even cause him to go to law about the income arising from a champion horse, called Rock of Gibraltar, which is jointly owned by Sir Alex and John Magnier, an Irish multi-millionaire who also happens to own a stake in the club whose team Sir Alex coaches³²⁵.

Sir Alex purchased a half share in the horse two years ago, when it was a two-year-old colt of the highest pedigree, and is seeking to earn 50 per cent of the proceeds from its stud fees, which could be worth up to £100 million. The Irish multi-millionaire, however, maintained that the fees are controlled by Coolmore, his horse-breeding business. The dispute is centred on the question ownership of the racing rights extends in this case to earnings from the horse's breeding activity. There was a risk that the disagreement would not remain confined to the two men involved, since it could well have a negative impact on the top Premiership side itself, given that Mr. Magnier is on its board and controls an 11.4 per cent stake in it together with John McManus, another Irish magnate³²⁶. To indicate that the disagreement had reached a fundamental stage, it was revealed in mid-August 2003 that Sir Alex was consulting lawyers over the dispute³²⁷. This appears not to have

produced any change in the stand-off, which indicated that neither party was prepared to back down. One of the difficulties in this case appeared to be that the agreement in question was a verbal one, which made the dispute fraught with all manner of evidential difficulties³²⁸. The dispute was also set to concern ever-higher stakes as the horse in question was breeding upwards of 250 mares per year at approximately £60,000 each³²⁹.

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

Application by new Brighton RFC to invalidate Nuneaton promotion dismissed (UK)³³⁰

The entitlement of a rugby club to promotion became infeasible as at the end of the season. This was the verdict of High Court judge Pumfrey J in a dispute between New Brighton RFC and the Rugby Football Union. In so doing, he dismissed the application by Bernard Hearn and Dennis Morgan, who brought the action on behalf of the New Brighton side, for a declaration that (a) Nuneaton RFC had provided the RFU with incorrect information, as a result of which the registration of Nuneaton's player Elisi Vunipola, a Tongan national subject to immigration control, was invalidated, and (b) minimum mandatory penalties should be applied to Nuneaton which should result in their relegation from the Northern League 2.

Pumfrey J found that Mr. Vunipola had entered the United Kingdom on a work permit in September 2002 which was subsequently extended, enabling him to remain in the UK and play Rugby Union for Coventry until 1/5/2003 on the basis that any alteration in his employment should be notified to the Home Office. The Tongan player then moved to Nuneaton for the 2003 season as an amateur. He failed to notify the Home Office of this move. Nuneaton registered him with the RFU as a new player in September 2002, certifying that both the club and the player had complied with UK immigration law. The club did well and was consequently promoted to the Northern League 2. However, New Brighton, which had played in the same league as Nuneaton but had failed to obtain promotion, discovered that the latter had possibly fielded an illegal player because Mr. Vunipola had not informed the Home Office of his move to Nuneaton. Accordingly, New Brighton lodged a complaint with the RFU requesting that the minimum penalties should apply, which would result in Nuneaton being relegated and New Brighton promoted.

The trial judge ruled that the role of the courts in relation to League rules, which were based upon a contractual relationship between the Union and its member clubs – such as those in the instant case – was essentially a supervisory one. Moreover, points could

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only be deducted from Nuneaton where the appropriate complaints procedure had been followed under Regulation 20 of the English Clubs Championship Regulations 2002-3. Under Regulation 20, a complaint had to be notified within 48 hours of the facts having become known. New Brighton had failed to do this; therefore the jurisdiction available under that regulation had not been relied upon. The RFU had also dismissed an attempt by New Brighton to raise this matter under Regulation 19 of the same 2002-3 Regulations, which laid down an alternative disciplinary jurisdiction.

Justice Pumfrey also found that the entitlement of a club to promotion became indefeasible at the end of the season. This was the case because of the need for finality in promotions, the potential for overall disruption to the League being substantial. There was no justification for judicial intervention unless the disruption was proportional to the benefit to be obtained. Since everything had been in due form as regards Nuneaton's position at the conclusion of the season in which it was promoted, and since New Brighton had failed to make its first complaint within the required time limit and had its second complaint dismissed, its application was rejected.

Financial benefit obtained from sale of horse to employer qualifies as "income from employment". Netherlands Supreme Court decision³³¹

In this case, the applicant was a 50 per cent shareholder in a limited company (Besloten Vennootschap), which operates a leading stable where dressage horses are trained. At the same time, she was a full-time employee of the company, whose duties were to teach, train and ride the horses. In 1990, the applicant bought a young and untrained horse. After five years' training, during which the horse was included in the training schedule intended for the other horses, it was sold in 1995 to the company for Dfl. 120,000. The amount of the purchase price was remitted by the company to the current account which the applicant had with it. The dispute concerned the question whether the financial benefit obtained through the sale of the horse should be counted as taxable income on the basis of the Law on Income Tax.

The Supreme Court (Hoge Raad) answered this question in the affirmative. It considered that the sum in question was part of the employment-related income referred to in the said Law, and therefore taxable under the latter's provisions. The Court based its ruling on the fact that the applicant could reasonably expect a financial benefit, and must therefore be deemed to have sought to obtain such a benefit. In view of some of the other sales for profit of privately-owned horses by the applicant, the renown of the company, of the

applicant and of her husband, and the manner in which the applicant trained the horse in question, i.e. without making any distinction between that horse and others which were being trained under the auspices of the company, there could be no question of this being a personal hobby on her part. The applicant's contention that she could be deemed to expect a profit to be made was dismissed by the Court on the grounds that the other horses trained by her were expected to yield a profit; the applicant's expectation could only have been otherwise if she expected to make a loss from the training the horse in question, if any profit that she made therefrom was purely speculative, or if the profit made could not be attributed to her activity with the horse. None of these three scenarios applied, in the Court's judgment.

The Supreme Court therefore dismissed the application and confirmed the decision appealed against.

4. Torts and Insurance

Sporting injuries

Local authority held liable for eye injury sustained by pupil struck by football. English court decision³³²

In the case under review, the claimant, a 14-year-old pupil, was hit in the eye by a full-sized leather football whilst he was standing in the lower playground with friends prior to the commencement of the school day. This caused him to lose all useful vision in the left eye. The school day started at 8.45 am. Between 30 and 40 teachers would be in the staff room between 8.30 and 8.45 am preparing for the school day. Pupils were expected to arrive at the school at least five minutes before school began, and most of them had started to arrive as from 8.30. However, as happens in many schools, there was no supervision of pupils in the playground before 8.45, although they were supervised during break periods. The lower playground, used by pupils of Years 9-11, was visible from the staff room; however, it was difficult for the staff to see from the staff room what kind or size of football was being used by the pupils.

The school operated a policy of prohibiting the use of full-sized leather footballs in the playground, particularly since another pupil had been struck in the face by one in March 1998. There subsequently occurred a series of incidents involving relatively minor facial injuries in May and June of that year. The judge stated that the staff did not enforce the ban properly, and that teachers failed to pay random visits to the playground to inspect the pupils' bags on arrival at school in order to check whether in fact they contained any prohibited footballs. It is true that footballs were occasionally confiscated during break time, but never during the pre-school period. The judge also found that no positive steps were adopted to ensure that the ban was enforced in the lower playground during the pre-school period. He also found that the teachers must have known that football was being played regularly, and that had they frequented the playground they would have realised that the banned footballs were in use.

Lord Justice Dyson dismissed the proposition that a school at no times owed a duty of care towards children who are in the playground before or after school hours. In so doing, he cited the Australian case of *Geyer v. Downs* and another³³³ in which a pupil had incurred severe injuries on being hit on the head by a softball bat wielded by a fellow-pupil who was playing in the school playground before school started. Applying the doctrine set out in that case, Dyson LJ ruled that a school owes to all pupils who are lawfully on its premises the general duty to take such measures to safeguard their health and safety as are reasonable in all the circumstances. In the instant case, the Court ruled that the school was in breach of its duty of care in failing to enforce the ban on

leather footballs more effectively, in particular by not having a more rigorous policy of enforcement and spot-checking during the pre-school period.

Such steps were reasonable to expect in view of the fact that (a) the ban on the use of full-sized leather balls was known to be flouted on a regular basis, (b) these footballs were known to be dangerous, and (c) any additional steps to that effect would not impose an undue burden upon the school. The judge was entitled to rule that the scope of the duty to take care on the school's part towards the boys in question included a duty to take reasonable care in ensuring that the ban was enforced, and to perform spot checks during the pre-school period to that end. It was important to bear in mind that the claimant was not playing football at the time of the incident, but was merely a bystander in a crowded playground where a number of games were being played; in being where he was and what he was doing, he was behaving entirely reasonably. The school was aware of the danger emanating from the banned footballs and knew that the ban was being disregarded on a daily basis. Their attempts to enforce the ban during school breaks had been desultory, and non-existent during the pre-school period.

In her comment on the case, author Anne Ruff emphasises the manner in which the Court of Appeal has expanded the scope of the duty of care owed by schools to pupils, in that they should supervise pupils whilst they are on school premises, not only during school hours. The degree of the supervision may be less intense before and after school than during breaks, but this will depend on the circumstances of each case. She concludes that the argument for a system of no-fault liability in the maintained education system has been strengthened by this decision.

Even beginners must ensure reasonable standards of care towards others when snowboarding. Austrian court decision³³⁴

This case concerned an accident which involved a 15-year-old high school pupil who was a beginner at the sport of snowboarding. At a certain point, he sought to approach the waiting group of fellow-pupils and to come to a standstill within one metre of the group. However, he failed in this endeavour by losing control over his snowboard and causing collision with one of the group, causing considerable physical injury. The pupil was sued for damages.

The Supreme Court (Oberste Gerichtshof) held that it is a general principle that anyone taking part in sporting activity should disport himself in such a way as to ensure that, to the maximum extent possible, no other persons are endangered. This also applies to the sport of skiing, for which the rules of the world governing body FIS are a

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good reference point, more particularly where they stipulate that every skier must behave in such a way that no-one else is endangered or injured, and that every skier must adjust his manner of skiing to the his/her ability. These principles also applied to a 15-year-old High School pupil, without requiring any specific instruction on the part of the officiating skiing instructor that an adequately safe distance should be observed when approaching other persons. The argument put forward by the defendant that, according to the case law of the Court, the mere fact of falling whilst skiing does not engage the liability of the person who fell, failed to take account of the fact that this was not the case here. The collision with the claimant had been caused by the defendant losing control over the snowboard on approaching the group, and thereupon attempted to come to a standstill by sitting down and swinging the snowboard across. Even if one could place a loss of control over a snowboard on the same footing as a fall, the incident in question amounted to negligence because of the defendant's action which preceded it.

Knowing that he was a beginner who had only been using a snowboard for three days, the defendant should have refrained from attempting to approach the group in the way he did, as he should have been aware that the slightest error or some other mischance could no longer be corrected. Given that it was impossible to determine the specific factor which caused him to lose control over the snowboard, it had to be concluded that the collision was occasioned by the fact he had incorrectly assessed his speed and his ability in the process. Precisely because beginners must at all times take account of the possibility of misjudgments, uncertainties and mistakes, they are particularly required to observe an adequate distance between themselves and other persons. The defendant was therefore liable.

Tort liability in a sporting context. Article in Netherlands journal³³⁵

As is the case in the vast majority of advanced countries, the Netherlands legal system has developed a considerable body of law dealing with the implications at tort of sporting injury. The author of this contribution provides a comprehensive and detailed overview of the position reached by statute and case law in this area.

The author starts by examining the statutory basis for the law of torts applied to sports, and quotes the key section of the Civil Code (Burgerlijk Wetboek) in this regards, which states that a tortious action:

"is an infringement of a right, as well as an act of commission or omission contrary to a statutory obligation or to that which, according to unwritten law, constitutes appropriate behaviour in society, subject to the existence of grounds for justification"³³⁶

The specific inclusion of grounds for justification is interesting, in that this was not the case in the original Napoleonic version of the Netherlands civil code (the entire Code was overhauled some ten years ago). However, the author makes it clear that this does not imply automatic acknowledgement of the acceptance of risk theory in relation to sport, as the Supreme Court (Hoge Raad) has made clear on more than one occasion.

The author then takes the reader through the most renowned decisions which have given substance to this fundamental provision. He draws particular attention to those decisions which have involved an assessment of difficult questions, such as (a) when are those taking part deemed to be in a competitive situation or not and what risk should it be reasonable that they could expect outside such situations, (b) what is the role played by the rules of the game in assessing liability, and (c) to what extent must players expect the risk of injury during the competition.

The author also examines the extent to which the organisers of sporting competitions should take precautionary measures in order to elude liability, and all the problems that this brings in its wake. This issue is particularly acute in sporting competitions which also involve a risk to the spectators and even the general public, such as rallying.

Summer camp organiser held liable for injury caused to infant on tennis court. Irish court decision³³⁷

During the summer of 1998, the claimant, who was 11 years old at the time, was participating in a summer camp operated by the defendant. During the period in which the camp took place, the child and her group were left unsupervised on some tennis courts, and the claimant proceeded to jump over the nets. The child fell and suffered from an undisplaced fracture of the right wrist, as well as fracturing a tooth. Although the claimant made a satisfactory recovery, the life of the tooth was shortened by the impact and will require treatment in the future. She was awarded €19,046 by way of general damages and €4,444 by way of special damages.

Golfer held liable for injury caused to fellow-player. Australian court decision³³⁸

In this tragic case, a golfer left badly injured following an unfortunate accident which took place in the course of a charity golf day was awarded compensation against a fellow-player. The claim instituted against the golf club was dismissed.

The facts were as follows. The claimant and the second defendant, Mr. Shanahan, were playing golf in a charity golf competition. The claimant was hit on the head by a golf ball struck by Shanahan and incurred

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serious head injuries as a consequence. As he had teed off, the defendant had failed to notice that the claimant was on the fairway, occupying a position where he might be struck. The claimant accordingly initiated court proceedings against the country club, which operates a nine-hole golf course at Magnetic Island, as well as against the fellow golfer.

The trial judge, Cullinane J, found that the first defendant, i.e. the country club, owed a general duty to take reasonable care to avoid foreseeable risks of injury to persons lawfully using the golf course, since it was responsible for the maintenance of the course and had invited members of the general public to use it. This duty was held to extend to the static features of the course, and possibly to its organisational and operational activities. Essentially, two specific allegations of negligence had been made against the first defendant. In the first instance, it was claimed that the country club was under a duty to ensure that those using the course were properly advised as to the risks associated with striking a golf ball whilst other persons were positioned within range of the ball to be hit. This view was supported by the evidence provided by a golf professional to the effect that, on charity golf days when there were likely to be large numbers of people present, including novices and occasional golfers, it would be appropriate to remind players of the rules and etiquette which govern the sport.

However, the judge ruled that, even were this to be the case, this was of no causal relevance to the loss caused, since Mr. Shanahan should have been aware of that which it was alleged he should have been told. In the course of his evidence, he had stated that he was aware of the basic golfing strategy rule requiring players to refrain from hitting a ball off the tee whilst players are in range on the fairway ahead, and that if he had seen the claimant before the latter hit the ball, he would not have struck it. Secondly, the country club was alleged to be in breach of its duty towards the claimant by omitting to provide marshals for the purpose of supervising play, since the course was congested and there was a risk that players would strike the ball before they could safely do so. There was, however, no evidence to support the proposition that any of the teams involved were under pressure to complete their round or any particular hole because of the number of players following them. On the contrary, the trial judge found that, according to the available evidence, the play had proceeded smoothly. Therefore there was no breach of a duty to take care where no marshals were provided, as there was no evidence to support such practice; it was also difficult to comprehend how this would have avoided the accident unless a marshal was stationed at every tee.

The judge also heard evidence of the rules of golf etiquette – which was also described by the witnesses as common sense – that players should not strike a ball from a tee when there are people on the fairway capable of being hit by it. He found that the claimant was perfectly visible by Shanahan from the position where he was teeing off. The argument that the claimant had voluntarily accepted the risk of the accident as an inherent risk in the sport of golf was dismissed. Cullinane J held the second defendant liable in negligence for the claimant's injuries, concluding:

“The risk to which the plaintiff was exposed was a risk that a following player would strike the ball at a time when the plaintiff was within range of being struck and was thus at risk of being injured. This is not a risk inherent in a game of golf and indeed, the rules of the game expressly provide that steps should be taken to avoid it. The second defendant was aware of that and it is, as he acknowledged, a matter of common sense that a person does not strike a ball from a tee in such circumstances. He acknowledged that had he seen the plaintiff, as in my view he ought to have, he would not have struck the ball because of the risk that the plaintiff might have been struck”²³⁹

The judge concluded that Mr. Shanahan's failure to notice the claimant was a breach of his duty towards the latter, as a result of which he incurred serious injury. The damages were assessed against the second defendant at \$2,610,795. Mr. Justice Cullinane opined that the enormous destruction of the claimant's way of life, particularly his family life, and the disabilities and deficits from which he subsequently suffered were only too apparent. Evidence was accepted that he would require care for 70 hours per week by two persons, at a total cost of \$106,688 per year for the balance of his life expectancy which was estimated at 25 years. Damages for future care were assessed at \$1,360,000.

In her comment on the case, author Tina Cockburn, a Queensland and High Court solicitor, states that there is always a possibility of injury associated with any activity, but that liability in negligence will only arise where an injury has been caused by a failure on the part of another person to meet the required standard of care. In view of the judge's determination that the risk of being struck by a fellow-player whilst on the fairway within range of the tee is not one which is inherent in the game of golf, as well as the finding that Mr. Shanahan should have seen the claimant, the decision in this case represents a straightforward application of the law of negligence.

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Horse rider and mountainbike race organiser held liable for collision between competitor and horse rider. Belgian court decision³⁴⁰

In this case, a mountainbike rider took part in a race held in Hoeilaart. At around the same time and in the same place, a horse rider was taking a leisurely ride through the same wooded area as that in which the mountainbike race took place. At a certain point the horserider crossed the path of the mountainbike racers, and collided with one of them, causing him serious injury. The victim sued the horse rider and the race organisers for damages.

The Court of Appeal of Brussels held that a horse rider who should have noticed, on the basis of the red and white tape hanging from the trees, that a mountainbike race was being held, and who should have deduced from the locational characteristics of the place in question that he would not be able to cross the path of cyclists coming from the opposite direction without creating the risk of an accident, committed an error by riding through the wooded area in question or at least failing to leave the course marked out for the race as rapidly as possible. It also ruled that the race organiser was also at fault for having omitted to place appropriate signals at important or dangerous places of the course.

In those circumstances, no fault can be ascribed to a cyclist who took part in a race in the proper manner and who could not expect that a horse rider would cross his path in the opposite direction. Nevertheless, participation in a cycling race on the public highway did not in principle exempt the cyclists concerned from observance of the provisions of the Highway Code.

Libel and defamation issues

Nike settles in legal dispute over free speech

In mid-September 2003, it was learned that sportswear manufacturer Nike had settled a court action brought by activists who claimed that its campaign against accusations that it used Asian sweatshops amounted to false advertising. This settlement resolved a struggle over the extent to which the Nike campaign was protected under the free speech provisions enshrined in the US Constitution. Nike announced that it would pay \$1.5 million to the Fair Labour Association, a group which promotes worker education³⁴¹.

Shoaib taken to court over newspaper interview

In July 2003, it emerged that Shoaib Akhtar, the Durham and Pakistan fast bowler, was being sued in Pakistan for comments which he had made in an interview with *The Guardian* the previous month. The

petition had been brought by an anonymous citizen who alleges that criticism made by Shoaib of his former Pakistani team-mates Waqar Younis and Wasim Akram were defamatory to the reputation of the Pakistan nation. No further details were available at the time of writing³⁴².

US promotor brings action against Lennox Lewis

The champion boxer Lennox Lewis has appeared in these columns before, but in the context of battles over the performance of contracts³⁴³. In mid-October 2003, it was learned that he, as well as various others, was being sued by Don King for libel over articles which appeared on two UK-based websites, which labelled him an "anti-semitite". The claim, issued in the High Court, seeks both damages and an injunction restraining the defendants from repeating these comments³⁴⁴.

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

Insurance

General road safety and insurance rules do not apply in case of modest damage. German Supreme Court decision³⁴⁵

In a case which arose from the loss incurred by a competitor in a motor racing event at the Hockenheimring circuit in Germany, a car had left the track and subsequently spun back onto it, colliding with the car driven by the claimant. The Supreme Court (Bundesgerichtshof) held that the general rules on insurance and road safety did not apply where the loss incurred was but minimal or had not been the outcome of grossly negligent infringement of motor racing rules. Under latter, drivers were required to sign a general waiver of insurance claims. Since motor races included the risk of collision by definition, the exclusion of claims for any loss which was caused not deliberately, or not through any gross negligence, was lawful and any claims brought in spite of this exclusion should fail. This valid exclusion was confined to a very specific group of cases, such as motor racing, which were inherently determined by speed. It could not be applied by analogy to any other form of motor vehicle competition.

Rugby League club and federation held liable for failing to inform injured player of limited scope of insurance. French Supreme Court decision³⁴⁶

In this case, Jean-Pierre Sauret, a French rugby league professional and international, had become seriously injured during a match which was played at Limoux playing for the home side against top club St Gaudens,

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both clubs being affiliated to the French Rugby League Federation. The player was covered by the general insurance taken out by the Federation with the Drouot group; however, this only made provision for the bare minimum. Mr. Sauret considered that he had been inadequately informed of the insufficiency of such insurance cover, and brought a claim to that effect against the Federation, the insurance company and the club. The position was complicated by the fact that since the time of the injury, both the club and the insurance company had changed hands.

The Court of Appeal had vested liability exclusively in the Limoux Rugby à XIII club (which had succeeded the original Sporting Club) and exonerated both the federation and Axa Insurance (which had succeeded the Drouot Group). The club was therefore ordered to pay 100 per cent compensation to the former player for the loss of opportunity suffered by him. The club applied to the Supreme Court (Cour de Cassation) against this decision.

The first ground put forward by the applicant was that the new club should not have to answer for the legal obligations undertaken by the previous one. However, the Supreme Court on this point agreed with the challenged decision, which had pointed out that the General Meeting of which it was alleged that it decided the winding-up of the former club had never been notified to the sous-préfecture of Limoux, which was necessary to make it official. Furthermore, it was a provable fact that two associations having the same objective, i.e. the promotion of Rugby League in Limoux, had existed side by side between 23 June and 26 July 1989, and that on the latter date the dissolution of the Sporting Club and the formation of the Limoux Rugby League club had been simultaneously announced. No-one familiar with the world of Rugby League could have been in any doubt that, in spite of a new name and constitution, the Limoux Rugby XIII club was definitely the continuation of the old Sporting Club. The former therefore was deemed to take over the legal obligations of the latter.

As to the Federation, the Court of Appeal had exonerated it from liability because the player was aware that the insurance cover provided by the Federation was inadequate, that he was a particularly well-informed player, that he had subscribed to the Federation newsletter which at a certain point had advised players of the need to contract additional insurance; accordingly, there was nothing to prove that the Federation had been deficient in its obligations to inform the player. However, the Supreme Court held that, under the existing law contained in the Civil Code and in specific legislation relating to insurance, it was incumbent upon the Federation to provide the player with a notice informing him of cover provided by the

group insurance taken out by the Federation. This is failed to do; therefore the Federation had to share in the liability for this tort.

It also ruled that the liability incurred could not be for 100 per cent of the opportunity lost by the player, but only for a part thereof.

The Court accordingly overturned the decision and referred it to another Court of Appeal for a new adjudication.

Other issues

[None]

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Sports policy, legislation and organisation

The London 2012 Olympic bid – the saga continues

The story so far

It will be recalled from the previous issue³⁴⁷ that, in the wake of the undoubted success of the 2002 Commonwealth Games held in Manchester, the prospect had been mooted that London could submit a plausible bid for the 2012 Olympic Games. Initial developments surrounding this proposal were far from promising, with the Government once again displaying the kind of hesitancy and ambiguity which had served it so ill in relation to other sporting projects (more particularly the costly Wembley saga). Following several tergiversations, the Government finally came round to giving its support to the bid in May 2003, with the Prime Minister solemnly declaring that the “time was right” for such a bid. This was naturally the starting point for addressing all the hard questions which needed to be faced, from financing the venture to selecting the proper venues and picking the right team – not to mention the progress of the bids emanating from other cities. Little progress seemed to have been recorded on any of these problems by the time the previous issue went to press.

Building the team...

When this column last addressed this issue, the identity of the person chosen to lead the bid was as yet unknown, although a firm favourite had emerged in the shape of Barbara Cassani, the North American businesswoman who had built the cut-price airline Go³⁴⁸. Ms. Cassani was eventually appointed in mid-June 2003. She had impressed the interviewing committee, which felt that she combined a successful track record and business acumen with an invaluable ability to “schmooze” (whatever that may mean)³⁴⁹. Although some had raised the objection that a bid headed by a foreign national might lack credibility, others felt that this could be an advantage by adding a cosmopolitan dimension to the London bid. It was also pointed out that women had an impressive track record in leading bids for sporting events, as witness the success of Gianna Angelopoulos-Daskalaki in securing the 2004 Olympics for Athens, and of Evelina Christellin in winning the 2006 Winter Olympics for Turin. Ms. Cassani also had considerable pedigree in the business world, having been elected Businesswoman of the Year some time previously³⁵⁰. It also transpired later than she accepted a lower salary than she was initially offered (from £200,000 to £150,000) which seemed to indicate a considerable commitment on her part to the success of the bid³⁵¹.

The London bid also appeared to receive a boost with the news that Sebastian Coe, one of the country's most renowned athletes, was to be appointed as Vice-Chairman of the bid campaign. The welcome universally expressed at this news was occasioned not only by Lord Coe's track record (literally!) in the sporting arena, having won gold medals at the 1980 and 1984 Olympics in the 1500 metres event, but also by the skills which he had acquired at the top level of sports administration. These qualities had already enabled him to secure election to the Council of the world governing body in his sport, the International Association of Athletics Federations (IAAF), where his contacts would be particularly useful in furthering the London bid³⁵². It was expected that Lord Coe would act as Ms. Cassani's special counsel on various issues, particularly the sports community in the UK and the bid company's international relations plan. Earlier, fellow-Olympic medallists Sir Steve Redgrave and Matthew Pinsent had also won a place on the board³⁵³.

The only cloud on the horizon in relation to the Coe appointment was the question whether this was consistent with his position as a columnist with *The Daily Telegraph*, which he has refused to abandon. Lord Coe could find himself compromised if details of any confidential Board meetings appeared in the newspaper, even if it was not he who was responsible for the leak. Critics were also concerned that Coe could unwittingly cause some problems for the London bid if he reported on the fate of any rival tenders for the Games, since, under the strict rules of the International Olympic Committee (IOC) on this subject, cities are not allowed to criticise their rivals in any manner. In fact Paquerette Girard Zappelli, who monitors these ethical issues for the IOC, announced, on hearing about the Coe appointment, that she would be checking the British press closely in order to establish whether London had stepped outside the relevant rules. It was also a fact that the British Olympic Association (BOA) were so concerned about the close association of *The Daily Telegraph* with the bid during the period in which the Government were in the process of deciding whether or not to support it (see above), that senior officials contacted various newspaper editors to assure them that the Telegraph was not in receipt of any preferential treatment. Obviously this position will need to be monitored closely³⁵⁴.

Further welcome news on this front came when it was learned that Charles Allen, the chairman of media company Granada, was to play a key role on the board of the bid company. Mr. Allen had won praise for using his position as Chairman of the Commonwealth Games in Manchester to rescue the event from financial meltdown. Further appointments to the Board featured:

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- Howard Bernstein, the Chief Executive of Manchester City Council, who helped to persuade the local authority to underwrite a considerable proportion of the cost of the 2002 Games;
- Mike Power, a senior executive of domestic goods manufacturer Proctor and Gamble, whose experience of working in Japan, the US and Europe were regarded as valuable assets;
- Patrick Carter, the multi-millionaire businessman who mapped out the financial strategy which rescued the Wembley stadium development, and who is currently the Chairman of Sport England;
- Simon Clegg, the Chief Executive of the British Olympic Association;
- Neale Coleman, a key advisor to the Mayor of London.³⁵⁵
- Alan Pascoe, the former Olympic runner
- Mike Lee, as director of communications and public affairs. Mr. Lee was formerly a spokesman for the European governing body of football, UEFA;
- Keith Mills, the man who devised the British Airways Air Miles scheme, who became the bid's Chief Executive³⁵⁶;
- Andrew Craig, who was part of Vancouver's successful bid for the 2010 Winter Olympics, as a consultant, and
- Steve Parry, a former Reuters sports editor, who is to be the bid's media director³⁵⁷

The composition of the Board has not been entirely free from controversy. It would appear at least desirable for it to feature some representation of the bodies overseeing the bidding for and staging of all major sporting events in this country. The name that springs to mind first and foremost in this respect is that of UK Sport, which oversees all top sporting activity in this country. In mid-September 2003, it transpired that, although representatives from this highly-placed body had held meetings with bid organisers, none of its officials had been invited to sit on the Board. Sir Rodney Walker, the outgoing Chairman of UK Sport, expressed his disappointment in unambiguous terms:

"I am hugely disappointed that, as an organisation which has helped the bidding for and staging of dozens of major sporting events in the UK, we have not been invited to be fully involved in the bid. We possess a lot of knowledge and experience, and it would seem extraordinary not to use it"³⁵⁸

Although a spokesman for the bid team expressed the latter's surprise at Sir Rodney's comments, the new Chairwoman of UK Sport, Sue Campbell, lost little time in building bridges, and immediately sought a meeting

with Barbara Cassani to discuss future co-operation. During that meeting, however, Ms. Campbell made it clear to the bid leader that she was not willing to see funds diverted from grassroots sport to assist with the funding of the bid³⁵⁹. Whether UK Sport will obtain the prominence it seeks in the bid remains to be seen.

The choice of Charles Allen as Chief Executive was not universally acclaimed either. It was understood at a certain point that Nick Bitel, the leading sports lawyer (and leading member of the British Association for Sport and Law) had been a front runner for this appointment. Mr. Bitel seemed to be well qualified to fill this position, in view of his wide-ranging and long-standing experience in the world of sports administration³⁶⁰.

As for Ms. Cassani, she made a somewhat inauspicious start to her campaign when a press call was hi-jacked by a group of eight-year-olds protesting at not having a field to play in. They were members of a residents' group from Coin Street in Waterloo, expressing their anger that the sum of £450,000, which had been promised for the purpose of developing their playing fields, had not materialised³⁶¹. However, she did a good deal better when she was interviewed by the House of Commons Select Committee on Culture, media and Sport, where she appeared to score an immediate hit with the assembled MPs³⁶². She was also adamant that the London bid must avoid the errors of England's disastrous bid for the 2006 World Cup and the Millennium Dome affair if it was to be successful³⁶³. She also stated that she would not have assumed the leadership of the bid if she had not been convinced that the International Olympic Committee had tackled the corruption which had marred several previous bid campaigns³⁶⁴.

Ms. Cassani has also met the greater London Authority's Assembly on a regular basis. The latter has taken a particular interest in the bid, and has questioned the bid leader intensively on matters of detail (such as the maximum capacity of the Hackney stadium, which would be the main venue)³⁶⁵.

(On the political aspects of the bid, see below p. 000.)

The reader may be forgiven for wondering why this column has concentrated hitherto on such marginal people as Chief Executives, bid leaders and forward planners, and neglected the most important functionary of all, i.e. the spin doctor. Well, it is understood that, since a certain Alistair Campbell has shaken the dust of 10 Downing Street off his feet, officials representing the bid company have been "prepared to talk" to the former tabloid journalist. Certainly Mr. Campbell is a sports enthusiast, and has been seen regularly at large-scale athletics meetings, and even ran in the London Marathon. Needless to say this would be a popular appointment with 10 Downing Street³⁶⁶. Speaking of

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which, it may be recalled from the previous issue³⁶⁷ that the name of Cherie Booth QC, the Prime Minister's consort, had also been mooted as a potential leader of the bid. Although nothing came of this project, it is understood that Ms. Booth will be acting at a more discreet and private level to make the most of her unique position in order to promote the London bid whenever possible on her travels.³⁶⁸

Variable prospects for The Bid, amid serious preparations (and less serious posturings)

The chances of the London bid succeeding are obviously conditioned by a number of factors, not all of them within the control of the city doing the bidding. However, there are some aspects which are definitely within the tenderer's powers, and they concern general presentation and communication. One can but wonder whether this particular aspect was well served by the comments of Sir Christopher Meyer, the former British ambassador to the US who had been approached to lead the bid but declined the honour. He welcomed the subsequent appointment of Barbara Cassani (see above), but somewhat strangely delivered himself of a somewhat mixed assessment of the city's chances, in the following terms:

"There are quite long odds against us winning it, but it can be done. One thing that the chairman (sic) has to get out of the government – and signed in blood – is written commitments to invest in the infrastructure, which would put us not just on a par with other candidates such as Paris but ahead of them"³⁶⁹

Exactly how motivated and keen any government could be to contribute such vast sums if the "odds were long" on the bid succeeding was not clarified by the venerable diplomat.

The London bid, however, received a boost when Vancouver was selected as the venue for the 2010 Winter Games (see above, p. 000). This had the effect of eliminating the 2012 bid of another Canadian city, Toronto³⁷⁰. It was also learned that IOC President Jacques Rogge was to discuss the London bid with Prime Minister Tony Blair at 10 Downing Street in early July, in the company of Culture Secretary Tessa Jowell. This was seen as a welcome opportunity for London to outline its plans to the IOC supremo and justify its selection ahead of the other bidders. The visit was also seen as a sign that Dr. Rogge was seeking to deflect criticism that he had become too regular a visitor to Paris, one of London's principal rivals. He also reminded his critics that he himself would have no vote in the process³⁷¹.

However, this was followed by the less welcome news of a spat between IOC President Jacques Rogge

and Frank Dick, the coach of Olympic athlete Denise Lewis, over the latter's association with Dr. Ekkart Arbeit, the former East German coach associated with the largest state-sponsored doping programme in sporting history, which has already been extensively covered in an earlier edition of this journal³⁷². Dr. Rogge had emphatically criticised this association, followed by an equally spirited response from Dick:

"This man was not in charge of the East German drugs programme. At what point is someone going to raise his role in east Germany's athletics team stopping the drug programme? I don't think people have seen the files. If they have, they might find themselves backtracking very quickly"³⁷³

(On further developments in the Dr. Arbeit case, see below under the heading "Drugs legislation and related issues", p. 000.)

Regardless of the veracity or otherwise of Mr. Dick's remarks, they were not calculated to be of great benefit to the bid team, with one of its spokesmen describing as "unhelpful". This was, however, followed by better tidings when it was learned that EDAAW, the company which planned the Sydney 2000 Games – arguably the greatest on record – had been selected to prepare the ground for the London bid. They beat off competition from five other groups to lead a consortium of nine companies in elaborating a master plan for the redevelopment of the site near Stratford, East London, which has been earmarked for the games should they be awarded to the nation's capital. Since planners must convince the IOC that they have considered every aspect in their choice of location, including transport, sustainability, cost management and public consultation, the choice of those in charge of this aspect is an extremely important one. Other partners who will participate in drawing up the plan include HOK Sport, which designed the award-winning Stadium Australia for the Sydney Olympics, Wembley Stadium (assuming it is built) and the future home of Arsenal FC at Ashburton Grove, North London³⁷⁴. (On the position of Wembley, see below, p. 000).

It is intended that the London document will emphasise the extent to which a successful bid will confer benefits on the entire city, and not only the area immediately surrounding the intended Olympic site, which runs from Stratford to Canary Wharf. Doubts over the proposed location had been raised by Alex Gilady, a veteran IOC member, who had opined that the bid should include the more widely-recognised western and central areas of the capital. Ms. Cassani, however, remains committed to the objective of regenerating one of the most deprived communities in London under a project which could create approximately 40,000 jobs,

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30,000 homes and 1,000 businesses³⁷⁵. Nevertheless, she does not intend to neglect the remainder of the capital. In addition to the venues referred to in the previous paragraph, it is intended to site triathlon and beach volleyball in Hyde Park, tennis at – naturally – Wimbledon and other sports across the entire capital³⁷⁶.

Putting the infrastructure into place will obviously constitute an important aspect of the bid, particularly the available means of transport. This is one area in which London – nay, the entire country – displays a pronounced weakness, as thousands of disgruntled commuters and tourists will readily testify. Plans to overhaul the transport network in readiness for the Games have already been drawn up, and intend to provide upgrades of the road, railway and Underground services. This envisages a scheme to allow the Underground to operate on a 24 hour/day basis, a 45 per cent increase in capacity on the Jubilee line by 2011. There would also be new trains on the Metropolitan line, as well as an upgrade for Stratford station, being the hub of the Olympic transport operation from the putative Olympic village. The capital's bus service would also increase by 28 per cent. The Channel tunnel rail link is also seen as playing an integral part in carrying competitors, officials and spectators to and from events. It will transport thousand of people from Kings Cross in just five minutes. On the roads, the Thames Gateway bridge connecting Thamesmead in South-East London with Beckton, North of the river, should have been constructed by 2010. The Silvertown river crossing, a road bridge stretching to North Greenwich which is also capable of carrying trams, also features on the Olympic wish list³⁷⁷.

One aspect which will need to be carefully considered is the security angle. Even before recent violent events in the US and Middle East, high-profile events have always been likely targets for terrorist activity – not least the Games themselves, as the events of the 1972 Munich games gruesomely testified. At the meeting between the Prime Minister and IOC President Jacques Rogge referred to earlier, this aspect took up a considerable proportion of their time, and in fact Dr. Rogge put security ahead of any other consideration³⁷⁸. We are likely to hear and read a good deal more about the measures taken to this end in the coming months.

Support from the politicians – real or synthetic?

Although the Government have finally decided to back the London bid, the hesitancy and prevarication which preceded this pledge gave the impression that this support was somewhat less than wholehearted, as can be seen from the previous issue³⁷⁹. It should be stressed at this point that political commitment is not in any way an optional extra, but more akin to a legal requirement, since the rules of the IOC stipulate that

any bidding city must have the support of its national government. It is reported that the Government have at least started to take this on board, and that Cabinet ministers have been briefed on the manner in which they should attempt to sell the London bid by co-ordinating it with their everyday work. A spokesman for the relevant Government department expressed the position thus:

“The IOC expects political support and it is not just about providing cash. There will be times when the bid team will need the help of politicians and they have agreed to do this from Tony Blair down”³⁸⁰

The political aspect of London's bid will be co-ordinated by Sports Minister Richard Caborn and his superior Tessa Jowell, and their respective teams at the Department of Culture, Media and Sport (DCMS). The bid organisers have also been assured Tony Blair, Gordon Brown and other Government ministers will attend functions and raise the issue of the bid if asked to do so. The Government also intends to use its existing international contacts to raise support for the bid. The 31 IOC votes within the Commonwealth have been identified as a key area. At a meeting of Commonwealth sports ministers to be held just before the Athens Olympics of 2004, Mr. Caborn and Ms. Jowell will attempt to secure support for London³⁸¹. Nor has Mr. Blair been slow off the mark in lending his political weight to the campaign. He sent a strong message of support for the bid when he met members of the Beijing 2008 organising committee during a visit to China in July 2003. At that meeting, he was shown plans indicating how the Games will change the Chinese capital. More valuable even than this, however, was the publicity which this meeting generated for the London bid³⁸².

However, it is not only at the Government and Parliamentary level that political support will be needed. Whether by coincidence or not, the London bid comes at a time when the capital has had some autonomous political life restored to it, in the shape of the directly-elected London mayor and the Greater London Authority. It has already been noted in an earlier issue³⁸³ that the incumbent Mayor, Ken Livingstone, had strongly backed the bid from the outset. Although he is no sports buff, and indeed showed signs of being rather ill disposed towards this medium in an earlier “Red Ken” incarnation, he had become aware from the beginning that mayors represent the fulcrum of all aspirant Olympic cities. Mr. Livingstone's colleagues in Paris and Madrid chair their bids, whereas, on a less positive note, Montreal's mayor Jean Drapeau was blamed for the infamous 30-year taxpayers' burden known as “Drapeau's baby” following the 1976 Games.

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Mr. Livingstone also professed the view that nothing would do for his city that a successful Olympic bid would³⁸⁴. It was feared in some quarters that problems would arise between Livingstone and the new Labour Government, given the fact that the Mayor, a former Labour member, had stood against the official Party candidate. These fears have proved to be unfounded, and there is widespread relief that the Mayor has in fact worked closely with the central Government, particularly on the issue of funding³⁸⁵.

The bid may nevertheless present Mr. Livingstone with different problems. The heading for one particular newspaper article read: "London leader promises logo is on its way"³⁸⁶. However, the article was not about the Mayor but about Ms. Cassani. Sic transit gloria mundi...

On a more serious note, not everything has been a bed of roses on the political front. For one, there remain those who are opposed to the bid. Jenny Jones, the Green Party Deputy Mayor of London, denounced the bid in no uncertain fashion, claiming that it would be environmentally damaging and represent poor value for money³⁸⁷. Secondly, there are those politicians who consider that the current incumbents have not in fact displayed sufficient energy in supporting the bid. This was certainly the view of former Sports Minister Tony Banks, who in mid-August 2003 stated that the Government should "get their hands dirty" if the capital was to be successful in its bid. Mr. Banks – who is also an MP for one of the East London constituencies which stands to gain from the bid – stated his belief that there were lessons to be learned from the bid advanced by this country for the staging of the 2006 football World Cup, of which he was the Government's ambassador. Mr. Banks believes that the Government should not only campaign in the traditional sense, but also engage in such activities as offering support to less-developed countries who could be influential in the vote. This, after all, is what the Germans did in relation to the 2006 World Cup bid. He explains:

"They need to be thinking in terms of aid policies and development investment with these nations. We could see all this happening with the Germans but not us. They were doing something we refused to do, and it could be the same all over again. The Government must get in there now and involve every department (...) We must if we are to win"³⁸⁸

Mr. Banks also considered that Princess Anne should step down from the IOC, as her "public face was not good". Although he admitted that she may be doing certain things behind the scenes, he understood that this did not "amount to a lot". He argued that she was the wrong person to argue London's corner³⁸⁹.

The London bid and its rivals

Obviously those cities which also harboured ambitions to stage the 2012 Games have not been idle while London makes all the running. In fact, such was the headway which some of the others appeared to be making that, as early as mid-September 2003, Ms. Cassani was already making some pessimistic noises about London's current position in the race when she met the relevant House of Commons Select Committee, stating that the capital's bid was in some ways behind those submitted by Paris and New York. Particularly Paris seemed to be a favoured candidate, since it had bid for the Games before and therefore had a head start³⁹⁰. New York also appeared to have forged ahead somewhat, said Ms. Cassani, since it had to participate in a national competition, winning ultimately against San Francisco, so all their branded material had already been created for that domestic competition. That may be so, but it hardly excused the fact that, three months after she had been appointed, the London bid had yet to launch a website or produce an appropriate logo³⁹¹.

This view seemed to be confirmed a few weeks later by the news that the French capital could claim to have drawn first blood in the campaign for the 2012 Games, since it had been drawn by lots to be the first city to make presentations to the IOC. London was drawn seventh, which meant that it would have to wait until Leipzig, New York, Moscow, Istanbul and Havana had had their turn. The draw also decides the entire protocol, including the order in which representatives of the cities sit when they meet members of the so-called IOC family, such as international federations and national Olympic associations³⁹².

Inevitably, speculation also arose as to the manner in which New York's bid would be regarded. More particularly the question arose whether it would receive the benefit of any emotional impact of the September 11th attacks, which left the city mentally and physically scarred, or whether it would, on the contrary, suffer because of its association with a belligerent US policy in response to these events, particularly in parts of the world having high Muslim populations. (Some may even speculate as to whether the London bid might also not be tainted with the same brush...). The organisers of the New York bid naturally do not wish to engage, or be seen to engage, in anything that could be interpreted as emotional blackmail in this respect. Rather they have tended to emphasise other aspects of their bid which differentiates them from their rivals. They have placed particular stress on the fact that the event would take place in the heart of the city, with the Olympic Village being located at the centre of an X shape which will include all the main venues. According to the person in

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charge of planning the new York tender, Alex Garvin, it would be the first time that virtually every competition site would be within 25 minutes' travel, or much less, from the Olympic village³⁹³.

Other cities have also been engaging in serious preparations. Particularly Madrid appears to have been quick off the starting block (if the reader will excuse the mixed metaphor). Some 60 companies have already been lined up as sponsors, and "pre-volunteers" have been urged to sign up as helpers. The city has also set land aside for the Olympic park and the competitors' village, all within a few minutes' drive from the airport³⁹⁴.

And finally...

The ripples caused by the Olympic bid have reached virtually every aspect of London life – even its fictional existence. Leaders of the bid were said to be studying a plan to feature their quest for the Games in the London soap opera *EastEnders*, ostensibly as a way of galvanising public support for the bid³⁹⁵. The present author can only express the hope that, far from constituting an incentive, this will not be the kiss of death for the bid, although the temptation of seeing Ms. Cassani and Sebastian Coe downing a pint at the Queen Vic becomes almost unhealthy at times...

Naturally, the author of this column pledges himself to monitor further developments with regard to any progress made by the various bids with the keenest of interest.

Athens 2004 – Greek tragedy or Homeric heroics?

When the Greek capital won the right to stage the 2004 Olympic Games, the nostalgic appeal of the "Games coming home" was enormous. Since then, the cold reality of deadlines and legal obligations has somewhat overshadowed the romance of the Games' homecoming. The attentive reader will recall that, on several occasions, doubts have been expressed as to whether Greece in general, and Athens in particular, was capable of staging such an event. Indeed, it appeared that, when the International Olympic Committee had awarded the Games to its original homeland in 1997, it had done so with serious misgivings³⁹⁶. Anxiety has been expressed in these columns before as to whether the 2004 games would take place as originally envisaged³⁹⁷, and recent events have done little to quell such disquiet.

When the IOC awarded the Games to Athens, it was not unreasonable for it to expect the latter to summon the nation's builders. Instead, the only people who appear to have been mobilised since are the politicians, lawyers, environmentalists and archaeologists, all of whom have various interests to defend, and have slowed down the process to the point where the

question has been asked whether it will be possible to stage the 2004 Olympics at all. Although the city authorities and those employed by it appear to have worked up a turn of speed in recent months, the overall impression is that of a frantic race to make the deadline rather than a rational build-up to the big event. Construction workers are being denied holidays, and on many sites a 24-hour, seven-day-per-week operation appears to be proceedings. Hardly a road is without its building site. Holes are everywhere. This has also produced environmental consequences. Scientists have already advised an environmental conference that the dust that results from this intense activity exceeds by far the relevant EU safety limits.

The sheer scale of the task awaiting the organisers of the Athens festival of sport can be gauged from the fact that, for the Sydney Games of 2000, everything was ready 14 months ahead of the opening ceremony. In Athens, on the other hand, not one of the sports facilities which had to be specially built for the Games has been completed. Even though the workforce were only allowed 10 days' holiday in the course of 2002, 32 facilities remained under construction at the beginning of summer 2003. The massive sports complex being constructed on the site of a former international airport is giving particular cause for concern, as it is scheduled to play host to a wide range of sports such as canoeing, basketball, softball, baseball and hockey. Even the new metro and tram systems which are to facilitate access to the Games appear to be lagging behind³⁹⁸.

Amongst many Greek people, there was also a feeling that the entire project was falling between two stools: whilst little progress seemed to be made on the actual Games sites themselves, the work in question had been sufficient to choke off various other projects. One such victim has been the plan to construct three much-needed bridges across Athens's choked main artery, the Kifissias Avenue, which has been partially curtailed. In addition, the scope of the vital suburban rail network has been halved, a string of extensions to the Athens metro system has been shelved, and the thousands of trees which had been promised for the purpose of greening the concrete jungle that is present-day Athens are nowhere to be seen³⁹⁹. There have also been issues of public policy at stake. In order to cope with what she predicted as an upsurge in demand, the capitals' mayor, Dora Bakoyanni, is determined to register 230 brothels – ostensibly to "bring law and order" to the profession. This has caused uproar amongst large sections of the Greek public, and prompted accusations that the Olympics would be used as a cover for sex tourism⁴⁰⁰.

Another fear entertained by critics of the Games is the security angle. Given that, as was noted earlier in

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relation to the London bid (see above, p. 000), high-profile events are at the very least possible targets for violent terrorist action, the Games have exposed the ancient city to this hazard as well. Public anxiety on this issue also appears to find some justification in the concern that the Athens police have not grasped the scale of the threat which might emanate from various terrorist groups. As a result, security experts from seven countries have been called upon to provide assistance to the local police force. Although the Games will be protected by a massive security cordon, with a record 58,000 police officers, soldiers and safety volunteers in attendance, the Greek response to warnings and offers of help has been described by one security source as “patchy”. Such is the concern that the Australian Olympic Committee has even announced that its team would use its own security force in the Greek capital⁴⁰¹.

All this does not mean, of course, that the Games will be a disaster – as a journalist for a British daily newspaper put it:

“With a huge effort, a fair wind and minimal political interference they might just pull it off but it will be really tight”⁴⁰²

This is far from reassuring diagnosis, and, as so often happens when a project is being hurried through, accidents happen. Thus a spectator at a pre-Olympic archery contest was seriously injured by a marble slab which came loose at the stadium which hosted the original modern Olympics in 1896. Organisers reported that Chrisantos Marinos had wandered into the area where workers were refurbishing the stadium⁴⁰³. The chances are that this would not have happened if the work had been carried out in accordance with a more prudent time-scale.

Nevertheless, the International Olympic Committee (IOC) do not seem unduly concerned by this state of affairs. In mid-August 2003, the IOC pronounced itself generally happy with progress, although it did concede that the schedule of preparations would be a close-run affair. The President of the bid organisers, Gianna Angelopoulos, had issued a report to the IOC’s Executive Board reviewing recent trials of events and construction progress, and the response by IOC Director-General François Carrard was that the test results were “quite good”, but the schedule remained tight⁴⁰⁴.

Whether such optimism is justified will only be answered as the date of the opening ceremony draws near.

British sports in series of financial crisis (some more excusable than others)

The present writer fully appreciates that, given the problems with which present-day society is ridden, public policy makers must be extremely selective in the beneficiaries of public largess. Building a new hospital obviously deserves priority over building a new gymnasium. Nevertheless, sport has come to assume a major role in the nation’s mind, and (as is made clear below) can in fact prevent some of the problems which it then takes much greater amounts of public money to remedy (and we are not only thinking of public health in this connection). Accordingly, demanding from the public authorities a funding policy which is more responsive to the nation’s needs in this regard cannot simply be dismissed as a symptom of a self-indulgent society.

Thus it is legitimate to entertain serious caveats about a state of affairs whereby some of the country’s leading centres of sporting excellence have been hit hard by cuts in National Lottery funding to the English Institute of Sport (EIS). The funding body in question, Sport England, had slashed the budget of the Institute by £17.7 million, with the cuts being borne by the East Anglian Sports Centre (to the tune of £1.51 million), the Holme Pierrepont Water Sports Centre in Nottingham (£5.8 million), Lilleshall (£3.9 million) and the Gateshead International Stadium (£6.5 million). These cuts were justified on the basis that athletics was already well served, with centres in Sheffield and Loughborough, and Sport England’s intention to invest £13 million in a new rowing lake at Caversham designed by Sir Steven Redgrave. The Institute had taken the brunt of a £31.8 million set of savings, with the remainder being found by overturning decisions to award funds to projects which had previously been awarded funding⁴⁰⁵.

All this followed a review by Patrick Carter, the new Chairman of Sport England, who had ordered a freeze on funding when he took over in December because of a decline in lottery income. Chief Executive Roger Draper glossed over these cuts as a “new joined-up approach” which, rather than concentrating on producing champions and elite athletes, also wanted the site to be used by the local community also. He added that Sport England did not wish to end up with “white elephants” in two years’ time. The smaller projects affected range from a £1.9 million sports centre wanted by Chesterfield Council to a £14,000 artificial turf wicket and nets proposed by Bourneville Cricket Club in the West Midlands. All this was justified by Mr Draper as “short-term pain for long-term gain”⁴⁰⁶.

There was, however, concern that one of the EIS facilities, i.e. that which is based in Sheffield, was itself in danger of acquiring white elephant status, since several sporting bodies which were supposed to make

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this their base for training elite athletes have claimed that they will not be able to afford the cost of using it. As the EIS (Sheffield) neared completion and was set to fulfil its destiny as the state-of-the-art venue for the elite in at least seven sports as they prepare for next year's Olympic Games in Athens, only basketball and athletics had agreed to base themselves at this site⁴⁰⁷. Moreover, the other eight EIS centres also had their problems: most of them had yet to be fully opened, whilst others had to be trimmed back because of funding problems. Thus plans for the North-East centre, which was supposed to be based in Gateshead, have had to be shelved altogether, and the athletes of that region are now compelled to use existing facilities requiring upgrading. Another state-of-the-art EIS centre, this time in the Midlands and also aimed at assisting high-performance athletes, was to be based at Lilleshall but is not going ahead either⁴⁰⁸.

Another sporting centre hit by a lack of funding is the Crystal Palace, one of the most evocative venues in British athletics. A reporter writing for a national daily newspaper founded it in what he described as a "shameful" condition, with wires hanging loose from the ceilings, paint peeling from walls and toilets not so much a public convenience as a public disgrace. Money is needed for everything, from a track which is now very much time-expired to window frames which have corroded. Part of the reason for its present state is the fact that Sport England had decided to discontinue its £1.8 million annual subsidy. Only four per cent of its users were found to be elite sporting performers; the remainder were local community charge payers, using its pool, squash courts and, just a few, its track⁴⁰⁹.

The Crystal Palace has raised a dilemma for the public authorities. On the one hand, the centre in question will require considerable upgrading and the money spent may not seem worthwhile given the poor crowds which its few events attract, and the fact that its swimming pool is too short to host international competitions. On the other hand, for the London Olympic bid to be presented to the International Olympic Committee (IOC) next year without having an athletics stadium to call its own may not be the best way of boosting its chances. At the time of writing, this seemed to have seeped through to the consciousness of the sporting authorities, with the news that, although the Palace would not be used for the Olympics if awarded to London, it would become a regional centre for athletics. Talks were continuing to raise the £2 million required for its refurbishment, but no definite news on this was available at the time of going to press⁴¹⁰. The need for an early decision was great, since the lease expires on 31/3/2003. Another factor was the circumstance that, if the Palace were to close, the Southern Counties

Swimming Championships may need to take place in Dunkirk next summer because the French port is the closest venue capable of accommodating 800 competitors. This would, once again, be extremely embarrassing for the London Olympic bid, and would surely be exploited by Paris, who, as was noted earlier (see above, p. 000) had become the front runner in the bidding race⁴¹¹.

At around the same time as all these issues were being highlighted, the Government was accused of misleading Britain's leading athletes over funding for their preparations for next year's Olympics. The various sporting federations had widely praised the Government earlier in the year when Sports Minister Richard Caborn had announced that new, additional funding of £4.7 million was to be made available for this purpose. The funding was part of a number of recommendations made by Dr. Jack Cunningham, a former Minister for the Cabinet Office, following his review of funding for elite athletes. However, these sporting bodies are now claiming that Mr. Caborn's announcement had been yet another example of crafty New Labour spin, since – in the time-honoured fashion – the money was simply being redirected from an existing fund. In other words, it was not new. Angry sports administrators claimed that the £4.7 million in question is in fact money which was originally in a modernisation fund aimed at the restructuring of British sport, which had been established by the Government 18 months previously⁴¹². In the words of a particularly incensed sports administrator:

"The Government has simply moved (the money) from one pot to another. Athletes are really desperate for the money because many sports bodies have already had their funding cut. The Government needs to address this situation because our athletes' preparation for next year's Olympics are already being seriously affected"⁴¹³

One particular newspaper which has helped to expose this chronic state in British sports funding drew attention to the manner in which other countries are nurturing top sporting talent⁴¹⁴. An appropriate example is Australia, whose Institute of Sport inspired its British counterpart, is widely regarded as the most successful in the world, and is based in Canberra but with attendant regional centres. It is adequately funded by the Government and offers scholarships. In Germany, there is the Institute of Applied Training Science, which was established in 2001. It has a main centre and regional outlets. It is funded mainly by the federal government and has set itself the target of having Germany finish third in the medals table for the Athens Olympics. In France, the Institut national de sport et de l'éducation physique (INSEP) was opened in Paris ten

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years ago, and has contributed towards increasing the country's Olympic medal haul⁴¹⁵.

One of the reasons why these funding shortages are causing so much irritation amongst the sports in question is the fact that there appear to be some double standards at work. This definitely appears to be the case with the sport of tennis. As Alan Hubbard, that most trenchant of sporting commentators, observes⁴¹⁶, Sport England, which has started something of an inquisition against British athletics because of its poor performance at the 2003 World Championships, has been extremely tolerant in its attitude towards lawn tennis, the sport in which Britain has probably the worst track record of all, which recently culminated in its latest Davis Cup humiliation at the hands of the nation whom Sir Alf Ramsey once memorably described as "them Moroccans". Could there, mused Mr. Hubbard, possibly be any connection between this fact and the circumstance that, in a previous incarnation, SE Chief Executive Roger Draper was in charge of development at the Lawn Tennis Association, and could Mr. Draper possibly be reluctant to upset his old friends at Baron's Court? Mr. Draper has vehemently denied this, and attempted to explain away this apparent discrepancy on the basis that lawn tennis has hitherto not been receiving any public money. This is in spite of the fact that the LTA has recently become the beneficiary of £9.4 million in Treasury largess, on the somewhat ludicrous basis that it is one of the "Big Four" sports in this country. When confronted with this fact, Mr. Draper did acknowledge that some questions needed to be asked as to what went wrong. The world of athletics, however, may feel that they have just cause for complaint, since it had been financially penalised after just one blip, having previously acquired decent credentials for itself on the world stage. (At the same time, it is worth asking the question, as does Claire Ward in *The Guardian*⁴¹⁷, why some of the millions earned by the LTA from the Wimbledon tournament fail to make their way towards the grass roots of the game.)

Another sport which deserves a closer look at its finances is cricket. This at least has been recognised by Sport England, which in late September 2003 despatched auditors to Lord's in order to subject the summer game to a thorough financial examination. They were given a free hand and informed they could look at anything, as well as ask any question they wished. Mr. Draper said that whatever changes were recommended by the auditors would be accepted, even if this meant slimming down the first-class county structure. The auditors have four issues to put to the game's administrators:

- Show us how you are increasing participation
- Show us how you are increasing the number of cricket clubs and membership

- Show us your winning record
- Can you run your ship efficiently⁴¹⁸?

Cricket currently receives £6 million per annum from Sport England and could not easily dismiss their proposals. Nor is cricket the only sport affected, as many other sports are undergoing similar audits. Any proposal to reform the first-class structure will be welcomed by reform-minded pressure groups such as the Cricket Reform Group⁴¹⁹. (On the subject of the latter, see below under the heading "Issues specific to individual sports", p. 000.)

Nevertheless, a glimmer of hope in this otherwise gloomy picture came in mid-September 2003, when it was learned that Victorian Baths in Manchester, which closed ten years ago, was the winner of the Restoration television series, in which viewers vote for their favourite restoration project. This was the culmination of the efforts undertaken by a passionate local campaign to retain and restore them⁴²⁰. This seems to indicate that the British public do actually care about their sporting infrastructure. Why can their elected representatives not implement their wishes?

Melbourne Commonwealth games already in financial trouble

It may give sports administrators in this country some satisfaction to learn that at least this country does not have a monopoly of financial imprudence and failure to keep major events within budget. In late June 2003, it was learned that the city of Melbourne, Australia, has already overspent its budget for the 2006 Commonwealth Games by nearly A\$350 million (£140 million), compelling the state of Victoria to double its contribution to A\$697 million. The total cost of the Games is now budgeted at £440 million, the balance coming from ticket sales, sponsorship schemes and contributions from other levels of government. This is slightly less than the overall cost of the Manchester 2002 Games, which were staged for a total of £480 million. Costs such as licence fees, security, police resources and public transport have contributed to this overspend because they were not included in the original Games bid⁴²¹.

Wembley – the end of the saga (Mark III)?

This column has, in spite of its many criticisms of the New Wembley project, served up so many false dawns on this issue that it has an automatic space reserved for this saga for the next three years! However, crossing the traditional digits, it does now seem as though the project is finally under way, and that its financial basis is now secure. That does not mean, however, an automatic end to the debate on some of the issues surrounding the project.

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One of these issues was the stability of the bank financing the entire project, WestLB. It will be recalled that, initially, the fact that this bank was prepared to finance the project was greeted with enthusiasm by the managers of this project, not only because there had been a distinct lack of interest by the City of London, but also because it is ultimately supported by the German state of Nordrhein-Westfalen, which guarantees the bank's business⁴²². Since then, however, the bank has experienced troubles of its own, in that Robin Saunders, the person responsible for arranging the Wembley finance, had failed to win the unequivocal support of her employer as an investigation into her unit was being launched⁴²³. More bad news followed in late June 2003, when the bank's Chief Executive, Jürgen Sengera, resigned, thus becoming the first casualty of the investigation into Ms. Saunders's controversial unit. He was joined by fellow-Board member Andreas Seibert, who until earlier that year had been responsible for overseeing Ms. Saunders's principal finance unit. The main focus of this upheaval seemed to be the investigation into the lapses in risk management which attended one of the deals conducted by Ms. Saunders's high-profile team of 20 financiers⁴²⁴.

More disquieting still was the news that the German regulators had handed over their report which followed the investigation to the local public prosecutor's office (Staatsanwaltschaft). Even though the bank insisted that its own internal inquiry had yielded no evidence of any criminality, this could mean the bank being subjected to a criminal investigation⁴²⁵. This could obviously have implications for the Wembley project. At the time of writing, however, no further news about any such enquiry was forthcoming.

The other issue relating to the project which continues to be relevant is the use for which the new stadium is actually intended. Given that the entire project will cost well over £750 million, it is legitimate to ask the question as to what, if anything, will be done to recover some of this expenditure. As has been mentioned in the previous issue⁴²⁶, the chances of the stadium being used as permanent venues by any of the capital's top football sides were virtually non-existent – even if the latter were willing to countenance such a move. (Below (p. 000) it will be reported that, although there was a brief revival of interest in the plan to have Arsenal FC and Tottenham Hotspur engage in a ground sharing scheme, this proposal now seems to be stone-cold dead.) There appeared to loom a golden opportunity to use the stadium in the event of a successful bid by the capital to stage the 2012 Olympic Games (see above, p. 000), but even for this event there is a marked reluctance to use the stadium, as has already been pointed out in a previous issue⁴²⁷, which is

remarkable to say the least, given that the infamous £120 million lottery grant awarded to the project was dependent on the stadium being used precisely for this purpose. The new stadium will be used for little more than a handful of football matches, which seems a questionable use for such a showpiece venue

Indeed, was there any reason why the New Wembley should not be used as the main venue for the Games, rather than the "bit player" role which is envisaged for it at present? This legitimate question is asked by leading sports policy commentator Alan Hubbard⁴²⁸. It would, according to the latter, be the perfect venue, with its 90,000 seats and an atmosphere to equal anything London's rivals could offer. There is naturally the objection that one of the objectives of the London bid is the regeneration of the East End of London, but the author believes that these problems can be overcome. Indeed, the focus on Wembley as the main showpiece could actually help the London bid, since the inspectors of the International Olympic Committee (IOC) would have something to observe in hard concrete rather than having to rely on pieces of paper and a good deal of imagination. It could also rescue the reputation that the New Wembley project has acquired of being a venue aimed especially at the wealthy and influential, because of its pricing policies⁴²⁹, and even give at least the aura of a "People's Stadium"⁴³⁰. Is it too much to hope for that the sports administrators responsible grasp this particular nettle?

Someone who has certainly done so is London Mayor Ken Livingstone. Replying to questions from the Greater London Authority, he gave the assurance that the project would be completed on schedule, adding:

"We are not stadium-rich in London. It is not as if Wembley is diverting money from somewhere else. The FA raised money from the City to build it and if they were not going to build Wembley they would not build a hospital. That is not the FA's job"⁴³¹.

The politicians have shown that they support the project. Whether the sporting authorities will do so full-heartedly remains to be seen.

Football ground seating order adopted (UK)

In August 2003, the British Government adopted the Football Spectators (Seating) Order 2003⁴³², which was made under the Football Spectators Act 1989. It directs the Football Licensing Authority to include in any licence to admit spectators to the football grounds specified a condition imposing the requirements specified as regards the seating of spectators at designated football matches. "Designated football matches" are those Association Football matches designated by the

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Secretary of State under the powers conferred by the 1989 Act, and they include all Association Football matches played at the premises specified⁴³³.

“Tote” to be privatised

The “Tote” (short for totaliser) is one of the more venerable institutions in British sports betting, having been established by the State in the late 1920s in order to provide extra competition for bookmakers, and in order to support horse racing by means of a proportion of its profits. Its core business is the exclusive licence for on-course pool betting. Veteran punters argue that it usually offers the best value for long-odds outsiders. Yet it would seem that not even this venerated institution can elude the winds of change, when news broke in the early summer of 2003 that its privatisation would be featured in the forthcoming Queen’s Speech, which sets out the main legislative plans of the incumbent Government for the next parliamentary session⁴³⁴.

Under its former Chairman, Lord Wyatt, any change to the Tote’s status was fiercely resisted. However, the interesting aspect about this proposal is that, before the Government can privatise the Tote, it must nationalise it. Indeed, at present, its status is somewhat nebulous, although its main board does report to the Government. It is intended that the Government will claim ownership of the Tote by Act of Parliament, and it is then expected that it will sell the bookmaker to a trust backed by the British Horseracing Board⁴³⁵.

As the date of the Queen’s Speech approached, the top UK bookmakers were becoming increasingly concerned about the implications of this move, and in mid-October met Treasury officials to express their worries. Their main concern was that the Tote, which includes 435 betting shops, could be handed over to the horse racing industry. They argue that this would give the latter an unfair competitive advantage, and entail that the leading bookmakers would miss out on an opportunity to expand their business in one fell swoop. Both Ladbrokes and William Hill are known to be interested in acquiring these shops, the business in question being valued at around £500 million⁴³⁶. This development is the result of the determination made in 2000 by the then Home Secretary, Jack Straw, that the Tote should be sold to a consortium of racing interests rather than on the open market. This is part of a move by the Government to deregulate the entire gaming industry, which is currently subject to certain laws it considers to be “archaic”⁴³⁷.

As the Queen’s Speech had not yet materialised at the time of writing, it is not possible to record here whether or not account was taken of these concerns.

MP calls for better protection of bettors following collapse of bookmaker

The fate of the Tote, referred to in the previous paragraph, is not the only public policy issue currently facing the betting industry. In early July 2003, Alex Salmond MP, one of the major supporters of racing in the House of Commons, called for a bonding scheme aimed at protecting bettors following the collapse of Burns Bookmakers, a one-shop outfit in North London. The two brothers who operated the company were believed to have fled abroad, leaving debts of at least £100,000. Government legislation which would impose strict financial tests on anyone applying for a betting licence, is expected to enter into effect in 2005. However, this legislation is not expected to include a mandatory bond to be paid by bookmakers and held independently in order to provide some security in case their business fails. This is precisely what Mr. Salmond wishes to see included in any such legislation. He added:

“Bookmakers can go out of business for two reasons. They might just have a bad Cheltenham, or they might go bust, as appears to have happened in this case, because they abscond with the dosh (sic). The financial test obviously provides some protection against the first, but it provides no protection against the second, and there should be some sort of lifeboat there”⁴³⁸

It is an unfortunate fact that the Burns Bookmakers case follows a pattern of similar failures in recent years. It appears that the two brothers in question, Chris and Nick Velounias, offered a wide range of bonus prices and special offers in an effort to attract customers. They also acquired valuable publicity through offers placed in The Sun newspaper, whilst the firm had also received a favourable mention on Channel Four Racing. In the long term, these concessions were simply too good to be true, and the business proved impossible to sustain. At a certain point, the brothers took a taxi to St. Pancras station, and have not been seen since. Similar scenarios were enacted with a string of other bookmakers, such as Bowmans, Front Line, SP racing and Rio Bookmakers, as well as a host of internet bookmakers.

Mr Salmond believes that, ultimately, the bond system could work in favour of the small firms⁴³⁹.

Walker steps down as UK Sport Chairman

As has already been mentioned earlier (above, p. 000), Sir Rodney Walker, the long-standing Chairman of UK Sport, stepped down from this position in September 2003. During his nine-year tenure, Sir Rodney has been hailed as having improved relations between sporting federations on the one hand, and the Government and the world of business on the other hand. He also

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oversaw one of the largest-ever injections of money into sport via the National Lottery. UK Sport's use of this cash has been cited as one of the major reasons for the success earned by British performers at the 2000 Sydney Olympics⁴⁴⁰.

Sir Rodney has also acted as Chairman of the Rugby Football League and of Leicester City plc. His most controversial appointment, however, has been as Chairman of Wembley National Stadium Limited (WNSL), where the response to his leadership was mixed, particularly over the manner in which the project was unable to attract backing from the City, thus delaying the project for some considerable time⁴⁴¹. His decision to resign came as something of a disappointment to the Government, who were hoping that he would continue in his role and oversee the reorganisation of British sport, helping it to become more streamlined and ensure that Lottery cash is more effectively targeted in time for the 2004 Olympics⁴⁴².

Public health and safety issues

Public (and other) initiatives on general fitness

On several occasions, this publication has had cause to report on the general concern aroused in the most widespread circles about the state of physical fitness of the nation⁴⁴³. Since then further evidence of this sad state of affairs has come to light; at the same time, the alarm bells have been set ringing in some quarters and galvanised them into action on this issue.

Thus in August 2003, it was revealed that one in six children leave primary school each year unable to swim, despite a three-year Government campaign aimed at raising standards in this regard, according to an authoritative survey on the subject. Teachers' leaders and sportsmen expressed their concern at these findings, commenting that they had worrying implications for children's safety as well as for the nation's sporting hopes. It is a fact that drowning is the third most common cause of death for the under-16s with 50 fatalities every year. Yet it was found that 100,000 primary school leavers in England and Wales were unable to swim 25 metres, which is the level of competence expected by the Government of 11-year-olds. In addition, the survey, conducted by the Central Council for Physical Recreation and the Times Educational Supplement, showed that three out of 10 children aged 11 left school without basic survival and basic life-saving skills⁴⁴⁴.

The following month, more disquieting evidence to this effect came to light. A study commissioned by Sport England, the Government-funded sports council,

revealed that only one in four 5-16-year-olds in England regularly engaged in any sporting activity. It also warned that pupils who did not participate in sports could develop health problems in later life, with a particularly increased risk of heart disease and strokes. The research revealed four different categories of school pupils⁴⁴⁵:

- (a) the reluctant participants: these accounted for 24 per cent. They included "couch potatoes" who dislike sport intensely, have a low level of participation and lead a sedentary lifestyle, and "tolerators" who have an average level of participation but did not enjoy it much;
- (b) the unadventurous: 14 per cent. They take part in little sport and dislike it, but not to the same extent as the reluctant participants;
- (c) untapped potential: 37 per cent. These are not in principle averse to sport, but spend relatively little time taking part in it;
- (d) sporty types: 25 per cent. They engage regularly in sports, both inside and outside school, and enjoy it

Peter Sullivan, a leading paediatrician, who at the same time is an expert in child nutrition, described the findings as "alarming", particularly when viewed in conjunction with the high levels of sugary and fatty food ingested by youngsters in the present age. Perhaps even more alarming was the finding by the report that government efforts to induce 70 per cent of the population doing half-an-hour's exercise at least five times per week by 2020 were doomed to failure. It predicted that the numbers in every group from six to 44 taking part in sport will fall from 53 per cent in 1996 to 46 per cent in 2026⁴⁴⁶.

This is why a national Sunday newspaper, *The Observer*, embarked upon a "Fit for the Future" campaign, which called upon the Government to revive school sport as the best single way of promoting active, healthy lifestyles amongst the youth of this country. It sought to achieve that every pupil should receive at least two hours of school sport by 2006, that schools should extend their opening hours to accommodate additional sport instruction, and that extra funds be found so that schools could afford the coaches and teachers to supervise them.

This campaign was backed not only by a number of the nation's top sporting performers but also by the public authorities. Thus it was that the Government's adviser on children's physical education, Crichton Casbon, also lent his support to this initiative⁴⁴⁷. He stated that there was no reason why the central recommendation of the campaign, which was that all youngsters receive at least two hours of exercise, could not be achieved, and warned Ministers that they could offer no valid excuses if they shied away from this demand. Indeed, the Qualifications and Curriculum

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Authority, to whom Mr. Casbon is the PE advisor, had, following a 30-month investigation into school sports, collected evidence to suggest that this target was eminently achievable. Data collected by the same body had also revealed that providing lunchtime activity at school dramatically reduced the level of classroom disruption. The importance of school sports for children's health was also highlighted in a report from the Government's Health Development Agency, which had conducted a review of research on childhood obesity⁴⁴⁸.

The need for urgent Government activity in this field was underlined by the fact that, in mid-June 2003, it had been learned that a government drive to reverse the decline of competitive sport in schools was producing but mixed results, according to a study published by education monitoring body Ofsted. The School Sport Co-ordinator programme had been designed in order to assist schools in achieving the aforementioned target of two hours' sport per week – and that was merely a target set for 75 per cent of pupils. Ofsted had examined the efforts of the first 1,400 schools to implement this scheme, and found that over 25 per cent of physical education lessons were poorly taught because staff had low expectations of that which school pupils were capable of achieving. It also found that too often, teachers spent too much time talking about the sport rather than practising it⁴⁴⁹.

The schools themselves seem to have reacted positively to the Observer's scheme. Since the newspaper started its campaign, it was learned that some of them had entered into a joint anti-obesity initiative between the fitness industry and state schools. Under this plan, schoolchildren would enjoy free use of private gymnasias and fitness lessons with personal trainers. High-street gyms were to send specialist staff into primary schools to teach children exercise routines, as well as providing advice on healthy eating and allowing children to use their premises during the day. The "adopt a school" scheme is to commence in January 2004 in Bristol, Birmingham, Sunderland, Barnsley, Milton Keynes and Islington, and be extended throughout Britain five months later⁴⁵⁰.

Under the scheme, one school in each area will be twinned with a gymnasium as part of a campaign initiated by the Fitness Industry Association (FIA) under the banner "On the Road 2010", which aims at halving the number of overweight Britons by the year in question. As an FIA spokesman explained:

"We are offering this initially to 10 and 11-year-olds because research shows that many of them stop doing regular physical activity when they go to secondary school. The best way to stop people becoming overweight is to encourage them while they are young to adopt positive, healthy behaviour"⁴⁵¹

However, not all news on this front has been positive. There is continued evidence of many schools taking an over-cautious approach towards the organisation of school sports- a trend to which attention has already been drawn in these columns⁴⁵². Regardless of the considerations which inspire it – which can range from trepidation before the current "compensation culture" to well-meaning but misguided attempts not to hurt pupils' self-esteem – such an attitude can hardly be described as conducive towards increased sporting participation by the nation's youth. However, it seems that they are being positively encouraged to take this line from some quarters.

Thus at the beginning of the 2003 school year, it was learned that hundreds of schools had been advised to consider preventing pupils from playing football or rugby because the ground had become too hard following a long, hot summer. This advice was issued by Groomfields, a Cambridge-based ground maintenance company, warning 250 schools about the dangers of using playing fields which had received no substantial rain since July. Several schools acted upon this advice and halted contact sports until such time as rain had softened the ground. This view was not shared by the Rugby Football Union, which stated the view that there was nothing to suggest that sport was any more dangerous because of weather conditions⁴⁵³.

Belgian Government "caves in" to Formula One and tobacco industries

Tobacco advertising is increasingly being outlawed in the western world, and pressures to that effect have been exercised in countries which have held out against this trend. One of the latter countries was Belgium. At one point, it seemed as though the parliament of that country was about to introduce legislation instituting one of the toughest and most comprehensive advertising bans in Europe, and indeed, a total ban on tobacco advertising was due to take effect in August 2003, with advertising being prohibited except at cigarette outlets. However, following a vote in the Parliament's Lower House – and a backroom deal involving certain interested parties – the ban will not come into effect until July 2005⁴⁵⁴.

This outcome represents a major victory for Formula One boss Bernie Ecclestone, who had objected to the legislation as being much tougher than was required by the relevant EU laws due to take effect in two years' time. He argued that the Belgian law would unfairly outlaw roadside billboards and the car sponsorship which underpins much of his lucrative sport. He had already stripped Belgium of its right to hold its annual Grand Prix in response to the legislative proposal in question – a move which was a serious setback for the

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French-speaking Walloon area in which the GP is held. As a result, this represented a major embarrassment for Belgian Prime Minister Guy Verhofstadt, who had been re-elected earlier that year. Walloon officials subsequently confirmed that Mr. Ecclestone was restoring the Belgian Grand Prix by way of reward for the postponement⁴⁵⁵.

Beijing Olympics rescheduled on health grounds

In late June 2003, it was learned that Olympic officials had rescheduled the 2008 Beijing Olympic Games to take place two weeks later than originally envisaged. This was done in order to avoid the worst of the city's heat and humidity which prevails at around that time⁴⁵⁶.

Sports grounds earmarked for safety certificates (UK)⁴⁵⁷

In late May 2003, an order was made under the safety of Sports Grounds Act 1975, which designated the Neasham Road stadium in Darlington and the National Hockey Stadium and Conference Centre in Central Milton Keynes (Wimbledon FC's new ground) as sports grounds requiring a safety certificate.

Nationality, visas, immigration and related issues

Major sports events continue to arouse illegal immigration fears

Previous issues of this journal⁴⁵⁸ have drawn attention to the potential for unlawful immigration presented by certain sporting competitions in this country which attract overseas competitors who arrive in this country only to disappear without trace even before the competition has taken place. This has prompted the organisers of certain events to take precautions against this contingency. Thus the Royal & Ancient Golf Club took the unusual step of checking that the 24 players from Ghana and Nigeria who entered the qualifying competition for this year's Open Championship were genuine professional golfers. This followed the previous year's episode when 47 Nigerians entered, each paying the £100 fee, but only four of them materialised when some 2,000 hopefuls teed off at the 16 designated regional courses in their attempt to qualify for the event at Muirfield. Speculation abounded that at least some of them were involved in an unlawful visa or immigration plan⁴⁵⁹. (Mystery continues to surround that incident, with a Home Office spokesperson declining to comment when asked about this case by a national newspaper⁴⁶⁰.)

There were similar suspicions the following month, when five cricketers from an Indian women's touring

team vanished three days into a month-long tour. The women in question, aged between 19 and 25, were staying at two houses in Hounslow, West London, when they were reported as missing. One of them was seen carrying luggage and climbing into a car with two men with whom she was apparently acquainted. The other four informed their team mates that they intended to visit friends in the other house, but were not seen again. The five women concerned all left their passports behind and were believed to have acted together⁴⁶¹. Detectives launched a missing persons enquiry⁴⁶¹.

Athletes involved in immigration clampdown

In early August 2003, the organisers of the Norwich Union Grand Prix (athletics) at the Crystal Palace were forced to make a hasty readjustment to their schedule of events when news came from France that the former African games champion Tacko Diouf had been jailed. The 26-year-old from Senegal had been detained by French officials as she attempted to fly from Paris apparently because her French visa had expired. Even though she had a valid British visa, which would have enabled her to compete in the Grand Prix, she was not allowed to leave⁴⁶².

Sweden also seemed to be tightening up on the visas of foreign athletes. Around the same time as the incident outlined above, the Dagens Nyheter Galan meeting in Stockholm had to take place without one of its top performers, the Kenyan 3000 metres steeplechaser Wilson Boit Kipketer, after Swedish authorities in Nairobi refused him authorisation to compete on the grounds that he lacked the appropriate visa⁴⁶³.

Foreign Secretary's personal intervention to prevent deportation of Australian player's wife

In late August 2003, it emerged that Foreign Secretary Jack Straw intervened personally to prevent the wife of an Australian Premiership footballer from being deported. He apparently stepped in when Sarah, the wife of Blackburn Rovers star Brett Emerton, was informed that she had no right to reside in Britain. It emerged that immigration officials had exercised discretion on three occasions to allow her into the country, and that the Foreign Secretary even wrote to thank a senior official at the Waterloo Eurostar terminal for his assistance in this matter. According to sources at Waterloo, Mrs. Emerton had applied to be admitted to Britain as a dependant of her husband after the latter had been transferred from Dutch club Feyenoord in July 2003. She was informed that she would have to return to France, from where she had travelled after visiting friends, then travel to the Netherlands to apply for a visa. Mr. Straw, who is MP for Blackburn, intervened

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after she contacted her husband's club, and enabled Mrs. Emerton to remain in Britain⁴⁶⁴.

This was not to the liking of Michael Ancram, the Opposition spokesman on home affairs, who wrote to Mr. Straw claiming that the latter had appeared to have demanded special treatment for the footballer's wife. He added that such suggestions would be of considerable irritation to the many deserving cases of people who are not so well connected⁴⁶⁵.

Rugby League's enfant terrible given British citizenship

In early August 2003, it was learned that Julian O'Neill, the enfant terrible of Australian Rugby League who holds the unique distinction of having been dismissed by both the Brisbane and the London Broncos, has received British citizenship, and could even be eligible to face his erstwhile compatriots at the Test level. Mr. O'Neill, who was transferred to Widnes from Wigan this season, took advantage of the Nationality, Immigration and Asylum Act passed in April this year. The latter corrected an anomaly under which having a British father permitted citizenship, but having a British mother did not. Mr. O'Neill's mother hailed from Liverpool, as a result of which he has now been removed from the game's overseas quota⁴⁶⁶.

Mr. O'Neill's eligibility for the Great Britain team, however, remains in some doubt, since he did actually play for Australia once, in 1997, although this was a Super League international rather than an official Test. If he were to be selected to play for Britain, an interesting legal case might ensue⁴⁶⁷.

Cuban triple jumper has British passport application refused

Yamile Aldama is a top triple jumper, who has lived in London since November 2001. She has a British son and has applied for a passport for the past two years, but the Home Office have yet to give her one. This may prevent her from competing in the 2004 Olympics in Athens, and has resulted in her casting her eyes elsewhere for a suitable flag under which to take part – unless she can benefit from a "fast-track" application. At the time of writing, this had not yet been granted⁴⁶⁸.

Olonga issued with five-year UK visa

The role played by Zimbabwean cricketer Henry Olonga in protesting against the regime of his home country on the occasion of the World Cup earlier this year has been extensively documented in the previous issue of this organ⁴⁶⁹. It was also reported that he had sought refuge in Britain in order to elude the ungentle attentions of the Zimbabwean secret police. In October 2003, Mr. Olonga was granted a five-year visa to remain in Britain⁴⁷⁰.

Dual nationality rule change approved by FIFA

In late September 2003, football world governing body FIFA, at its Congress held in Qatar, approved a statute allowing young players having dual nationality to switch countries. Players who have competed for one country may change to another provided that they hold dual nationality and did not appear in a full senior international match⁴⁷¹.

Other issues

Broadcasting watchdog upholds bookmaker complaint against BBC

The corruption scandal which has rocked the world of racing over the past two years has been extensively covered in the previous two issues of this journal⁴⁷². It will be recalled that in a edition of the BBC's flagship programme Panorama, which purported to expose widespread corruption in the Sport of Kings, various allegations of impropriety were levelled against various figures involved in racing. One such accusation had been made by the Jockey Club's former head of security, Roger Buffham, which had implied that bookmaker Victor Chandler was still offering "no lose" betting accounts even after these had been outlawed by the racing industry. Mr. Chandler applied to the Broadcasting Standards Commission, which upheld his complaint against the BBC for this allegation⁴⁷³.

PCC "unlikely to take action" against newspaper over Bruno headline

It is a sad fact that Frank Bruno, the former heavyweight world champion boxer, has experienced a decline in his health of late. In the course of September, these problems caused Mr. Bruno to be detained in a psychiatric unit under the Mental Health Act (or "sectioned" as the media inaccurately describe this process). This naturally did not escape the attention of the media, some of which covered this story with less discretion than others. Particularly *The Sun*, the sensationalist magazine sometimes inaccurately described as a newspaper, distinguished itself in this regard, calling Mr. Bruno "bonkers" and a "nut" who had been "locked up"⁴⁷⁴.

This was followed by a deluge of complaints from outraged readers, which at least caused the paper to tone down its initial front-cover headline "Bonkers Bruno locked up", with later editions describing the boxer as a "hero" under the headline "Sad Bruno in mental home". The insensitive nature of the original coverage was described as "ignorant" by Marjorie Wallace, Chief Executive of mental health charity SANE. The Press Complaints Commission (PCC) fielded ten

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complaints from members of the public concerning the nature of this coverage. The Commission, however, responded by announcing that it was unlikely to take action because the complaints emanated from third parties⁴⁷⁵. This is a loophole which has come in for a good deal of criticism from certain quarters.

PCC rules that Sunday paper did not break rules in Beckham kidnap case

The bizarre saga of the arrests which followed allegations that a plot to kidnap and hold to ransom Victoria Beckham, the wife of England football captain David Beckham, as well as the couple's two children, has been extensively documented in the last two issues of this journal⁴⁷⁶. The arrests were made after the News of the World Sunday newspaper had tipped off Scotland Yard about this matter. In the event, the entire case collapsed, but resulted in five innocent men spending seven months in jail as a result of the newspaper's story.

This affair became the subject-matter of a complaint to the Press Complaints Commission (PCC). In mid-July 2003, the Commission issued its ruling, in which it held that the News of the World did not infringe the rules which prevent payments to criminals and witnesses in criminal trials. It stated that the newspaper was justified in paying £10,000 to Florim Gashi, a Kosovan parking attendant residing in South London, for the information which led to the story. The PCC accepted the contention that Mr. Gashi was not a witness to the trial at the time, and that he was not being paid for a story relating to a crime for which he had been convicted. It also accepted that the story was in the public interest. This stance will give ammunition to critics who claim that the Commission is not sufficiently strict with the excesses of the tabloid newspapers⁴⁷⁷. More particularly the editors of several newspapers have compared its decision unfavourably to the PCC's earlier ruling in which it had censured The Guardian for paying a standard fee for an article written by a prisoner in jail with Lord Archer⁴⁷⁸.

(For the criminal law implications of the newspaper's role in this affair, see above, p. 000.)

MI6 plotted spying role for sport, alleges book

That the leading exponents of sport have a role to play in international relations is a factor which prompted the author of this column to devote an entire section to this aspect (see above, p. 000). However, there has hitherto been no suggestion that sporting figures had involved themselves in the murkier realms of international espionage. This assumption may need to be revised as a result of a recent book, *The Spying Game* authored by Michael Smith. In this publication, he alleges that at a

certain point during the Cold War, MI6 proposed that cultural and sporting bodies should be used in order to spy on the Soviets.

Apparently the plan was drawn up at the end of World War II when MI6 was turning its attentions to the Soviet Union. One method suggested was to invite Russian teams to Britain in the expectation that the latter would reciprocate. The document in question, called "Penetration of Russia (sic) to Obtain Intelligence Information", stated that there were many advantages in using sporting, cultural and commercial organisations as spies. It did not cost much government cash, and the individuals earmarked for infiltration, both operatives and agents, had natural reasons to meet each other. At a certain point, the document describes the way in which companies could begin by asking Russian technicians to their laboratories, secure in the knowledge that the Russians would respond with a similar gesture. It goes on:

"The same could be said of music, ballet, drama and the like, also sport. As far as this is concerned, a start should be made now, by preparing the ground with the Football Association to get them to start work immediately the right moment comes along"⁴⁷⁹

Whether that "right moment" ever materialised is not made clear in the book.

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Planning law

London football clubs' planning turmoil continues...

Arsenal FC/Tottenham Hotspur

When this column last broached this subject⁴⁸⁰, it was reported that Arsenal FC remained determined to site its new home at the Ashburton Grove stadium, in spite of the planning difficulties which the project had encountered and the financial worries which were beginning to give cause for concern in the boardroom at Highbury. It categorically dismissed a plan to engage in a ground-sharing scheme with deadly rivals Tottenham Hotspur at the new Wembley stadium once the latter had been completed. Tottenham, however, had been markedly more receptive towards this plan, particularly as some of the shortcomings of its current home at White Hart Lane, particularly in as regards its accessibility, were becoming apparent.

As the new season got under way, however, there were some indications that the ground sharing proposal was gaining in appeal at the Arsenal. This issue appeared to come down to a disagreement in the Highbury boardroom between Daniel Fiszman, one of the club's wealthiest and most influential directors, and David Dein, the Arsenal and Football Association (FA) Vice-Chairman. The former was adamantly opposed to the project, whereas Mr. Dein seemed to be receptive to the Wembley alternative. (Whether this view had been furthered by the fact that Mr. Dein's son had recently contracted matrimony with the daughter of a Spurs director is impossible to tell) FA Chief Executive Mark Palios had also announced that a ground share between the two teams was possible at his first press conference⁴⁸¹.

Speculation over the possibility of such an outcome continued when it was announced a few days later that Arsenal had set themselves a 15-week deadline to secure funding for their new stadium, after which they would consider scrapping the Ashburton Grove project, or shelving it indefinitely. Although the Premiership club was able to announce a record turnover of £117.8 million, as well as a pre-tax profit of £4.5 million, the Board considerably softened its stance on the fate of the £350 million stadium development. In order to complete the move in time for the 2006-7 season, construction had to commence before April 2004. Having already delayed the move from the initially projected date of August 2005, the board was seeking agreement on the financing details before the New Year. It should also be noted that the apparently healthy financial position set out above concealed the fact that over the previous 12 months, the club had seen a small cash surplus plunge to a debt totalling £60.2 million because of borrowing for the new stadium⁴⁸².

As if to emphasise that the club's financial position was far from problem-free, Arsenal plunged to a humiliating defeat to Internazionale Milan the following week, underlining the fact that manager Arsène Wenger had been unable to bring significant reinforcements the side – which fell away so badly the previous season in its pursuit of the Premiership title – during the summer's transfer window. However, the view generally held within the club was that the squad needed to move away from Highbury if it was to maintain its long-term challenge to the dominance of English football by Manchester United. It also insisted that the Board were solidly united behind the Ashburton Grove project⁴⁸³.

The following week, the ground sharing proposal was being kept alive – this time by Roger Draper, the Chief Executive of Sport England, which had a direct interest in the matter as it is this body which was funding the new Wembley project. Although he recognised that this would involve planning problems, particularly since the planning approval for the Wembley stadium only allowed for 19 football matches, indicated that the Arsenal/Spurs ground sharing proposal remained a possibility⁴⁸⁴. However, the project seemed to receive a killer blow a few days later, when Arsenal's managing director, Keith Edelman, announced at the club's Annual General Meeting that the Ashburton Grove project was "progressing satisfactorily". He once again stressed that the move was necessary for financial reasons and to allow more fans to watch the game⁴⁸⁵. Shortly before this AGM, it had been revealed that a consortium of banks had agreed to provide the £260 million which the club required to build its 60,000 strong stadium⁴⁸⁶. The banks agreed to sanction the release of the money on condition that compulsory purchase orders were placed on two properties on the Ashburton Grove site, giving the club vacant possession of the land. This issue was under consideration by the office of Deputy Prime Minister John Prescott, a decision on which had not yet been made by the time of writing⁴⁸⁷.

Just before going to press, this column also learned that the Ashburton Grove project had received the blessing of London mayor Ken Livingstone, who stated that football clubs should remain in their own community. He specifically disapproved of any suggestion that the North London Premiership clubs should share the new Wembley, adding:

"If I had the power I would have stopped Wimbledon from moving to Milton Keynes. Wimbledon has been a disaster. You have got to keep football clubs in their neighbourhood. It may be that West Ham want to move into the new Olympic stadium, but then that is a mile from their existing one"⁴⁸⁸

6. Administrative Law

In order to assist Arsenal with their plans, the mayor has provided, through the London Development Authority, funding to the tune of around £10 million. Whilst this is not an enormous sum in the light of the overall cost of the project (see above), it is a sure sign of the commitment to the Ashburton Grove stadium which Livingstone feels, not only because it is good for the local community, but also because it will provide affordable housing.

Mr. Livingstone has also considered the transport facilities available around White Hart Lane, the home of rivals Tottenham. He had discussed extending the Victoria Underground line from Seven Sisters to Northumberland Park, but ruled this out on grounds of cost. However, he pledged himself to improve the road network around the ground⁴⁸⁹.

Fulham FC

Another London club experiencing planning difficulties, and for which a ground-sharing scheme had been proposed as a way out of their difficulties, was Fulham FC. Previous issues have extensively dealt with the trials and tribulations experienced by this club in ultimately finding its proper home⁴⁹⁰. It will be recalled that what had at first appeared to be a redevelopment scheme of the club's ancestral Craven Cottage home rapidly turned into a rather more controversial scheme to sell off the site as a housing redevelopment. This was followed by some intense campaigning, involving some of Craven Cottage's favourite sons, but which did not seem to have the same objective – whereas some wanted the club to return to Craven Cottage, others were encouraging the club to make overtures to Chelsea in order to arrive at a ground-sharing arrangement at Stamford Bridge.

Ultimately, it was decided that the club should return to the Cottage after its temporary exile, once it appeared that the ground-sharing proposal was going nowhere fast. The scheme will involve bolting seats to three sides of the ground, thus increasing the latter's capacity to 22,000. This was something of a "cut-price" solution, but definitely pleased the club's traditionally-minded fans. This makeshift outcome has apparently not prevented Fulham owner Mohammed Al Fayed from abandoning his original scheme to build a 28,000 capacity ground at the Cottage. The club will continue to play at Loftus Road for the remainder of this season, but return to their ancestral home in time for the 2004-5 season⁴⁹¹.

... as do Merseyside's

There appears to be an uncanny parallelism between the locational difficulties experienced by the North London top Premiership clubs and their counterparts on Merseyside. Previous issues⁴⁹² have highlighted the planning difficulties experienced by both Everton and

Liverpool FC in finding new homes. As is the case with the North London clubs, it has also been proposed that the two Merseyside rivals should engage in a ground-sharing arrangement.

In fact, in September 2003 the Liverpool City Council wrote to both clubs requesting them to consider a proposal to that effect, which would have them share a stadium built at public expense, possibly in the docklands area of the city. The Council's Chief Executive, David Henshaw, stressed the financial advantages which this scheme would entail for both clubs⁴⁹³. However, Liverpool FC's Chief Executive, Rick Parry, lost no time in distancing his club from such a proposal. He insisted that the club were pressing ahead with their own plans to relocate to their own new ground at Stanley Park, where it was hoped the side would start playing in 2006. He added:

"This is more than just a new stadium in Stanley Park, it is about the regeneration of Liverpool itself. The club have been working closely with the Anfield Breckfield Steering Group (a local residents' group) and city council for the past three years to put together a comprehensive regeneration package which addresses the needs of the wider community"⁴⁹⁴

He added his conviction that the club enjoyed the support of the local community, stressing that these proposals were submitted to the public in an extensive consultation exercise involving 19,500 households, resulting in a strong vote in favour of the plans⁴⁹⁵.

Shortly afterwards, in fact, Liverpool FC moved a step closer to finding a new home when they submitted a planning application for the £80 million project. Mr. Parry expressed his confidence that the new stadium, located fewer than 300 yards from the club's venerated Anfield ground, would contribute towards Liverpool's European Capital of Culture accolade in 2008⁴⁹⁶.

As for their rivals Everton, at the time of writing no further news was forthcoming about the club's plans following the club's aborted plans to move to the King's Dock area, as was reported in the previous issue⁴⁹⁷.

Cardiff FC given authorisation to build new ground

Another club seeking pastures new is Welsh side Cardiff City. Since falling into the hands of Sam Hammam, the controversial businessman, the latter has nurtured plans to move the club out of its current Ninian Park location, which has a maximum capacity of 22,000. In mid-September 2003, the club were given authorisation to build a £165 million 60,000 seater stadium by the Welsh Assembly planning minister Carwyn James. The club will now sign legal

6. Administrative Law

agreements with the local council before commencing work on the new home, which will also include an athletics stadium, hotel, health and fitness complex and shopping centre. As proposed, the stadium will offer 30,000 seats in two tiers, with a third tier, raising capacity to 60,000, to follow⁴⁹⁸.

Broncos to remain at Griffin Park

A London Rugby League club sounds about as plausible as an Albanian cricket field, yet the London Broncos have kept going against considerable odds related to both location and culture. It has to be admitted that during their existence they have led a somewhat nomadic life, starting at Fulham's Craven Cottage and ending at Griffin Park, home to Nationwide League club Brentford two years ago. However, in mid-August 2003 the news broke that the club had agreed a deal to extend their tenancy at Griffin Park for a further five years. Chief Executive Nic Cartwright insisted that the club's ultimate aim was to find a home of its own, but expressed his appreciation of the club's current location, which had undergone considerable refurbishment⁴⁹⁹.

Judicial review (other than planning decisions)

Upper noise level limits for sporting facilities do not apply directly to children's ball game areas. German administrative court decision⁵⁰⁰

In Germany, there applies legislation under which the noise levels emanating from sporting facilities may not exceed certain levels (Immissionsrichtwerte). At a certain point, the appropriate authority issued instructions to the operator of a ballgame and skating area used by children up to the age of 14 as to the maximum permissible noise levels under this legislation. The operator objected to these instructions, and brought an action to attempt to have these set aside. The question arose before the relevant administrative court (Verwaltungsgericht) was whether the legislation in question applied to this type of facility. At first instance, the court awarded the action to the complainant. The defendant sought to have this decision overruled by the Supreme Administrative Court (Bundesverwaltungsgericht).

The Court found that, for the legislation to be directly applicable to the installation in question, it was necessary for the latter to be intended as a sporting facility. Because of the facts as established by the court whose decision was under challenge, this was clearly not the case. The lower court had found that, because of its intended use, the category of people using it and

its status, the facility in question was more akin to a children's playground than to a communal sporting area which was open for use by older teenagers and young adults. Small areas intended for the leisure activity of children up to the age of 14 could not therefore be qualified as sporting facilities within the meaning of the legislation. The authority which issued the order in question normally dealt with facilities involving team sports, school sports and similar activities. The restrictions imposed on the facility in question were not appropriate for small areas which were attended by hardly any spectators, and were not supervised by any referee or other officials.

Nevertheless, the Court ruled that, even though the noise level legislation did not apply directly to children's playing areas, its applicability to individual cases could not be automatically excluded. The noise levels emanating from such facilities needed to be determined on a case-by-case basis, in the light of specific investigation and measurement criteria which were also available in the relevant legislation.

The Court accordingly dismissed the application for review and confirmed the challenged decision.

Sport is not a "fundamental right" and therefore cannot justify a summary administrative order. French Supreme Court decision⁵⁰¹

Under recent changes made in French administrative law, it is possible to apply for an emergency order such as a *référé-liberté*, being a summary order enabling the administrative courts to take all such measures as are necessary to protect a fundamental freedom which may have been seriously and unlawfully infringed by a legal person, whether in the public or private sector, in the pursuit of its duties. A number of handball players had applied for such a summary decision against the rulings of the French Handball Federation which drew up the list of players qualified to play in the 2001-2002 championship and which registered the results of the first two French championship dates.

That there was an emergency here was not in doubt, since the players were in a suspended state of activity whilst the championship had already commenced, and the results in question, if they were allowed to stand, would cause serious loss to the club to which the players belonged. The next question which the Supreme Administrative Court (Conseil d'Etat) had to face was whether it was dealing here with a fundamental freedom, given the general interest inherent in the Law of 16/7/1984 on the organisation and promotion of sport. The Court replied in the negative, which rendered superfluous the question as to whether the handball federation had actually infringed a fundamental freedom.

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The commentator Jean-François Lachaume⁵⁰² observes that it should not be concluded from this decision that the French administrative courts have downgraded the freedoms which are related to sporting activity. They have shown that they considered them as true rights, but not of such a fundamental nature as to permit the type of summary decision involved in this case. The author also wonders whether it was appropriate to apply for this type of summary decision, given that there was already a remedy available to the applicants, which takes the form of a conciliation procedure having the effect of suspending the enforcement of the disputed decision, and which is constitutes a compulsory step to take before any judicial proceedings are initiated. The author arrives at the conclusion that this conciliation procedure is an obstacle to the summary administrative procedure which was under consideration in this case, since the effect of both procedures in this case would have been the same.

Boxer may apply for summary administrative decision against a disciplinary decision even during the conciliation period provided⁵⁰³. French administrative court decision

Another administrative remedy which has been introduced by recent legislation in France is that of the *référé-suspension*, a summary order which enables the administrative courts to suspend, in cases of emergency, the enforcement of an administrative decision or of some of its effects, where the applicant can make out a *prima facie* case for casting doubt, at the preliminary inquiry (instruction) stage, on the lawfulness of the decision challenged. A boxer who had been disciplined by the French Boxing Federation had applied for such an order against this disciplinary decision.

Before deciding whether there were in fact grounds for casting doubt on the lawfulness of the measure, the Administrative Court (Tribunal administratif) of Rouen had to give a ruling on an incidental plea of inadmissibility raised by the boxing federation. The latter argued that, since the boxer had already initiated a conciliation procedure before the French National Olympic and Sporting Committee (Comité national olympique et sportif français – CNOSF) in accordance with the provisions of the French 1984 Law on the organisation of sport, and since this procedure had not yet been completed, he was not yet entitled to bring an action before the court sitting in summary proceedings.

The Administrative Court followed the established line in the case law laid down by the Supreme Administrative Court (Conseil d'Etat), which is that the summary suspension order in question has the objective of enabling, whenever it is proper to do so on grounds of emergency, the suspension to take place of an

administrative decision challenged by the applicant, and that therefore this opportunity must also be available in cases where a preliminary administrative remedy is imposed by legislation or regulation before the administrative courts may be addressed, as long as that preliminary remedy did not have a suspensive effect. The suspension of this decision may be applied for without waiting for a ruling on this preliminary remedy, as long as the applicant can prove that he had initiated with the administrative authority in question an application for the annulment or amendment of the decision under challenge. The Administrative Court therefore held that the boxer's application was admissible.

The attentive reader may have noticed that this decision goes against the opinion given by the commentator annotating the decision dealt with in the previous section. This does appear to be a highly controversial topic in French administrative law circles. Commenting on the instant case, the author Jean-Christophe Breillat⁵⁰⁴ describes the decision under review as a strange one. The Supreme Court's decision, he writes, only applies as long as the preliminary remedy has no suspensive effect. However, this is precisely one of the principal characteristics of the conciliation procedure before the CNOSF, since the relevant section of the 1984 disposes that, in the case of an individual decision, its enforcement must be suspended as from the date on which the letter designating a conciliator has been notified to the body which took the disputed decision. The author states the view that only in three circumstances could an application for a summary order be admissible in spite of the CNOSF conciliation procedure having been initiated:

- the decision in question was not an individual decision (for in such cases the initiation of the CNOSGF procedure has no suspensive effect);
- even though the decision in question is an individual one, the conciliator considered it necessary to lift the suspensive effect – as in certain cases he is allowed to do by the 1984 Law;
- the application took place in the very brief period between the initiation of the CNOSF procedure and the letter notifying the parties involved of the designation of a conciliator, which is the point at which the suspensive effect of the conciliation procedure commences.

Other issues

[None]

7. Property Law

Land law

[None]

Intellectual property law

Former Olympic runner Bedford seeks compensation for “118 118” image rights

When, in August 2003, the age-old 192 number for directory inquiries was replaced by 14 different numbers (in the best interests of the consumer, of course) this triggered off a comprehensive advertising campaign for one of the new services, being the 118 118 number. With the handlebar moustaches and 1970s hairstyles of the two runners featured in the advertisement, his campaign appears to have produced spectacular results for The Number, the company operating this number, since it is outperforming all its rivals in this market. However, one person who has been far from amused by this campaign is former Olympic runner and 10,000-metre record holder David Bedford, who claims that the firm in question has used his image without his authorisation. He is reportedly seeking compensation in the region of £200,000. He alleges that, if one considers the way in which he looked in 1973 (the year in which he broke the record referred to above) the representation could not be more exact⁵⁰⁵.

The Number has denied modelling its campaign on Mr. Bedford, who is now race director of the London Marathon, and dismissed the latter's claims as “ridiculous”. It reported that, although Mr. Bedford had not as yet served a writ, his solicitor had written to it claiming compensation. A spokesman for the company pointed out that sportsmen in the 1970s wore moustaches and long hair. Mr. Bedford, for his part, stated that counsel had been instructed and that the legal process would “decide who is telling the truth”⁵⁰⁶.

The present author can only comment that Victoria Beckham does not seem to be the only one to bring fatuous court actions⁵⁰⁷.

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

Oliver Kahn wins image rights ruling⁵⁰⁸

Image rights are becoming an increasingly prominent component of the intellectual property rights available to the performers in the world of sport and entertainment. This applies both in this country and abroad – even in Germany, if a recent case involving Bayern Munich and Germany goalkeeper Oliver Kahn is anything to go by.

Mr. Khan brought an action against US games producer Electronic Arts over the use of his name and image in the popular FIFA 2002 computer football

game. The court ruled in the claimant's favour, holding that the distribution of the computer game in question, because of the likelihood of constant repetition, infringed the footballer's right to his own image and his general “personality” rights. The Court also indicated that the compensation awarded – to be assessed at a separate hearing – is to be substantial. The US company had raised a number of defences. It maintained that the figure representing Mr. Kahn was not a significant element in the game, given that the latter featured a number of other players. The Court dismissed this defence on the grounds that the game was to be marketed in Germany and that in that country the numerous people playing the game would regard Kahn as the top goalkeeper. It also dismissed the defence that the company had secured permission from FIFPRO (the international footballers' Trade Union) to allow Mr. Kahn to be featured in the game, since the latter successfully argued that he had not given the trade union any authorisation to give such consent.

The Court pointed out that, under German law, a personality of contemporary history could prevent the distribution of his/her image where it was justified so to do. In his capacity of goalkeeper to the German national team, Kahn was, in relation to the World Cup, a personality of contemporary history. The fact that his character was monopolised by its use as a player in a computer game was, in the court's opinion, sufficient grounds for allowing the claimant to prevent the marketing of his image. Electronic Arts could not plead artistic freedom to justify such marketing, since the court held that there was a conflict between this freedom and the fundamental rights of a third party, in this case the renowned goalkeeper. In addition, whereas Mr. Kahn's personality rights would be infringed by distribution of the computer game, the defendant's artistic freedom to distribute would not be compromised to any significant extent by a prohibition on the use of his personality. The Court also ruled that the use of Mr. Kahn's name in the computer game infringed the latter's general personality rights in that it infringed his right to choose the manner in which his name might be used.

As regards the level of the loss incurred, the Court dismissed the US company's assertion that the connection between the computer game and the 2002 World Cup made this a once-only situation. The Court so ruled because the excellent performance of the German team made it likely that the game would be redistributed for sale during later competitions such as Euro 2004 and the 2006 World Cup.

The only comfort which Electronic Arts drew from the decision was that the Court dismissed a similar action brought by the footballer in relation to the televised

7. Property Law

advertising of the computer game, on the grounds that the goalkeeper featured in the advertisement was not recognisable as Mr. Kahn. It was a stylised representation of a goalkeeper whose face filled the screen in a close-up for a split second. The character's featured presented no individual characteristics which would have created the impression that a living person was the subject. Admittedly the character in question had blonde hair, as is Mr. Kahn's, but the Court held that this was not a characteristic which was sufficient to make the figure similar to the German goalkeeper.

Court of Appeal bans football stickers over copyright

It will be recalled from the previous issue⁵⁰⁹ that the Panini company had been successfully sued by the English Premier League and various clubs competing in it on the grounds that its Football 2003 Album, which included stickers of players containing reproductions of the Premier League's logo and the relevant club badge, violated their copyright. Panini appealed against this decision. The Court of Appeal, however, confirmed the original decision⁵¹⁰.

No further details were available at the time of writing.

Adidas stripes do not constitute trade mark, claims EU Advocate-General

This case is dealt with below, under the heading "EU Law" (see below, p. 000).

Trade names "loto" and "loto sportif" may not be used in magazines and newspapers. French court decision⁵¹¹

In this case, the La Française des Jeux company had brought court proceedings against the Institut Européen de Pronostics Sportifs (IEPS) company for infringement of its trade mark rights. IEPS had used the trade names Loto and Loto Sportif in several of its magazines without the claimant's permission. The District Court (Tribunal de Grande Instance) of Paris awarded the decision to the claimant, and not only issued an injunction to the defendant prohibiting it from repeating this practice, but also an order for the payment of substantial damages. The defendant appealed against this decision before the Paris Court of Appeal (Cour d'appel).

The Court dismissed the appeal. It held that the registered trade names Loto and Loto Sportif should apply to lotteries and games. The term "Loto" was an age-old term applied to a process whereby six tokens are drawn at random and award a prize to the player who had these six numbers on his or her form. It is therefore a game of chance (jeu de hasard) and therefore belonged to the lottery category. The addition of the term "Sportif" to the word "Loto", giving the impression that the game of chance in question was

being applied to sporting activity, did not confer on the term "Loto" a distinctive character enabling it to be distinguished from the general use of the word "Loto".

The appellant had therefore infringed the claimant's trade mark rights.

Sportsmen's image rights examined in the available literature

There have recently appeared a number of articles on the subject of sporting performers' image rights.

In the first⁵¹², practitioner Mark Gay focuses on the commercial implications of footballer David Beckham's move from Manchester United to Real Madrid. One of these concerned £20,000 per week by way of "image rights". He reminds us that image rights are not recognised as a species of right in English law. This had implications for taxation law, since in one particular case, decided in April 2000, the Special Commissioners of the Inland Revenue had to decide whether these rights were payments for valuable consideration or simply a tax dodge. He also points out that, although image rights as such do not exist in England, the courts have come very close to recognising the substantive content of such contracts, citing the Irvine v Talk Sport case (reported in an earlier issue of this journal⁵¹³) as an example.

In the second⁵¹⁴, solicitor James Hennigan critically examines some of the recent examples in this field, both at home and abroad. He first of all considers the Oliver Kahn decision, reported above (p. 000) and comments that Mr. Kahn's successful claim could give rise to others against it. The German Football Association (Deutscher Fußballbund – DFB) could also bring an action against the US company concerned because it failed to secure permission from the DFB to feature the German national team strip in the contentious computer game. In addition this game enables users to select players from 75 national teams in 16 leagues – how many of these other players have had their images used without giving the company permission to use them?

He also features, almost inevitably, the image right implications of David Beckham's transfer to Spanish champions Real Madrid (see above, p. 000), and expresses his lack of surprise that Real were prepared to pay the £25 million asking price for the England captain, knowing that its merchandise sales could increase by some £100 million with the English player's arrival. He also focuses on the disagreements expressed by various parties over the manner in which the contracts linking players to the 2003 Rugby World Cup are regulated⁵¹⁵.

His general conclusion is that the outcome of these various disputes on image rights will determine who really calls the shots in the world of sport: the federations, the clubs and their sponsors, or the players and their agents.

7. Property Law

New Lords for the Rings? Protecting the Olympic symbol in German law. Academic article⁵¹⁶

Against the general interest in – some would call it obsession with – London's bid for the 2012 Olympics, the bids submitted by other cities has aroused little if no interest in this country. Thus it is not generally known that for Germany, the city of Leipzig has been selected to tender for the right to host the 2012 Games. In the midst of all the euphoria which this has occasioned in the Eastern part of Germany (the former German Democratic Republic) there have arisen some sobering considerations as to some of the practical side-effects of this bid should it be successful. One of these is the legal protection given to the commercial aspects of the Games.

These legal aspects have become increasingly important over the years. Past issues of this Journal⁵¹⁷ have borne witness to the manner in which the Sydney Olympics of 2000 have been the particular focus of legal interest, and more particularly in relation to the intellectual property rights involved. It is precisely this issue which has captured the imagination of the author of the article in question. He points out that, in awarding the Games, the International Olympic Committee (IOC) has particular regard for the legal protection which the country in question can give to the event's commercial aspects. This issue is particularly crucial in the case of any bid by a German city, as there is currently raging a dispute between the German national Olympic committee, its commercial arm, the German Olympic Company (Deutsche Olympische Gesellschaft) and a marketing company on the utilisation of that most characteristic symbol of the Games, i.e. the Five Rings. It is therefore important to assess the current position of the "Rings" under German intellectual property law.

The author examines the various headings of intellectual property law under which the Olympic symbol is in principle capable of legal protection. Generally speaking, his conclusion under each of these headings is that the level of protection available is rather weak. In some areas, the level of protection has actually been deliberately reduced. This was the case, for example, as regards the trademark protection of the symbol. Until recently, the black-and-white representation of the interwoven rings was a registered trade mark. In 2000, however, the German trademark and patent authority cancelled this registration, on the basis that they did not possess adequate distinguishing properties as demanded by the Law on Trade Marks (Markengesetz). (The author at this point expresses his doubts on the wisdom of this decision.) By contrast, the words "Olympic" and its many variations (Olympia, etc.) have, either on their own

or as part of a compound denomination, been registered more than 80 times as national trade marks. This has not been to the taste of the IOC.

Even for the combination of the words "Olympic games" and the Rings, the trademark protection under German law is weak. True, this combination is a registered EU trademark of which the holder is the IOC. However, the practice of the German trade mark authorities has been very tolerant of applicants who merely depart from the strict wording and pictorial representation of the by a slight degree, thus undermining the legal protection afforded.

It is also a fact that Germany failed to accede to the Treaty of Nairobi concluded in 1981, under which some 50 states agreed to give special protection to the Olympic symbol. Many countries have in fact laid down further, even more stringent, rules on the protection of the symbol under their intellectual property law. In view of the Leipzig candidature, the Federal Ministry of Justice (Bundesjustizministerium) has presented a proposal for a Law on the protection of the Olympic emblems and symbols. The proposal makes provision for extensive trademark protection of these symbols, which are owned exclusively by the IOC and the German national Olympic committee. However, in view of the many trademarks containing Olympic symbols which, as was noted earlier, have already been registered, the rights of these third parties are to be protected up to April 2003. It was necessary to do this because of the non-retroactivity principle which is enshrined in the German constitution, and which had it not been inserted would have made the entire legislation vulnerable before the German Constitutional Court (Bundesverfassungsgericht).

The author concludes by welcoming this legislative initiative, whilst expressing the caveat that it could undergo changes as a result of amendments proposed and accepted by the German parliament. He considers that the proposal in question is capable of reconciling the requirements of the IOC and the public domain status of certain symbols and concepts in everyday use.

US Court of Appeals gives federal jurisdiction to domain name dispute involving Brazilian football club⁵¹⁸

This issue is dealt with below, under Item 11 "Procedural Law and Evidence" (see below, p. 000).

Other issues

[None]

8. Competition Law

National competition law

Horse trading? Predominantly negative response to OFT Rule 14 notice on racing

The background to the dispute

It will be recalled from the previous issue⁵¹⁹ that, as a result of a lengthy enquiry into the compliance of British racing with existing competition legislation, the Office of Fair Trading (OFT) had, in April 2003, issued a Rule 14 notice which held that the industry had been held in breach of this legislation. Rule 14 notices are subject to ultimate confirmation, giving the industry concerned an opportunity to respond to the accusations made. Respond they did, in no uncertain fashion, to the point that the Rule 14 confirmation, which was expected by the time of writing, has not yet materialised.

The main issue on which the OFT held the racing industry to be in breach of competition law were the following:

- Control of fixture allocation by the British Horseracing Board (BHB). The vast majority of British racing tracks wish to have more meetings allocated to them. The OFT is of the opinion that to deny them this is anti-competitive;
- BHB claim to ownership of pre-race data. The OFT demands that racing courses should be able to sell the relevant data rights to bookmakers;
- Attheraces contract. The OFT is concerned that the pooling of rights by 49 racing tracks, including all the major venues, effectively amounts to a cartel⁵²⁰;
- BHB rules on prize money, programmes and entry fees: here too, the OFT finds no reason why the value and structure of race cards should not be the responsibility of the courses themselves;
- Tote monopoly on pool betting: the Office believes that competition in the pool-betting market will result in a better deal for bettors⁵²¹.

Reactions by press and other commentators

Quite apart from the defence submitted by the BHB to the OFT, the latter's findings were being subjected to much obloquy from various quarters. Thus in late August, David James, the Chairman of the Racecourse Holdings Trust, warned ominously that British racing would be a "dead duck" and destroyed within four years if these findings were to be fully implemented. He commented that it was not feasible for racecourses to compete for given races – which would mean making available the Derby of Grand National to any bidding track. Given Mr. James's record as an acclaimed industry and Government troubleshooter, his comments were bound to send shockwaves through the world of racing and cause a stir within Whitehall⁵²².

The press reaction was generally hostile. Writing in

*The Daily Telegraph*⁵²³, Richard Evans attacked the OFT as an organisation built on a creed which owes much to theory and little to common sense or reality. He takes the example of a separate ruling on prize money in respect of which the OFT had stated that the Racehorse Owners Association and the National Trainers Federation would be breaching the Competition Act if they advised members not to run horses in particular races owing to the row over cuts in prize money. This too had been condemned by the OFT as exercising undue influence over owners and trainers.

He also takes issue with what he regards as the unaccountable clout wielded by the OFT:

"The OFT creed, which determines the interests of the consumer must be safeguarded at all costs by fair competition, is underpinned by staggering legal powers. Most worrying of all, the OFT's faceless bureaucrats are not subject to the normal checks and balances of democratic government. They are not accountable to a Government department or minister. They certainly do their best to thwart press scrutiny."⁵²⁴

The view taken by the legal profession of the OFT report tended to be more mixed. Naturally, the views of the legal representatives and consultants to the racing industry also tended to be negative. Guy Leigh, a partner at Addleshaw Goddard, which represents the BHB, stated the view that the OFT had misunderstood the nature of the sport, and that if they did there would have been no finding of unlawfulness⁵²⁵. He accused the OFT of having approached the entire issue equipped with its own agenda and that its attitude had been more akin to that of prosecuting counsel rather than that of an impartial regulator, even suggesting that they wished to recover some of the ground which they lost over the collective selling case against the Premier League⁵²⁶.

Among those without a direct axe to grind, however, the tone was markedly more moderate. Neil Baylis is the head of the Competition Group at Nicholson Graham & Jones and advises the National Greyhound Racing Club which, whilst taking a natural interest in these proceedings, is not directly involved in or concerned by them. He is sceptical about the various objections raised by the interested parties to the OFT report. Describing the role of the OFT as that of an organ implementing legislation, he does not see its conclusions as unreasonable or irrational, and expressed his confidence that it would confirm its initial findings in what he predicts will be a "quite robust" decision⁵²⁷. Howard Cartledge, head of Olswang's competition group who advises Northern racing, one of the larger racecourse groups, as well as the Attheraces consortium, tried to steer a middle course. He admitted to a "slight

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disconnect” between the two sides of the debate, and as to the BHB’s accusation that the OFT simply wanted chaos, he replied that, in his view, the racecourses did not desire a free-for-all either. They recognised the need for some centralised oversight, but considered that this was too centrally controlled at present⁵²⁸.

As for the bookmakers, they do not seem unduly concerned one way or another – at least if the views expressed by William Hill’s spokesman David Harding are anything to go by. It will be recalled⁵²⁹ that it was this organisation which started the spinning of the proverbial spheroid when it complained that the BHB was in breach of the rules on dominant position in the supply of racing data. That original complaint had been settled very much in the bookies’ favour, since it resulted in a five-year deal with the Board which could net them well in excess of £500 million by the time it expires⁵³⁰.

The politicians intervene

The Sport of Kings has its adherents in all walks of life, including politics. It was only to be expected, therefore, that at some stage or other at least some of the nation’s elected representatives would make their views and feelings on this matter felt. First off the mark was MP and former Foreign Secretary Robin Cook, speaking at a fringe meeting of this year’s Labour Party conference in Bournemouth, who commenced his speech unambiguously by explaining his presence at the meeting because he “had an addiction” for racing. Also on the panel were BHB Chief Executive Greg Nichols and Nicky Henderson, one of the finest trainers of his generation. Mr. Cook delivered a ringing defence of the BHB’s opposition to the OFT findings, stating:

“I fear that the OFT’s officials, very admirable and well qualified as they are, have drunk at the well of competition theory, and have a touching belief that competition is always the answer. There are occasions, and this is one of them, when competition could have a perverse and dire outcome. They seem more interested in how things look in textbooks than in how they will work out in real life”⁵³¹

Mr. Cook stressed that this question was very much a Labour Party issue, given that racing was one of the largest employers in the country, accounting for over 100,000 jobs. In terms of staffing, it was much larger than the motor industry. If the OFT’s view prevailed, he argued, smaller courses would be at an enormous disadvantage when they came to negotiate picture and data deals with the big bookmakers⁵³².

Not to be outdone, the Conservatives also had their racing champion, in the shape of a quietly-spoken Tory MP Laurence Robertson, whose constituency includes

the Cheltenham race course, and who also happens to be the opposition spokesman on competition issues of the type handled by the OFT. His frank opinion was that it could not be right to enforce a free-for-all on the basis of theory “without any reflection on the likely impracticalities, and he set about writing letters setting out his concerns about the potential impact of the OFT findings to the Department of Trade and Industry, and Sports Minister Richard Caborn. This flurry of activity resulted in a response from the Sports Minister, who replied in the following terms:

“I share your view that full implementation of the OFT’s rulings, as far as we understand them, may damage the fabric or integrity of the sport and I am well aware of the industry’s feelings on this”⁵³³.

He shared the view that smaller National Hunt courses, such as Hereford, would be particularly vulnerable if the OFT’s findings were to prevail. He added that his immediate superior, Culture Minister Tessa Jowell, would be setting out the concerns of her Ministry, the Department of Culture, Media and Sport (DCMS), to the OFT within the not too distant future. He also disclosed that, in spite of being the sponsoring department for horse racing, the DCMS had not received a copy of the OFT’s report and had no official role in approving or commenting on its content. In this case, it is legitimate to ask why Mr. Caborn felt he could take sides even before the OFT’s findings had entered fully in force (indeed, whether a Secretary of State should take any sides in this matter at all).

The BHB responds

The BHB made its official response in early September 2003. Launching both the 1,000-page response and its executive summary, Greg Nichols, its Chief Executive, warned of the “disastrous implications” which the OFT’s findings would produce for the world of racing. He stated that:

“courses will close, jobs will be lost, National Hunt racing will be almost wiped out and the quality of racing will decline. This is not in the interests of the millions of consumers who love and follow racing”⁵³⁴

In the press release which accompanied the launch of these documents, the BHB went even further, accusing the OFT of wilful ignorance and prejudice. It stated that the OFT’s investigative process was flawed by an unwillingness objectively to gather and assess evidence and a determination from the outset to find the sport guilty. The executive summary listed ten areas in which the Board believed the OFT’s case to be flawed or just plain wrong. These include the claim that

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the OFT had failed to understand that the relevant product in issue is “British racing” and all that it means and stands for, rather than simply a racing or betting opportunity, as is contended by the OFT. The investigators had committed serious errors of fact, law and economics and produced artificial definitions which owe nothing to reality and were entirely contradicted by overwhelming evidence⁵³⁵.

The Board also alleges that the imposition of a free-for-all as regards racing fixtures, which would see courses organising meetings as and when they please and making their own deals, would cause immense and irreversible upheaval. Its predictions include an explosion of low-grade, all-weather racing at the expense – possibly fatally so – of National Hunt racing, and an unhealthily powerful role of bookmakers, who could pick and choose which courses to support⁵³⁶.

Just before this issue went to press, however, there appeared to be a realisation amongst the members of the Board that it may have to compromise, and that it might be best on its part to make some radical proposals which would go some way towards satisfying the OFT that the industry was prepared to accommodate more liberal commercial activity. Some sources close to the Board suggested that it may be content to withdraw from commercial activity and concentrate on being a governing body. This would, however, make uncomfortable reading for the industry’s current guardian, the Jockey Club, whose role was already under pressure (see, inter alia, the criticism the latter had to endure in the aftermath of the racing corruption scandal⁵³⁷).

If such a move were to materialise, it would embrace commercial deals being carried out by a company controlled by the racecourses and horse owners, who would sell their rights to a central buyer, i.e. the bookmakers. However, here we have to bear in mind that the Northern racing group of racecourses have already signed their own deal with bookmakers, which would suggest that their own future funding and share price is more important to them than any venture with the owners. Arena Leisure racecourses would also appear to be hot on their trail, rendering the prospect of a united industry more remote than ever.

Writing in a leading national daily newspaper, racing commentator Charlie Brooks ventures the opinion that the main priority for the OFT is to ensure that the system for the reallocation of fixtures is made more competitive⁵³⁸. For this to happen, racecourses should realise that they can no longer assume a divine right to owning a fixture in perpetuity. They will need to accept a real market solution such as bidding for fixtures, which is the solution towards which the Board appears to be moving. Under these conditions, new and existing

courses would bid the amount which they are prepared to guarantee in prize money for as many fixtures as they are capable of staging⁵³⁹.

However, no concrete proposals to that effect had as yet been forthcoming at the time of writing.

So what happens next?

At the time of writing, the OFT was still considering the 1,000-page response to its Rule 14 notice submitted to it by the BHB, whom it would allow to argue its case at an oral hearing in the course of October. However, if the officials at the competition authority are not swayed, the BHB have stated their intention to take the matter to the Competition Appeals Tribunal⁵⁴⁰. There was a feeling that the BHB’s initially bellicose and adversarial response was a dress rehearsal for such an appeal rather than a serious attempt to change the mind of the OFT officials. The BHB will also hope to rally its friends in Parliament to the cause, and Mr. Nichols claims that many MPs – including Secretary of State Patricia Hewitt – have contacted the Board offering their support⁵⁴¹. The politicians’ intervention outlined above would appear to give some credence to this view. Here again, the present writer must enter some personal caveats as to whether it is meet for politicians to intervene in what is essentially a judicial matter.

It will have been noted earlier that much of the disquiet – synthetic or otherwise – about the OFT’s findings concerned the fate of the smaller racecourses, particularly those engaged in National Hunt racing. They may have less cause to worry than we have been led to believe, if recent events at one such track, Towcester, is anything to go by. In early October 2003, this modest arena was the scene of a bold experiment in racecourse management, one which may shake some tracks to their economic foundations. The crowd attending the meeting had more than doubled, but the gate receipts amounted to nothing – for the very good reason that entrance was free of charge. Former racing driver Lord Hesketh, who owns the course, drew a comparison with a certain desert town in the US: the bettor who enters a Las Vegas casino does not expect to pay at the door; why should he/she do so at a race course⁵⁴²?

This strategy is a high-risk one, but may succeed. If people have not paid to enter the track, they are thought to be more likely to bet more at the Tote, at which the track takes a percentage of turnover, or enjoy an extra drink (or more). On-course bookmakers could also expect to experience an increase in business – in fact, they have already agreed to pay more for their pitches during the period in which this experiment is being conducted⁵⁴³.

Needless to say, this journal pledges itself to continue to monitor developments in this saga with the keenest of interest.

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OFT issues fines to football kit price-fixing cartel

It will be recalled from previous issues of this journal⁵⁴⁴ that the Office of Fair Trading (OFT) has for some time been investigating allegations that several companies, including football clubs, were participating in an unlawful cartel aimed at fixing the price of replica football strips at artificially high levels. In early August 2003, the members of the cartel, which included Manchester United and sportswear manufacturers Umbro and JJB, were issued with fines totalling £18.6 million for having engaged in this practice. The OFT claimed that it had uncovered a network of anti-competitive agreements to set the price of top-selling England and Manchester United shirts, as well as replica kits for such clubs as Chelsea, Celtic and Nottingham Forest. These infringed the terms of the Competition Act 2000. John Vickers, the OFT Chairman, justified these fines on the basis that:

“the fines imposed reflected the seriousness of the price-fixing in this case. However, since we launched our investigation, the prices of replica football shirts have fallen and consumers can now shop around and get a better price”⁵⁴⁵.

JJB, the high-street chain, incurred the largest fine with £8.4 million, followed by Umbro with £6.4 million and Manchester United with £1.5 million. The Old Trafford club immediately denied any wrongdoing and indicated that it was considering an appeal. JJB, for its part, claimed that the allegations had been politically motivated, totally unfounded and based on flimsy evidence. John Whittingdale, Opposition spokesman on sport, had no sympathy with these protestations of innocence, claiming that the OFT's fines proved that, for far too long, the fans had been “ripped off” by a few leading football clubs and businesses⁵⁴⁶.

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Commission gives clearance to acquisition of fitness clubs by two investment funds⁵⁴⁷

In early July 2003, it was learned that the European Commission had granted clearance under the EU Merger Regulation to the proposed acquisition of the British fitness club operator Holmes Place by investment funds Bridgepoint and Schroder Ventures Limited.

In 22/5/2003, Bridgepoint Capital Group Limited and Schroder Ventures Limited made a joint public offer for Holmes Place, an operator of health and fitness clubs, as well as a manager of publicly-owned leisure facilities, in the United Kingdom. Bridgepoint counts amongst the firms controlled by it Virgin Active, which operates in the

same field as Holmes Place, having 12 health clubs in the UK and 76 clubs in South Africa. Holmes Place itself owns 49 clubs in the UK, rendering the latter the only country affected by the deal. At present, Schroder Ventures Limited has no interests in this product market.

The Commission's examination of this deal found that the only significant overlap was to be found in Central London, where Virgin Active owns one club and Holmes Place owns two. However, it was found that their combined market share would not exceed 20 per cent of the number of privately owned health and fitness clubs having comparable facilities in this area.

UEFA and Bundesliga media rights deals cleared – but not Premiership/BSkyB arrangements

General background

The European Commission has recently been much exercised by the implications for EU competition law of various arrangements enabling the main matches in the football calendar of the member states to be broadcast.

In principle, EU competition law views media rights as just another commercial deal which, as long as it concerns intra-EU trade, is subject to the rigours of its competition law just as much as the sales of the television sets on which viewers avidly follow the fortunes of their favoured teams. However, it may be recalled from an earlier issue⁵⁴⁸ that an added dimension was given to this matter when the European Council, meeting at Nice in 2000, encouraged the redistribution of some of the revenue obtained from the sales of television broadcasting rights at the appropriate levels as being beneficial to the principle of solidarity between all levels and areas of sport.

Nevertheless, the Commission has refused to make too many concessions to this mitigating factor, particularly when arrangements which may ostensibly further the cause of solidarity have the effect of foreclosing television market, which ultimately restricts television reception of the matches concerned by consumers. It is for this reason that it commenced its inquiry into the policy of joint selling television rights engaged in by the European body governing football, UEFA. It also started investigating similar deals in individual member states, including Germany and Britain – particularly, in the case of the latter, the collective selling of television rights concerning Premiership matches to BSkyB549. Below, we report on the progress made by these various inquiries, and their implications for the future.

(On the allegedly “special nature” of sport under EU law, see also below, p. 000).

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Commission clears new UEFA policy on sales of Champions' League media rights

In an earlier issue of this Journal⁵⁵⁰, it was reported that the European Commission had given preliminary approval to the new policy of the body governing European football, UEFA, on the selling of media rights to Champions' League fixtures. In late July 2003, the European Commission took a final decision exempting this new joint selling arrangement. The new policy will enable UEFA to continue selling the rights to its successful Champions' League brand whilst bringing football within the reach of more broadcasters as well as Internet and telephone operators, and permitting clubs to market these rights on an individual basis⁵⁵¹. Commenting on this decision, EU Competition Commissioner Mario Monti stated:

"The Commission's action will provide a broader and more varied offer of football on television. It will allow clubs to develop the rights for their own fan base and will give an impulse for the emerging new media markets such as UMTS services. (...) This positive outcome shows that the marketing of football rights can be made compatible with EU competition rules without calling into question their sale by a central body to the benefit of all stakeholders in the game"⁵⁵²

It will be recalled that the Commission originally objected to the joint selling arrangements, which were notified to it in 1999, on the basis that UEFA sold all Champions' League television rights in one package to a single broadcaster on an exclusive basis for up to four years at a time. The purchasers were often free-to-air television broadcasters. One of the major drawbacks of the original joint selling arrangement was that not all matches were seen live on television, whilst Internet and telephone operators were simply denied access to these rights.

Accordingly, UEFA's joint selling rights had the negative effect of restricting competition between broadcasters. By barring access to key sporting events it also stifled the development of sporting services on the Internet and of the new generation of mobile telephones. This was not in the interests of broadcasters, clubs, fans or consumers.

As a result of the Commission's objections, UEFA had proposed a new joint selling arrangement, which meets the Commission's concerns, and which is operational as from the 2003-4 football season. Under this new system:

- UEFA will continue to market centrally the rights to live television broadcasting of the Tuesday and Wednesday night fixtures. The principal rights will be split into two separate rights packages (the Gold and

Silver packages) giving the winning broadcasters the right to select the two best matches;

- UEFA will initially have the exclusive right to sell the remaining live rights of the Champions' league. However, if it does not succeed in selling this "Bronze package" within a certain time limit, the individual clubs will be requested to sell the fixtures themselves;
- The new joint selling system also affords opportunities to new media operators, as both UEFA and the clubs will be able to offer Champions' League content to the Internet and to operators seeking to launch or boost the new generation of mobile telephone services using the UMTS technology;
- Individual football clubs will also, for the first time, have the right to utilize television rights on a deferred basis and to use archive content, for example for the production of videos, thus providing their fans with an improved and more varied offer;
- UEFA will not sell the rights for a period longer than three years, and will do so through a public tender procedure allowing all broadcasters to submit bids⁵⁵³.

The new joint selling system represents an improvement on the initial compromise which was reached with the Commission in July 2002 and was subjected to public consultation. More particularly, it was agreed that football clubs would not be prevented from selling live rights to free-to-air television broadcasters where no reasonable offer had been forthcoming from any pay-television broadcaster.

(UEFA was advised by leading London firm Olswang in obtaining this clearance from the Commission⁵⁵⁴.)

Commission intends to clear new Bundesliga broadcasting rights

On the same day as that on which it made its statement regarding UEFA's policy on selling broadcasting rights (see previous section), the European Commission announced that it intended to exempt the new system for marketing the rights to broadcast first and second division fixtures in the German Bundesliga competition from the prohibition of anti-competitive agreements set out in Article 81 of the EC Treaty. It found that the plan submitted by the German Football League (Deutscher Fußballbund – DFB) would ensure a greater measure of variety and competition in the broadcasting of fixtures from these competitions. The plan was also expected to give a boost to the new media, such as UMTS and broadband internet⁵⁵⁵.

The Commission had earlier taken the view that the traditional central marketing system which applied before restricted competition between clubs and between media

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companies, thus exacerbating trends towards concentration in this sector. Under the revised system, all broadcasting rights will no longer be sold to a single broadcaster in one package. For the first time, broadcasting rights will be unbundled and offered for sale transparently in a number of separate deals. Henceforth it will be possible to show all games live over the Internet and via mobile telephones. Clubs of the first and second divisions will also be able to sell some broadcasting rights themselves. At the next stage of the Commission's procedure, the market players will have the opportunity to present their views.

The main outlines of the draft settlement are as follows⁵⁵⁶:

- The DFL or an independent selling body will offer packages in a transparent and non-discriminatory procedure. Applicants may resolve disputes through arbitration. No contract may cover more than three seasons;
- Two television rights packages contain live broadcasting rights. They may be acquired by both free-to-air television and pay-per-view providers. One package includes first division matches played on Saturdays and second division matches played on Sundays (i.e. the main match day package). The second package contains first division games played on Sundays and second division matches played on Fridays (the secondary match day package). Both packages will also contain other rights, including conference-call coverage of the other match day;
- The third package consists of free television rights for the first highlights programme and the right to broadcast at least two Bundesliga first division matches live per season. The fourth package entitles the provider to broadcast second-division fixtures live on free-to-air television. These packages may be shared out amongst free television broadcasters;
- Centrally marketed Internet and mobile telephone packages – various packages offering live and deferred broadcasting;
- Television rights held by clubs: every club may sell its home games, once, 24 hours after the match on free-to-air television;
- Clubs' mobile telephone, internet and audio rights: every club may offer the latest clips through mobile telephones and put extensive match highlights on its website. In addition, every club may market live extracts of its matches on radio and mobile telephones, as well as offering live audio streaming on the Internet;
- Rights which the League is unable to market may be offered at the same time by the home club;
- Further League packages and club rights conclude the draft settlement, the television aspects of which will enter into effect in July 2006. All other provisions will apply as from July 2004.

Before the Commission makes a final decision on the question of exempting the newly-liberalised marketing rules, it will publish a summary of the DFL proposals in the official Journal of the EU (in accordance with the rules of competition procedure laid down in Council regulation 17, more particularly Article 19(3) thereof). All interested parties will have an opportunity to submit their comments on the proposed system to the Commission.

The Commission regards the UEFA and Bundesliga deals as a blueprint for others to follow. This has ominous implications for the deal currently operating between the English Premiership and broadcaster BSkyB, as will be discussed in the next section.

Premiership broadcasting rights deals still unacceptable to the Commission

It will be recalled from the previous issue⁵⁵⁷ that the collective deal struck between the English Premier League and broadcaster BSkyB had aroused the interest of the Commission, the latter claiming that this arrangement amounted to price fixing by excluding other channels from the arrangement. In the intervening period, there have been protracted negotiations between the two parties, and the Premier League was growing increasingly exasperated at attempting to meet the Commission's demands whilst attempting to maximise revenues in an effort to match the £1,400 million which it obtained under the current deal. Already BSkyB had let it be known that it would only be bidding £1,100 million, factoring in a premium for exclusivity of coverage⁵⁵⁸. By mid-summer, it appeared as if the two sides are as far away as ever from reaching an agreement. The events of 24 July referred to above do not appear to have brought any significant change to this position.

Following the accommodation reached with UEFA and the Bundesliga in the manner described above, Competition Commissioner Mario Monti lost little time in hailing these plans as a "template" which the Premier league should be aiming to follow⁵⁵⁹. The latter responded by restructuring one of the live broadcasting packages, in the sense that it split the so-called "bronze package" of 62 Saturday matches into two, enabling different broadcasters to bid for the games, which have kick-offs at 1pm and 5.15pm. Initially, the Premier League wished to sell the bronze package as a whole to one broadcaster. The new proposal was seen to aimed at attracting terrestrial broadcaster, which are less wealthy than broadcasters as BSkyB (or so we are told)⁵⁶⁰. This meant that the television rights offered by the Premier League now consisted in four packages. League insiders considered that they had gone a long way towards meeting the Commission's objections by offering this new set-up. Yet it remained the case that it would still be possible for BSkyB to win all four packages, and even if this was done as a result of a fair auction, the

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Commission remained likely to judge that competition would still be restricted. The Premier League proposals also did not make provision for clubs to strike their own deals with broadcasters – more particularly to offer unsold live matches to broadcasters, which, as can be seen above, is one of the central features of the deal struck with UEFA and the Bundesliga⁵⁶¹.

Accordingly, it seemed as if the Commission and the League would be at loggerheads for some time to come, particularly as the Commission had ominously warned that the League would go ahead with its plans “at its own peril”, adding that although it was not looking for identical agreements for Germany and Britain, it was necessary to have diversity of broadcasters. Industry analysts for their part believe that the Commission is fighting a losing battle, in that it is impossible to force the market into a single direction, no matter how many packages were on offer⁵⁶².

Ultimately, the Premier league did plough its own furrow heedless of the consequences at EU law. In mid-August, it awarded all its live football rights to BSkyB, which bought the four available packages for £10,164 million⁵⁶³. However, the first news of any potential challenge came not from the Commission, but from Dermot Desmond, the Irish multi-millionaire and shareholder in Glasgow Celtic FC (who also has a stake in Manchester United). Stating his conviction that the agreement was unlawful under EU and British competition rules, he announced that he was about to submit formal complaints to the Office of Fair Trading and the European Commission. He also announced that he was considering a challenge through the English courts, possibly by way of judicial review, in order to challenge BSkyB’s continued monopoly over the right to televise live Premiership matches, scheduled to continue until 2007. If Mr. Desmond’s interventions were successful, this could lead to the League being compelled to hold a new auction for the television rights⁵⁶⁴.

Unsurprisingly, the deal attracted the attentions of the Commission without needing to await a complaint by Mr. Desmond. Within days of the agreement having been concluded, it restated and even amplified its concerns on the question whether sufficient tenders had emanated from various broadcasters to make the bidding process for the four packages competitive. Although Tilman Lueder, spokesman for Competition Commissioner Mario Monti, conceded that the Premier League had made “tremendous progress” in splitting the original package, he nevertheless announced that the Commission would seek to establish how many broadcasters bid for each of the packages, in order to ensure that they were not merely tailored to the requirements of a very specific group or individual broadcaster. It was understood that Sky was not the only bidder, but less clear how many companies were involved or for how many of the four packages. ITV had

expressed an interest in one of the four, but the BBC, Channel Four and Channel Five denied that they had attempted to win any of the live broadcasting rights⁵⁶⁵.

In early October came a further twist to the saga, when a new deal was concluded between BSkyB and the Premier League, under which Sky would be able to broadcast all 242 matches not already covered by the deal concluded in August, for an additional £60 million. The broadcaster also won the right to show matches on the Internet. This meant that football fans were able to view every game played during the season, either live or on a deferred basis. One delayed fixture may be shown in full from 8.30 pm on Saturdays, one on Sunday afternoons and one on Monday evenings⁵⁶⁶. This consolidation of Sky’s position was obviously not such as to make the Commission more amicably disposed towards the arrangement.

In mid-October, the Commission announced that it was launching an investigation into this new deal. At a certain point it had been unclear what would be the basis for this enquiry, given that Sky had bid in an open auction and won because it had offered the most. The Commission specified that it was seeking to establish whether BSkyB had made a “pre-emptive purchase” by paying well over the market rate for these exclusive rights, thus closing off rival bids. If this were found to be the case, Sky would be accused of creating a monopoly by paying an inflated price for all supplies, then recovering the money spent through charges to subscribers. The major difficulty in all this would be to establish what was the appropriate market rate⁵⁶⁷.

It is a fact that there was some astonishment amongst business analysts as to why BSkyB had paid such a sum for the rights, as it was believed that they could have acquired them for half that amount. There was also some bewilderment amongst commentators as to why the Commission did not decide to mount a simpler case against the right of individual football clubs to sell their matches collectively through the Premier League. The Commission’s approval of the arrangements proposed by UEFA and the Bundesliga would have appeared to make out a case for such an approach. However, lawyers were reported to be of the opinion that such a case would not necessarily invalidate the BSkyB deal. It is possible, however, that in any formal proceedings the Commission will combine both lines of attack⁵⁶⁸.

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

(As a footnote, it is worth mentioning that H. Ungerer, a Commission official specialising in this area, had, in early October 2003, addressed a conference in Barcelona on the subject of sports media rights under EU competition law. Mr. Ungerer appeared to adhere to an uncompromising stance on this issue – perhaps already a “shot across the bows” of the Premier League?⁵⁶⁹)

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Foreign quotas unlawful following Kolpak ruling

The name of a certain average Belgian footballer has become synonymous with the free transfer. However, it may well be that the moniker attaching to an equally undistinguished Slovak handball player will find equal renown as a result of another ECJ ruling. It will be recalled from the previous issue⁵⁷⁰ that this decision resulted from the case of Mr. Kolpak, the handball player in question, who had been playing for a German second division team called TSV Ostringen as a goalkeeper. Mr. Kolpak had requested a player's licence which did not designate him as a non-EU national, on the grounds that the non-discrimination principle set out in the association agreement concluded between the country of his birth and the EU entitled him to such a status. The ECJ, replying to a question put to it by the relevant German court, agreed with the player.

Given that over 100 countries have such association agreements with the EU, it would seem that it will not be possible to exclude sporting performers from those countries from the EU sporting arena. Since that professional football in this country has undergone an exponential influx of European players as a result of the EU's anti-discrimination rules, might this not, mutatis mutandis, be the fate of rugby and cricket also – especially given that South Africa and the South Sea islands are parties to such association agreements? The Rugby Football Union (RFU) appeared to be quite relaxed about this prospect and did not expect a rush of players into the Zurich premiership. An RFU spokesman pointed out in this connection that players from such countries would still require a work permit even though they would have the same rights as EU workers. However, others were not quite so sanguine, predicting that England might not be able to win the World Cup again if the nurturing of home-grown talent was stunted because of a massive influx of foreign players⁵⁷¹.

In cricket, the results could also be dramatic. Currently, the domestic game operates a quota which restricts overseas players to two in any match and four in a squad. However, thus far there appears to have been no reaction to the Kolpak case from the game's authorities⁵⁷². (On the subject of recent calls to slash overseas quotas in cricket, see below under the heading "Issues specific to individual sports", p. 000).

No agreement on "special status" of sport under EU law

As is the case with those dealing with other areas of government jurisdiction, the Ministers of Sport of the European Union meet on a regular basis to discuss issues of common concern. The meeting scheduled for October 2003 was widely regarded as one of the more

crucial ones, since it was to feature a discussion on the Nice 2000 resolution referred to above (p. 000). More particularly it was proposed to improve its wording in such a way as to give sport special status, acknowledge the important role which it has to play in society, and exempt it from some of the stricter items of EU legislation, particularly that which concerns the free movement of persons and sex discrimination. However, it was not to be, and the meeting ended without agreement on this issue⁵⁷³.

It was thought that the British sports minister, Richard Caborn (himself a former MEP), as well as his French and Spanish counterparts, believed that the existing resolution was poorly defined and did not make out a clearly defined special status for sport, which is currently bracketed together in the same category as culture, meaning that a football club is governed by the same rules as orchestras and art galleries. These three Ministers are also thought to enjoy the support of leading football authorities such as world governing body FIFA and European governing body UEFA, who fear that EU officials will continue to interfere with the manner in which sport is operated if its special status is not acknowledged. They believe that the sporting federations themselves are best placed to deal with such issues as gender and nationality discrimination.. It is also feared that these interventions will not stop there, but may also impinge on area such as doping and discipline⁵⁷⁴.

One of the reasons why agreement on this issue seems to be so hard to obtain is the attitude of the Commission, whose hard line on the consistency of sporting media rights with EU competition rules has already been dealt with earlier (p. 000). Uncompromising was certainly the correct word to describe the tone adopted by Viviane Reding, the European Commissioner whose brief covers sport, in one of her ubiquitous speeches – pronounced in Monaco in mid-September 2003 – in which she stated:

"As I have said before, it is illusory to think that the Community dimension in sport can be made to disappear by including an exemption clause for sport in the future Constitution of the European Union. This subject was debated three years ago (the Nice 2000 declaration) and none of the EU's 15 Heads of State or Government wanted an exception to be made for sport. (...) In view of this, I am puzzled, to say the least, by the repeated demands heard in some quarters for the right to limit the number of non-nationals in a particular sport. It is clear to everyone that the free movement of EU citizens and their families is a fundamental right which cannot be overlooked. Nationals of countries outside the EU are already subject to certain restrictions as regards their

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freedom of movement. But, more than the legal considerations, it is the logic behind these demands that escapes me. Leaving aside the feasibility of introducing such restrictions at a time when economies and societies in Europe need to absorb large numbers of immigrants, can one seriously believe that people who are residing legally in a European Member State can be prevented from pursuing sport professionally?⁵⁷⁵

Regardless of whether one agrees with Ms. Reding's views or not, they do not seem to herald any perceptible change in approach on the part of the European Commission. Since the Commission is the body that proposes EU legislation and monitors its application, its views carry considerable clout, even amongst assembled Ministers.

At the time of writing, no further progress seemed to have been made on this question.

Joint EU declaration on the social value of sport for young people

In spite of some of the controversies surrounding the approach of the EU authorities towards the status of sport, as instanced in the previous section, there is no disagreement on the actual value of sport to society, particularly its social value for young people. It was particularly this aspect which was the subject-matter of a Joint Declaration issued by the Council of Ministers and the representatives of the Member States' governments in May 2003⁵⁷⁶. This declaration has to be seen in the context of the decision which designated 2004 as the European Year of Education through Sport⁵⁷⁷. Among the issues stressed in this declaration were the following:

- the importance of promoting the values and virtues of self-discipline, self-esteem and hard effort fostered by sport, thus assisting young people in identifying their skills and limitations and to overcome the difficulties they may face in their everyday life, and as a result permitting them to achieve their objectives and to gain their autonomy;
- the role which can be played by sport for social cohesion, especially amongst disadvantaged young people;
- by promoting tolerance, acceptance and respect for diversity towards other young athletes, sport may make an important contribution towards intercultural understanding, and combating racism, xenophobia, sexism and other forms of discrimination;
- the need to ensure that these values are respected by all those involved in sport and that measures aimed at young people in favour of fair play and against threats to their health, in particular doping, as well as violence in sport should be encouraged.

Adidas stripes do not enjoy EU trade mark protection, claims EU Advocate-General⁵⁷⁸

This is not the first occasion on which the "three stripes" which characterise the Adidas sportswear have caused ripples in the area of EU trademark law⁵⁷⁹. Under the EU Trademark Directive, registered trade marks are protected against signs which are identical to them or which are likely to cause confusion amongst the general public because of their similarity or identity with the trade mark in question. Member states are also entitled to lay down that owners of trade marks are entitled to prevent third parties from using similar or identical trade marks in relation to goods and services which are not similar to those for which the trade mark is registered if the latter has a reputation in the Member State and where use of that sign without due cause is detrimental to the distinctive character or repute of the trade mark.

Adidas-Salomon is the owner of a figurative trade mark taking the form of a motif consisting of three stripes, which is registered as a Benelux mark for a number of types of sportswear. The trade mark is characterised by the striking vertical stripes of equal width running parallel, appearing on the side and down the entire length of the article of clothing. Fitnessworld Trading for its part markets fitness clothing under the name Perfetto. Adidas sought an order from the District Court at Zwolle, The Netherlands, which would instruct Fitnessworld to cease using any sign similar to the Adidas motif, such as the double stripe motif used by the former, and to account for profits on sales of the allegedly infringing articles of clothing. Adidas argued that the double-stripe motif was capable of creating confusion, in that the general public might associate these articles with Adidas clothing. The Zwolle court awarded the order sought.

The Court of Appeal (Gerechtshof), however, set aside the initial decision. It ruled that, even where a trade mark enjoyed a high degree of recognition the use of a sign similar to it was more likely to give rise to confusion; even so, however, there was no likelihood of such confusion in this case. Moreover, Fitnessworld had itself achieved some recognition for its own two-stripe motif, which had been regularly used in The Netherlands for some time. It was not therefore appropriate to give to Adidas a monopoly over the stripe motif. Adidas sought to have this decision set aside by the Netherlands Supreme Court (Hoge Raad). The latter had some doubts as to the interpretation of the Trademark Directive, and therefore requested the European Court of Justice to issue a preliminary ruling on this issue of EU law.

At the time of writing, the Court had not yet issued its ruling, but we already had the benefit of the opinion of the Advocate-General, F.G. Jacobs. The latter essentially agreed with the interpretation of the Court of Appeal, where he stated that:

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“In my view, it would in any event be undesirable as a matter of principle to extend the protection of trademarks in such a way as to preclude the use of common decorations and motifs such as stripes (....) The notion of similarity between a mark and a sign for the purpose of Article 5(2) of Directive 89/104 is to be assessed on the basis of the degree of sensory or conceptual similarity between them. The protection conferred by Article 5(2) of Directive 89/104 does not require the existence of a likelihood of confusion between the mark and the sign”

Mr. Jacobs, in other words, considers that trademark holders are powerless if someone else decides to use a similar motif for decorative, as opposed to trademark, purposes.

The next issue of this journal will report on the Court’s ultimate verdict. In the majority of cases, the Court follows the Advocate-General’s opinion.

Court of Appeal overturns Laddie J ruling on Arsenal v Reed

It will be recalled from an earlier issue⁵⁸⁰ that, following the referral by the High Court to the European Court of Justice in the dispute between Premiership club Arsenal FC and a street trader over the use of the club’s logos on his merchandise, Laddie J had ruled that the ECJ had “exceeded its jurisdiction” by making findings of fact which reversed the national court on those findings, and that therefore, contrary to the European Court’s view, the action should be awarded to the street trader. The North London club appealed against this decision to the Court of Appeal.

It will be recalled that the case has its origins in the registered trade marks which Arsenal owns for the words “Arsenal”, “Arsenal Gunners” and its cannon and crest logos. It had sued Mr. Reed, a vendor of unofficial Arsenal merchandise, for trademark infringement under the Trade Marks Act 1994. In April 2001, Laddie J had ruled against the club, holding that Mr. Reed’s use of the signs and logos registered as trademarks did not constitute use indicating the origin of goods (i.e. did not amount to “trade mark use”) on the grounds that the general public merely interpreted the signs and logos used by him as badges of support, loyalty and affection. However, the club had sought refuge in EU law, which compelled Laddie J to seek the assistance of the ECJ on the interpretation of the EU Trademark Directive. The ECJ found for the football club⁵⁸¹, ruling that the use which Mr. Reed made of the trademark in question was such as to jeopardise its guarantee of origin, so that it was immaterial that in the context of that use the sign in question was perceived as a badge of support, loyalty or

affiliation to the trade mark holder.

In May 2003, the Court of Appeal allowed Arsenal’s appeal against Laddie J’s ruling in relation to the ECJ⁵⁸². The Court held that the European Court had not in fact disregarded the trial judge’s findings of fact, and that he should have followed the ECJ’s preliminary ruling and decided the case in the North London club’s favour. Aldous LJ held that the relevant parts of the ECJ ruling merely contained reasoning and explanation based on agreed facts. The ECJ had stated that there was a clear possibility that certain consumers, particularly those who encountered Mr. Reed’s products after the latter had left his stall, could interpret the use of the Arsenal signs as indicating the club as the undertaking of origin. This finding was inevitable once the Community Court had made it plain that the material consideration was whether the use complained of was liable to jeopardise the guarantee of origin, not whether the use was trade mark use. The Court of Appeal also reconsidered the evidence which had led Laddie J to his original finding that the use of the marks did not constitute use indicating origin of the goods. Aldous LJ stated the view that the evidence was unambiguous, to wit that the use made did indicate origin.

Commenting on this decision, M. Shillito and L. Harrop⁵⁸³ write that the Court of Appeal’s decision supports the case law of the ECJ that there is a middle way somewhere between the two apparently contradictory positions: (a) that any use of a trade mark is capable of constituting trade mark infringement under Article 5(1)(a) of the Trademark Directive, and (b) that trade mark use is a prerequisite for a finding of trade mark infringement. The fact that trade marks applied to goods are bought and worn as badges of support, loyalty and affiliation to a trade mark owner, and therefore does not constitute trade mark use, does not mean that their use by a third party cannot jeopardise the role of the trade marks in guaranteeing origin. In this case, the ECJ and Court of Appeal held that the defendant’s activities run precisely that risk and for that reason constitute an infringement. A test is therefore developing whereby the possibility of an impairment of the function of a trade mark will be sufficient to constitute infringement under Article 5(1)(a) of the Directive⁵⁸⁴.

Another commentator, Simon Miles⁵⁸⁵, focuses on the issue of passing off which was touched upon by Aldous LJ in the Court of Appeal’s verdict, even though there was no appeal on this point against the judge’s ruling in Mr. Reed’s favour. He describes this as an “odd piece of obiter dicta”. The appeal judge states that he did not feel that the reasoning by the High Court judge was correct, but fails to explain why. It could be that, since the remainder of the decision is directed at the question whether the use by Mr. Reed of Arsenal’s trade marks constituted a designation of origin (which

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the High Court judge doubted) it was for this reason that he considered Laddie J's reasoning to be incorrect. This could also be the reason why Aldous LJ merely touches upon the question whether there needs to be an element of misrepresentation in the tort of passing off by referring to that which Cross J⁵⁸⁶ stated in relation to the decision in the Spanish Champagne cases⁵⁸⁷, which by clear analogy have a bearing on Mr. Reed's use of the Arsenal marks.

Advocate-General in sportswear trademark case proposes that burden of proof should be shared by trade mark owner and alleged infringer⁵⁸⁸

Under the Community Trade Mark Directive, a registered trade mark confers on the owner of the mark the exclusive right to prevent all unauthorised third parties from using any sign which is identical with that mark in the course of their trading activity. However, where the trade-mark owner consents to the use of the trade mark, or uses it himself/herself within the European Economic Area (EEA, which consists of the 15 Member States of the EU plus Liechtenstein, Iceland and Norway), he forfeits the right to prevent others from using it under the doctrine of "exhaustion" of trade-mark rights. The place where trade-marked goods have been placed on the market for the first time (with the trade-mark proprietor's authorisation) is therefore significant.

Stussy Inc., a Californian company, owns the word and device mark "Stüssy", which is registered for clothing. It distributes goods under that mark worldwide. Van Doren + Q. GmbH, a clothes wholesaler and retailer, is the exclusive distributor of Stussy Inc. goods in Germany. It has Stussy Inc.'s authority to bring legal proceedings in its own name in the event of infringement of the mark. Van Doren says there is only one exclusive distributor for each EEA country, and that distributors are contractually bound not to sell Stussy Inc.'s goods to intermediaries for resale outside their contractual territory.

Michael Orth is managing director of Lifestyle + sportswear Handelsgesellschaft mbH, which markets goods bearing the Stüssy trade mark which it has not acquired from Van Doren in Germany. Van Doren brought court proceedings against Michael Orth and his company in Germany seeking an injunction, damages and disclosure of information. Van Doren maintains that the offending goods were first placed on the market in the US, and that the trade-mark owner did not consent to their distribution in Germany or any other EU Member State. Michael Orth and his company argue that the rights in the trade mark had been exhausted, because the goods had been acquired within the EEA,

where they were put on the market by the trade-mark owner or with its consent. The case therefore turns on the question of where the products were first put on the market with the trade-mark owner's consent. Who has the burden of proof?

German law imposes the entire burden of proof on the party alleging exhaustion of trade-mark rights. That party must therefore prove that the goods were put on the market in the EEA for the first time by the trade-mark owner or with his consent. A dealer will generally be able to name his suppliers, but he will not be able to compel those suppliers to disclose their sources, or to identify other links in the distribution chain. Even if he could, doing so might cause his supply source to dry up. There is a risk that the trade-mark owner might use this to partition national markets. In other words, imposing the entire burden of proof on the alleged infringer places him before a dilemma because he has to choose between:

- (a) either producing the evidence required, thus losing his future sources of supply, or
- (b) losing the case, even where the goods in question had been placed on the market within the EEA by the trade mark proprietor or with his/her consent

That is the background against which the German Bundesgerichtshof, which dealt with the case on appeal, has asked the Court to determine whether the German rule on the burden of proof is compatible with Community law.

At the time of writing, the only the opinion of the Advocate-General, which necessarily precedes the Court's decision proper, was available.

Since the Directive does not affect national procedural law, Advocate General Stix-Hackl takes the view that the Member States enjoy autonomy in that sphere. In other words, it is legitimate for national rules on the burden of proof to apply in exhaustion of rights cases. Ms Stix-Hackl does, however, set out the limits laid down by Community law: a procedure to determine where the burden of proof lies cannot be allowed to undermine trade-mark owners' rights, which the Directive seeks to protect. The purpose of the Directive is to promote the free movement of goods, which is precisely that which the doctrine of exhaustion seeks to safeguard.

Advocate General Stix-Hackl concludes that a rule whereby the entire burden of proving exhaustion falls on traders against whom trade-mark owners bring infringement proceedings puts such traders in an impossible position. It was clear from the established case-law of the ECJ that the purpose of trade mark rights is not to enable trade-mark owners to partition national markets, thus enabling price differences between Member States to be maintained. Such a

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national rule therefore constitutes a barrier to the free movement of goods.

As regards any possible justifications for such a barrier, the Advocate General observes that a parallel importer may not be compelled to produce evidence in the form of documents to which he has no access, where that evidence can be produced by other means (be they administrative or judicial). She emphasises that it is against Community law to require the production of evidence that is excessively difficult or impossible to obtain.

Accordingly, the Advocate General proposes that the burden of proof should be shared, to reflect a duty of cooperation on the part of the trade-mark owner. That would render the national rule consistent with the free movement of goods principle as enshrined in the Directive. The trade-mark proprietor should have to prove that there are no gaps in his/her distribution system within the EEA. If he succeeds in doing so, a national court would have to conclude that the goods acquired by the parallel importer must have come from elsewhere, and that the trade-mark rights attaching to those goods are not necessarily automatically exhausted as a result of these possibly having been put on the market for the first time by the trade-mark owner or with his consent.

The duty of cooperation may not, however, go beyond what is necessary to avert the risk of market partition, or to prevent alleged infringers from being required to produce evidence that it is excessively difficult for them to obtain. The Advocate General emphasises that the detailed rules remain a matter of national procedural law.

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Bankruptcy (actual or threatened) of sporting clubs & bodies

Football clubs in crisis – an update

General developments

When this Journal last went to press, the news on this front was quite bleak. As a result of various factors, of which the ITV Digital fiasco, corporate greed and wage inflation were but some of the more outstanding factors in this state of affairs⁵⁸⁹. Various clubs had officially fallen into financial meltdown, and would require dramatic action if they were to be rescued from liquidation. The footballing authorities were also becoming increasingly concerned at this state of affairs, to the point of proposing stringent penalties for clubs which went into administration.

The intervening period has been blessed with mixed fortunes in this respect. Just before the English season kicked off, the prospects looked bleaker than ever. A leading newspaper claimed that the worst was yet to come for clubs in the greatest need⁵⁹⁰. The main reason was that clubs were facing drops of 50 per cent in their revenues from transfers, resulting in the loss of millions of pounds, because so many are having to sell off players cheaply or release them on free transfers as they attempt to come to terms with their uncertain financial futures. With the exception of the "Chelskis" of this world (see below, p. 000), many clubs were selling off players at prices which were much cheaper than those at which they were valued as few as twelve months previously, as they attempted to reduce their wage bill and tackle their economic problems.

Thus it was that Sunderland had to let midfielder Gavin McCann go to Aston Villa for £2.5 million, even though he was valued at £4 million the previous season. West Ham United had to part with another midfielder, Trevor Sinclair, to Manchester City, also for £2.5 million, even though he had been valued at £10 million during the 2002-3 season, when the club had actually turned down an offer for the player from City's deadly rivals Manchester United. As has been mentioned elsewhere (above, p. 000), Australian star Harry Kewell was sold to Liverpool from Leeds for a mere £3 million, even though his worth had been assessed at a figure between £15 million and £20 million just a year earlier. Matt Holland left Ipswich for Charlton Athletic for a mere £750,000, which also constituted a very pale reflection of the player's true worth, Ipswich having refused an offer of £4 million from Aston Villa for their star player.

A more sanguine view was voiced at approximately the same time by sports accountants Deloitte & Touche, when it published its annual review of football's finances. It claimed that, in spite of a projected

decrease in revenue from broadcasting deals and other financial difficulties, there was some cause for optimism, and clubs were learning to cope with their new circumstances. The report states that the introduction of new measures such as salary caps, performance-related contracts of employment and the increased use of loan deals would all aid clubs to balance their books. It also claims that, despite warnings of financial doom and gloom, there was more money now in the English game than ever before, and that the Premiership was Europe's richest league⁵⁹¹.

As regards the measures taken against clubs in financial difficulty, the Football League, in late September 2003, decided that Nationwide League clubs which went into administration would be issued with an automatic 10-point penalty. Chairmen from all the member clubs voted to ratify this proposal at an emergency meeting held at the Kassam Stadium, home to Oxford United, in order to prevent situations such as those which enabled Leicester City, in what was regarded as a move of highly dubious morality and even legality⁵⁹², to use the expedient of receivership in order to wipe out vast debts before gaining promotion to the Premier League. Clubs issued with this points deduction will have the opportunity to appeal to an independent body⁵⁹³.

All this sent out the message that the football clubs concerned now had every incentive to manage their finances better. In the words of League Chairman Sir Brian Mawhinney, speaking immediately after the decision was taken:

"This is necessary because the Football League are the guardian of competitiveness in our divisions and we can't have clubs who (sic) go into administration gaining an advantage. It is a fundamentally different approach and there was a healthy debate – but I pay tribute to the clubs for attaching that significance to it"

Another feature of that meeting was the introduction of parachute payments for clubs relegated to the Second and Third Divisions. A new structure for the management of the League was also ratified, giving the First Division their own Managing Director on a three-man executive team answerable to Sir Brian⁵⁹⁴.

Individual clubs

Oldham Athletic. It will be recalled from the previous issue⁵⁹⁵ that the club was on the verge of ceasing to operate as Chris Moore, its major shareholder, announced that he was no longer prepared to support the club financially. Its plight deepened a few weeks later when three of its players, including defender Fitz Hall, served notice on the club after they failed to

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receive their pay cheques for the previous month. All three would be entitled to free transfers in the event of the money not being forthcoming. In an attempt to stem the financial tide, the club organised a fund-raising fixture between an all-star side and the "Latics" side of 1990 which had such a memorable FA Cup run and went on to reach the Premiership⁵⁹⁶.

Shortly afterwards, the club engaged in a "fire sale" of several players, including Armstrong, Hall, Hill, and Welsh midfielder Josh Low, at prices much lower than might have been expected. Moore made his final exit by signing his shares over to Sean Jarvis and Neil Joy, the club's marketing and finance directors respectively, and writing off his loans of over £4 million. All this did not, however, appear to make a sufficiently significant difference to the club's finances. The wage bill, set at £2.5 million per annum, was expected to account for the entire income earned by the club. The Inland Revenue are owed £400,000 and have issued a winding-up petition, which is what led the club to seek the protection of administration. This, however, does not represent the full extent of Oldham's indebtedness, since the outstanding VAT bill is £120,000 and sundry debts are estimated at £800,000⁵⁹⁷.

At the time of writing, Oldham's administrators had warned the club that it would fold unless they found a sum of approximately £1.2 million by the end of the following month⁵⁹⁸. The onus seemed once again to have passed to that most undervalued of football financiers, the long-suffering club fans. A supporters trust has raised £180,000 and is planning to become a more integrated part of the club's future – if there is one⁵⁹⁹.

Sunderland FC. This side, which was relegated from the Premiership at the end of the 2002-3 season, has also experienced considerable difficulty, and in mid-July was liaising with the professional Footballers' Association (the players' union) in a last-ditch attempt to prevent the club from going into administration. More particularly, club and union were negotiating a wage-deferment arrangement with several first-team players in the hope that bankruptcy could be staved off. The club had accumulated debts of £30 million, and was asking several of its best players to defer payment of their earnings⁶⁰⁰. It had also commenced discussions with insolvency lawyers⁶⁰¹.

Leeds United. The famous Yorkshire club, which only a few seasons ago came close to winning trophies at the European level, is now in a very bad way, both on and off the field, as was already reported in the previous issue, having accumulated over £100 million in debts⁶⁰². Amidst reports of miraculous rescuers from overseas for other clubs (see "Chelski", below p. 000), Leeds

announced that they had engaged in talks with a multi-millionaire sheik in a bid to solve its dire financial crisis. Speculation to this effect had started when it was learned that Sheik Abdul bin Mubarak Al Khalifa, one of the wealthiest men in the United Arab Emirates and a fan of the club, had been invited into the directors' box for a home fixture with Newcastle. Elland Road officials were hoping to induce him to expend some of his vast wealth to reduce the club's debt⁶⁰³.

As to the club's immediate position, it was learned at the end of August that John MacKenzie, the new Leeds chairman, was close to agreeing a crucial refinancing deal with the holders of the debt-laden club's £60 million bond. The Chairman was holding discussions aimed at extending the "honeymoon period" on the 25-year loan. Under the original terms, interest has been paid for the first two years only, with actual repayments due to commence in September 2004. Prof. McKenzie, however, was keen to extend this by a period of three to five years, and at an interest rate of 7.652 per cent, it was thought that the bondholders were willing to accept.

Towards the end of October, with Leeds having slumped to 17th place in the Premiership, Prof. McKenzie warned that the Leeds finances were not showing a marked improvement, in spite of having sold a number of senior players, on the basis that "you can't turn an oil tanker round in two minutes"⁶⁰⁴. He added that administration remained a possibility.

Barnsley FC. Another Yorkshire club, though not able to boast of a past as illustrious as that described in the previous section, which is currently experiencing financial hardship is Nationwide League side Barnsley. It went into administration in October 2002. In late June the following year, a consortium headed by former Stoke City manager Gudjon Thordarson, attempted to take over the club⁶⁰⁵. Eventually the club was bought by Sean Lewis. By early August, however, the club was unable to convince the administrators that under its new ownership the club was being taken forward on a solid financial footing, so that even its opening fixture of the new season was in doubt. The Football League had given the club more time to meet their criteria, but a request for further assurances had remained unanswered⁶⁰⁶.

The fact that the club did actually make a start to the season appears to indicate that this immediate hurdle had been cleared, although for how long is another matter.

Notts County FC. In the previous issue⁶⁰⁷, the sad news was recorded that this the oldest professional football club in history had also fallen on such bad financial times that it was forced into administration, i.e. in June 2002. It seemed that a consortium headed by former Leicester City directors Roy Parker and Bob Wilson would rise to

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the rescue, but with the new season barely under way it was learned that the consortium pulled out less than a week before the details were to be presented to the Football League, since they felt their bid was no longer viable⁶⁰⁸. A few days later, the Chairman of the League, Brian Mawhinney, convened a meeting of the club board at which it was to be decided whether or not the venerable old club was to be wound up⁶⁰⁹. The club were given until December to prove their financial stability.

Ultimately, a new consortium was formed which seemed capable of solving the club's problems, and the £3 million takeover was approved by the League on 7/10/2003. This was expected to put an end to the club's 15-month period in administration⁶¹⁰.

Derby County. Here too, we are dealing with a club with an illustrious past – even reaching the semi-final of the European Cup in 1973 – only to fall on harder times in the more modest surroundings of the Nationwide League. In the previous issue⁶¹¹ it was recorded that the Midlands club was £30 million in debt, and that the owner, Lionel Pickering, was on the verge of selling it. This is precisely what happened in late October 2003, when a three-man consortium, headed by John Sleightholme, a barrister involved in the Hillsborough disaster enquiry, purchased the club from the receivers for the sum of £15 million. Mr. Sleightholme became the club's new director, and was joined on the board by Jeremy Keith, as well as marketing and communications entrepreneur Steve Harding⁶¹².

The trio completed the transaction within hours of Derby County Ltd. appointing a receiver. They raised the sum in question through refinancing. Most of this will be used to repay the debts built up with the Co-operative bank and the financial institution Lombard. It was unclear, however, whether or not the new owners had taken over Lionel Pickering's £9 million worth of personal guarantees⁶¹³.

Leicester City. Reference has already been made, both in this issue (see above) and in the previous one⁶¹⁴ to the general obloquy which greeted the somewhat unorthodox – and certainly unethical – manner in which Leicester City succeeded in using the receivership laws to leave massive debts unpaid whilst at the same time remaining sufficiently healthy to be able to gain promotion to the sunny uplands of the Premiership. One of those to protest their vehement opposition is John Barnwell, the Chief Executive of the League Managers' Association, on the basis that one of the unpaid creditors was their former manager, Peter Taylor, who was owed the sum of 200,000 by way of compensation after being dismissed in October 2001⁶¹⁵.

The club have since emerged from administration

thanks to the consortium headed by former player Gary Lineker. Mr. Taylor was amongst the major losers in this affair because, under Nationwide League rules, he is not a priority creditor. This has incensed Mr. Barnwell to such an extent that he publicly demanded that City should be denied promotion because of this sleight of hand. He explains:

“Leicester went up illegally as far as I’m concerned in that they were able to keep paying expensive players at the disadvantage (sic) of other clubs who were trying to run (sic) in a proper manner. How can it be right that Leicester still owe Peter Taylor £200,000 and yet you read they are prepared to pay £1 million or more for players?”⁶¹⁶

Neil Warnock, a member of Mr. Barnwell's organisation and manager of Sheffield United, also condemned Leicester City, calling their promotion “immoral”.

Wimbledon FC. As was reported in the previous issue⁶¹⁷ this club, which had succeeded in obtaining official leave to move to a new home in Milton Keynes, has suffered a catastrophic decline in its gate receipts, as a result of which it was forced into administration in June 2003. Because its move to its new home was postponed, it had to start the new season at its Selhurst Park location. However, such was the decline in its finances that the club had fallen behind in paying the £600,000 per year rent for sharing this venue with Crystal Palace. The sale of striker Neil Shipperley to Palace for £400,000 eased the burden somewhat, and the club were at least able to start their season until they could move to Buckinghamshire⁶¹⁸. (See also below, p. 000.)

Interestingly, Wimbledon appeared to have taken their cue from Leicester City in their imaginative use of the receivership laws. John Barnwell, the League Managers' Association Chief Executive whose fulminations against Leicester's knavish tricks in this regard are recorded in the previous section, also delivered a broadside at Wimbledon in this regard. He compared the position of Peter Taylor, the hapless former Leicester manager owed compensation, to that of ex-Wimbledon coach Terry Burton in the following terms:

“The League clubs recently put the issue of deducting points from clubs who go into administration to an EGM in September (see above, p. 000). Surprise surprise, the very next day Wimbledon went into administration and Terry (Burton) becomes an unsecured creditor”...⁶¹⁹

The fortunes of the club at its new home in Milton Keynes will be examined later (below, p. 000).

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Clubs in other sports in financial difficulty

Belfast Giants (Ice Hockey)

In June 2003, play-off champions Belfast Giants admitted that they were beset with mounting debts. Creditors were requested to accept 20 per cent of outstanding debts as lawyers admitted that the club's financial plans had been "fundamentally flawed" from the beginning. As result, there are no UK representatives in the European Continental Cup competition for the current season⁶²⁰.

Pontypridd RFC (Rugby Union)

These are lean times indeed for the once-proud Welsh rugby tradition – both on and off the playing field. As has been reported in earlier editions of this journal⁶²¹, the plan to restructure Welsh rugby has meant the downgrading of a number of famous clubs, one of them being Pontypridd, which combined its forces with Bridgend to form the new Celtic Warriors side. The cash-strapped club subsequently went into administration in September 2003, but were offered a financial lifeline by Bridgend owner Leighton Samuel⁶²².

Mr. Samuel had originally offered to buy out Pontypridd, who had incurred debts of £670,000, and take sole charge of the Celtic Warriors. However, the Welsh Rugby Union (WRU) had opposed this move because they wanted the side operated on a 50-50 partnership basis. Subsequently Mr. Samuel offered to buy Pontypridd's share in the Warriors, then present it as a gift to the WRU. If he succeeds, therefore, the Warriors would be owned jointly by Bridgend and the WRU, which would allay fears that Samuel was looking for sole control over the Warriors. However, all the latter's games would be moved away from Pontypridd's ground. Mr. Samuel would first have to meet the administrators in order to establish whether he has a first option on buying Pontypridd's share in the Warriors⁶²³.

Mr. Samuel's views on the new structure of Welsh rugby are recorded later (see below, p. 000).

billionaire had bought the club in a deal worth £140 million. Ken Bates, the club chairman, sealed the deal with Roman Abramovich, an oil tycoon as well as being an influential politician in his native Russia. He is reputed to be the country's wealthiest man with a fortune of \$5.7 billion and a wide range of business interests, including the airline Aeroflot⁶²⁴.

From the outset, this move was greeted with suspicion and downright hostility in a number of quarters. There were those concerned about the identity of those behind the deal, as well as certain mysterious movements on the stock market immediately before and after the announcement of the takeover was made. There were also those, mainly in the political arena, who expressed certain caveats about the suitability of someone with Mr. Abramovich's background to be entrusted with such a footballing institution as Chelsea. Indeed, even the Russian authorities seemed to have some reservations about Mr. Abramovich's dealings in this respect. All this is examined below.

The FSA takes more than a token interest...

First of all, it was learned that City regulators had commenced an investigation in the flurry of stock market dealings in Chelsea FC ahead of the announcement of the takeover. Shares in Chelsea Village, the club's parent company, rose sharply during the days leading up to the announcement, fuelling suspicion that news of the deal was leaked in advance. Speculators using inside information were thought to have made a profit of well over £1 million when the takeover was confirmed. If passed onto the Financial Services Authority (FSA), the latter would be able to prosecute anyone suspected of dealing on the basis of confidential price-sensitive information⁶²⁵. To date, no further news of any action on this front has emerged.

However, this was not the only aspect of the deal which attracted the interest of the financial regulators. Only a few days after the deal was signed, it emerged that Chelsea Village was to be owned by a British Virgin Islands company. The offer document revealed that Chelsea Limited, a special purpose company formed to buy Chelsea Village, was wholly owned by Isherwood Investments Limited, a company incorporated in Cyprus, which in turn is wholly owned by Taverham Holdings Limited, a company incorporated in the British Virgin Islands. Mr. Abramovich is the sole beneficial owner of Taverham. To add to the complex corporate structure, it was reported that Taverham would ultimately be owned by Millhouse Capital, a holding vehicle for all Mr. Abramovich's assets, which is registered in the UK and has an office in Weybridge, Surrey. Millhouse shares are all owned by an entity

Other issues

"Chelski" is born as Russian tycoon takes over at Stamford Bridge – but gives rise to concern and various investigations

General background

In recent years, Chelsea FC have acquired a reputation as being the Premier League's foremost mercenaries, being the first professional side ever to field a team consisting entirely of foreign nationals. Yet another exotic dimension was added to the club's existence in early July 2003, when it was learned that a Russian

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based in Cyprus. Russia and Cyprus have a fiscal treaty which makes the Mediterranean island an attractive place for wealthy Russians to hold their cash⁶²⁶.

This entire network of mysterious offshore trusts owning shares in Chelsea aroused some concern as to their ultimate ownership. Nowhere was this concern felt more keenly than amongst the members of the Financial Services Authority (FSA), who in late July 2003 announced that they were launching an inquiry into this matter. The FSA stated that it was concerned that the “market may have been misled” over the true ownership of the Chelsea Village. Under existing rules on takeovers, anyone holding more than 29.9 per cent must make a full offer for the outstanding shares⁶²⁷. Another issue of company law which is relevant in this connection is the question whether certain shareholders, hiding behind nominee accounts, were acting in concert or were connected in some other relevant manner. If they were, their identities should have been revealed⁶²⁸. Ken Bates, the Chelsea chairman, took umbrage at this move, and went so far as to describe the members of the Authority as “little worms”, urging them to reveal the source of their information. Meanwhile, however, the 35p-per-share bid by Mr. Abramovich was being allowed to continue⁶²⁹.

It later emerged that it was a probe into the business affairs of Patrick Murrin, a close associate of Ken Bates, which was behind the decision by the FSA to investigate this matter. Mr. Murrin’s activities in the Channel Islands were being investigated by the Guernsey Financial Services Commission, which was examining his involvement in a company, called Swan Management, which sold 20 million Chelsea shares to Mr. Bates in 2002. The Commission’s findings were passed onto FSA and led to the UK regulator’s separate inquiry⁶³⁰.

These matters remained at the time of writing. In the meantime, Mr. Abramovich’s offer was accepted by 95 per cent of the Chelsea Village shareholders, and Chelsea Limited, the acquisition vehicle, lost no time in announcing that it would be sending out compulsory purchase notices to those investors who had failed to accept the offer⁶³¹. Chelsea Limited then applied for the stock to be delisted from the Alternative Investment Market⁶³².

... as do the politicians...

The Lord forbid that certain atavistic prejudices should ever be allowed to cloud the judgment of our elected representatives. It is, however, a fact that the words “Russian” and “tycoon” have come to elicit certain Pavlovian reactions amongst many people, most of which seem to imply that no-one from that particular neck-in-the-steppes could ever have acquired his/her millions ethically or without being involved with the Russian mafia. These thought processes did not appear to be too far away from the minds of some of Britain’s

politicians in their reaction to this development.

The ink on the Bates/Abramovich deal had hardly had the time to dry when Tony Banks MP, the former Sports Minister, called upon the Government to examine the agreement, with the following words:

“At the moment, I don’t like it. We know that Chelsea is in financial difficulties and that a deal has been arranged with an individual we know nothing about, from a country which has a reputation that is not always savoury in terms of its financial situation”⁶³³.

Exactly what was meant by the “savouriness” of a country’s financial situation, and why that should tar every citizen of that country with the same brush, was never made clear by Mr. Banks; nor was it clear whether the full import of his observation was that an offer emanating from any Russian citizen was to be regarded as being automatically suspect. The following are some of the questions which might not unreasonably be asked of Mr. Banks:

- Would Mr. Banks have dared to deliver himself of the same remarks if the person making the offer had emanated not from Russia, but from Nigeria – also a country where financial dealings have the odd whiff of controversy about them?
- More particularly did Mr. Banks – or anyone else, for that matter – ever raise any questions about the acquisition of another football club, situated within a bottle’s throw of Stamford Bridge, by another individual with (to put it very charitably) a somewhat controversial business record?
- Why should official interest in football club ownership be determined by the fact that a former sports minister is a Chelsea season ticket holder – a fact of which Mr. Banks never ceases to remind us ad nauseam? Should Mr. Banks, as the professional political delegate representing the constituency of West Ham, not confine himself to the club within his own constituency, which has plenty of problems of its own?

When confronted some weeks later with the somewhat primitive nature of his reaction, Mr. Banks attempted to “clarify” his remarks by claiming that he was merely restating a viewpoint he had held when he was Sports Minister, i.e. that no football club should be taken over until the football authorities had satisfied themselves about the bona fides of the proposed new owner, to wit whether the intentions were honourable⁶³⁴. They should insist that a surety bond is deposited with them, which would be surrenderable should the new owner turn out to be less than trustworthy. Regardless of whether Mr. Banks ever expressed himself in such

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dispassionate terms or not, these words do nothing to explain exactly why he saw fit to relate Mr. Abramovich's trustworthiness to his nationality.

In the meantime, however, Mr. Banks's words seemed to have produced the desired effect. As soon as Mr. Banks issued his predictions of doom and gloom, sources at the Department for Media, Culture and Sport indicated that Tessa Jowell, Secretary of State, had expressed the hope that football would introduce a "fit and proper persons" test in the near future. It also emerged that Jowell had met FA Chief Executive Mark Palios on this subject. Although the issue of probity was not raised, the Government clearly hoped that, with his business background, Mr. Palios would be the man to push through the measures deemed necessary, despite the objections of club chairmen. Options under discussion included a code of conduct which club owners would be required to sign and to which they could be held accountable, or a vetting system which would prevent unfit persons from taking control⁶³⁵.

It is important to remember at this point that all this was said and decided less than 24 hours after the Bates/Abramovich deal was signed, and before any of the concerns raised by the FSA and the Russian fiscal authorities (see below) had the time to be aired – and even at the time of writing, Mr. Abramovich has yet to be accused, let alone convicted, of any infringement of the law. The present author cannot help the feeling that kneejerk prejudice rather than rational judgment were the prevailing sentiments in this flurry of official concern. This impression is reinforced by an additional comment made by Mr. Banks where he said "we need to know rather more about Roman Abramovich's financial background and bona fides". – a proposition that should surely apply to any wealthy individual who buys out a club, not only to oil-rich Russians (see, once again, the fate of Fulham FC!). In addition, there is the natural justice element. Any code of conduct introduced would naturally apply to existing owners as well as future once, and would raise the prospect of Mr. Abramovich having to provide evidence that he is fit and proper to own Chelsea – an invidious proposition if ever there was one⁶³⁶.

....and the Russian fiscal authorities

The critical observations made above do not, of course, in any way imply that Mr. Abramovich is purer than the proverbial frozen precipitation. During the aftermath of the deal, in fact, there seemed to emerge some evidence to the contrary, not only domestically (see the FSA investigation reported above), but also in the new Chelsea proprietor's native land. One week after the deal with Mr. Bates was struck, a senior Russian tax official reprimanded Mr. Abramovich for taking advantage of a loophole in the country's fiscal legislation to avoid paying

£200 million in taxation. He alleged that the money in question was used to fund his purchase of the Stamford Bridge club. Sergei Stepashin, who heads Russia's audit chamber (which monitors the acquisition and expenditure of Government funds) claimed that the Russian tycoon used this loophole to enable his oil company, Sibneft, to avoid paying its fiscal debt in the course of 2001. He added that the move was entirely lawful, but expressed displeasure at its use:

"Oil companies' money should go into introducing new industries and the growth of production, instead of on the purchase of football clubs. This [tax loophole] is where he got the money for Chelsea"⁶³⁷

This story broke at a time that tension between Russia's wealthy business operators and the state had heightened. Russian taxation legislation is highly complex and can be as fluid as its enforcement. Big business tends to accuse the Government of harassing them exploiting the vagueness of the tax laws. The Kremlin has pursued seemingly unlikely investigations against out-of-favour tycoons in the past, often in an attempt to drive them out of the country⁶³⁸.

Whether this fact explains another reprimand on the part of the Russian tax authorities a few weeks later is impossible to tell. However, the fact is that another highly-placed Russian tax official, Vladimir Panskov, revealed that managers of Abramovich's Sibneft company used trading companies registered in Russian "offshore zones" such as Kalmykia and Chukotka, where the oil magnate is also a regional governor. All Sibneft oil is apparently sold to these offshore outfits, only to be sold back immediately to Sibneft at double the price. Income from such re-sales is not subject to regional tax, thus enabling Mr. Abramovich to make another substantial fiscal saving. In 2000, Sergei Ignatiev, currently the head of the Russian Central Bank but then Deputy Finance Minister, calculated that Sibneft paid a mere 23 roubles of tax for each tonne of oil, i.e. eight times less than a similar company, Surgutneftegaz⁶³⁹.

Here again, nothing unlawful appears to have occurred. However, the Audit Chamber seemed to hint that the company's strategy would infringe the law if it was used, because of recent changes in the relevant regulations.

At approximately the same time, British newspaper claiming that Mr. Abramovich avoided paying several millions in tax by exploiting a scheme aimed at enabling the disabled to find work. It appeared that approximately 50 per cent of the staff employed by companies linked to the new Chelsea owner were registered as "invalids". This has apparently enabled the tycoon to slash the corporation's tax bill by 50 per

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cent, and for 2001 these savings amounted to tens of millions of pounds. During the same year, six out of seven of the managers at one Sibneft-linked trading firm, Olivestra, were registered as disabled⁶⁴⁰.

But at least the club's freehold is safeguarded

One of the main concerns which is invariably raised whenever a wealthy individual acquires a sporting facility located in a highly desirable area is that the person concerned has the long-term objective of selling off the club's premises to property developers – a suspicion which certainly hovered over another West London club not a million miles away from “The Bridge”⁶⁴¹. At least this danger seems to have been avoided in the case of Chelsea's takeover. For Mr. Abramovich may have purchased one of London's top football clubs, but it appears that he has not done so “lock, stock and barrel”. Buying the club has not conferred upon him the freehold to the club's ground. This is held by Chelsea Pitch Owners (CPO), an independent company with 12,000 shareholders who are fans of the club. As the freeholder, CPO has to authorise any plan to redevelop the ground. This will serve to prevent the redevelopment of Stamford Bridge for any purposes other than football. CPO acquired the freehold when Ken Bates sold it to the organisation for the price of £7 million. Since then, CPO has been seeking 70,000 shareholders prepared to pay £100 each, so that it can redeem the debt. Voting rights are strictly limited, so no single investor in CPO could exercise a disproportionate interest⁶⁴².

The status and role of CPO is understood to be well known to Mr. Abramovich's financial advisers, who are the investment group Citybank and law firm Skadeen Arps. The existence of CPO has been highlighted in order to demonstrate that Mr. Abramovich's interest in owning the West London club is sporting rather than financial⁶⁴³. He has also pledged himself to fund four new sports grounds in the Moscow area, and the city's mayor, Sergey Korol, has declared that there is no way in which Mr. Abramovich can renege on that pledge⁶⁴⁴. (It is also being contended that buying a football club in London constitutes a step down the road for ultra-successful businessmen, from personal wealth creation to social respectability⁶⁴⁵. Whether one agrees with such objectives or not, they are hardly illegal and do not single out Mr. Abramovich from many other tycoon owners of football clubs.)

The battle for ownership of Manchester United – an update

The last issue of this Journal left the complex struggle for the ultimate ownership of this most famous of all football clubs at a point where all options remained open⁶⁴⁶. It will be recalled that, for some time, various stratagems had

been deployed by two Irish horse-breeding tycoons, John Magnier and J P McManus, to increase their existing stake in the Old Trafford club, putting the club's authorities on full-scale bid alert. However, this was not the only attempt for shareholder control at the club being deployed at the time, since Dutch entrepreneur Jon De Mol had also increased his stake in the club, raising speculation of a summer raid on the club.

This speculation seemed to have a good deal of substance to it a few weeks later. As football club shares gained in value in the wake of the Chelsea takeover (see previous section), rumours abounded that another, but unnamed, Russian billionaire was planning a bid, and that Keith Harris, a former Chairman of the Football League, was also interested in making a bid. Shares in the Manchester side hit their highest levels for almost two years after rising by 10 per cent to 160.75 p, giving the club a stock market value of over £400 million. This type of share movement is unusually large for a sector of the market where prices can wait for days to show major changes. There was even talk of the two Irish magnates being interested in selling their stake, which would provide a platform for other potential bidders⁶⁴⁷. (It should, however, be remembered that any bid for the club would be complicated by the fact that an attempted takeover four years ago by BSKyB was blocked as contrary to national competition policy⁶⁴⁸. BSKyB continues to hold 10 per cent of Manchester United's shares).

The remainder of the summer passed without any further developments, and for a while it seemed safe to ascribe the rumours referred to above as a mere short-term reaction to the Chelsea takeover. However, as summer turned into autumn they were back with a vengeance when it was learned that three overseas billionaires were poised to launch £600 million bids to purchase United. The trio, each acting independently, had sought expert City advice about questions such as the cost of the club,

whether the shareholders would be willing to sell and how they could gain control. Intriguingly, they were said to be as rich as, if not wealthier than, new Chelsea owner Abramovich, and although they were not identified by name, it was understood that they consisted of an Abramovich-style oligarch, a Middle Eastern billionaire and a European businessman. Once again, it was being rumoured that various stakeholders, including not only the Irish duo mentioned above, but also their close associate Dermot Desmond and Scottish millionaire Harry Dobson, who were contemplating selling their shareholding⁶⁴⁹. During the days which followed, shares in the club leaped by 4 per cent, even as the club denied the rumours and claimed that it had not received any bid approaches⁶⁵⁰. Investing in the club would become even more attractive if the investigation by the European

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Commission into the collective media rights arrangement between the Premier League and BSkyB resulted in the latter being declared illegal under the EU's competition laws (see above, p.000), since Manchester United would stand to gain the most from being allowed to negotiate individually with media organisations to broadcast its games. United having up to 50 million supporters worldwide, the club's matches will invariably attract a larger audience than any other club⁶⁵¹.

The growing belief that the club was vulnerable to a takeover was also fuelled by the news that the club's Chief Executive, Peter Kenyon – whose assaults on the English language are well documented in this organ – had departed Old Trafford to take up a similar position at Chelsea's "Roman Empire". This not only indicated Mr Abramovich's belief that he could persuade anyone to join his "Russian revolution", but was also indicative of a measure of dissatisfaction with Mr. Kenyon's performance at Old Trafford⁶⁵². More particularly the Shareholders United pressure group accused him of making "amateurish errors" in the convoluted saga which culminated in Old Trafford only receiving £18 million from Real Madrid for the Beckham transfer rather than the £35 million asking price which had been initially mooted. In addition, Mr. Kenyon's failure to replace David Beckham with Brazilian star Ronaldinho highlighted the underlying suspicion that, when it came to negotiating the truly big transfers, his results were open to criticism⁶⁵³.

Unsubstantiated rumours, however, gave way to speculation having a more solid basis with the news that Malcolm Glazer, the owner of American Football team Tampa Bay Buccaneers, had almost doubled his stake in the club⁶⁵⁴. It will be recalled from the previous issue⁶⁵⁵ that Mr. Glazer, who purchased the Buccaneers for £120 million in 1995 and took them from obscurity to the 2003 Superbowl title, first emerged as an investor at the beginning of this year. In mid-September, it was announced that his family limited partnership had increased its shareholding to 5.92 per cent. This moved him to fifth position in the league table of United investors⁶⁵⁶. Predictably, Mr. Glazer kept his counsel when asked whether this heralded a takeover bid⁶⁵⁷. The fires of speculation were once again fanned a few weeks later when, amidst hefty stock market dealings, traders believed that Messrs. Magnier and McManus had returned to the market to raise their stake from 11.4 per cent to 13 per cent. This was concluded from fact that Cubic Expressions, the company acting as a vehicle for their shareholding dealings, were buying shares as they exceeded the £2 mark even though it had bought most of its shares the previous year at an average cost thought to be barely 120p. To continue buying shares well north of £2 suggested that the Irish duo also believed come form

of bid action was imminent – with Mr. Glazer probably being uppermost in their minds⁶⁵⁸. The Irish duo increased their stakeholding even further to 23.1 per cent when they purchased BSkyB's 10 per cent holding in the club⁶⁵⁹.

There were various interpretations placed on the motives for this increased share buying on the part of the two Irishmen. One theory was that they might be involved in a complex manoeuvre which could result in them acting as "kingmakers" for Mr. Glazer, making him pay an even higher price for control of the club (at current market prices, the club is already worth £610 million). The scenario was as follows. After a day of rumours, the Takeover Panel – the City organ which monitors mergers and acquisitions – would investigate the trading in Manchester United shares following yet another day redolent of rumours. The panel could ask Messrs Magnier and McManus to clarify reports that they did not plan to bid themselves. It would also be expected to ask the Irish pair whether they had any connections with Mr. Glazer. If the two camps were deemed to be acting in concert, this would trigger a mandatory bid for the club⁶⁶⁰.

Another view was that the duo actually did plan to take over – or at least be part of a takeover bid in concert with other existing Manchester United shareholders – with a view to removing the club's manager, Sir Alex Ferguson. The main reason for this was the bitter legal dispute which had erupted over the breeding rights for the horse Rock of Gibraltar, which was owned jointly by them, and which has already been extensively dealt with elsewhere in this Journal (see above, p. 000). It is a near-certainty that Sir Alex would refuse to serve under people with whom trust and friendship has been replaced by anger and resentment⁶⁶¹. Alternatively, if Sir Alex wished to remain at Old Trafford under this new ownership, he would have every incentive not to pursue his claim in respect of Rock of Gibraltar⁶⁶².

The intrigue over the future ownership of the Old Trafford club intensified just as this issue was about to go to press, when it was learned that Malcolm Glazer had increased his stake in the club yet again – this time to 9.7 per cent. This brought him to the level at which he could force a vote for a seat on the board of the club⁶⁶³. Mr. Glazer was fully expected to raise his stake to the 10 per cent which would give him this position of power⁶⁶⁴. Attempts by the United board to contact him proved unsuccessful, and at the time of writing no approach had as yet been made to the Takeover Panel in order to compel the North American businessman to reveal his intentions⁶⁶⁵.

The present author, as ever, pledges himself to monitor this saga with continued interest.

10. Company Law

O'Neill and others sell their shares in Proactive and avoids conflict of interest

Proactive, the sports agency firm which has such top performers as Wayne Rooney and Andy Cole as its clients, is no stranger to some of the more controversial areas of this journal. At a certain point, the involvement which former Aston Villa manager John Gregory had with the firm's Chief Executive, Paul Stretford came under scrutiny by the footballing authorities and, whilst it was not being alleged that Mr. Gregory or the firm had engaged in any unlawful activity, this relationship was regarded as a potential conflict of interest⁶⁶⁶.

The desire to avoid any such conflict was undoubtedly one of the main reasons why Celtic manager Martin O'Neill decided to sell his holding in the group. According to a list of shareholders seen by a major British daily newspaper⁶⁶⁷, Mr. O'Neill's account of 172,000 shares was closed on 20/5/2003. His is one of a number of high-profile names no longer listed on the share register of the Wilmslow-based company. Officials at the Scottish club were believed to have advised the successful manager that they preferred him not to have the shareholding. There was no suggestion that Mr. O'Neill ever engaged in any improper action when he owned the shares, or derived any benefit to which he was not entitled. Various other top names in football, including Everton players Kevin Campbell and Alan Stubbs and former Sunderland manager Howard Wilkinson, had also sold or reduced their holding in the group⁶⁶⁸.

Another reason for this new-found lack of enthusiasm may have been a sharp downturn in the financial fortunes of the Group. In late July it was learned that it was to write off over £12 million from its balance sheet, following an audit made by leading accountants Deloitte and Touche which concluded that Proactive was overvalued. It also decided to sell a significant part of its European operation. The move came amid growing disquiet in European football at Proactive's activities⁶⁶⁹.

Boris Becker once again in court – this time over website collapse

The former Wimbledon singles champion decidedly finds it extremely difficult to keep out of the courtroom these days. Having narrowly escaped seeing the inside of a jail for his fiscal transgressions⁶⁷⁰, he once again faced the Bench in mid-September 2003 to defend himself in a lawsuit worth £1 million. Mr. Becker is defending himself against a claim instituted by the administrator of the insolvent internet portal Sportgate. The latter alleges that Mr. Becker, who once was a majority shareholder in the company, promised to pay £1 million to cover the company's losses. The former tennis star denies the charge but has offered an out-of-

court settlement of £18,000. The website was intended as the portal for the German Sports Federation, but the firm filed for insolvency in 2001⁶⁷¹.

Chepstow racecourse in reverse takeover move

In mid-September 2003, Sir Stanley Clarke, the founder of Northern Racing, one of Britain's top race course groups, unveiled plans to float the company through a reverse takeover of AIM-listed Chepstow Racecourse. The all-paper deal would create a nine-strong portfolio of tracks, including Newcastle, Uttoxeter and Brighton, in which Sir Stanley emerges with a 57.1 per cent stake. Sir Stanley denied that the deal was a prelude to selling down his stake or taking out £1.1 million of debt owed to him by Northern Racing. He claims that the debt is staying in the business while he has undertaken to sell no shares for 12 months⁶⁷².

No further news was available at the time of writing.

11. Procedural Law and Evidence

Evidence showing use of ice hockey team trade mark admissible in Canadian hearing⁶⁷³

In this case, the Canadian Registrar of Trade Marks had forwarded notices under s. 45 of the Trade-Marks Act to the owner of registrations for the trademarks WINNIPEG JETS and WINNIPEG JETS & DESIGN, each covering the provision of entertainment and promotion of athletics through the medium of ice hockey games and the organisation and administration of an ice hockey club as well as numerous ice hockey-related goods. The sole affidavit furnished in evidence was that provided by the general manager of the current licensing authority. The evidence showed that until the end of the 1995/6 season of the National Hockey League (NHL), the Winnipeg Jets team was a member team of the NHL, and each of the trademarks in question were used by the then owner in association with the services set out in each of the registrations. A copy of the NHL official guide and record book, and a photograph of a hockey jersey bearing the trademark and worn by the players during all NHL games were attached as exhibits. In June 1996, when the WINNIPEG JETS ice hockey team were sold and renamed, the NHL became the owner of the trademark.

The available evidence also indicated that all member teams of the NHL, including the WINNIPEG JETS, licensed their respective trademarks to the NHL licensing authority in Canada. The evidence demonstrated use of the trademark on several items of clothing and souvenirs, namely pucks and miniature hockey sticks, by several sub-licensees. The evidence showed that the owner exercised control through an agent, the NHL licensing authority, who controlled the use of trademarks by the sub-licensees. Representative invoices and royalty statements were attached by way of exhibits. The requesting party alleged that the affidavit evidence constituted hearsay because the affiant had no stated connection to the registrant and that the evidence was insufficient to demonstrate that the trademarks were used in association with the services during the relevant period, or that the said use did not accrue to the registrant.

The Senior Hearing Officer held that the registration should be amended. The evidence was admissible since the affiant stated that the facts resulted from personal knowledge and review of the files of his company which is the licensing authority with respect to the wares. The fact that the trademarks were used and displayed in the advertisement of the registered services during the relevant period, and up to the end of the 1995-6 NHL season, was sufficient evidence of use during the relevant period in respect of the services.

The use of the trade-marks by the sub-licensees in respect of some of the wares was under the indirect control of the NHL licensing authority, and agent of the trademark proprietor. The exercise of indirect control by the owner through an agent, the latter of which controls the use of the trademarks by the sub-licensees is sufficient evidence of control. Use of the mark by the sub-licensees was to the benefit of the owner. The registration was amended to delete some of the wares from each of the registrations for which no use had been shown.

US Court of Appeals gives federal jurisdiction to domain name dispute involving Brazilian football club⁶⁷⁴

In this case, a dispute had arisen between Jay Sallen, a resident of Brookline, US, and Corinthians Licenciamentos, a Brazilian corporation which is the merchandising arm of a famous Brazilian football team, concerning the Mr. Sallen's registration and use of the domain name corinthians.com. The court was asked to determine whether Sallen, a domain name registrant who had lost the use of a domain name in a dispute resolution procedure which is laid down by the World Intellectual Property Organisation (WIPO) and which declared him a "cybersquatter" under the Uniform Domain Name Dispute Resolution Policy (UDRP), may bring an action in a US federal court seeking (a) a declaration that he was not in violation of the US Anti-cybersquatting Consumer Protection Act (ACPA), (b) a declaration that he was not obliged to transfer the domain name to Corinthians Licenciamentos, and (c) such relief as is necessary to achieve these ends.

The District Court at first instance had held the federal courts lacked jurisdiction over such claims. The US Court of Appeals, however, overturned this decision and held that there was federal jurisdiction over such claims.

12. International Private Law

[None]

13. Fiscal Law

Changes in tax legislation affect sports clubs

In mid-July 2003 the Home Secretary, David Blunkett, announced a reassessment of Britain's 400-year-old charity laws. More particularly he announced a new definition of the term "charity", which will require charities to work for the "public benefit" in one of 12 key areas if they are to enjoy this status. This move will make charitable status available to human rights organisations and amateur sports clubs⁶⁷⁵.

Then in early September, thousands of amateur sports clubs in Britain were granted exemption from paying local authority rates, at a time when many of these clubs feared that they would go bankrupt. Following several months of campaigning by sporting bodies, the Government agreed that amateur sports clubs should receive mandatory rate relief of up to 80 per cent, which could be increased to 100 per cent at local discretion. Sports Minister Richard Caborn and Culture Secretary Tessa Jowell had also been arguing for such relief with the Treasury and the Deputy Prime Minister's office, which is responsible for rates issues. Under existing legislation, amateur sports clubs are entitled to rate relief where they register with the Charity Commission. However, many have failed to do so because of the excessive bureaucracy and cost involved. The new arrangements will simplify the process considerably⁶⁷⁶.

In mid-October 2003, more fiscal changes were being mooted – this time for the benefit of professional football clubs. At the time of writing, discussions were about to take place between the all-party Football Group, Dawn Primarolo, the Paymaster-General, and Sports Minister Richard Caborn, which will focus on proposals to introduce tax breaks which could enable supporters to take over ailing clubs and to ensure fairer treatment by administrators⁶⁷⁷.

The Government may also support a proposed change in the law to allow Football League clubs to be established as mutual societies as opposed to private companies. More particularly the idea would be to give tax breaks to clubs which find themselves in administration so as to make it fiscally beneficial for the administrator to hand the club over to a supporters'

trust or a mutual. The bulk of the debt afflicting most clubs which are in administration is owed to the Inland Revenue or Customs & Excise, which gives the Government ready leverage. At present, most clubs in administration are handed over to businessmen at bargain prices rather than to supporters' groups. There have also been complaints that clubs in administration are not being treated on an even-handed basis. Thus it has already been highlighted in these columns⁶⁷⁸ that Leicester City, taken over by a private consortium, was only required to pay 10p in the pound for its fiscal debt, whereas the supporters' trust which took over York City was required to pay 60p in the pound⁶⁷⁹.

Becker has assets seized over tax owed – and becomes tax exile

The former Wimbledon champion's trials and tribulations with the tax man have been extensively documented and commented upon in these columns⁶⁸⁰. Having been convicted of tax evasion in respect of income earned during his playing days, he is now facing fresh turmoil over the corporation tax resulting from a string of failed business ventures. In early August 2003, it was reported that officials of the Munich city authorities had authorised seizure of his assets to the tune of more than £500,000 in respect of this unpaid tax. However, his lawyer asserted that discussions with the city authority were "ongoing"⁶⁸¹.

The following month, Mr. Becker announced that he was moving from Germany to Switzerland in order to elude the high taxation imposed under German legislation. In so doing, he was following in the footsteps of sporting compatriots such as motor racing champion Michael Schumacher and his brother Ralf, cyclist Jan Ullrich and the former Germany and Bayern Munich captain Franz Beckenbauer. This is Mr. Becker's second move towards countries with an easier tax regime. During his playing days he moved to Monaco – at least in theory, since the German tax authorities ruled that in reality he continued to spend most of his time in his Munich flat, hence his conviction last year⁶⁸².

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Tax authorities target Wimbledon landlords...

There can be little doubt that the two weeks per year during which one of the major tennis tournaments takes place in this country confers considerable benefits on the community where it is staged, i.e. the Wimbledon area. One of these benefits consists in the opportunity given to many local residents to rent out their homes to tennis stars for the duration of the tournament. However, in the process many of these residents seem to have fallen for the temptation of failing to declare the income derived from this facility to the tax authorities.

This has prompted a major investigation by the Inland Revenue, who were reported to be mingling with the crowds in the area during the tournament in an effort to identify those responsible – often middle-class families who surrender their homes to players and use the proceeds to go on holiday for the duration of the fortnight in question. Those who are found out will be required to pay the appropriate taxation, whilst anyone found to have repeated this omission for a number of years is likely to face a demand for thousand of pounds in arrears of taxation, accompanied by fines and possibly also court action⁶⁸³.

.... and errant football clubs

Another category of potential tax evaders has recently been identified by the British tax authorities as a number of football clubs, which are to be targeted by the Inland Revenue as part of a new campaign against organisations suspected of failing to pay appropriate levels of tax. In late August 2003, the Chancellor of the Exchequer, Gordon Brown, allocated an additional £66 million to the Inland Revenue in order to assist them in bringing under control areas of the economy which are said to be under-taxed. This new drive could spell further problems for football clubs, since especially those who are already suffering from financial problems (Journals passim!) will find it hard to meet any retrospective demands⁶⁸⁴.

This new hard-line approach was launched following concern within the Inland Revenue that the football industry had become a haven for tax avoidance, particularly in respect of under-the-counter payments and cash transactions of various kinds which were suspected of not having been declared to the tax authorities. According to experts in football finance, the Revenue would also be examining the lawfulness of a number of tax-avoidance schemes operated by clubs and consider alternative methods being used to pay players, such as off-shore bank accounts and trusts. A new Inland Revenue team is being organised to operate this clampdown, and it is believed that a number of financial experts who were formerly employed by football clubs but now work in other areas of finance

have been requested to give the Revenue the benefit of their knowledge and expertise in this matter⁶⁸⁵.

Sports administrators attack Olympic lottery tax

The London bid to stage the 2012 Olympic Games, which is extensively covered elsewhere in this issue (see above, p. 000) gives rise to many issues, one of which is how to finance it. For this purpose, the Government will introduce a special lottery game which would be introduced as from 2005, when the final vote is taken in Singapore to select the host city for 2012, and which is expected to generate funding of approximately £750 million.

However, in late July 2003 it emerged that the Government at the same time intends to extend the existing 12 per cent of tax on lottery tickets to the Olympic lottery. This news was greeted with dismay by sports administrators, who are calling for the entire profit from ticket sales to be used for the specific purpose of staging the Games. Nigel Hook, of the Central Council for Physical Recreation, the umbrella organisation for Britain's leading sporting organisations, expressed the general feeling on this subject in the following terms:

"A tax on an Olympic Games lottery is a scandal. The public will believe that all the money they are spending will go towards the cost of the Games, but that will not be the case. We would like to see all the money go towards helping to stage the Games and the Government should not take its usual 12 per cent on each ticket sold"⁶⁸⁶

Simon Clegg, the Chief Executive of the British Olympic Association (BOA) voiced similar objections⁶⁸⁷.

Sports club owner penalised by VAT tribunal⁶⁸⁸

This case concerned Mr. and Mrs. Taylor, partners in two sports and leisure clubs which had been trading since 1988 and 1996, although Mrs. Taylor was not actively involved. Club members paid their subscriptions either annually or monthly. By way of example, one type of membership cost £29 per month or £290 per year, which meant that monthly payers were paying a premium of 20 per cent. Other types of membership had similar differences, the maximum being 32.5 per cent. Membership application forms for the clubs indicated that paying by direct debit (the monthly charge) gave rise to an interest charge representing approximately 30 per cent of the annual rate.

Mr. Taylor took advice from a VAT consultant, who advised him that it must be established that membership did include an element of credit and that

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the exemption for credit finance (Item 3 of Group 5 of Schedule 9 to the VAT Act 1994) applied only where a separate charge was made and disclosed to the customer. Mr. Taylor then wrote to Customs & Excise, enclosing copies of the membership terms, etc., explaining that he operated a credit charge and claiming repayment of VAT to the amount of £17,000. Customs & Excise dismissed the claim, on the basis that the monthly charge was for a series of separate and successive supplies of monthly membership. There could not as a consequence be a supply of credit.

Mr. Taylor's accountants (being a separate firm from his VAT consultants) lodged an objection against this, but in June 1998, and again in April 1999, Customs & Excise confirmed their original decision. In the meantime, Mr. Taylor had not been paying any VAT on the difference between the annual and monthly fees, a fact which came to light during a visit paid by Customs & Excise to his premises in November 1999. Mr. Taylor explained that he considered the previous advice given by Customs & Excise as merely a "local decision", on the basis that other clubs operated the same system, although no evidence of this was ever produced.

Mr Taylor sent copies of the correspondence with Customs & Excise to his VAT consultant, who advised him and his accountants of the conditions attaching to Item 3 of Group 5, pointing out the factors in Mr. Taylor's favour and those against. The consultant proposed that consideration should be given to an appeal, although appropriate evidence should be obtained from members. In the course of 2000, Mr. Taylor was interviewed by Customs & Excise in respect of VAT arrears of £28,210. Customs & Excise thereupon imposed a penalty amounting to £9,869 under Section 60 of the VAT Act 1994, which applies where a person evades VAT and his conduct involves dishonesty.

Mr. Taylor appealed against this penalty, claiming that he had not acted dishonestly and that additional mitigation of the penalty should be given. He argued that he had not requested a ruling but simply made a voluntary disclosure. He also claimed that he had not seen the correspondence between Customs & Excise and his accountant, although it had been discussed. In his view, the matter was still being contested and he realised that if a final decision went against him, he would have to repay the VAT plus interest. He restated the view that, since he was aware of other clubs taking the same approach, he felt that this "local decision" would not, ultimately be upheld. At first he gave evidence that his accountant had said "carry on with it and we will deal with it", but agreed that no-one had actually said "you should continue not to pay" – this was there by implication. However, on the second day of the hearing, Mr. Taylor read a statement that his

accountant had advised him to "operate the concept" whilst making clear calculations and being prepared to make repayment. He had not said this before because he had not wanted his accountant to be criticised for a concept which he had originally proposed to them.

Customs & Excise contended that Mr. Taylor was being disingenuous by stating that the opinion issued by Customs & Excise was a "local decision". He had requested a ruling and then ignored it – nor had any appeal been lodged. It was also considered unthinkable that the accountant would advise the Taylors to ignore the Customs & Excise ruling.

The VAT Tribunal found that there could have been no doubt in the appellants' minds that the letter by Customs & Excise was intended as a ruling, and that the monthly payments were consideration for supplies of monthly membership. The tribunal also held that Mr. Taylor's credibility was damaged by the statement which he had made regarding the advice received from his accountant, which did not correspond to his original interview with Customs & Excise. The tribunal also held that Mr. Taylor could easily have corroborated his evidence by calling he accountant as a witness. Whilst not called upon to give a decision regarding the nature of the monthly fees, the tribunal agreed with the position adopted by Customs & Excise and felt that this must have been within Mr. Taylor's knowledge at all times.

The Tribunal ruled that, by ignoring the advice proffered by Customs & Excise on two occasions, Mr. Taylor was being "dishonest according to the ordinary standards of reasonable and honest people" and that his actions were deliberate. Accordingly, the two conditions set out in Section 60 of the VAT Act 1994 had been met and the penalty had been correctly charged, with no further mitigation being felt to be due.

Services provided to non-members of a golf club are exempt from VAT, rules ECJ⁶⁸⁹

Kennemer Golf is an association which promotes sport, in particular golf. Its members pay an admission fee as well as an annual subscription fee. They also participate in an interest-free debenture loan issued by the club. Non-members of the club may use the course and associated facilities, in return for payment of a subscription fee for one day. Kennemer Golf earns relatively high sums in this manner, amounting to approximately one third of the amounts paid by members by way of annual subscription fees.

In relation to the tax year in question (1994), as for other years, Kennemer Golf made an operating surplus which was then appropriated as a provisional reserve fund for non-annual expenditure. In the belief that its services to non-members were exempt from VAT, Kennemer Golf did not pay tax on those services. The

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fiscal authorities, however, considered that the club was seeking to make a profit and imposed an additional assessment to VAT in relation to these services.

The Netherlands Supreme Court (Hoge Raad) referred a number of questions to the European Court of Justice on the interpretation of the Sixth EC Directive on VAT. More particularly it sought to establish;

- (1) whether Article 13A(1)(m) of the Directive must be read as meaning that the categorisation of an organisation as “non-profit-making” must be based exclusively on the services referred to in that provision, or on all the organisation’s activities (subpara. (m) refers to “certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education”);
- (2) whether the same provision, read in conjunction with the first indent of paragraph (2)(a) of that provision, should be interpreted as meaning that an organisation may be categorised as “non-profit-making” even where it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services;
- (3) whether Article 2(1) of the Directive should be interpreted as meaning that annual subscription fees of the members of a sports association can constitute the consideration for the services provided by the association, even though the members who do not use or do not regularly use the association’s facilities must still pay their annual subscription fee.

As regards the first question, the ECJ held that, if the categorisation of an organisation as “non-profit-making” must be based on the nature of the organisation itself and not on the services which it provides in the form of those specified in Article 13A(1)(m), it follows that, in order to determine whether such an organisation meets the conditions for application of that provision, account must be taken of all its activities, including those which it provides by way of extension to the services covered by that provision.

In relation to the second question, the Court ruled that it was clear from Article 13A(1)(m) that an organisation qualifies as non-profit-making” where it does not have the aim, unlike a commercial undertaking, of achieving profits for its members. It was for the appropriate national authorities to determine whether an organisation meets the requirements enabling it to qualify as a non-profit-making organisation. The fact that an organisation subsequently makes profits, even where it seeks to make them or makes them systematically, will as such not affect the original categorisation of the organisation as long as these profits are not distributed to its members as profits.

As regards the third question, the ECJ ruled that the fact that the annual subscription fee is a fixed sum which cannot be related to each personal use of the golf course does not alter the fact that there is reciprocal performance between the members of a sports association and the association itself. The services provided by the association were constituted by making available to its members, on a permanent basis, sports facilities and the associated advantages and not by particular services provided at the members’ request. There was therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides.

Italian Government’s own goal? Article on fiscal response to financial problems of football clubs⁶⁹⁰

In this article, the author explains the origins of the financial crisis being experienced by a number of Italian football clubs, and examines the lawfulness of the response provided by the Italian Government, proposing an amendment to fiscal laws allowing clubs to depreciate the accounting losses from the decrease in the market value of players for the year 2002. The author considers whether this amendment constitutes state aid capable of distorting competition, as prohibited by EU law.

Irish betting duty changes implemented⁶⁹¹

Section 111 of the Finance Act 2003 was brought into operation with effect from May 1 2003. The result of this is that:

- the Revenue Commissioners may only raise estimates and assessments in respect of betting duty for four years, and
- specific time limits apply to the raising of estimates and assessments on the personal representatives of deceased persons.

VAT chargeable on riding lessons, rules tribunal⁶⁹²

In this case, the VAT treatment of lessons in horse riding given by trainees was considered in an appeal to the tribunal. The appellants, Miss and Mrs. Charles, were a mother and daughter who operated riding stables. They provided livery stables, riding for the disabled, summer riding camps, as well as riding lessons and training for pupils for the Horse Knowledge and Riding Examinations. Miss Charles gave riding lessons to customers. She also instructed those pupils who were stable hands at the stables, this being their main occupation, and although the latter was modestly paid, these pupils obtained a formal qualification which

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would enable them to advance their careers. As part of the course leading up to the examinations, the pupils had to demonstrate that they were capable of taking a class lesson for customers. The tribunal found that, whilst theoretically Miss Charles would be able to give all instruction lessons to customers, her other business commitments would prevent this, and some lessons would be given, under her supervision, by the unqualified trainees, although they would not be paid for doing this.

Lessons provided by the owner of a business for the supply of private tuition on a subject normally taught in a school or university, by an individual teacher acting independently from an employer, are exempt from VAT, and it was agreed that the riding lessons were such a subject. The appellants argued that the lessons given by the trainees, to the extent that they were being supervised by Miss Charles, should be exempt from VAT in the same way as Miss Charles's own lessons were. Miss Charles accepted that, when being taught by a trainee, customers would know that the trainee was their teacher. (Customers would pay slightly less for such lessons, although they would expect the trainee to be competent to teach the particular subject of that lesson.) However, the applicants argued that the reality of the situation was that Miss Charles, and not the trainees, provided the tuition, as she was the qualified teacher.

The tribunal first considered whether there could be any split between the teaching element provided by Miss Charles and the trainee in any given lesson, but decided that this would be artificial; the customer was purchasing one element, i.e. riding tuition. Dismissing the appeal and refusing exemption, the Tribunal held that, although unqualified, the trainees were the ones giving the instruction. Although more basic and at a lower cost, it remained tuition. To regard Miss Charles as providing it would be to overlook the importance of the word "individual" in Item 2. The "individual teacher" in this case was the trainee.

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

Björn Borg

In mid-October, the Swedish fiscal authorities informed former Wimbledon singles champion Björn Borg that he should pay taxes after decades of having lived in Monaco. This view was based on the fact that Mr. Borg's wife and new-born son live in Stockholm, which prompted the tax authorities to suspect that he was spending his time there also⁶⁹³.

Grigory Yesaulenko

In early July, this former executive of top Russian football team Spartak Moscow, who was once the agent for ex-Manchester United star Andrei Kanchelskis, was charged with tax evasion following the sale of Russian international Dmitry Alenichev to AS Roma in 1998⁶⁹⁴.

Sachin Tendulkar

In mid-August, an Indian court ordered an inquiry into a Government decision to allow the top Test batsman Sachin Tendulkar to import a Ferrari sports car without having to pay 11 million rupees (£150,000) by way of customs duty. The car had been given to Mr. Tendulkar by the Italian car manufacturer during India's tour of England in 2002⁶⁹⁵.

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Racism in sport

Is racism blocking path to football management for black players?

The many black players currently playing at all levels of professional football in this country testify to the fact that at least some progress has been made in eliminating discrimination and racial prejudice from the football field. However, it would appear that a number of problems remain in this sphere, more particularly as regards the ability of black players to continue a career in football as managers. There seems to be some evidence to support this view, and some of the former players aspiring to managerial status have been protesting this fact over the past few months.

The case of John Barnes is a telling one. The former Liverpool and England winger hung up his football boots several years ago, but remains unsuccessful in finding durable employment as a manager. He attempted a brief spell at Glasgow Celtic, but was dismissed three years ago, since when he has found it impossible to find work. He claims that he has applied for half a dozen posts and not even received a reply, let alone an interview⁶⁹⁶. It is particularly poignant that it should be Mr. Barnes who should be experiencing this bar, since it was an incident in 1988, in which a banana skin was thrown to his feet during a derby between Liverpool and Everton, which lifted the lid on an insidious culture of racialism which existed amongst a considerable proportion of football spectators. Mr. Barnes ascribes this phenomenon to what he describes as "covert racism", which he describes as a more dangerous form of discrimination because it is very difficult to prove and even identify⁶⁹⁷.

On the principle that actions speak louder than words, a number of former and current black professional footballers met in late September in order to launch a campaign aimed at increasing the number of black managers and coaches. One proposal was for a Black Footballers' Association to be formed and to be affiliated to the Professional Footballers' Association (PFA), the players' trade union, in order to address the problems of racism. Former leading players such as Cyrille Regis, Garth Crooks, John Barnes, Luther Blissett and Paul Elliott, some of whom have coaching experience, attended the conference, along with a number of black footballers currently playing. The meeting was organised by the PFA and Kick it Out, the football anti-racism group⁶⁹⁸.

One particular guest speaker at the conference promised drastic action against clubs if they failed to implement equal opportunity programmes and increase the number of non-white staff they employ behind the scenes. At one point Sir Herman Ouseley, chairman of

Kick it Out and a former Chairman of the Commission for Racial Equality (CRE), indicated that the latter could be requested to investigate such clubs:

"We want to work with football clubs to address the situation. But there is an incredible amount of frustration among former black players at the lack of opportunities they are being given at coaching, management and other levels within the game once they stop playing. The CRE has a legitimate role to play in investigating football clubs and making sure that they are doing as much as possible to adopt good practices. Obviously we would like the clubs to co-operate but we would not hesitate to get the CRE involved formally if we have to"⁶⁹⁹

The players attending the meeting agreed to form a steering group which will examine what measures can be taken to increase numbers of black managers and coaches⁷⁰⁰.

Welsh FA protest against racist abuse in Serbia international

As the new football season got under way, a number of internationals were played in which the participating countries attempted to qualify for the final stages of the Under-21 and European Championships in 2004. At both levels, Wales played Serbia and Montenegro away from home, in Novi Sad and Belgrade respectively. Considerable abuse was hurled by some spectators at the black players representing the Welsh team. Thus in the senior international, Danny Gabbidon, Robert Earnshaw and Nathan Blake had come in for this treatment. Following the match, the Football Association of Wales (FAW) made a protest with both UEFA delegates present⁷⁰¹.

However, a few days later accusations of double standards were levelled against the FAW, in that anti-racism campaigners claimed that the Association had not been so quick to respond to racism at grounds located in the Principality, and to wider problems of racism in the domestic game. Particularly the Cardiff City support has come in for criticism on this score, and it is claimed that the FAW took no action against them despite a number of complaints made against the club. Nor has the Welsh Premier League adopted an anti-racism charter, despite the fact that it was presented with one the previous season. The charter lays down a number of guidelines on what should be done to combat racism within Welsh football, and calls for special training of stewards as well as more positive police action⁷⁰².

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FA pledge to reassess handling of racism in grassroots football

In late September 2003, there appeared a BBC Radio Five Live documentary which purported to reveal that, ten years after the Football Association (FA) signed a pledge to “kick out racism out of football”, and at a time when well-publicised efforts were being made to eradicate racist incidents at the top of the professional game, racism remains a problem at the grass roots, even in the children’s leagues. Several black players talked about the racial abuse they have suffered, and the programme asked the question whether league organisers at every level were doing enough to stamp it out. The FA subsequently issued a statement indicating that it would assess the manner in which they handle allegations of racism in grass-roots football⁷⁰³.

Chanting of “Paki” is racially offensive, rules High Court⁷⁰⁴

In this case, Sean Ratcliffe was charged with attending a football match in Oldham and chanting the words “you’re just a town full of Pakis”. At the trial, he admitted to the charge but claimed that the words were not of a racist nature within the meaning of Section 3(2)(b) of the Football (Offences) Act 1991. At first instance, the district judge had acquitted the defendant and found that the charge was not insulting; the phrase merely amounted to doggerel and the term Paki was nothing more than “Brit”, “Aussie” or “Kiwi”, being shorthand for Pakistani. The Director of Public Prosecutions, however, appealed by way of case stated.

The Queen’s Bench Division held, allowing the application, that the chant was insulting within the meaning of section 3(2)(b) of the 1991 Act because it implied that Oldham was inferior because of the nationality and ethnic origin of a number of its citizens, and the use of the word “Paki” indicated that it was those of Pakistani origin who were the cause of this inferiority. The Court also found that the term “Paki” was used in a racially abusive or derogatory sense, and the word “just” in the chant was indicative of that fact. Accordingly, the defendant’s admitted behaviour fell within the mischief at which the statute was aimed and the case was to be remitted to a judge with a direction to convict.

UEFA charge Macedonia with failing to control racist fans

In early September, the English national team were involved in an away fixture in the context of the qualifying stage for the Euro 2004 tournament, their opponents being Macedonia. During the match, considerable abuse was directed against England’s black players, and the flag of St. George was burned

during the playing of the national anthems. The European governing body UEFA charged the Macedonian football authorities with failing to control their supporters, which could result in an order to play their next match behind closed doors⁷⁰⁵.

Dagenham manager in racism row

Dagenham & Redbridge are an undistinguished football team in the Nationwide Conference, which could earn the unenviable reputation for being better known for the attitude of its management towards ethnic minorities than for any prowess on the playing field. At least that seems to be the message being conveyed by the high-profile transfer demand made in late September 2003 by Mark Stein, the former Chelsea striker, who gave as his reason the allegedly racist attitude of manager Garry Hill. Mr. Stein claimed that other black players may follow his example. (In fact, his black team mate, Mark Smith, has also asked the club to terminate his contract.) In particular, Mr. Stein claimed that he had been informed by at least two white team-mates that they had heard Mr Hill hurl racist abuse at Telford’s former Manchester City midfielder Fitzroy Simpson when the two sides met earlier that month, in that he called the player a “black bastard”⁷⁰⁶.

Mr. Hill for his part denied having made any racist comments and is supported by the club’s Chairman, Dave Andrews. Mr. Simpson, a former Jamaica international, wrote to the Football Association (FA), the Nationwide Conference and the Professional Footballers’ Association (PFA – the players’ trade union) requesting a full investigation of the incident⁷⁰⁷.

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

New work on racism in football⁷⁰⁸

In a work which is as thought-provoking as it is enlightening, authors Jon Garland and Michael Rowe begin their examination of this explosive topic by giving a historical overview of the participation by black footballers in British football. It traces the careers of the first black players and the changes in attitude towards them which have occurred over time. They then proceed towards one of the other main features of the book, which is the thesis that there is a good deal more to race and racialism than that which is popularly known about it – which is mainly that it is only engaged in by short-cropped thugs. They discuss institutional racism, elusive racism and the racism of stereotypes. They convey the notion that it is not only the abusive chanting by a few skinheads which needs to be addressed. Racism is also inherent in such stereotyping as the notion that Asians cannot play football, Africans are tactically incompetent and all foreigners are at best poor sports and at worst

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downright cheats. They highlight the way in which these misconceptions add to the problems faced by many players who are either denied access to the sport as players or even spectators, or whose participation in sport is not taken seriously because of their ethnic origins.

Racial issues continue to beset South African sport

The extent to which, even after the official ending of the apartheid era, racial issues continue to fester in South African sport – in particular rugby union and cricket – is become a familiar landmark of this part of the Journal. However, it seemed as though the valiant attempts made by many dedicated people were at last beginning to bear fruit – until late August, when the issue flared up with renewed intensity, with potentially disastrous effects on the sport of rugby and race relations in the country generally.

As Rugby Union's international showpiece tournament, the World Cup in Australia, approached and the teams competing in it were engaged in its preparation, the last thing the sport in South Africa wanted was an ugly spat along racial lines – yet that is precisely what happened when lock Geo Cronje was reported to have refused to share a room with a black team-mate, Quinton Davids. This led to the bearded forward from Transvaal, who is something of a cult hero amongst Afrikaner supporters, being expelled from the training squad at Pretoria University⁷⁰⁹.

The South African Rugby Football Union (SARFU) ordered an immediate investigation into the incident, with two high-level officials flying from Cape Town to interview all the parties involved. Rian Oberholzer, Managing Director of South Africa Rugby, commented:

“Our position is a simple one that is dealt with in the South African Rugby constitution. We have zero tolerance for racism in rugby and feel very strongly about this issue. We have removed the player from the camp, the allegations will be investigated to establish whether we should have a judicial hearing and, if necessary, the player will be offered counselling”⁷¹⁰

Eventually, no action was taken against Mr. Cronje over the incident following the investigation, which found “no conclusive evidence” to support the charge of racism against Cronje, but added the rider that the inquiry would be reopened if new evidence came to light⁷¹¹. However, Cronje was omitted from the 30-man squad selected by coach Rudolf Straeuli a few days later. Also omitted was Quinton Davids⁷¹².

However, it was never likely that this was going to be the end of the matter, and the issue flared up again when Mark Keohane, the media manager of the South African

team, announced his resignation, stating that he could no longer be part of a squad in which prejudice was “tolerated, wished away and excused”. On leaving, he submitted a seven-page report containing various allegations of prejudice which Rian Oberholzer described as being of a “cultural and racial” nature. The report was discussed at a special meeting of the Board of SA Rugby and at an executive meeting of SARFU, both of which concluded that the allegations were serious enough to warrant a new investigation⁷¹³. Several days later it was announced that Edwin King, the former judge whom readers may recall uncovered evidence of corruption in South African cricket⁷¹⁴, had been appointed to take charge of an investigation into allegations of racial prejudice. This investigation would not only cover the issues raised by Mr. Keohane, but also reopen the Cronje case. Judge King had earned a reputation as an opponent of racism and apartheid, defending black activists and organisations in numerous cases between the 1960s and 1980s⁷¹⁵.

Fearing perhaps that the momentum might be lost if the investigation took too long, Mr. Keohane returned to the attack several days later, when he called upon the South African coach, Rudolf Straeuli, to resign, claiming that the latter had acted improperly when the allegations of racist behaviour had surfaced. Without saying so directly, he seemed to imply that Mr. Straeuli has been part of an attempt to cover up the matter. He also implied that the problems of racial prejudice were quite endemic in the side, saying:

“When a black player is with a white player there is not a problem. When there are two black players and a white player there is not a problem. But when there are two white players with one black player he is suddenly invisible”⁷¹⁶

The entire affair seems to have laid bare tensions not only within the world of South African rugby, but within the country's society as a whole. This was underlined a few days later when it was learned that no lesser figure than former president Nelson Mandela intended to play an advisory role in the affair, offering to meet the parties involved and offer counsel⁷¹⁷. There was consternation also when, on the day when Judge King commenced his investigation, tough action against racism and racists was urged by a former hard-line conservative, who had once taken Nelson Mandela to court rather than allow the game to be probed for racism⁷¹⁸, to wit former SARFU president Louis Luyt, who proclaimed himself shocked at the allegations which had been made. He did, however, have some criticism for the manner in which the affair had been handled:

“If it's true what they are saying, they were right to get rid of him (Cronje). But I'm very distressed about how this has been handled. SARFU should

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have told him what was expected of him these days and then the incident should have been dealt with in-house. He should have been told "thank you, goodbye and don't ever come back"⁷¹⁹

The King investigation itself did not get off to a very auspicious start. Julian Smith, one of two black members of the inquiry team, resigned over the decision to postpone any further action until after the World Cup. The main reason appeared to be a number of complex legal issues which would require protracted argument. Professor Smith, Vice-rector at Stellenbosch University, was not impressed, accusing SARFU of losing a "prime opportunity" to advance fundamental change⁷²⁰.

The situation was made even worse a few days before the World Cup started, when the dossier submitted by Mr. Keohane, which had given rise to the enquiry, was published in full on the Internet by News 24, a website which represents a group of Afrikaans-language newspapers in South Africa. One of the more damning allegations was that, in the wake of the Geo Cronje affair, black players in the squad were made to feel "dirty and inferior". The SARFU later published a statement distancing the Springboks from allegations of racism, and Mr. Keohane denied that he had leaked the dossier⁷²¹.

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

Allegations of racist incidents in Rugby League

The sport of Rugby League has hitherto been relatively free from accusations of racism, but this may be about to change in view of certain allegations which have been made of late. In late August 2003, the Rugby Football League was called upon to investigate a claim that the Widnes black forward, Anthony Farrell, was racially abused in a Super League match against Wakefield Trinity. The incident was included in the match report submitted by referee Steve Ganson and passed onto the independent disciplinary commissioner⁷²².

This incident came as the Commissioner was already investigating another incident in which Salford player Simon Baldwin was accused of racially abusing Whitehaven's Maori forward David Fatialofa in a National League match in June 2003⁷²³.

Neither case had yet been resolved at the time of writing.

US sports pundit resigns over race remark

In early October 2003, it was learned that one of the bastions of US conservatism had resigned from a part-time occupation as sports commentator after causing uproar with a remark about a Black American Football star. Rush Limbaugh, whose radio talk show numbers

20 million listeners, was acting as a studio pundit for sports television network ESPN when he alleged that Donovan McNabb, of the Philadelphia Eagles, was overrated because he was black. More particularly he delivered himself of the following remark:

"The media has (sic) been very desirous that a black quarter-back do well. I think there's a little hope invested in McNabb and he got a lot of credit for the performance of his team that he didn't really deserve"⁷²⁴

Mr. McNabb described these observations as "somewhat shocking" and several politicians, including Democrats such as the presidential hopefuls Howard Dean and General Wesley Clark, called for Mr. Limbaugh's dismissal. Although he resigned his position, Mr. Limbaugh refused to retract or apologise⁷²⁵.

Human rights issues

Is compulsory HIV testing of sporting performers justifiable? Article in South African journal⁷²⁶

South Africa is a country where the AIDS disease is an extremely serious public health issue, having a very dramatic impact on its social well-being and economy. Employers have certain obligations in this regard, in that it is his/her duty to ensure a working environment which is free from dangers likely to cause death or serious injury. The author examines the extent to which sporting federations or clubs have the same responsibilities as those which are incumbent on employers under labour legislation. He also examines the human rights implications of any compulsory testing which this may bring in its wake.

He concludes that in order to be able to discharge their duty to ensure a safe working environment, employers must be allowed to introduce precautionary measures to assist in the diagnosis of HIV, and therefore also introduce HIV testing. Because sporting federations have a responsibility towards their athletes, they too should introduce HIV testing to minimise the impact of AIDS on their sporting code. There appeared to be no human rights objections under the Bill of Rights enshrined in the South African constitution, and the author is even of the opinion that most participants would actually welcome compulsory HIV testing, as it is legally and morally justified to do so.

14. Human Rights/Civil Liberties

Doping procedures and human rights: an Irish perspective. Articles in professional journal

In the first article⁷²⁷, the author examines the relationship between an athlete's right to privacy and mandatory drug testing in sport under Irish law, and compares this with the position in the US. More particularly, she compares the right to privacy under the Irish constitution and the US Bill of Rights. She discusses the application of the US special needs doctrine to privacy and the testing of student athletes. She assesses the possible reaction by the Irish courts to an action brought by an athlete for invasion of privacy and considers the position of professional athletes. She also examines the moves made by the International Olympic Committee to unite the drugs testing policies of member sporting organisations at the national and international levels, and the difficulties faced by athletes in bringing actions related to drug testing against their governing bodies. Finally, she criticises the drug testing policies of professional sporting organisations.

In the second paper⁷²⁸, the same author discusses the fairness of anti-doping procedures. She discusses UK and Irish cases in which there has occurred judicial intervention in order to review decisions by sporting organisations because of alleged infringements of natural justice. She outlines the circumstances in which the courts may intervene, e.g. cases where the procedure for investigating allegations of drug use by sporting performers is found to be at fault, where the constitutional rights of the individual are being violated, or where the sporting federation in question has failed to follow its own rules or procedures.

Gender issues

Renewed calls for end to men-only golf clubs

The problem of exclusively male golf clubs is one that has been adumbrated in the last few issues of this journal⁷²⁹. It is an issue that refuses to go away, and was almost bound to resurface at the time of the British Open championship, which was played at yet another exclusively male venue, the Royal St. George's at Sandwich, Kent. Writing in *The Guardian*⁷³⁰, commentator David Davies deplores this continued state of affairs, and points to the anachronistic male chauvinist attitudes which prevail, not only at this venue, but also at most others, not least the Royal and Ancient club, which is the controlling body for the sport in this country. The author also points out that, if an organisation such as the R&A is financed in part by the public purse, it should be accountable to all sections of the public, and maybe even acknowledge that they all exist.

Other issues

International "paralympic" officials fear for accessibility problems in Greece

Running parallel to the "official" Olympic Games next year will be the Games organised for people with disabilities, the so-called "paralympics". Officials overseeing these games have expressed the fear that next year's Games are in danger of suffering adverse effect of the Greek attitude towards disability. Athens currently makes little provision for the disabled, but the "paralympics" have spurred the Government into making public areas and buildings more accessible, including the Acropolis. Nevertheless, officials have remarked that organisers must make efforts to integrate people with disabilities into society, and not merely focus on accessibility. In order to help change attitudes, organisers are planning to launch an autumn education campaign⁷³¹.

15. Drugs legislation and related issues

General, scientific and technological developments

Designer drugs “only a mouse click away”, say insiders

The term “the global village” has become much more of a reality in recent years, and one of the main contributory factors towards this state of affairs is undoubtedly the growth of the Internet. This facility has, however, also presented society with a number of problems, one of them being the manner in which the cyberspace is capable of transcending traditional boundaries between states and continents. This makes it much easier to purchase unlawful goods, or to order controversial material more or less incognito. Unfortunately, it was only a matter of time before performance-enhancing drugs joined this particular category.

At present, it suffices to visit any search engine on the Internet, type in the words “performance-enhancing drugs”, and one will receive a list of hundreds of websites where it is possible to learn about what to take, how to avoid being caught and even how to purchase banned substances by mail order. Whereas at one time acquiring banned drugs meant visiting a seedy gymnasium in a suspect area of town, nowadays this procedure appears to have become as simple as buying the latest Harry Potter book⁷³².

One of the more popular steroids to have seen its sales rocket through this medium appears to be HCG, which is the latest “designer drug” for which a number of top sporting performers have been caught already (see the case of Rugby League international Keiron Cunningham, below p. 000). All this is part of the continuous drugs war, in which many competitors constantly seek to remain a step ahead of the authorities. To add to the difficulty, the industry today is increasingly hi-tech, a complex array of “designer” drugs which is changing at a dizzying pace. HCG may be the latest drug to come to public attention; amongst insiders it seems already to be somewhat passé. Some performers have moved onto the very latest innovation, a drug called clomid, which offers the same benefits as HCG but is much harder to detect.

A further example of the way in which dishonest competitors can steal a march on the authorities came during the 2000 Olympics in Sydney, when it was rumoured that some competitors were using an anabolic steroid called ganabol, for which the International Olympic Committee did not even have a test. Scientists were baffled because the drug had been discarded by laboratories many years earlier on account

of its high degree of toxicity. However, in clinical tests carried out in 1967 involving rats, ganabol had been shown to promote high muscle growth, making it attractive to competitors in the power events such as swimming and sprinting. The fact that some athletes were using it was confirmed in 2001 by Charlie Francis, Ben Johnson’s former coach, when he wrote about ganabol for Testosterone Magazine. The drug has had its chemical properties modified so that it is undetectable in urine tests, but maintains its performance-enhancing qualities⁷³³.

In the same article, Francis alleged that clandestine laboratories throughout the world were already researching the next designer drug which cannot be detected, in time for the 2004 Athens Olympics. Few doubt that they will succeed.

New designer drug included in WADA list of banned substances

In mid-September, Modafinil, the drug which was at the centre of the Kelly White doping affair (see below, p. 000) has been specifically named in the new list of banned substances drawn up by the World Anti-Doping Agency (WADA). However, caffeine and pseudoephedrine, the principal ingredients in the cold remedy Sudafed, have been dropped⁷³⁴.

(See also the Kelli White case, below p. 000)

Doping issues and measures – international bodies

WADA chief hails drug find as warning

In mid-October 2003, the detection of a new designer steroid in the US was hailed as a major breakthrough by the World Anti-doping Agency (WADA), which claimed that its discovery was a “warning to cheats”. Several US athletes have tested positive for this drug in what has been described by the US anti-doping authorities as the largest drugs bust in sport. Reacting to the discovery of this drug, called tetrahydrogestrinone (TGH) – a steroid which has been refined by chemists in such a way as to make it undetectable under normal testing procedures, WADA president Richard Pound hailed this as a “serious warning for cheats”⁷³⁵.

The US anti-doping body said it first learned about the TGH drug when a male, who identified himself as a high-profile coach, called the agency in early June 2003, claiming that certain US and international athletes were using an “undetectable” steroid. He subsequently sent

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the US Anti-Doping Agency (USADA) a syringe containing a substance which a laboratory, accredited with the International Olympic Committee (IOC), later identified as a designer steroid which would not have been detected under normal testing procedures. A test for this steroid was then developed. The positive samples containing the steroid were found in the re-testing of 350 doping tests at the US Championships held in June as well as 100 subsequent out-of-competition tests⁷³⁶.

News about the availability of this new type of drug coincided with reports that a major drugs scandal was in the offing involving these drugs. Up to twenty unnamed US athletes, including Olympic champions and world record holders, could be suspended for life after it was revealed that they had tested positive for THG. This could make it the most sensational doping scandal since the affair involving sprinter Ben Johnson, who tested positive for steroids and was disqualified following his win in the 100 metres at the Seoul Olympics in 1988. Officials at UK Sport, the body in charge of drug testing sporting performers in Britain, have urgently contacted their counterparts in the US in order to discover how they could administer similar tests to British athletes⁷³⁷.

News of this latest major drugs scandal only reached this column at the time of writing. However, it had already learned that the IAAF was preparing to re-test 400 samples taken during the World Championships in Paris⁷³⁸. Doubtless further developments will emerge by the time the next issue goes to press. It will, however, be returned to below (p.000) in view of some of the other issues which this affair raises, and to bring it on conjunction with a wider drugs scandal which appears to be occurring in the US (see section below).

Doping issues and measures – individual countries

United States

New US athletes doping scandal in the making

Reference has already been made in the previous section above to the manner in which new detection procedures are identifying sporting performers who ingested the latest “designer” steroid which unlawfully assists them in their sporting endeavours. However, these were merely the latest tidings in what was gradually developing as a major drugs scandal, in which US athletes had been engaging for some considerable time and which has been discovered only relatively recently. The intensity of the scandal is made even worse by the fact that there is some evidence that the US authorities have attempted to cover up this matter, an issue which has already been adumbrated in earlier editions of this Journal⁷³⁹.

The issue flared up again in late August 2003,

coincidentally or not at the time of the World Athletics Championships in Paris, when it was learned that the newly-crowned 400 metres champion Jerome Young was named as having tested positive for the banned steroid nandrolone prior to winning a gold medal in the 2000 Olympics at Sydney. The test had been taken at a meeting in Eugene, Oregon, in June 1999. Nor was he the only athlete involved – his name was just one of 13 athletes who had tested positive for the drug between 1996 and 2000 but whose names had not been released by their national governing body, USA Track & Field (USATF), which had overturned Young’s doping violation⁷⁴⁰.

The president of the World Anti-Doping Agency, Dick Pound, accused USATF of having engaged in a “conspiracy of silence” by failing to report the positive result to the world governing body, the International Association of Athletics Federations (IAAF) immediately. He declared that the legitimacy of the US win in the 4x400 metre relay, in which Young had participated, was now shattered. Officially, the US authority’s silence was covered by legal acquiescence. USATF have maintained throughout that any athlete who was subsequently cleared should not be named. They did not feel it necessary to inform the IAAF immediately on being notified of the test results because they had a policy of not naming athletes who had failed drugs tests before the entire appeals procedure had been exhausted⁷⁴¹. In January 2003, a ruling by the Court of Arbitration in Sport had allowed USATF not to reveal the names of any of the athletes who had tested positive during the period in question⁷⁴². Nevertheless, a month after the World Championships, the International Olympic Committee (IOC) requested both the IAAF and USATF to reopen the case of Mr. Young. However, they did not seem to be very optimistic about the outcome of such a request, particularly in view of the Court of Arbitration ruling referred to earlier⁷⁴³. This may explain why a few days later the IOC decided to take the matter into their own hands and launched disciplinary proceedings to have the entire medal-winning squad of which Mr. Young was a member stripped of its medals. On the eve of the date on which the three-year deadline for bringing disciplinary action expired, the IOC set up a commission to investigate the case. It was the first occasion in its 109-year-old history that the IOC decided to take action against one of its competitors independently of the body governing the sport⁷⁴⁴.

There was further bad news for US athletics a few days after the Jerome Young story broke, when it was learned that Kelli White, who won the 100 metres and 200 metres sprint events in the women’s section of the World Championships, had tested positive for the stimulant modafinil, a psycho-stimulant which boosts the nervous system. It had not yet been placed on the list of banned substances enforced by the IAAF or the IOC, but

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it did feature on the list of “related substances”. Ms. White reacted by claiming that she had taken the drug on prescription after having been diagnosed as suffering from the sleep disorder narcolepsy⁷⁴⁵. The IAAF launched an investigation into the product, and after receiving expert opinion announced that it would classify the drug as a “weaker stimulant”. This would mean that, if found guilty, Ms. White would merely receive a public warning and be stripped of her medals rather than incur a lengthy ban from the sport⁷⁴⁶.

Any punitive action taken against Ms. White depended on her actually being found guilty of having taken the drug. The athlete wrote to the IAAF giving her version of the affair. She repeated that she had taken the drug to combat narcolepsy and stated that she had not declared her use of it to the IAAF because it was not featured on the list of banned substances. The IAAF rejected this plea and forwarded the case to USATF as well as the US anti-doping body, USADA⁷⁴⁷. At the time of writing, no news was forthcoming about the outcome of these procedures.

None of the above naturally served to enhance the image or reputation of US athletics, and gave rise to plenty of adverse comment in the media. One such commentator, Solomon Wariso, a former British international runner at the 200 and 400 metre levels, went so far as to state that there was “one rule for Americans and one rule for the rest of us”. He points out that in fact the various websites on which the drug modafinil is advertised carry warnings to the effect that it should not be used if one is likely to compete in events where drug testing is likely. He also states that the US athletes are notorious for taking these matters to the courts, involving protracted periods of litigation. This acts as a deterrent to disciplinary bodies, including USATF, who may fear being bankrupted in the process⁷⁴⁸.

Doping issues and measures – individual sports

Athletics

Doping-tainted coaches controversy continues

It will be recalled from the previous issue⁷⁴⁹ that various athletes had become the butt of bitter criticism because of their association with coaches whose past was tainted by their association with systematic doping policies. The issue has continued to fester over the period under review.

In Britain, the case of Dr. Ekkart Arbeit continued to attract a good deal of obloquy. Dr. Arbeit had been appointed as coach to British heptathlon champion Denise Lewis, in spite of his background, which was that

of having been the architect of the systematic policy of administering drugs to East German athletes during the 1970s and 1980s. However, both Ms Lewis and Frank Dick, her chief coach, had defended this appointment, mainly on the basis that Dr. Arbeit had never been subjected to any prosecution. This was in spite of the fact that there was overwhelming evidence of the coach’s involvement in the massive drug-taking programme as it emerged from an 840-page file held by Stasi, the East German secret service. In mid-June, UK Athletics, the national governing body, officially endorsed Dr. Arbeit as Ms. Lewis’s coach⁷⁵⁰. It emerged that it was the former Olympic sprinter, Jonathan Edwards, who had been the key figure in securing this endorsement⁷⁵¹.

The controversy intensified a few days later when the most powerful man in international sport criticised the appointment. Jacques Rogge, the president of the International Olympic Committee (IOC), called the decision “unwise”, adding that although he did not suggest that the athlete in question would be more prone to take drugs because of being linked to Dr. Arbeit, the association with someone of his reputation would not be in the best interests of the sport⁷⁵². Another leading sports administrator, Dr. Wade Exum, the former chief anti-doping officer of the US Olympic Committee, warned Ms. Lewis that turning a blind eye to Arbeit’s past would lead to problems in the future⁷⁵³. Dr. Exum spoke with some authority, as he had spoken out against what he claimed to be systematic cover-ups by the US Olympic Committee over positive drugs tests (see above, p. 000), for which he was dismissed by the Committee (he is still pursuing legal action for unfair dismissal in respect of this affair)⁷⁵⁴.

Undeterred by all this, Ms. Lewis announced in mid-August that she was taking her controversial coach with her to the World Championships in Paris the following month. Once again, there was no objection to this from the sporting authorities, with UK Athletics spokesman Max Jones restricting himself to describing this matter as a personal decision for the athlete concerned⁷⁵⁵. However, the relationship seemed to have soured during the championships themselves, since it was learned that Ms. Lewis had started to consult her former coach Charles van Commenee rather than the former East German coach. In fact, it seems that Ms. Lewis may request Mr. van Commenee, who is currently the UK Athletics technical director for multi-events, to assist her with trying to retain her heptathlon title at next year’s Olympics. In fact, the Dutchman had assisted her to achieve gold in Sydney, but the association went sour thereafter⁷⁵⁶. To date, however, no official announcement putting an end to the Arbeit/Lewis association has been made.

As for the other partnership between a female Olympic champion and a tainted coach, that between

15. Drugs legislation and related issues

US athlete Marion Jones, as well as her partner Tim Montgomery, and Charlie Francis, who had been banned for life from coaching Canadian athletes after the Ben Johnson affair referred to earlier. It will be recalled from the last issue that Ms. Jones had ended her relationship with Mr. Francis under pressure from her sponsors, but that Mr. Montgomery had yet to do so officially⁷⁵⁷. In fact, the latter did just that in mid-June. He also publicly stated his regret that he had ever been associated with the tainted coach, calling it “not a good decision”⁷⁵⁸. Since then, both he and Ms. Jones have found a new coach⁷⁵⁹.

Chambers in positive drug test

Just as this issue was going to press, it was learned that Dwain Chambers, the fastest sprinter in Europe and one of Britain’s principal hopes for the 2004 Olympics, had tested positive for the “designer drug” THG (see above). Traces of the drug were apparently found in a sample taken during an out-of-competition test in Germany in mid-summer. The test was taken by officials of the International Association of Athletics Federations (IAAF) following a tip-off from the US anti-doping body USADA. They sent the sample to the same laboratory which had succeeded in finding a test capable of detecting the drug (see above, p. 000)⁷⁶⁰.

If found guilty, Mr. Chambers would certainly miss the Olympics, and earn himself the unwanted reputation of being the biggest name ever to be unmasked as a taker of banned drugs. No further news was available at the time of writing.

CAS cuts Wilkins ban to four years – as it prepares for Myerscough appeal

The case of Perriss Wilkins, the top British discus thrower, has been highlighted before in these columns. It will be recalled from the previous issue⁷⁶¹ that Mr. Wilkins had been issued with a life ban as a result of two convictions for doping offences. The athlete, however, had vowed to pursue the matter up to the level of the Court of Arbitration for Sport (CAS) even if it meant mortgaging his house. He did just that, and the outcome of these proceedings were announced in late July 2003.

The CAS decision was that Mr. Wilkins’s life ban should be commuted to a suspension for four years, although the Court did conclude that he was guilty of tampering with the evidence. The appellant had based his case mainly on a claim that releasing details of his confidential medical records showed that he was the subject of discrimination, and that the positive test which he had incurred for artificially raised levels of testosterone had been caused by testicular cancer. UK Athletics, the body governing the sport in this country, claimed that the appellant had forged a letter from his

doctor about his condition. The CAS would not release details of the decision until a later date, but is believed to have concluded that UK Athletics had not been consistent in applying the rules⁷⁶². They had failed to ban for life shot putter Carl Myerscough after he had failed two drugs tests in 1999, separated by more than three months, for a cocktail of banned steroids and for testosterone⁷⁶³. In fact, the Wilkins decision came at a delicate time, with the CAS being due shortly afterwards to hear Mr. Myerscough’s appeal against his lifetime Olympic ban (under Olympic rules, anyone who has ever tested positive may not represent his country at the Games ever again). UK Athletics was supporting the applicant’s case for reinstatement⁷⁶⁴.

Lagat withdrew from World Championships following positive EPO test, it is revealed

At the World Championships held in Paris in the later summer of 2003, there was some consternation when it was learned that Bernard Lagat, the leading middle-distance runner from Kenya, had withdrawn from the 1,500 metres event at late notice. It was revealed a few weeks later that the reason for this withdrawal was the fact that Mr. Lagat had tested positive for the banned substance EPO during a race meeting in Germany some weeks earlier. The Kenyan athletics authorities decided not to make this fact known at the time in order not to affect the performance of the remainder of the national team⁷⁶⁵.

Mr. Lagat’s agent, James Templeton, announced that his client denied categorically ever having taken performance-enhancing drugs, and expressed his regret that news of the positive A sample had been made public before the B sample had been tested⁷⁶⁶.

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

Lynn Davies. In late October, the former Olympic long-jump champion urged a hard line on doping cheats, calling for them to be banned for the full two years – even if they were British. Mr. Davies made this statement as it was being announced that the IAAF was preparing to retest 400 samples taken during the World Championships in Paris, following the THG scare referred to earlier (see above, p. 000)⁷⁶⁷.

Alberto Garcia. In October, it was learned that the European 5,000 indoor record holder, from Spain, was suspended for two years by the Spanish Athletics Federation following a positive test for EPO at the world cross-country championships in March⁷⁶⁸.

15. Drugs legislation and related issues

Football

Rio Ferdinand affair shakes English football to the core

When it was learned that Manchester United and England defender Rio Ferdinand had failed to turn up for a drug test, everyone expected some disciplinary action to be taken against the player. However, few could have foreseen the ructions the entire affair would cause throughout the game as the drama unfolded.

The entire affair started in early October 2003, when it was learned that Mr. Ferdinand had failed to provide a sample during a random drugs test at Manchester United's training ground two weeks previously. The sampling official had arrived, accompanied by an FA supervising official, at the Carrington training ground, asked to see the United doctor and informed him they wished to test four of the first-team squad, whose names were drawn from a hat. Under FA rules, the four players had an hour to join the testers. The other three United players complied, whereas Ferdinand did not. When the hour had passed, he was in violation of the FA's anti-doping rules, and the FA were notified the following day⁷⁶⁹.

The player's agent immediately announced that his client had provided a sample later, which had tested negative. However, the news led to a delay in the naming of England's squad for the crucial tie against Turkey in Istanbul a few days later. Some Football Association (FA) officials were understood to want Ferdinand excluded from the England team in order to emphasise the commitment of the Association to the campaign against doping. The management at United, however, were furious at this news and threatened legal action⁷⁷⁰.

When the team for Istanbul was announced, Mr. Ferdinand's name was not on the list. This was not apparently much to the taste of England manager Sven-Göran Eriksson, if only because of the effect he knew the exclusion would have on the team's morale. Predictably, the omission of Mr. Ferdinand also provoked outrage amongst the England players, who demanded that the defender be reinstated. It was also understood that, at a certain point, some of the players, if not all, had threatened to withdraw from the team unless this reinstatement occurred. This was denied by the FA⁷⁷¹. The latter also stated that it would defend with vigour any legal action which Mr. Ferdinand's club would initiate as a result of this decision. It also emerged that the person responsible for having Ferdinand omitted from the squad was the new Chief Executive of the FA, Mark Palios⁷⁷².

Although there ultimately was no boycott of the fixture by the England players, they nevertheless made known their disenchantment with the manner in which the FA had handled the affair. They later issued a statement to this effect, claiming that the FA – which

they represented on the field – had let them down very badly through this decision, adding:

“One of our team-mates was penalised without being given the rights he is entitled to and without any charges being brought against him by the governing body of the game. Rio Ferdinand was entitled to confidentiality and a “fair” hearing in front of an independent commission. We believe the people responsible for making the decision did not give Rio Ferdinand that due process and that has disrupted and made the team (sic) weaker against the wishes of the management and the players”⁷⁷³

Mr. Ferdinand, in the meantime, attempted to explain away his failure to deliver the relevant sample. He claimed that he forgot to take the test because he was moving house that day, even though he had been photographed shopping at Harvey Nichols in Manchester that same afternoon. He added that he had never used drugs or condoned their use, either in sport or in society, and that hitherto all the tests to which he had been subjected in the course of his career had provide negative⁷⁷⁴.

By then Manchester United had reiterated their threat to bring legal action against the FA for their failure to include Ferdinand in the national squad. It emerged, however, that legal considerations had been very much to the forefront of the FA officials' mind when they issued the ban. Lawyers had advised them that if they included the defender in the team and England won, Turkey would be within their rights to request world governing body FIFA to have the result declared null and void, on then basis that the Manchester United player's failure to take the test automatically disqualified him from the fixture⁷⁷⁵.

It was becoming increasingly clear that a major dispute was in the offing between the club and the players' trade union, the PFA, on the one hand, and the FA on the other hand. The FA had met United's threat of legal action with noises to this effect of their own. The Old Trafford club then seemed to adopt a more conciliatory approach, inviting Mr. Palios to a home match in the near future. However, it was thought that Mr. Palios would first be seeking a formal meeting at which the club would be invited to withdraw some of the more derogatory comments made about the affair against the FA and its Chief Executive. Mr. Palios seemed confident that he could prove that the FA had every right to exclude Mr. Ferdinand and that all the relevant procedures had been correctly followed⁷⁷⁶.

Naturally this affair had not escaped the attention of world governing body FIFA, and the organisation waded into the affair shortly after the Turkey fixture when Michel D'Hooghe, the head of FIFA's medical committee, stated that Ferdinand should be penalised for missing the test

15. Drugs legislation and related issues

and insisted that FIFA would intervene if it considered that the punishment issued by the FA was too lenient. Past precedent seemed to suggest that Mr. Ferdinand would be fined rather than banned, particularly if he was charged with failing to take the test rather than wilfully refusing to do so. One particular case was sure to be used by Mr. Ferdinand in his defence, i.e. that of Christian Negouai, a midfielder ironically playing for deadly foes Manchester City. The Frenchman had been issued with a fine of £2,000 after missing a drugs test shortly after the end of the previous season⁷⁷⁷. In another case, Billy Turley, who plays for Nationwide League club Rushden and Diamonds, escaped with a rap over the knuckles in spite of having been the first player in England to test positive for a banned steroid⁷⁷⁸. Any decision by the FA which was out of line with past cases was certain to be challenged by Manchester United in the courts⁷⁷⁹. FIFA returned to the attack a few days later, when president Sepp Blatter praised Mr. Palios for the firmness of the action which he had taken⁷⁸⁰.

Shortly afterwards, it emerged that Manchester United had been unable to prevent the News of the World, a Sunday tabloid, from publishing details of Rio Ferdinand's mobile phone bills, which would demonstrate that, contrary to the player's allegations, his telephone was not in fact switched off on the day of the test. The FA had asked Ferdinand to provide copies of his telephone bill in order to help establish whether his failure to provide a sample was accidental or constituted the more serious offence of wilfully missing a test⁷⁸¹.

Also not slow to crank up the pressure on this case was the manager of Arsenal, one of United's major rivals for the Premiership title. Arsène Wenger stated the view that, far from being too strict, the FA's attitude towards drug testing was far too lax, that he had said so in meetings involving the European governing body UEFA, and that none other than United manager Sir Alex Ferguson had expressed agreement with this view. More particularly he considered that drug testing which only occurred once per year was totally inadequate⁷⁸². The FA responded by announcing that it would tighten up its procedures, if only to avoid a repetition of the unfortunate repercussions which the entire affair had provoked⁷⁸³.

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

Mark Bosnich loses drugs appeal

The case of Mark Bosnich, the former Manchester United goalkeeper subsequently transferred to Chelsea, has been well documented in previous issues of this organ⁷⁸⁴. The Australian international had tested positive for cocaine in November 2002, as a result of which he was banned by the Football Association (FA) for nine

months. His club also imposed five penalties on the player. Since then, Mr. Bosnich appealed against these to a Premier League panel, but lost on four of these⁷⁸⁵.

Cycling

Followers of cycling "tacitly accept" use of doping, claims journalist

It is well-known that cycling is one of the sports in which the temptation to use performance-enhancing drugs is at its strongest, and recent scandals involving the Tour de France and the Giro d'Italia are merely some of the more infamous instances of this practice. This year's major races seem to have been less afflicted in this respect, which does not mean that the sport has suddenly cleansed itself from any association with these substances. This is certainly what emerged from an investigation by Guardian journalist John Rawlings, who published his findings as this year's Tour was getting under way⁷⁸⁶. His conclusion was that there seemed to be almost a tacit acceptance of the use of drugs on the part of the followers of the event, on the premises that no normal man can cope with the demands of this race without some recourse to chemical assistance.

Museeuw in drug probe by Belgian police

In early September 2003, Johan Museeuw, who won the World Championship in the road in 1996 and is regarded as the sport's best single-day rider, became embroiled in one of the murkier aspects of cycling when he was interviewed by police in Bruges who were investigating the connection between the possible use of drugs in cycling and the trafficking of animal hormones within agriculture. Earlier that day, his home had been searched and substances removed for analysis⁷⁸⁷.

The Belgian rider's name had been given to the police by a masseur employed by several top cyclists, Herman Versele, who named five other riders, including the Belgian-based Briton Oliver Penney, whose homes were also searched. Mr. Versele had earlier been named by a vet suspected of distributing drugs within the sports of cycling, horse racing and pigeon racing, according to a spokesman for the investigative judge (Onderzoeksrechter) of Kortrijk, West Flanders. The search was, according to the spokesman, for human hormones⁷⁸⁸.

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

Ullrich cleared

In early October 2003, it was learned that Jan Ullrich, who finished second in this year's Tour de France, was cleared by Germany's Olympic committee to defend his title in Athens next year, after serving a doping ban earlier this year⁷⁸⁹.

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Llorente fails drugs test

In August 2003, it was revealed that Javier Pascual Llorente was the only rider in this year's Tour de France to fail a drugs test. The Spanish cyclist had tested positive for the banned hormone EPO⁷⁹⁰.

Rugby Union

Frankie Sheahan

Earlier this year, it was learned that Ireland hooker Frankie Sheahan had tested positive for the banned substance salbutamol⁷⁹¹. He was initially issued with a two-year ban, but this was reduced on appeal by the International Rugby Board (IRB) to three months, arguing that the positive result had been caused by his using an asthma inhaler⁷⁹². This meant that he would be able to represent his nation in the World Cup a month later.

This decision was clearly not to the liking of Dick Pound, President of the World Anti-Doping Agency (WADA), who stated that this was only due to the IRB not being a signatory to the Agency. He added that if the IRB were such a member, his organisation would have challenged the decision immediately before the Court of Arbitration for Sport (CAS). He told the Sydney Daily Telegraph:

"I think it was manifestly unsatisfactory. There would be a case where WADA would have an independent right of appeal in the CAS. We would have exercised that. We would have done that as soon as we knew. You can expedite these proceedings"⁷⁹³.

Mr. Pound did not elaborate on WADA's grounds for contesting the ruling.

Romanian First Division club expelled for doping offences

In mid-September, it was learned that the Romanian Rugby Federation had expelled Stiinta Universitatea Remin Baia Mare, a club playing in the First Division, and banned its vice-chairman Dan Danut for life after thirteen players tested positive for the banned steroid norandrosteron. Three other players had refused to submit to a second test, and three refused to take any test at all. All nineteen players were banned for two years⁷⁹⁴.

Alistair McKenzie banned

In early July 2003, Wasps prop Alistair McKenzie was banned for six weeks after testing positive for ephedrine. The player had pleaded guilty, stating that he had consumed the substance in a food supplement. The London club subsequently issued a statement claiming that the player had been misled by the supplement's manufacturers, saying that the product

had been recently varied to include a small proportion of the prohibited substance whilst not altering the outward packaging in a significant manner⁷⁹⁵.

Willie Steenkamp banned

In mid-September 2003, it was learned that South Africa Under-21 lock forward Willie Steenkamp had been banned by the South African Rugby Union (SARFU) until June 2005 after testing positive for the anabolic steroid stanozolol. Mr. Steenkamp had been tested before the Under-21 World Cup, held in England in June. The player had admitted taking the substance⁷⁹⁶.

19 players from same club banned

In one of the most baffling cases of indiscipline ever witnessed at any level of the game, nineteen players from the Welsh Third Division club Penygraig were banned for eighteen months after refusing to take a drugs test in May 2003. Penygraig secretary Peter Bowen was barred from holding any position in the game for three years after admitting a charge of wilfully obstructing or interfering with doping control tests⁷⁹⁷.

Rugby League

Cunningham banned, but could sue

In mid-July 2003, Keiron Cunningham, the St. Helens and Great Britain hooker, was given a suspended ban after testing positive for a prohibited substance. Traces of the hormone HCG were found in a urine sample, and he was fined £2,500 by an independent panel, although he had not been initially named. The one-year ban was suspended for a year on grounds of mitigating circumstances⁷⁹⁸. The 26-year-old Welshman had tested positive eighteen months previously, but his name had only been released just before the hearing under pressure from UK Sport, the agency responsible for dope testing, and Sports Minister Richard Caborn, who had been critical of the Rugby Football League (RFL)'s alleged lack of transparency⁷⁹⁹.

Mr. Cunningham mounted a robust defence of his reputation, shifting the blame firmly onto his dietician, Mike Sutherland, who had been employed by the RFL and had also been recommended to his club, St. Helens. The player contended that the substance responsible for his positive test had been administered by Mr. Sutherland. He went on to claim that the substance had been given to him in order to burn off fat to keep his weight down whilst he was recovering from a broken foot. He also revealed that the test had been carried out whilst preparing for the one-off Test against Australia in Sydney the following month. He was under pressure to get fit for that fixture, and was informed that the product in question was natural and

15. Drugs legislation and related issues

approved⁸⁰⁰. It later transpired that Mr. Cunningham was subsequently dismissed by the RFL for irregularities in his professional qualifications⁸⁰¹.

However, top sports lawyer Nick Bitel later said that Mr. Cunningham could have a strong case if he sued the RFL for compensation, given that his reputation had been tarnished by having been issued with banned drugs without his knowledge by someone whom they employed. Mr. Bitel went on:

“Any professional owes you a duty of care. You’ve got to prove they’ve broken that duty of care by doing something you didn’t consent to. If you can prove that, they are liable. In order to properly consent you have to have some information. If you don’t have that you can’t say to have given (sic) your consent. But he’s got to prove that the official acted within the course of his duties and the RFL may argue that what he did was outside his duties”⁸⁰²

Mr. Bitel compared the Cunningham case to that which involves Czech tennis player Bohdan Ulihrach, who at the time of writing was about to bring court action against the Association for Tennis Professionals (ATP) for loss of earnings after having been cleared of doping charges which kept him out of the sport for nine months. Earlier this month, the ATP conceded that an electrolyte replacement product routinely administered to the players by tour trainers may have been contaminated with the banned anabolic steroid nandrolone⁸⁰³.

No news of any legal challenge by Mr. Cunningham had been forthcoming at the time of writing.

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

Danny Burton. In August, the young Hunslet forward was suspended until 31 December 2003 for refusing to take a drug test following a recent National League Two fixture. The relevant panel of the Rugby Football League accepted, however, that there were exceptional and extenuating circumstances (believed to involve family bereavement) and therefore kept the penalty well below the two-year ban imposed on Alan Shea, the Swinton prop forward, who also refused to take test⁸⁰⁴.

Alan Shea. See previous section.

Matt Calland. In July, this Huddersfield player submitted a sample containing nandrolone. He was issued with a six-month suspended ban, but has since retired⁸⁰⁵.

Golf

R&A rejects mandatory drugs testing, in spite of calls to do so....

The sport of golf is not normally associated with the abuse of performance-enhancing drugs, but that may be about to change. Greg Norman, the former British Open winner in 1993, has stated his conviction that some golfers are taking steroids to build up strength. He accordingly called for the Royal & Ancient Club, which governs golf in this country, to carry out random tests at this year’s Open in order to catch the cheats. Golf is at present one of the few sports which does not carry out random testing⁸⁰⁶.

However, the distinguished Australian’s plea seems to have been without effect – at least for the time being. R&A Secretary Peter Dawson stated that there had been discussions on the subject with other bodies governing the sport, but that dismissed rewriting the rules in order to make this possible⁸⁰⁷.

...and in spite of the French golfer who tested positive

It may be that Mr. Dawson will need to revise his ideas on the subject of drug testing, since in August 2003 there occurred the first drug test ever carried out in professional golf – and with it the first positive result. Marc Jarry, a European Tour journeyman competitor, tested positive for prednisolone, a steroid which is used to treat conditions such as asthma and multiple sclerosis, and which is sometimes used as an anti-inflammatory to treat injuries. A series of voluntary tests had been conducted by the French sports ministry at the French open in June 2003⁸⁰⁸.

Tennis

Are ATP procedures unimpeachable? Wada proposes independent assessment

Drugs scandals seem to spare no sport these days, and certainly hit the world of tennis in no uncertain fashion in July 2003 when it was learned that seven players, six of them unidentified, had tested positive for traces of nandrolone between August 2002 and April 2003. The association of Tennis Professionals (ATP), the players’ ruling body, subsequently alleged that an electrolyte replacement product, routinely administered to players by Tour trainers, could have been contaminated, and conceded that it was the ATP, and not the players, which was culpable⁸⁰⁹.

This aroused the suspicions of the World Anti-Doping Agency (WADA), which, through its Chairman, Dick Pound, wrote to the ATP offering an independent review. According to WADA spokesman David

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Howman, claimed that the ATP findings only amounted to a theory which was "inconclusive". Although the ATPO is not bound to take up the WADA offer, it could be seen as disingenuous to refuse to take up an offer by an independent drugs monitoring body. Matt Rapp of the ATP, however, rejected any notion that its procedures were anything but above-board:

"This was not half-assed (sic). We have used the absolute experts in their field in the most objective and transparent fashion"⁸¹⁰

As has been reported above (p. 000), Czech player Bohdan has indicated to the ATP that he is about to take them to court for loss of earnings in respect of their negligence in this affair.

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

Rowing

In late August, three Austrian rowers were suspended by world governing body FISA for having tested positive for traces of the banned steroid norandrosterone⁸¹¹.

Snooker

In late July, Wayne Saidler, ranked No. 155 in the world, was fined £750 after testing positive for a derivative of cocaine. The west Midlands player gave a urine sample at a Challenge Tour event the previous November. It was found to contain traces of benzoyllecgonine⁸¹².

16. Family Law

[None]

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Football – Internal rules and institutions

New regionalised Nationwide Conference to take off in 2005

In June 2003, it was learned that a new regionalised Nationwide Conference Second Division, with twenty-two teams in the Northern and Southern sections, will be launched at the end of the 2004-5 season. Conference North and Conference South teams will be elected from the existing feeder leagues, i.e. the Unibond Premier, Doctor Martens and Ryman leagues. The move was approved by the Football Association council in Torquay⁸¹³.

World Cup changes: various developments

In recent months, a number of proposals have been made in order to change the format, timing and membership of the World Cup finals.

In June 2003, world governing body FIFA abandoned a plan, reported in the previous issue of this Journal⁸¹⁴, to increase the number of finalists to thirty-six. The organisation retreated, having given approval only seven weeks previously to have the Finals contested by thirty-six teams at the 2006 World Cup in Germany, a decision which had been greeted with criticism and incredulity. Meeting in Paris on the eve of the Confederations Cup final, the FIFA Executive Committee rejected the plan by twenty-three votes to one. The one opponent was the FIFA representative from Oceania, which will now lose the one automatic place in the Finals which they had been given last December, and revert to having effectively only half a place, in the form of a two-leg play-off⁸¹⁵.

FIFA President Sepp Blatter, a vocal critic of the plan, stated that it had been rejected on the grounds that it was impractical. There was no easy way to get from 36 teams to 16 for the second round. The planned increase fell when Conmebol, the South American federation which proposed it after losing half a qualifying place to Oceania, withdrew support from their own plan. It appears that a deal to return their half-place was sufficient to defeat the most divisive idea FIFA have considered since they examined the possibility of

staging the Cup every two years⁸¹⁶.

The two-year cycle may have been soundly rejected, but that has not prevented certain quarters from attempting to introduce greater frequency in the number of Cups staged. Thus in late September 2003, FIFA President Sepp Blatter held out the prospect of the Cup being played every three years rather than every four. Since the new FIFA constitution adopted a few days earlier, he anticipated a certain degree of frustration from Confederations at having to wait 24 years for their turn. He did not mention Europe, but was clearly referring to the European governing body UEFA because the World Cup has always rotated from Europe to another continent, and then back again⁸¹⁷.

Foé tragedy could lead to downgrading of Confederations Cup

The Confederations Cup is a somewhat obscure tournament which has, however, been surrounded by controversy because of the tight schedule of games played after a long domestic season. It was in the course of this year's tournament that Manchester City and Cameroon midfielder Marc-Vivien Foé collapsed and died on the field of play, representing his country in the semi-final with Colombia⁸¹⁸. It is impossible to tell whether the taxing nature of the tournament had anything to do with the player's too early demise. However, it did lead FIFA President Sepp Blatter to admit that too much pressure may be placed on players, and that the Cup may need to be staged every four years rather than every two, as is the case at present. The present format is scheduled to continue until 2005, but thereafter changes in its frequency may be introduced⁸¹⁹.

Blatter offers "glasnost" in the shape of television documentary

This Journal has had ample opportunity to examine the way in which world governing body FIFA president Sepp Blatter has discharged his duties and, although the Swiss administrator does not appear to have committed any unlawful actions, his regime at FIFA has come in for

17. Issues specific to individual sports

a good deal of criticism⁸²⁰. Probably aware of the manner in which all this criticism had tarnished his image, Mr. Blatter announced in mid-September 2003 that stewardship of the high temple of football would be opened up for public viewing in the shape of a television documentary aimed at coinciding with the organisation's 100th anniversary in 2004. The documentary makers, commissioned by the European Broadcasting Union, will be able to screen parts of the FIFA Executive Committee meeting, this being the first occasion on which cameras have been allowed access to the decision-making inner sanctum. The full FIFA Congress, which will be held in Doha, is to be filmed in detail as well⁸²¹.

The Danish television team will also spend a full working day with Mr. Blatter at his headquarters in Zurich, and be allowed access to every meeting as well as asking any questions they wish. It is some irony that this documentary is the brainchild of German journalist Jens Weinrich, who has been one of Mr. Blatter's most trenchant critics over the past few years.

Clubs which go into administration to have points deducted

This issue has already been dealt with earlier, under the heading "Company law" (see above, p. 000)

From Wimbledon to "MK Dons" – birth or death of a new concept?

The saga of the attempts made by Nationwide League club Wimbledon to continue their nomadic existence, with Milton Keynes as their next stop, has been extensively documented in these pages⁸²². The reader will recall that it ended with the "Dons" being allowed to transfer their premises to Buckinghamshire, in a pale imitation of the US baseball and American football teams who have been doing so for some considerable time. The club finally opened its doors at the National Hockey Stadium in late September 2003, having secured formal permission from the Football League to do so the week before. Representatives from the League had inspected the ground and granted clearance after examining closely details of Wimbledon's tenancy agreement. The club will play its home fixtures there for at least two years until a £75 million, 30,000-seater stadium, part-funded by supermarket chain Asda, can be constructed at nearby Denbigh North⁸²³.

At first sight, there were grounds for optimism for the beleaguered club, in that they had succeeded in obtaining advance sales of 3,000 season tickets and were reasonably expecting average crowds of around 6,000 – Old Trafford it isn't, but at least it promised to be an improvement on the soulless trap which Selhurst Park had become, with crowds of fewer than 2,000 spectators having become the norm rather than the

exception⁸²⁴. Came the day of the grand opening, a First Division fixture against Burnley and, yes, there was a crowd of about 6,000 (well, 5,639 actually, but let's not be too curmudgeonly) who gave a rousing welcome to the "MK Dons" (as they are henceforth to be known in the vernacular) when they trotted out onto the field of play, and a gaggle of cheerleaders duly cavorted onto the pitch at half time. And there was even some infantile chanting when the Dons scored their equalising second goal⁸²⁵. But as to the claims of some of the more histrionic commentators, made at the time when permission for The Move was granted, that this heralded a new age of franchise-style football sound as credible as those of a dodgy Internet racing tipster.

Meanwhile, in Wimbledon itself, AFC Wimbledon have raised the first million of their share offer aimed at generating the £3 million needed to purchase the Kingsmeadow ground where they played their inaugural season. Those who set up this alternative club want the new ground to be called The Fans' Stadium, and be a focal point, not just for AFC fans, but also for supporters throughout the country who are concerned about the direction in which football is heading⁸²⁶.

Falkirk to stay in Scottish First Division

In late June 2003, Scottish club Falkirk were informed that they would have to start the 2003-4 season in the First Division after the Scottish Football Association Appeals Committee, which met for ten hours to discuss the matter, upheld the decision by the Scottish Premier League to deny them promotion. As a result, Motherwell, who should have taken their place in the First Division, were not relegated⁸²⁷.

Football – Disciplinary cases and procedures

The Istanbul brawl

The fixture between Turkey and England in October 2003 for a place in the finals of the Euro 2004 tournament was always going to be a tense affair, in view of the bad blood which has existed between the players and followers of both the national team and the club sides from these two countries. The efforts – largely successful – made by the public and footballing authorities to contain any mischief off the pitch before, during and after the match have already been described earlier (above, p. 000). Instead, the ugly scenes occurred on the field of play rather than on the terraces and in the town centre.

At a certain point in the match, which ended in a 0-0 draw, England had a penalty awarded to them by referee Pierluigi Collina, which was missed by England skipper

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David Beckham. This prompted the opposing centre-back, Alpay Ozalan to taunt the unfortunate Beckham about his miskick, even jabbing his finger into the face of the opposing captain, who reacted by pushing his head against the Turkish player's. Even though Mr. Beckham appeared to have reacted under severe provocation, both he and Ozalan might well have been sent off. To make matters worse, a fracas erupted in the tunnel as the teams left the field at half-time. Mr. Beckham claimed that Mr. Ozalan had made "improper comments" about his mother, thus setting off a melee involving several players from the home and away teams⁸²⁸.

More evidence of this unsavoury incident emerged a few days later, when Turkish television footage captured by a camera trained on the tunnel showed a scuffle, ending after six seconds with a player, believed to be David Beckham, pushing the camera towards the ground as it captures a scrum of England players attempting to reach Hasan Sas, the Turkey substitute. The other England players involved included Wayne Rooney, Ashley Cole and Emile Heskey⁸²⁹. The England players explained their reaction against Sas by claiming that the Turk had spat in Ashley Cole's face. FA officials interviewed the English players involved before issuing a statement to European governing body UEFA that they had been victims of premeditated aggression rather than being the perpetrators of violence⁸³⁰. In what was becoming a somewhat juvenile game of tit-for-tat, Alpay Ozalan accused David Beckham of spitting on the badge of his Turkish shirt and butting him as the ill-feeling between the sides gathered momentum⁸³¹.

It is obvious that this entire affair will produce certain disciplinary consequences, although at the time of current writing no official charges had been brought. Any further developments will naturally be reported in the next issue.

Campbell fined rather than banned for Community Shield clash

The traditional opening fixture of the English football season, which pits the FA Cup winners against the League champions, used to be called the "Charity shield" before being re-baptised as the more politically-correct "Community shield". However, for some years the charitable element has been lacking on the pitch. It was this fixture that witnessed one of the ugliest incidents in 1970s football, i.e. the bare-knuckle fight between Leeds United player Billy Bremner and Liverpool's Kevin Keegan. Unfortunately, history repeated itself in this year's contest between Arsenal and Manchester United, in the course of which television replays caught Arsenal defender Sol Campbell kicking out at Eric Djemba-Djemba of the opposing camp, who was then spoken to by the referee for a

raised boot which hit Campbell in the chest⁸³².

This incident led to Mr. Campbell being charged with violent conduct. This was plainly not to the England defender's liking, and he immediately arranged a meeting with England manager Sven-Göran Eriksson and Football Association officials Mark Palios and David Davies at which he complained bitterly about the treatment he had received⁸³³. For some reason, he regarded himself as the subject of victimisation on the part of the game's authorities⁸³⁴. Patrick Vieira, Arsenal's defender who has also frequently been in trouble with the game's disciplinary bodies, also weighed in with a similar accusation⁸³⁵. Ultimately, the FA drew back from upsetting another member of the England squad (this affair arising during the aftermath of the Rio Ferdinand case, reported on earlier – see p. 000) and merely fined Mr. Campbell the sum of £20,000. This was achieved by the three-man disciplinary panel reducing the charge from one of violent conduct to that of improper behaviour. The Arsenal defender graciously conceded that he had received a "fair hearing"⁸³⁶.

Football managers in trouble with the disciplinary authorities

One of the more disturbing recent trends in the domestic game has been the petulance displayed by football managers when the match officials' decisions go against their team. This has led to an increasing number of disciplinary proceedings having been initiated against them. The usual suspects were at it again during the period under review.

In December 2002, Blackburn manager Graeme Souness was charged with using foul and abusive language towards the fourth match official, Matt Messias, during a Worthington Cup fixture against Wigan Athletic. He had already been the subject of two suspensions during the previous 10 months⁸³⁷, and initially threatened to employ the services of a QC to clear his name. Ultimately, however, he opted to plead guilty, as a result of which he was fined £10,000, but still had the threat of a lengthy touchline ban hanging over him⁸³⁸.

Another manager who has difficulty in controlling his temper is Sheffield United boss Neil Warnock⁸³⁹. In late August 2003, he was issued with a four-match touchline ban by the Football Association, and fined £300, following charges of improper behaviour in the 2002/3 FA Cup semi-final, and during the First Division play-off final⁸⁴⁰.

By contrast, Harry Redknapp, the Portsmouth manager, has hitherto enjoyed an unsullied reputation for sportsmanship. However, during a Premiership game with Wolverhampton Wanderers he gave vent to his annoyance at a decision by referee Andy d'Urso following a tackle on Pompey striker Yakubu Ayegbeni

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by soundly abusing the match official, after which he was banned from the touchline. At the time of writing, he was awaiting the outcome of an improper conduct charge arising from this incident⁸⁴¹.

Spurs manager Glenn Hoddle has also succeeded in steering clear of the disciplinary authorities, until he was charged in mid-September 2003 with misconduct by the FA for casting doubts on the integrity of referee Rob Styles following the opening game of the season at Birmingham. Hoddle had intimated that Mr. Styles had awarded a penalty in order to "even things up" after having sent off Kenny Cunningham in a pre-season "friendly" in Malaysia. The FA accepts managers disagreeing with officials' decisions, but will not tolerate the latter's integrity being called into question. Mr. Hoddle was accordingly charged with misconduct by the FA, for which he still awaits the outcome at the time of writing⁸⁴².

In spite of his eternal criticism of referees and their decisions in the media, Manchester United manager Sir Alex Ferguson has a reasonably good disciplinary record up to this point. However, in mid-September he was dismissed from the technical area at Newcastle after expressing forcefully his disagreement with the decision of referee Uriah Rennie not to dismiss Andy O'Brien for denying Manchester's Welsh international Ryan Giggs a clear goal-scoring opportunity. After appearing to berate the linesman nearest to the dugout, Sir Alex was sent off⁸⁴³. Having been charged with misconduct, the United manager was issued with a £10,000 fine and a two-match touchline ban. Ferguson expressed his surprise at what he regarded as the severity of the penalty⁸⁴⁴. At first, there was talk of his appealing against this decision, but Sir Alex abandoned any such notion the following day⁸⁴⁵.

Finally, Tony Pulis, the manager of Nationwide League side Stoke City, was ordered off the touchline by referee Jeff Winter after being involved in a heated exchange with his Millwall colleague Mark McGhee. Mr. McGhee subsequently apologised to Mr. Pulis⁸⁴⁶.

This succession of disciplinary incidents involving coaches has not gone unnoticed in official circles, with some demanding that drastic action be taken to penalise such behaviour in the future. One such personality is Chelsea chairman Ken Bates, who insisted that coaches should "lead by example" and not criticise referees' decisions themselves. In addition, managers who fail to control their players should be suspended⁸⁴⁷.

The "Battle of Old Trafford" and its aftermath

The Community Shield fixture between Arsenal and Manchester United was a fairly tempestuous affair, as has been reported above in relation to the Sol Campbell affair (p. 000). When the two teams met a month later

in the Premiership, there were once again unsavoury scenes after United's striker Ruud van Nistelrooy missed a penalty at a very late stage of the match. Three Arsenal players, most prominently Keown, Parlour and Lauren, openly taunted the Dutchman about his miss, jostling him in the process. Lauren appeared also to have made contact with assistant referee Mike Tingey, which is capable of attracting a long suspension. The Football Association (FA) launched an immediate inquiry after receiving the report on the match by referee Steve Bennett⁸⁴⁸.

The FA subsequently brought nine charges of misconduct against Arsenal and two against Manchester United. Remarkably, the Arsenal players involved and their club decided to plead guilty to the charges levelled against him. Originally, the Gunners' manager Arsène Wenger had been adamant that his club would be fighting charges which he described as arising from "trial by Sky", but he was overruled by the Arsenal chairman, Peter Hill-Wood, who had described the players' action as "stupid"⁸⁴⁹. The outcome of these charges was not yet known at the time of writing.

Reaction in the media was overwhelmingly hostile to the Arsenal players, although some commentators saw fit to accuse those showing outrage as "climbing on a moral high horse". Commentator Richard Williams, writing in *The Guardian*, seemed to think that nothing serious had occurred because no-one was hurt as a result of the incident, the match had been a clean one up to that point, the referee made several pedantic decisions and, most disingenuously of all, if Martin Keown's face looked more like Michael Owen's he would not have found himself the butt of so much vituperation. The present author will leave the reader to draw his/her own conclusion as to the wisdom of expressing such sentiments⁸⁵⁰.

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

Steven Gerrard. The Liverpool and England player was sent off during a pre-season tournament in Amsterdam, but escaped a first-team ban under the FA's rules relating to pre-season matches⁸⁵¹.

Bart Griemink. In early October, the Swindon goalkeeper successfully appealed against a yellow card which he received against Leeds United in a Carling Cup fixture. Referee Mark Clattenburg contacted the FA after having taken another look at the incident concerned⁸⁵².

Grant Brebner. In August, the Scottish Football Association (SFA) rescinded the red card shown to the Hibernian midfielder during the Edinburgh derby with Hearts, reducing it to a caution⁸⁵³.

17. Issues specific to individual sports

Luis Boa Morte. The Fulham striker was charged with improper conduct by the FA after he appeared to stamp on Leicester City player Frank Sinclair during his side's 2-0 victory on 4 October⁸⁵⁴.

Thierry Henry. The Arsenal striker was reported to the FA in August for the manner in which he celebrated a goal by his side at Highbury in front of visiting Everton supporters, which sparked off some aggravation⁸⁵⁵.

Football – Other issues

Nicky Law cleared of agency scam charge

In mid-June 2003, it was learned that Bradford manager Nicky Law had been cleared by the Football Association (FA) following an inquiry into claims that he placed pressure on players to sign for a favoured agent. The investigation had been prompted by a complaint from an unnamed player, who made allegations about the relationship between Mr. Law and Mark Curtis, a FIFA-accredited agent with Sports Player Management, which is based in Maidstone. The FA statement on the subject made it clear that there was no evidence to substantiate the claim, and that at no time did the investigation relate to any financial impropriety on Mr. Law's part or on that of his football club⁸⁵⁶.

Regional courts may not overturn decisions made by sporting bodies, rules Italian government

In mid-August 2003, it was learned that the Italian government had ruled that regional courts have no authority to overturn decisions made by sports federations. This was a measure aimed at ensuring that the new Serie A football season commenced on time on 31 August. The decree was passed in order to discontinue the string of acrimonious legal tussles which had thrown Italian football into chaos. In one case, Sicilian club Catania were at loggerheads with the Italian football federation (FIGC) following their relegation. They claimed that they had been unfairly docked two points by the Italian Football League, and addressed the Regional Court, which ruled in their favour. The FIGC, however, stood firm, and have now won Government backing⁸⁵⁷.

Rugby Union – Internal rules and institutions

Plot to oust Baron peters out

There appears to be certain degree of discontent within the Rugby Football Union (RFU), which seems to centre mainly round the performance of its Chief Executive, Francis Baron. The first attempt to unseat him failed when Mr. Baron accepted a significant reduction in his powers rather than resign. However, the level and intensity of the opposition within the RFU senior hierarchy have increasingly made Mr. Baron's position difficult to sustain⁸⁵⁸.

Since the failure of their initial coup attempt, the anti-Baron faction on the Management Board succeeded in regrouping, and returned to the attack under the codename Project George Issues. They even went so far as to take legal advice from City firm Linklaters about their rights and the cost of terminating his employment. They also deposited 22 allegations against their Chief Executive, which include claims that he was generally "economical with information" and failed to acknowledge errors or mistakes. The greatest concern appeared to be that Mr. Baron had failed to inform the management about a French offer to share matches during the 2007 World Cup, for which, as has been reported in earlier issues of this Journal⁸⁵⁹ England made a humiliating bid costing £600,000 and ultimately earning them just one vote (Canada's). It was also claimed that Mr. Baron failed to control the spiralling cost of running the England national team⁸⁶⁰, and that, more generally, he was running Twickenham as a personal business.

The campaign to oust Mr. Baron had potential consequences for the England team's chances at this year's World Cup, since Mr. Baron was a strong ally of England's uncompromising coach Clive Woodward. Were he to leave in controversial circumstances, this would raise a serious question mark over Mr. Woodward's future⁸⁶¹. This is probably why the campaign to unseat the Chief Executive petered out. In mid-September 2003, Mr. Baron received a unanimous vote of confidence from the RFU's leading power-brokers after the enemy factions within English rugby announced a pre-World Cup truce. The RFU management board chose the dinner organised to mark England team's official in order to release a statement which was clearly intended to discontinue the damaging speculation which had arisen from the various plot rumours. The Board insisted that the majority of the allegations made by the dissenting group referred to above were "spurious, out of context and without foundation"⁸⁶².

It was later also learned that Jeff Blackett, the RFU disciplinary officer who had been given the task of investigating the allegations made by the plotters,

17. Issues specific to individual sports

claimed that some of the senior members of the campaign to oust Mr. Baron had lied under oath⁸⁶³. No further details were available at the time of writing.

New Welsh rugby structure “on verge of collapse”, claims Samuel

The “Moffett revolution”, which is intended to restore Welsh rugby to the position it once enjoyed in the game, has been well documented in previous issues of this organ⁸⁶⁴. This has involved a reorganised regional system, creating five teams which would compete at the top level. This involved the merger of six old-established sides, although Llanelli and Cardiff were allowed to remain.

This plan has obviously not been to the liking of everyone involved in Principality rugby. One of the dissenting voices is Leighton Samuel, the owner of Bridgend, one of the clubs sacrificed under the new structure (see also above, p. 000). As early as the summer before the new system was due to come into effect, Mr. Samuel predicted that the plan was on the verge of collapse even before it started operating, and that one of the five regional sides would go out of business within a few years. He also announced that he was withdrawing his financial support from Celtic Warriors, the side created through the merger of Bridgend with Pontypridd, on the basis that he was tired of “pouring money down a black hole”⁸⁶⁵.

Mr. Samuel maintains that the initial plan, i.e. that of having four provincial sides, should have been adhered to by the Welsh Rugby Union (WRU). Instead, he says, the Welsh game has ended up with two clubs and three regions, with insufficient money to go round. He also claimed that the new set-up lacked the business expertise to make the scheme work⁸⁶⁶.

Various World Cup issues

Board plans full-strength “minnows”. Just as the 2003 tournament was about to kick off in Australia, it was learned that the International Rugby Board (IRB) was establishing a working party aimed at ensuring that the emerging unions are able to field full-strength sides at the next World Cup, scheduled for 2007. The 2003 tournament had seen a number of teams – such as the three South Seas islands, Canada, Georgia and Namibia – arriving without leading players who claimed that they could not afford to give up club rugby in order to represent their nations at the tournament. IRB Chairman Syd Millar called this situation “undesirable and unacceptable” and capable of undermining the integrity and quality, not only of international rugby, but of the game at all its levels. The working party will seek to avoid a repeat of this situation in four years’ time⁸⁶⁷.

(See also below, p. 000)

Woodward calls for neutral judges. The pre-tournament Test between England and New Zealand in Wellington during the early summer was marred by a stamping incident in which the All Black lock Ali Williams appeared to stamp on England full back Josh Lewsey. The culprit was duly cited by the England team, but the relevant disciplinary panel failed to ban the player. This followed an incident involving Springbok captain Corne Krige in an earlier test with England, who also escaped punishment for an alleged incident of violent conduct⁸⁶⁸.

This led England coach Clive Woodward to call for neutral judicial committees to investigate citing charges at the forthcoming World Cup, and that accordingly players guilty of the type of violation referred to above should be eliminated from the tournament. The panel which adjudicated the Williams incident consisted of two New Zealanders and an Australian, who chaired the hearing, which in Mr. Woodward’s view prevented an impartial assessment⁸⁶⁹.

“Stop rape of the Islands” urges Australian official.

The Wallabies, Australia’s national rugby team, have over the years derived considerable benefit from their association with the Pacific islands of Fiji, Samoa and Tonga, since it has yielded them players such as Ofahengaue, Tabua, Tuqiri and Kefu. Some personalities in the Australian game, however, have been feeling somewhat uneasy about this one-way process, as the rugby authorities of the islands concerned prepared for a World Cup which threatened to leave them almost as impoverished competitively as they are economically. Particularly John O’Neill, the Chief Executive of the Australian Rugby Union (ARU) has called for an end to this practice, as this “rape” of the Islands’ most precious sporting resource, i.e. their young rugby talent, is threatening the entire fabric of the game. He called upon the International Rugby Board (IRB) to take appropriate action⁸⁷⁰.

Fiji call for IRB action against refusenik clubs. Mention has already been made above (p. 000) to the manner in which the absence of key players from certain minor World Cup sides was seriously undermining their ability to produce competitive sides for the tournament. One of the sides concerned Fiji, have asked the International Rugby Board (IRB) to take action against recalcitrant clubs which refused to release its internationals. More particularly Pio Bosco Tikoisuva, Chief Executive of the Fijian Board, claimed that the Saracens lock Simon Raiwalui and Rotherham scrum half Jacob Raulini had been prevented from playing for their country. He wanted the IRB to invoke a rule which would stop these clubs from playing the two internationals from the date on which the national squad went into camp, until ten days after the side is eliminated from the World Cup⁸⁷¹.

17. Issues specific to individual sports

Leeds dispute “equivalent funding” claim

In early October 2003, Leeds disputed a statement made by Premier Rugby, the umbrella organisation grouping the 12 Zurich Premiership clubs, that all teams in the competition would receive “equivalent funding”. The statement in question had claimed that a Board meeting had approved proposals which gave Leeds and Rotherham funding equivalent to that of the other 10 clubs for this year and the next⁸⁷².

However, Gary Hetherington, the Leeds Chief Executive, responded by saying that this statement was misleading, and that his club would still be almost £600,000 worse off than all the clubs except Rotherham, who were also newly promoted to the competition. On average, clubs have received £1.8 million from the central fund this year⁸⁷³.

Rugby Union – Disciplinary cases and procedures

World Cup issues

Sheahan free to play for Ireland in spite of dope test result. On this issue, see under the heading “Drugs legislation and related issues”, above p. 000.

Crackdown on Cup “bad boys”. One month before the tournament was to kick off, officials of governing body Rugby World Cup announced that players who committed acts of foul play during the tournament faced a severe crackdown on discipline. Any player who received three yellow cards would be summoned to appear before a judicial committee in order to face a ban of at least one match. Also, citing commissioners would have the power to review any incident during the game and institute proceedings even if the referee took action at the time. Referees were instructed to adopt a zero tolerance approach towards players who throw punches⁸⁷⁴.

Caucaunibuca banned for two matches. Fiji wing forward Rupeni Caucaunibuca was banned for two matches after having assaulted Olivier Magne, from France, in one of the first World Cup fixtures⁸⁷⁵.

Lukas van Biljon. South Africa withdrew their hooker from their World Cup training squad following a brawl at a Durban nightclub. Van Biljon admitted that he and some friends had been involved in an altercation, but added that he was attempting to separate his friend and another man who became involved in a fight. However, it was the second occasion on which Mr. van Biljon had been involved in such an incident⁸⁷⁶.

Paul O’Connell. In an incident involving this Irish player during his country’s fixture against Namibia, it was claimed that he had trampled on opposing lock forward

Archie Graham. The relevant panel, however, cleared him of foul play⁸⁷⁷.

Premiership clubs in points penalty

In early October 2003, Leicester and Saracens, who play in the English Zurich Premiership, had points deducted from their tally for having fielded unregistered players. The penalties relate to the Leicester prop Darren Morris, who played against London Irish on 13 September, and hooker James Parkes, who was involved for Saracens against Newcastle the following day. Mr. Parkes had also played against Gloucester the previous weekend, which is why the Saracens’ penalty was the heavier.

Leicester Director of Rugby Dean Richards expressed his disappointment with this ruling, stating:

“The RFU was asked to produce an up-to-date register of players on a number of occasions in the space of 48 hours, but we received nothing. The registration procedure is a straightforward procedure. We did, however, omit to include a release paper, but did ask to be informed if any further documentation was required. The registration papers were submitted to the RFU nine days before the registration deadline, and we received a verbal notification that all of our players were registered to play. We were not alerted to the fact that there was a problem for a further 17 days”⁸⁷⁸

Mr. Richards added that this was a mere administrative error and not a playing issue, and that to bring the player’s name into the public domain was completely unnecessary⁸⁷⁹.

Rugby Union – Other issues

Deferred payment decision in Arlidge inquiry costs

The reader will doubtless recall the allegations made in the course of 2002 that some Zurich Premiership clubs had established a slush fund to keep First Division champions Rotherham out of the Premiership⁸⁸⁰. This had given rise to the Arlidge inquiry, organised by the Rugby Football Union (RFU), which dismissed the allegations, although some individuals were criticised. As a result, Jeff Blackett, the Chief Disciplinary Officer of the RFU, ordered Premier Rugby to contribute £90,000 towards the cost inquiry. Worcester RFC, whose allegations had sparked off the inquiry, were ordered to pay £10,000.

The money was due to be paid by early July 2003, with the threat of disciplinary action in the event of non-payment. However, since then the two sides, who were unhappy with the ruling, were given more time to pay, i.e. until the end of that month⁸⁸¹.

17. Issues specific to individual sports

Rugby League – Internal rules and institutions

Wales could have professional Rugby League team again soon

Until relatively recently, any proposal to organise a professional Rugby League club in the Principality would have been greeted with the incredulity of a proposal to run a professional cricket team in Albania. Attempts to introduce a Super League club in Cardiff and Swansea were soon shelved, and in 1996 a South Wales entered the old Third Division, only to abandon the experiment the next season.

However, Bridgend have recently announced that they wish to enter a team into National League Two in the summer of 2004. This optimism was based on the success which current amateur team, Bridgend Blue Bulls, were enjoying in the Total1.com League – from which the next step up would be a National League team⁸⁸².

No further details were available at the time of writing.

Rugby League – Disciplinary cases and procedures

Halifax salary cap appeal dismissed – may take legal action

It will be recalled from the previous issue⁸⁸³ that Super League club Halifax had two points deducted from their total for having breached the Rugby Football League (RFL)'s strict upper limit on earnings. The club appealed against this decision, but this was dismissed in late July 2003. Hull and St. Helens, who also had points deducted for breaching the salary cap, also lost their appeals⁸⁸⁴.

Halifax, however, immediately announced their intention to seek legal advice on having the decision overturned on judicial review. The Board issued a statement insisting that the club had broken none of the salary cap rules, and that, moreover, it had at all times acted within the information and advice provided by the RFL⁸⁸⁵.

At the time of writing, no news of any legal action was forthcoming.

Smith banned

In early July 2003, top side Wigan learned to their displeasure that they would be deprived of the services of their first-choice prop Craig Smith. Mr. Smith was suspended for one game and fined £300 for a careless tackle in a fixture at Huddersfield. He had been placed on report for the offence⁸⁸⁶.

Rugby League – Other issues

Widnes protest at “offensive” Warrington poster

In mid-August, Super League side Widnes accused their Cheshire rivals of potentially provoking crowd trouble with an inflammatory poster aimed at promoting the Super League clash between the two clubs which was to take place a few days afterwards. The poster, emanating from that well-known haven of pastoral delight called Warrington, was intended as an “amusing” dig at the town, which used to be famous for its chemical industries, and featured belching clouds of smoke, a barrel of toxic waste and a three-eyed fish⁸⁸⁷.

Widnes spokesman Andrew Kirchin reacted angrily to this poster, and expressed his fear that the poster might stir up crowd trouble at the match, particularly because these Cheshire derbies have had a history of trouble between both sets of supporters. He described it as not only objectionable but also inaccurate as Widnes had not hosted a chemical plant for years. Fortunately, the fixture passed off without any major incident⁸⁸⁸.

Racing – Internal rules and institutions

Mobile phone ban causes major rift between Jockey Club and jockeys

Depending on which commentator you read, the racing corruption affair which has been extensively described in these and other pages is either the greatest scandal ever to be visited upon the Sport of Kings, or the biggest and most artificially contrived non-story in decades – with a few intermediate positions thrown in for good measure. Whatever one's view of this development might be, it is an undeniable fact that it has produced a number of rule changes in the world of racing.

It will be recalled⁸⁸⁹ that one of the central features of the BBC Panorama investigative programme which purported to lift the veil on widespread corruption in British racing was the trial of jockey Barrie Wright, at which his former colleague Graham Bradley admitted having communicated privileged information to suspected cocaine smuggler Brian Wright. This information was passed by mobile telephone. This affair, as well as the adverse publicity which it earned through the Panorama documentary, as well as the investigative series Kenyon Confronts which had prompted it, caused the sport's regulatory body, the Jockey Club, to establish a Security Review Group headed by former chief policeman Ben Gunn (sic). As part of a raft of measures aimed at rooting out, or at least preventing, any untoward communications between jockeys and the outside world, the Group decreed that henceforth,

17. Issues specific to individual sports

jockeys must switch off their mobile telephones at race meetings from half an hour before the first meeting, until such time as the last race has started or jockeys have left the course for the day.

In order to enforce these new rules, the Club employed the services of ten former policemen. In view of the important implement which the mobile phone had become for the vast majority of jockeys, these measures provoked a good deal of opposition on their part. Such was the intensity of the pressure they exerted that ultimately the Club had to make certain concessions, such as allowing jockeys to check their messages in a designated area and to use three Jockey Club phones by keying in a personal identification number, and to use their mobile phones if Jockey Club telephones were unavailable. Initial plans to record all calls made on Jockey Club phones were also moderated⁸⁹⁰.

Nevertheless, the wave of opposition to these plans continued and intensified as the date on which these new rules were to become effective, i.e. 1/9/2003, drew near. The first meeting at which these rules would be policed was at Leicester, and a group of approximately 20 dissenting jockeys pointedly went out onto the road just outside track in order to use their mobile phones. Thus they were hoping to communicate their protest without actually breaking the rules⁸⁹¹. The leader of the dissenters, Philip Robinson, accused the racing authorities of regarding jockeys as "gangsters or school kids – probably a combination of both". Another dissenter, Richard Hills, also voiced his opposition in the following terms:

"It's like being back at school, being told to stand in the corner to talk to owners and trainers. We all work very long hours and with all the travelling we don't need this nonsense. Sometimes we don't have time to talk to owners in the morning due to riding out, so now we're being told we can't talk to anybody at work. It is basically ridiculous. Let's hope after today's protest that we can sit down with the Jockey Club and sort this problem out"⁸⁹²

However, this dissent was not in evidence at every race course. At Folkestone that same day, the riders seemed to accept the new regime, albeit with sullen reluctance. However, this may have been something to do with the fact that the course was well off the beaten track, where it was impossible to receive a signal on mobile phones⁸⁹³.

The protest action was continued during the days that followed. At York, leading jockey Frankie Dettori and several of his weighing room colleagues left the confines of the race course to make and receive calls beyond the tenuous grip of the security officers on duty. He explained that the next day he had to go to

Salisbury and was trying to organise a helicopter to convey him thither⁸⁹⁴. The next week, Richard Quinn became the first jockey to be apprehended under the new rules. He was handed a telephone by owner Paul Dixon in the paddock at York in order to speak to trainer Jamie Osborne, who had been delayed from getting to the course for the first race. The rider received his instructions on how to ride the horse Overdrawn (who proceeded to win the Maxiprint Nursery stakes). The stipendiary steward informed Mr. Dixon that he faced a £250 fine for this infringement⁸⁹⁵. In fact, Mr. Dettori was fined for this amount following a Jockey Club meeting in late September⁸⁹⁶.

The day after this incident, the Jockey Club offered to vary the mobile phone restrictions. It was proposed that the jockeys may continue using their own phones free from any restrictions up to half an hour before the racing starts. From that moment onwards, until the start of the final race, the "phone zone" would become the area in which calls could be made and messages checked. Without needing to ask for permission, jockeys would be able to collect their phone from a pigeon hole/locker, check it for messages and make their necessary calls providing they log the details of the call. The riders requested time to consider the offer⁸⁹⁷.

In spite of this offer, a number of riders were determined to continue their protest, and refused to call off the threat of a "strike" at Sandown Park the following Saturday. One of the reasons for this obduracy was the fact that the Club authorities were attempting to bypass the dissenters' leaders such as Mr. Robinson, and appeal directly to the nation's jockeys⁸⁹⁸. A meeting between the Club authorities and representatives of the Jockeys Association, the riders' trade union, to discuss these new proposals broke up acrimoniously⁸⁹⁹. The protest action at Sandown duly took place, causing the meeting to be cancelled – in spite of last-minute talks between the Jockey Club, the British Horseracing Board (BHB) and Sandown Park executives. It was the first jockey's strike in living memory⁹⁰⁰. It caused the racing and betting industries thousands of pounds, particularly as the meeting had potentially the most attractive domestic card of the day. The next day, the Club confirmed that the two sides were no closer to a resolution of the dispute by announcing that no further talks were planned for the present.

Indeed, the chasm seemed to have widened as the Club hinted that it might resort to court action in order to impose its new regulations. It transpired that the BHB had attempted to pressurise the Sandown executives into staging the meeting using apprentices and part-time riders, but that ultimately abandonment of the day's racing was inevitable – thus demonstrating how powerful was the jockeys' bargaining position⁹⁰¹.

17. Issues specific to individual sports

Nevertheless the next few days brought no further tidings of possible reconciliation – in fact, the threat of a second strike was being mooted⁹⁰². The tension grew as the next weekend approach when the Jockey Club outlined plans to introduce a new set of amended restrictions on a trial basis as from Friday, 19 September. These were dismissed by Michael Caulfield, the Jockeys Association's Chief Executive, as being no different from the ones that his organisation had rejected the previous week⁹⁰³.

The following week, a new element added to the already acrimonious nature of the dispute, when a leading racehorse owner was accused of having used "bully-boy tactics" in an attempt – which proved unsuccessful – to achieve a boycott of the Wolverhampton meeting on 18 September. This attempt was inspired not only by the mobile phone ban, but also by disenchantment over the low level of the prize money on offer, and was led by Paul Dixon, a member of the Council of the Racehorse Owners' Association and the top owner of horses competing on the winter's all-weather circuit for the past two years⁹⁰⁴. It was alleged by fellow-owner Peter Hiatt that his intended jockey, Luke Fletcher, had been pressured into abandoning the event, having been threatened with never being able to ride a horse again if he did not fall in with Mr. Dixon's wishes. The latter, however, dismissed the claims as "an absolute lie"⁹⁰⁵. Nevertheless, the Jockey Club announced the following day that it would investigate these allegations of intimidation⁹⁰⁶.

At the time of writing, no solution to the stand-off seemed in sight, after a meeting of jockeys in Nottingham on 30/9/2003 showed no reduction in the intensity of the opposition to the new restrictions⁹⁰⁷. However, there was a chink of light at around the time of going to press, when it was learned that both sides held a meeting, the outcome of which was described by Jockey Club spokesman John Maxse as "positive" and "constructive"⁹⁰⁸.

Racing staff banned from laying bets to lose

As part of the same drive to clean up the sport of racing, the Jockey Club, in mid-July 2003, announced that, as from the following September, owners, trainers and stable staff would be banned from laying their own horses to lose on betting exchanges. This was the outcome of the findings produced by the Integrity Review Committee established by the Club⁹⁰⁹. It will be recalled from the previous issue⁹¹⁰ that already some concern had arisen in racing circles at the potential for corruption which the betting exchanges posed. More particularly the Club had commenced an investigation into the operation of betting exchanges after it was alerted to some strange price movements involving a

horse called Hillside Girl on the occasion of a meeting at Carlisle on 15/6/2003⁹¹¹.

The measure adopted by the Club was felt necessary in order to restore the confidence of the public in the integrity of the sport⁹¹². The staff concerned seem to have accepted this new rule without demurring.

Additional 695 meeting planned – but not courtesy of the RSPCA

Just before this issue went to press, it was learned that the Racecourse Association (RCA) had launched a revolutionary plan to stage almost 700 more meetings in the course of 2005, with racing taking place every Sunday, evening racing on every weekday, as well as 52 new teatime fixtures. Although it obviously would mean greater revenue for the sport at all levels, this news is bound to be received with some apprehension by trainers, jockeys and stable staff as they face mounting transport and labour difficulties. Betting shop workers are also likely to view this design with a certain degree of circumspection. This move was apparently in response to the finding of the Office of Fair Trading (OFT) that the control exercised by the British Horseracing Board (BHB) was anti-competitive (see above, p. 000). The RCA anticipated the OFT's final ruling by creating a scenario for 2,035 meetings from 2005, an increase of 695 on the number planned for 2003. Significantly, there were no plans to increase the number of jump fixtures, presumably because jumping is expensive to stage and vulnerable to the bad weather⁹¹³. This seems to bear out some of the more dire predictions as to the impact of the OFT ruling (see above, p. 000).

Another source of opposition to this plan may come from a totally different quarter, i.e. the Royal Society for the Prevention of Cruelty to Animals (RSPCA). At its Annual General Meeting held in the early summer, it passed the following motion by 71 votes to 61:

"That the Society calls upon racehorse trainers and owners, with the support of the Jockey Club, to provide for the resting of horses for at least a week between races, together with the provision of leisure time to reduce stress"⁹¹⁴.

This would seem to be incompatible with the RCA's plans outlined above. The adoption of this resolution does not mean that it becomes RSPCA policy – yet – and there is considerable doubt whether the Jockey Club would ever support it, in spite of the good relationship which it has struck up with the Society. It was also pointed out by some commentators that most race horses are on a seven-hour-week, amounting to approximately one hour per day, and that it was difficult to imagine how much more "leisure time" a horse would need⁹¹⁵.

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Racing – Disciplinary cases and procedures

Disciplinary measures resulting from mobile phone ban imposed by Jockey Club

This issue is dealt with in the previous section (p. 000).

“Non triers should face stiffer penalties” claims Jockey Club security group

This issue has already been dealt with earlier, under the heading of “Corruption in sport” (see above, p. 000).

Dalgleish faces disciplinary action for failing drinks test

As part of its efforts to improve the image and spirit of racing, the Jockey Club have instituted not only the various anti-corruption rules reported in the previous section, but also a strict clampdown on drugs and alcohol abuse. More particularly it was announced that there would occur a 20-fold increase in the number of tests for alcohol and such drugs as cocaine and ecstasy. Random urine tests had already been increased considerably from 150 to 1,000 per year⁹¹⁶.

This new policy claimed its first victim in mid-September, when it was announced that jockey Keith Dalgleish had failed a breathalyser test. Officials at the Club’s headquarters in London confirmed that the rider had been stood down for the remainder of the race meeting in Redcar, at which the test was administered, for “safety reasons”. However, Jockey Club spokesman John Maxse added that a urine sample would need to be analysed before any disciplinary action could be contemplated against Mr. Dalgleish⁹¹⁷.

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

Fallon banned, but plans to appeal

Jockey Kieren Fallon’s is an all-too familiar name in this section of the Journal because of his frequent clashes with the disciplinary authorities of his sport. The period under review has brought little change in this situation, since Mr. Fallon picked up yet another ban on the occasion of the Scottish Derby in mid-July 2003. On this occasion, he was suspended for two days for careless riding. He stated his intention to appeal⁹¹⁸.

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

Former trainer “warned off” for 10 years

In late September 2003, Kamil Mahdi, the former trainer who was based at Newmarket, was “warned off” racecourses for ten years following a hearing of the Jockey Club disciplinary committee. Earlier this year, Mr. Mahdi had been banned by a court from keeping

horses for life after having been convicted of causing unnecessary suffering to five racehorses in his care. He was also ordered to perform 240 hours of community service and to pay £6,000 towards the cost of the case, which took place in Bury St. Edmunds in February 2003. This penalty related to charges arising from the treatment of Desert Warrior, Chillisima, Awassi, Hamdeen and Mount Holly between December 2001 and February 2002⁹¹⁹.

Eddery collects three-day ban

In late October, the veteran Jockey Pat Eddery incurred a three-day ban for careless riding at a Newmarket meeting – an occurrence made all the more regrettable by the fact that it marked the day on which he carried off one of the few big races which have eluded him in the course of his glittering career – the Cesarewitch⁹²⁰.

Winston cleared following price change suspicions

At a meeting at Ayr in June 2003, jockey Robert Winston had finished sixth of ten runners on Dominion Rose. There was nothing inherently dramatic in this result, but suspicions were aroused by certain changes in the betting price which had drifted from 5-1 to 10-1, particularly after some comments made on an Internet chatroom site. Mr. Winston was called to a disciplinary panel to answer accusations that he had failed to obtain the best possible placing, where his explanation convinced the panellists that there was nothing untoward about this course of events⁹²¹.

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

Richard Guest. In early July 2003, Grand National-winning jockey Richard Guest was suspended for 10 days for taking the wrong course during a meeting at Perth. He had been in the lead on Ceresfield in the four-runner novice chase when he steered past the water jump with a circuit to go. He retraced his steps to rejoin the race, but his mistake was compounded when two of the remaining runners came to grief⁹²².

Eddie Ahern. Mr. Ahern, Gerard Butler’s stable jockey, is currently wearing the carpets – and patience – of the stewards’ inquiry room thin following another series of brushes with authority. No sooner had he completed a four-day ban for kicking a recalcitrant filly at Bath, than he was in trouble again at Brighton, where he received a three-day ban for various whip offences, and Lingfield Park, where he was suspended for one day for careless riding⁹²³.

17. Issues specific to individual sports

John Carroll. In mid-July, this jockey was suspended for ten days for having eased up whilst competing for second place⁹²⁴.

Fran Ferris. This apprentice jockey was banned for 21 days by the Southwell stewards in July after he dropped his hands on the horse Claptrap when he was a dozen lengths clear in a 12-furlong handicap, and was caught on the post by Sambaman⁹²⁵.

Neil Callan. In August, Mr. Callan was suspended by Windsor stewards for 14 days for dangerous riding. The rider immediately announced his intention to appeal⁹²⁶.

Robert Havlin. In early July, this rider was suspended for four days after having been found guilty of careless riding⁹²⁷.

Racing – Other issues

[None]

Cricket – Internal rules and institutions

“White lines” and other experiments to be started soon

Umpires are frequently accused of requiring white sticks in their decision-making. The cricketing authorities have thus far declined to follow this advice, but look set to provide them with white lines instead. These will be pitched between wicket and wicket in an attempt to enable umpires better to assess appeals for lbw. The pressure on umpires has intensified considerably in this regard ever since technological progress has given the television viewer a virtual reality carpet between the stumps. In preference to turning to the television umpire for advice, particularly where the ball has pitched outside the off-stump before hitting the batsman's pads or foot, the International Cricket Council (ICC) have turned to this particular experiment⁹²⁸.

This experiment will not be to the liking of all those involved in the game, since, unlike television umpiring, this rule change could actually affect the game as it is played. More particularly the bowlers will be irritated by this, as it will give the batsman a useful guide as to where the ball pitches. One of the essentials of good batsmanship, knowing where your off-stump is, may be about to become perfectly obvious, at least against the spinners. However, Dave Richardson, the former South African wicketkeeper/batsman who is now the ICC Cricket Manager, stated that it was premature to state whether or not these “ping lines” would be adopted in the international game⁹²⁹.

Another umpiring aid to be introduced is an earphone which will pick up the sound effects from the stump microphone and of which it is hoped that it will enable the umpires to hear edges off the bat more clearly. On the other hand, because of the fallibility of the technology in determining the legality of low catches, this will no longer be used after the 2003 summer season, apart from cases in which the umpires were unsighted. However, it will be introduced to determine whether or not batsmen have been caught off a bump ball, where the ball is immediately hit into the ground. Also, and quite paradoxically, as responsibilities are increasingly being removed from on-field umpires, the ICC is also considering increasing their numbers from two to three. The additional one would be positioned in such a way as to monitor no-balls, leaving the umpire at the bowlers' end to concentrate on watching the batsman. Here too, these are proposals which will take some time to come into effect – if ever – since they have yet to be considered by the Cricket Committee or, indeed, by the International Umpires' Panel⁹³⁰.

Players' Union wishes to slash overseas numbers

As the 2003 summer season receded into history, the Professional Cricketers' Association (PCA), the players' trade union, launched a concerted attempt to reduce the numbers of overseas professionals and players who are not qualified to appear for England, whom they claim are leading the game into financial ruin as well as undermining the quality of the national side. It cited opinions elicited from the England coach Duncan Fletcher, and national academy director Rodney Marsh, as well as from past England captains, to press for an overall reduction in overseas player to one per county club by 2005⁹³¹.

The delayed paper was presented to the county clubs' Chief Executives as they assembled for a First-Class Forum at Lord's meeting in mid-October which was to start a debate on the future of the first-class game.

Former players call for reform

The players' Trade Union has not been the sole body to campaign for changes in the way in which the game is operated, as a group of journalists and former players, describing themselves as the Cricket Reform Group (CRG), called for a complete restructuring of the game. In an open letter bearing the signatures of five campaigners, including former England captains Michael Atherton and Bob Willis, calls are made for a reduction in the number of professional county teams, as well as advocating replacing the First-class Forum with a streamlined management board⁹³².

17. Issues specific to individual sports

Cricket – Disciplinary cases and procedures

Code of conduct on “sledging”: Waugh vows to enforce new rules

One of the uglier aspects of current first-class cricket is the habit adopted by some of the more intellectually-challenged players to direct verbal abuse at batsmen as a matter of routine, in order to spoil their concentration. Although many other teams have adopted this habit, the worst perpetrators are generally accepted as being the Australian cricketers. Recently, the situation in this respect has become so bad that, in mid-July 2003, John Buchanan, the Australian cricket coach, called upon his players to reduce this infantile activity and improve their on-field behaviour. This was a result of some well-publicised incidents during the Australians’ tour of the Caribbean, involving Glenn McGrath and the West Indies’ Ramnaresh Sarwan on the one hand, and Steve Waugh and Brian Lara on the other hand⁹³³.

Mr. Buchanan’s words clearly had their effect, since two months later Cricket Australia, the national ruling body, issued a new code of conduct for on-field behaviour and warned its players that they could face life bans if they breached it. In what many would claim is a somewhat perverse development, Steve Waugh, the captain of the national team, who has been known to be one of the leading exponents of this kind of behaviour, pledged himself to ensure that his side would take it upon themselves to discipline their own players for breaches of the new code of conduct⁹³⁴. Whether Mr. Waugh will succeed remains to be seen.

Derbyshire CC in trouble with pitch inspectors

In June 2003, English county club Derbyshire were advised by the England and Wales Cricket Board (EWCB) that any one-day pitch marked as “poor” within the next 12 months would be penalised by means of a two-point deduction if a National League match, a one-point deduction if a Twenty20 Cup match and, if a Cheltenham & Gloucester fixture, concession of home advantage for the next occasion on which they are drawn at home. Their pitch had been rated as “poor” for the Twenty20 Cup game against Nottinghamshire⁹³⁵.

The management at Derbyshire were very much incensed by this, to the point where, a week later, they threatened rebellion against what they described as a “fatally flawed” system. They informed the EWCB that they were considering banning pitch liaison officers from the County Ground and refusing to co-operate with future pitch panel hearings unless their complaints about what they described as a “dreadfully inconsistent and unfair” system were taken up as a matter of urgency and importance at the highest level⁹³⁶.

Cricket – Other issues

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

Dominic Cork. The outspoken Derbyshire and former England all-rounder was fined £500 and order to pay £500 costs, but escaped a ban, for having called Leicestershire player Brad Hodge a “cheat” over an incident during a Twenty20 Cup match in June. Mr. Cork considered that Mr. Hodge had carried the ball over the boundary whilst making an important catch, and told his opponent so in no uncertain fashion⁹³⁷.

James Foster. The promising young wicketkeeper was fined £4,000 for verbally abusing an Essex supporter during a one-day game at Chelmsford in early July⁹³⁸.

Rashid Latif. The Pakistan captain was banned for five one-day internationals after match referee Mike Procter upheld a complaint about an unfair catch on the third day of the third Test against Bangladesh in Multan⁹³⁹.

Graeme Smith and Andrew Hall. The two South African players received bans for actions in breach of the Code of Conduct during a one-day international against Pakistan in Lahore. Smith picked up a one-day ban from one-day internationals, whereas Hall was banned for one one-day international and two Test matches, as well as forfeiting 50 per cent of his match fee⁹⁴⁰.

Motor Racing – Internal rules and institutions

Tyresome dispute? Drivers hit by Michelin ban

In late August 2003, world governing body FIA conducted an investigation of post-race Michelin tyre widths at the Hungarian Grand Prix and ruled them to be in breach of the rules in their worn state, even though they had complied at the start. Subsequently, teams using Michelin tyres were warned of similar post-race checks in the future, which could lead to disqualification if they revealed non-compliance⁹⁴¹. This deal a severe blow to Juan Pablo Montoya (Williams) and Kimi Raikkonen (McLaren) in their attempts to wrest the World Championship from the all-conquering Michael Schumacher, as it meant that the venerable old company had to produce a batch of replacements in time for the Italian Grand Prix at Monza barely two weeks afterwards⁹⁴².

As a result, the riders concerned had to continue their challenge using the new tyres which had barely been tested. At a reported cost of over £1 million,

17. Issues specific to individual sports

Michelin technicians in Clermont-Ferrand constructed marginally narrower moulds for the tyres. This came at a particularly critical time in the Formula One calendar, since only two points separated the leading drivers, with Michael Schumacher being the only one not to compete in a car shod by Michelin⁹⁴³.

These drivers can only have been superficially elated when the FIA announced that the tyre dispute “had been resolved to the satisfaction of all Formula One teams – contradicting McLaren’s expressed view earlier that week. A spokesman worded the announcement in the following terms:

“During a meeting on Monday [8 September] with representatives of Michelin and the McLaren and Williams Formula One teams the FIA was shown examples of a new Michelin tyre before and after use. The FIA technical department has confirmed that these tyres will comply with the Formula One regulations if used the same way at Monza in Sunday’s Italian Grand Prix. A number of press reports have suggested that the FIA has changed or reinterpreted the tyre regulations. This is not correct. The maximum tread width has been 270 mm since 1999. The FIA has never suggested that tread width was unlimited once the tyre was in use”⁹⁴⁴.

However, the affair did not end there. Ferrari, whose protestations had led to the post-race inspections in the first place, announced that they might very well request the FIA to review previous races that season involving Michelin tyres which ran on the illegal tread width referred to. Patrick Head, the technical director of BMW/Williams, commented that the patience of the general viewing public would become exhausted if Formula One went through a period of retrospective rule interpretation⁹⁴⁵.

Thus far, no official action has been taken in this respect.

Canadian Grand Prix axed, then reprieved

Mention has already been made above (p. 000) of the reassessment made by the Belgian Government of the ban on tobacco advertising, which seems to have been the salvation of the Belgian Grand Prix, for the near future, at least. The Formula One leaders attempted a similar coup with the Canadian Grand Prix. In early August, Norman Legault, the promoter of the Montreal-based race, announced that he had received a communication from Bernie Ecclestone, the Formula 1 commercial rights holder, informing him that Canada would be losing its race because of the tough anti-tobacco legislation introduced by the country’s legislature. This legislation had in fact been originally

announced in 1997, but the Canadian race was given seven years’ grace before stringent new measures restricting tobacco advertising at sporting events were to be introduced this year⁹⁴⁶.

Mr. Ecclestone initially denied claims that he had sent this letter, and restricted himself to stating that the relevant calendar has yet to be published, a move widely interpreted as a gambit to increase the pressure on the Canadian authorities to reconsider the introduction of this legislation⁹⁴⁷. However, the following week he recanted and confirmed that the Canadian GP had in fact been dropped for 2004⁹⁴⁸.

Two months later, however, there came a reprieve for the race, which was reinstated on the Formula One calendar⁹⁴⁹. This does not, however, seem to have been accompanied by any changes in the Canadian legislation on tobacco advertising.

Formula One changes race rules

At its Council held in Paris in October, the world governing body, FIA, ratified proposals made by the Formula One Commission to merge the single-lap qualifying session run on Fridays with the crucial Saturday session, with each driver now having two attempts in two hours of qualifying to decide the grid⁹⁵⁰.

Motor Racing – Disciplinary cases and procedures

Schumacher fined, but Raikkonen and Barrichello escape penalty for German GP collision

This year’s German Grand Prix was marred by a first-corner collision involving Ralf Schumacher, Rubens Barrichello and Kimi Raikkonen. Mr. Schumacher was initially demoted ten places on the next starting grid for the next race, being the Hungarian GP, but won an appeal against this penalty, which was converted into a \$50,000 fine. The FIA later reconvened the stewards who had officiated at the German GP in order to re-examine evidence suggesting that both Raikkonen and Barrichello might have been partially responsible for the incident. Technical evidence had materialised appearing to show that Raikkonen’s McLaren had steered straight into Barrichello, contributing to the Ferrari’s collision with Schumacher’s Williams-BMW, which itself had swerved to the left. However, the stewards decided that there was insufficient evidence to impose any penalty⁹⁵¹.

Motor Racing – Other issues

[None]

17. Issues specific to individual sports

Athletics – Internal rules and institutions

[None]

Athletics – Disciplinary cases and procedures

Drummond in false-start protest

Digital technology currently decides such matters as whether athletes have left the starting blocks at the correct moment, and even a split-second early start can mean disqualification. This is what happened to US runner Jon Drummond in the 100-metre event at the World Championships in Paris held in August 2003. Both he and Jamaican Asafa Powell displayed reaction times of 0.052 and 0.086 seconds respectively after one false start had already been recorded, which was sufficient to earn them a disqualification. This was not to Mr. Drummond's liking, and he staged a one-man protest by lying down on the tracks officials impotently remonstrated with him, in full view of such Olympic luminaries past and present as Juan Antonio Samaranch and Jacques Rogge⁹⁵².

Despite winning the backing of the crowd, who made their feelings plain by a chorus of boos and whistles, the organisers failed to be swayed, and Mr. Drummond ultimately had to accept defeat. Earlier, three runners had already fallen victim to the new rules during opening heats, but, unlike Mr. Drummond, they were inexperienced athletes unfamiliar with the new rules. Mr. Drummond's training partner and friend, Ato Boldon, unsurprisingly indicated that Drummond's attitude to the new rules had "hardened" – whereas before this incident he had spoken in favour of the new starting arrangements. Rather strangely, Mr. Boldon claimed that the machine made a wrong call, adding that "50,000 pairs of eyes saw it was a wrong call". This is strange because the new rules were introduced precisely in order to make such a split-second matter as sprint starts invulnerable to the fallacies of the human eye⁹⁵³.

Mr. Drummond later withdrew from the US team. This was probably in order to forestall any disciplinary action on the part of US Track & Field, which regulates the sport in the US, and which had been requested by the world governing body, the International Association of Athletics Federations (IAAF) to investigate the incident⁹⁵⁴.

Athletics – Other issues

[None]

Golf – Internal rules and institutions

Watson wants curb on golf balls

On the eve of the 2003 British Open, Tom Watson, who won the event five times, stated his belief that the time has come to reduce the distance by which golf balls fly, and that this should apply to everyone playing the game, not only for the top names. He said that he had already suggested to the two regulatory bodies, the Royal and Ancient and the United States Golf Association (USGA) to engage in a dialogue with the manufacturers of golfing equipment, if possible requesting the latter to give a "no legal action pledge" (possible court action having hitherto been seen as a potential stumbling block to any change in this respect).

This is not the first occasion on which changes and/or restrictions in golfing equipment have been mooted. The so-called hot drivers have been the subject of much debate, and testing is to be introduced shortly so that illegal clubs can be identified⁹⁵⁵.

"Clerical errors no longer to cause disqualification?"

Some of the rules of this noble sport are so strict as to appear perverse. One of these is that anyone signing a golfing partner's card by mistake is disqualified from any further participation in the event. This is what happened to Mark Roe and Jesper Parnevik during this year's British Open, as a result of the pair signing each other's cards. This led Mr. Roe to call for a rule change, arguing that clerical errors should not be allowed to have such an impact as to deny someone a chance to play in the final round. Peter Dawson, the secretary of the Royal and Ancient Club, which regulates golf in this country, promised a "pause for reflection" on the wisdom of this rule⁹⁵⁶.

Golf – Disciplinary cases and procedures

No disciplinary action in Ian Woosnam case

In late June, Welsh golfer Ian Woosnam was involved in an alcohol-fuelled fracas in a Jersey pub. Mr. Woosnam subsequently apologised for this incident, which forestalled any disciplinary action against him by the European Tour organisers⁹⁵⁷.

Golf – Other issues

[None]

17. Issues specific to individual sports

Tennis – Internal rules and institutions

Calls for smaller rackets

Golf is not the only sport going through a period of introspection as to its rules and regulations. As this year's Wimbledon tournament drew to a close, John McEnroe, Boris Becker and Martina Navratilova were just some of the 33 former prominent players who signed a letter to the International Tennis Federation, the world governing body in the sport, calling for major changes in racket technology. The letter describes the modern game as "unbalanced and one-dimensional" and calls for changes to encourage more "serve-and-volley" specialists. The current game seemed to be dominated by baseliners using Western grip forehands, most of them having two-handed backhands and hitting with fierce top-spin. Modern racket technology, which has developed powerful, light and wide-bodies rackets, is seen as the main culprit. The letter goes on to suggest a reduction in size of the racket, from the current limit of 12.5in. to 9in.⁹⁵⁸

The impact of the letter was, however, somewhat dampened by the fact that it featured none of the names of today's top players.

Tennis – Other issues

[None]

Tennis – Disciplinary cases and procedures

Rusedski fined for outburst at umpire

During the second round of this year's Wimbledon tournament, British hope Greg Rusedski was locked in a tense battle with US player Andy Roddick. At a highly critical point of the match, a spectator called a Roddick forehand out, and his opponent failed to return the ball believing that the call came from a linesman. The umpire refused to replay the point, and Mr. Rusedski vented his displeasure on the official with a series of four-letter words, heard by millions on television. As well as losing the match, he was later fined £1,500 by tournament referee Alan Mills. Both Mr. Rusedski and the spectator who caused the upset, Zilioni Ivaldes, later apologised for their part in the incident⁹⁵⁹.

Some commentators poured scorn over the umpire, Lars Graff, for his decision. The rules, however, are quite clear on this point and showed Mr. Graff to be in the right.

Costa fined

In late September 2003, former French Open champion Albert Costa was fined \$20,000 by the Association of Tennis Professionals (ATP) after withdrawing from the Shanghai Open with a back injury⁹⁶⁰.

Footnotes

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58 Ibid.
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It's just not cricket!

Shane Warne's positive dope test not only raises sporting issues but also financial and commercial ones with particular application to sports marketing agreements in general says international sports lawyer Ian Blackshaw

Introduction

At the recent Cricket World Cup, Australia's star cricketer, Shane Warne, tested positive for a banned substance and was sent home in disgrace.

It appears that, to cure a shoulder injury, Shane's mother – as caring mothers are wont to do – gave him a diuretic. Unfortunately, whilst proving to be a miracle cure, it seems to have done him more harm than good. For, it contained a banned substance – a steroids masking agent. He says that he took it "inadvertently", had no intention of using any performance-enhancing drug and, indeed, had never done so in his entire sporting career.

Following a lengthy hearing before the Disciplinary Panel of the Australia Cricket Board (ACB), chaired by an Appeal Court Judge and before which he was represented by two solicitors and two senior barristers, the ACB announced on 22 February that he had been found guilty of the doping offence and handed down a one-year ban from competition. He said he was 'devastated' of being found guilty. That he was a victim of 'anti-doping hysteria'. And that the punishment was 'harsh'. In parentheses, it may be remarked that the normal minimum ban for a first doping offence is two years. In fact, for most sports governing bodies, a two-year ban is mandatory.

This case raises the thorny issue, in sporting circles, of 'strict liability' for doping offences. Should sports persons be found guilty and banned from competition when they did not know, nor had any intention of taking a banned substance? And even where it can be scientifically shown that the substance was not performance enhancing? Or should liability be absolute, irrespective of the particular circumstances in which the offence occurs? That, in modern day sport, where winning counts more than taking part, is the million-dollar question. Protagonists of the 'strict liability' rule argue – and I believe with full justification – that sports persons are solely responsible for any banned substances found in their bodies – however they got there. And, indeed, without such a rule, it would be difficult – if not impossible – to kick drugs out of sport.

Apart from that, as Shane Warne admitted in an article in 'The Times' on 24 February, it is up to sports persons to check if they have any doubts about any medication they may take or be given (cf. the Alain Baxter case and the offending nasal spray).

Be that as it may, but in this article I want to take a look at the financial and commercial consequences of doping cases.

Financial and Commercial 'Fall-Out' of Doping Cases

Sport is now big business and worth more than 3% of world trade and 1% of the combined GNP of the fifteen member states of the European Union. So, there is a lot to play for, not only in sporting terms, but also in financial and commercial terms.

In Shane Warne's case, his enforced year's sabbatical is reportedly going to cost him around £500,000 in lost playing contracts, plus about the same amount of money in lost promotional, sponsorship, endorsement and other sports marketing arrangements. It is also unlikely that he will be taken on as a TV cricket commentator for the Australian Broadcasting Corporation for whom he was being groomed for his retirement from professional cricket, because of the stigma attaching to him as a result of the doping offence. In other words, the pill he 'innocently' took was a very expensive one!

Take endorsement contracts, for example.

Under these contracts, companies use well-known sports persons to endorse and promote their products and services, which usually have a sporting connection. For example, a famous golfer, like Nick Faldo, to promote golf clubs, or a sports personality, like David Beckham, to promote the sale of sunglasses under the brand name 'POLICE'.

The commercial rationale for this kind of business arrangement is that potential purchasers of the products will be attracted by the endorsement of them by the sports personality concerned. Because – so the argument runs – 'Becks' wears this particular brand of sunglasses they must be good and his fans will want to emulate him and buy them too! In other words, the

name and reputation of the person endorsing the product or service concerned is used to lure potential customers into purchasing that particular one.

The value of the endorsement, therefore, not only depends on the continued success of the sports personality in their particular sporting discipline, but also on their general behaviour on and off the 'field of play'. When things are going well, there is a positive and

'Becks' wears this particular brand of sunglasses they must be good and his fans will want to emulate him and buy them too!

valuable association between the sports person and the company whose products and services they are endorsing and promoting.

On the other hand, when they are not, bad behaviour can have a negative effect on the business association between that personality

and the company seeking their endorsement of its products and/or services.

So, how can companies paying astronomical sums to sports persons for their endorsements – Beckham, for example, earned last year more than £15 million of which only £1.5 million was for playing football, the rest was for endorsements and promotions! – protect themselves against sports personalities who turn out to have feet of clay?

By including so-called 'morality', 'good behaviour' and 'disrepute' clauses in their sports marketing and promotional contracts.

'Morality' 'Good Behaviour' and Disrepute' Clauses Generally

These clauses are not only advisable but also essential as the fortunes and popularity of sports persons, especially footballers, cricketers, golfers and tennis players, wax and wane. Footballers, in particular, seem to lead colourful and risqué lives – 'Gazza' in his day is perhaps a typical example. And what about Bowyer and Woodgate in our day?

Such clauses need to be expressed in precisely defined terms in order to avoid them being held to be legally unenforceable on the grounds of vagueness and uncertainty. A general clause in general terms requiring a sports personality not to behave 'badly' or in an 'anti-social' or 'uncivilised' manner may lack such precision and, *ipso facto*, enforceability. On the other hand, the clause should contain some specific prohibitions, such as testing positive for performance enhancing drugs or using illegal recreational drugs – yet another footballer has recently tested positive for cocaine! – and, as a result being suspended from competition. Prohibitions such as acting 'illegally' tend to pass muster, whereas acting 'immorally' may not in these liberated times in which we live, where anything seems to go (as the popular phrase has it). If any of these particular and specific contingencies occur, such conduct can – and, indeed, should – be expressly made a ground for termination of the particular sports marketing contract.

To introduce precision generally into these so-called 'morality' clauses, yet at the same time make them comprehensive and flexible – not necessarily mutually exclusive objectives – wording along the following lines could be considered:

Specimen Morality Clause

"The Sports Personality shall, at all times, during the period of this Agreement act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorise there to be done or said anything which, in the reasonable opinion of the Company is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Company or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Company, offends against decency, morality or professionalism or causes the Company, or any of its associated

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companies, to be held in public ridicule, disrepute or contempt, nor shall the Player be involved in any public scandal".

Of course, the term 'associated companies' will need to be defined.

The advantage of such a clause is that it lays down objective standards/norms of good behaviour, whilst, at the same time, giving the Sponsor the freedom to decide whether or not those standards/norms have been breached.

To ensure compliance with a 'morality clause', in practice, either a 'stick' or 'carrot' approach can be taken by the company whose products or services are being endorsed, sponsored or promoted by the sports personality. Under the former, a financial penalty will be exacted for any breach. But beware! This raises the 'hoary chestnut' at Common Law of whether the amount involved is a legally unenforceable contractual 'penalty' or an enforceable 'liquidated damages' provision – that is, a reasonable attempt to evaluate in advance the financial damage caused by the breach. Apart from this, such a provision may be difficult in practical terms to enforce as an 'after the fact' type of sanction.

On the other hand, it may be better to use the latter approach and award a 'bonus' payment for 'good behaviour'. This should act as an incentive and encourage compliance with the terms of the 'morality clause'. Put the other way round, an attractive 'bonus' payment should act as a disincentive to bad behaviour.

It is advisable to supplement a 'morality clause' with a contractual provision requiring that, in case of any breach, the offending party shall hand over to – or, at the least, fully co-operate and collaborate with the company in – the management and control of a public relations damage limitation exercise, to mitigate any loss of goodwill or reputation of the company as a result of the breach. Such campaigns will also, naturally, include media charm offensives! After all, sports marketing is all about publicity and exposure.

Other Key Contract Provisions

Furthermore, to safeguard the considerable financial investment in sports personality marketing arrangements, other key clauses need to be included. So, it is also advisable to require 'exclusivity' from personalities, in the sense that they will not enter into similar contracts with competitors during the term of the contract. And also to define the geographical territory in which the endorsement, sponsorship and promotional rights may be exercised. Sponsor conflicts are a particular problem in practice, as, I am sure, David Beckham and his advisers well know!

Again, the sports personality may misbehave by criticising the endorsed/promoted products and this also needs to be expressly covered by suitable contractual provisions. Such criticisms may be express or, perhaps more commonly, implied. For example, a sports personality seen in public or photographed by the press consuming a competitor's products. In either case, this kind of behaviour undermines the exclusivity value of the endorsement. And any relevant contractual provisions may need to be extended beyond the term of the contract. But, cave, post-termination restrictions may raise competition issues under national and EU law.

Also, provisions need to be included in the contract to guard against sports personalities endorsing or promoting alcoholic beverages becoming and making it known that they are now 'teetotalers'! or endorsing meat products, such as burgers, when they have become vegans!

Other key clauses are the financial and payment terms and conditions, and, as previously mentioned, the termination provisions, including the legal and practical effects of termination, especially in relation to the post-termination sale of existing stocks of 'endorsed' products.

Finally, it should be made expressly clear that the contract with the sports personality does not constitute an employment, partnership or joint venture relationship, with the corresponding legal, financial and practical consequences and inconveniences, but is merely a contract to provide personal services by the sports personality acting purely as an 'independent contractor'. As such, the arrangements will automatically terminate on the death or other physical or mental incapacity of the sports personality to perform the agreed services. Also, beware of contracting with minors – their contracts should be approved and signed by their parents or legal guardians.

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Breach and Termination

Of course, the ultimate sanction for any breach of any 'morality clause' is termination of the contract. And this right should be expressly reserved in all cases. Remember that it is a right – and not an obligation – and so the company is free to decide, according to the particular circumstances of each individual case, whether or not to exercise it. In view of this, the contract should also contain the usual 'waiver' clause as part of the 'belt and braces' provisions, whereby the waiving of any particular right under the contract, especially the right of termination, on one particular occasion and under certain particular circumstances should not be deemed to be a general waiver of that right on all other future occasions and in other circumstances.

One important practical consideration in deciding what to do is the effect the breach of the 'morality clause' may have on an ongoing marketing, promotional and advertising programme in which the particular endorsement by the particular sports personality is a key and integral part. In other words, there can be occasions where it may be better not to exercise the right of termination but carry on with the promotion. Perhaps a case of any publicity – including bad publicity – being better than none at all. This, of course, is a difficult call to make in practice!

Conclusion and Contract 'Checklist'

The need to negotiate clear terms and conditions – especially those dealing with any misbehaviour on the part of the sports personality that may have disastrous effects – like Shane Warne's positive dope test and ban – on the value of the sports marketing arrangements – and incorporate them into a well-drafted contract cannot be over emphasised. Contracts for personal services are notoriously difficult to draw up and enforce in practice. Before drafting them, it is good practice to draw up a 'Checklist' of the various legal, financial, commercial and practical matters to be included on both sides. En passant, it may be mentioned that, as far as dispute resolution is concerned, Mediation is proving to be particularly appropriate and effective for the settlement of sports commercial disputes in general and disputes under 'morality' clauses and the financial and commercial 'fall-out' of doping cases in particular. A corresponding express reference clause should be included in the contract.

A sample Contract 'Checklist' could be as follows:

- Parties and their capacities to contract
- Interpretation Clause
- Preliminary approvals and pre-conditions
- Warranties and conditions
- Rights and product/service category exclusivity

- Registration and Use of Intellectual Property Rights
- Territor(y)(ies)
- Duration
- Payment terms and conditions
- Tax issues including vat on sales and withholding taxes
- Personality's obligations
- Company's obligations
- Termination and practical effects
- Post-termination obligations
- 'Belt and Braces' clauses
- Proper Law and Dispute Resolution
- Appendices

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Are sporting bodies abusing human rights?

Ambi Sithamparanathan and Matthew Himsworth Schillings

Drug abuse is now the single largest problem in sport. A recent survey by the Professional Footballers Association to all 2,863 of its playing members into the use of recreational drugs, indicated that a staggering 70% of those surveyed said that recreational drugs were used by footballers and 46% of those said that they personally knew other players who had taken them. Around 50% of players said that footballers used performance enhancing drugs.¹

There are three perceived categories of 'offenders' in this regard; recreational drug abusers who might smoke marijuana, take ecstasy or cocaine socially, and there are performance enhancing users some of whom take drugs intentionally in order to enhance their performance and some of whom consume the banned substance inadvertently by virtue of their use of another product². It seems that the rules have become confused about the underlying objective of most sports governing bodies' rules which is to prevent participants obtaining an advantage in their performance over another competitor by use of performance enhancing drugs. The drafting of the rules means that those who are using drugs in a social sense will also fall foul of the doping rules and will be found to have breached the doping regulations, leaving us in a situation where sports disciplinary bodies are effectively investigating crimes where the usual criminal safeguards do not apply.

The European Convention on Human Rights

It has now been three years since the Human Rights Act 1998 came into force, yet the rules and regulations of the UK's sports governing bodies could still be flying in the face of the European Convention Rights that the Act seeks to protect. As has been noted by sports legal commentators, "There is little or no standardisation in their constitutions."³ which has resulted in there being no uniform approach to the adoption of the ECHR by UK sports. The implementation of the Act has brought about a spate of litigation with individuals and organisations testing the boundaries of our existing law in light of the provisions of the Act.

The Human Rights legislation has already impacted

upon the world of sport to some degree. From the challenge against Fulham Football Club's bid to rebuild Craven Cottage⁴ under Article 6 of the European Convention on Human Rights; to the challenge by football supporters against International banning orders imposed by the government under the Football (Disorder) Act 2000⁵. The question remains, though, does the Convention apply to the "laws" and regulations imposed by sporting governing bodies and associations themselves?

Sports Associations as Public Bodies

Section 6(1) of the Human Rights Act states:

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right". A public authority includes "any person certain of whose functions are functions of a public nature".

The definition of who should be a public authority and what is a public function for the purposes of Section 6 has been given generous interpretation.⁶ It has been strongly argued that "sports bodies are in substance regulators whose decisions ought to be amenable to judicial review."⁷ The Home Secretary himself expressed the view during the passage of the Human Rights Bill that the Jockey Club was a functional authority under the Act.⁸ It would appear that the Courts would be predisposed to this approach, particularly considering Neill LJ's comments in the pre-HRA case of *R v Disciplinary Committee of the Jockey Club Ex P Massingberd-Mundy*⁹.

The precept of the Universal Declaration of Human Rights urged that "every individual and every organ of society"¹⁰ should play its part in securing universal observance of those rights guaranteed by the ECHR. For their part, international sports organisations have attempted to recognise their athlete members' fundamental rights. Indeed, the Olympic Charter states that "the practice of sport is a human right"¹¹. It is accepted by those drafting the World Anti-Doping Agency Code ("WADA Code") that:

“because sports governing bodies exercise a monopolistic ‘quasi-public’ position in their relation with the athletes, there is a understanding among lawyers that sports governing bodies can no longer ignore fundamental rights issues in their activities, at least if they want to avoid governmental intervention”¹².

Sporting regulations and the Human Rights Act

The FA

Whilst it appears that sports governing bodies may be within the remit of the Human Rights legislation, it is clear that a number of them have not fully considered the impact of this law in relation to their own rules and regulations, specifically those in relation to disciplinary offences and procedures.

Rule 1 (a) of the Rules states:

***“The following matters will be regarded as amounting to a breach of the Doping Control Regulations and for the purposes of Rule E26”
(a) the detection of a prohibited substance in a sample provided by a player..”***

Rule 1(a) constitutes an offence of strict liability, i.e. whether, when and for what purpose the player took the prohibited substance would be immaterial to guilt, although relevant to the penalty imposed upon the player.

This raises considerations as to the law’s aversion to unreasonable restraint of trade, elementary fairness and importantly the concept of the right to a fair trial in Article 6 of the European Convention on Human Rights. The right to continue in professional practice is a civil right, thus Article 6 is applicable when a disciplinary tribunal uses its authority to suspend a person from professional practice.¹³

The RFU

Another sporting association whose strict liability laws may fall foul of the ECHR are those of the Rugby Football Union. Interestingly the RFU Doping Regulations provide;

“Under these Regulations a doping offence is committed when:

- (i) a prohibited substance or a diagnostic metabolite of a prohibited substance is found to be present in a player’s body tissue or fluids: or***
- (ii) a person is found to have used a prohibited substance or a prohibited method; or***
- (iii) a person admits using a prohibited substance or method”***

Under the last two provisions it appears that a player can fall foul of the doping regulations even if they are not found to have the prohibited substance in their body tissue or fluids. It then follows that a player can be in breach of the rules by being ‘found’ to have used a prohibited substance. The question then remains as to what will prove to be a breach of this particular regulation, will a photograph of a player apparently using a banned inhaler in the dressing rooms be sufficient evidence of the player being ‘found to have used a prohibited substance’? Considering that this is an offence of strict liability and the RFU rules, as with the FA, do not appear to allow for mitigation in terms of the player adducing evidence to the effect that it was not their fault, the RFU regulations also appear to fall foul of Article 6 and the Human Rights Act.

UK Athletics

UK Athletics Ltd is the governing body for athletic sports in the UK, and is also a member of the International Association of Athletics Federations (“IAAF”). Athletics is another sport where, unsurprisingly due to the sport’s much publicised battle with doping, an offence is one of strict liability. The rules clearly state:

“For the avoidance of doubt the offence of doping is an absolute or ‘strict liability’ offence. Therefore it is not necessary for UKA to prove any intention (or guilty state of mind) on the part of an athlete to commit such an offence. By way of example

Are sporting bodies abusing human rights?

and without limitation, it is also no defence to a charge of having committed a doping offence, if a prohibited substance is found to be present as a result of accidental or inadvertent ingestion of a prohibited substance.”

In line with the WADA code (discussed below) UKA rules that the minimum ban for breach of a doping regulation is two years for a first offence and life for a second offence. However, where UKA appears to fall short of the WADA standard is their failure to allow for athletes to mitigate against the length of that ban where there has been no, or no significant, fault. Again, the austerity of these rules appears to be in breach of Article 6 and also arguably an unreasonable restraint of trade. If an accused athlete cannot bring any evidence in mitigation where they are accused of an offence, that if they are found guilty of, could result in them losing their livelihood, how can their disciplinary hearing be described as a fair trial in accordance with Article 6?

Strict Liability

The nature of strict liability offences are that, even where a sportsperson can produce evidence of unknowing consumption of the prohibited substance, this evidence will be treated as irrelevant by the sporting association¹⁴ (see the Court of Arbitration for Sport's decision in *Baxter*¹⁵.) However, in the case of *Petr Korda*¹⁶ (the tennis player who appealed to the Court of Arbitration for Sport in Lausanne over the ITF's decision to ban him over his positive nandrolone test) the CAS upheld the ITF decision, yet indicated that defences exist in UK sports to strict liability offences. Despite this it seems that in the majority of cases strict liability will apply.

Such strict liability interpretation by a sporting body's disciplinary commission (which is effectively a trial, the outcome of which, directly impacts upon the player's livelihood) could be deemed to have fallen foul of the right to a fair trial as enshrined in Article 6 of the ECHR.

Strict liability in the criminal law has been held (by the European Court of Human Rights in *Salabiaku v*

*France*¹⁷) not to be in complete contravention of Article 6, however, the Court's opaque reference that it was suitable "under certain conditions" has led to conjecture from commentators that, where an individual's Convention rights are threatened by the application of strict liability, the legislation "would be subject to scrutiny for compliance with the requirement of proportionality"¹⁸.

Recently the Court of Appeal has exercised such discretion in its analysis of the £2,000 fixed penalty scheme for haulage firms found to be carrying illegal immigrants. It was held that it was not right to impose so high a fixed penalty without the possibility of mitigation as the penalty far exceeded what any individual

should reasonably be required to sacrifice in the interests of achieving improved immigration control.

It is the authors' contention that the public policy reasons for applying strict liability to doping offences in sport, identified by Scott J in *Gasser v Stinson* (see below) as stopping the "floodgates" from opening the result being that "attempts to prevent drug-taking by athletes would be rendered futile", are not as persuasive as the maintenance of good immigration control. Lord Woolf stated in *Re Lee Kwong-kut*¹⁹ that the "implicit flexibility allows a balance to be drawn between the interest of the person charged and the state [or for our purposes; the sporting body]". The protection of the athlete's right to have the determination of an issue, that will ultimately affect his right to a living (in a comparably short-term career), tried fairly (in line with Article 6) must surely outweigh the benefits to the sporting body in attempting to prevent drug-taking in the sport. A further consideration must be the effect on the sportsperson's professional reputation

It is within the capabilities of sporting associations to prevent endemic drug-taking in sport through adequate policing and education.

where a finding against the athlete will result in them being labelled a “drugs cheat”.

It is within the capabilities of sporting associations to prevent endemic drug-taking in sport through adequate policing and education. The authors’ accept that, without strict liability, it would be difficult to achieve a positive finding against an accused athlete, although, it

Sporting bodies, particularly some of the UK’s smaller associations, appear to have great difficulties in appointing panels that have no relationship with either the association’s legislators or the parties involved

is considered that a system of monitoring suspected athletes may be more equitable. Given the draconian effect on an athlete’s career where he/she is suspended for a great length of time, it is useful to recall the words of Sir William Blackstone: **“the law holds that it is better that ten guilty persons escape than that one innocent suffer”²⁰**.

Independence and Impartiality

Article 6(1) provides that “everyone is entitled to a fair and public hearing ...

by an independent and impartial tribunal”. An independent tribunal was defined in *Ringeisen v Austria*²¹ as meaning “independent of the executive and also of the parties”. Sporting bodies, particularly some of the UK’s smaller associations, appear to have great difficulties in appointing panels that have no relationship with either the association’s legislators or the parties involved (particularly where the parties include clubs and other associations). In *Ringeisen* the European Court set out a number of factors to determine whether or not a tribunal was independent, namely:

- (i) the appointment process for tribunal members
- (ii) guarantees offered against outside pressures
- (iii) whether there is an appearance of independence

The second factor is one that, in light of the media campaigns of those championing a hard line on drugs use, must be unsustainable at present. There can be no guarantee that the recent pressure applied on sporting bodies to apply strict measures against doping will not result in tribunals lacking the requisite independence (see the comments, in particular, of Richard Caborn, the Minister for Sport²², and Dick Pound, the World-Anti Doping Agency’s Chairman²³).

The third factor will always be problematic as long as sports tribunals are made up of active members of the association itself. An athlete who is charged by the association may reasonably consider that there is no appearance of independence where he is tried by the association.

Impartiality was defined by the European Court in *Fey v Austria*²⁴ as:

“[A] subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect”.

This test is to be applied to individual tribunals, on a case-by-case basis, and thus is beyond the scope of this article.

Case Law – Gasser v Stinson

The case of *Gasser v Stinson*²⁵ considered whether the rules of sporting bodies were applicable to the English legal doctrine of restraint of trade and Scott J found that they were²⁶ (including those rules of international sporting bodies) and that unfair restriction of competition in this light could be found to be in restraint of trade; the test was whether the restraint was unreasonable. *Gasser*, though, fell foul of this test as Scott J held that there were reasonable considerations for IAAF in applying a strict liability test. Furthermore he found that the IAAF’s decision was fair and reasonable and as such, there was no need for the court to intervene.

This case was decided in 1988, many years before

Are sporting bodies abusing human rights?

the Human Rights Act came into play and was the individual decision of a High Court Judge that a sporting body was fair and reasonable in its decision to apply strict liability. However if the same facts were to be considered in the present day, in conjunction with the European Convention on Human Rights, and in particular Article 6, it is arguable that this decision is no longer good law.

Edwards v BAF and IAAF

In the case of *Edwards v BAF and IAAF*, E brought a claim against the BAF and IAAF for a declaration that the decision to ban him for four years was contrary to Articles 6, 59-66 of the Treaty of Rome. His argument was based upon fact that athletes from other countries would only receive a two year ban because their national legislation would not allow longer bans and accordingly that the BAF and IAAF treatment of him was contrary to various Convention rights, namely right to a fair trial and discrimination by nationality. Lightman J held that the decision of the BAF and IAAF did not come under this EC legislation because these rules merely regulated sporting conduct, and sporting rules would only be covered by EC law where the rules affect "an economic activity". This is a decision that is not particularly helpful, though, in consideration of the applicability of the ECHR to such decisions of sporting bodies as it is concerned solely with the applicability of EC competition law. In the authors' opinion, given the applicability to UK Courts now of ECHR cases such as *Le Compte v Belgium*, this is a judgment which may well have been decided differently if it had been considered now on the basis of a Human Rights Act claim.

World Anti Doping Agency

Sporting associations the world over recently (in March 2003) signed up to the World Anti Doping Agency Code (WADA). Article 10 of the WADA Code sets out a two year standard punishment for doping offences (i.e. a two year period of ineligibility), however, this is subject to Article 10.5 of the WADA Code which provides that this period may be reduced if the athlete may show no,

or no significant, fault or negligence. In other words, whilst a breach of the WADA Code is a strict liability offence, in contrast to, say, the FA doping regulations, a player can put forward arguments in mitigation as to why the prohibited substance being in their body is not their fault (including the fact that the test result was a result of the deliberate or accidental activities of a third party). This highlights the inadequacies that can be found in the disciplinary regulations of sporting bodies across the UK, which only allow mitigation in respect of previous conduct of the player.

Conclusion

There is an undoubted pattern across the whole of UK sport as sporting associations have struggled, in the face of media condemnation of "going soft on drugs"²⁷, to draft their laws to be lawful and in line with the current sporting policy of "zero tolerance". The World Anti-Doping Agency conference in Copenhagen in March 2003 was an attempt to create a uniform set of rules across world sport. The difficulties that some of the most experienced legislators in the UK have found in drafting legislation in line with the European Convention on Human Rights goes only to show why sporting bodies have been hard-pushed to achieve this kind of uniformity.

The difficulties that sporting bodies have experienced in drafting their regulations and the apparent problems with independence and impartiality of tribunals suggests that an ideal responsible approach would be for an organisation, such as UK Sport, to take full control of all sports doping tribunals in the UK. Such a move would create a uniform legislation and remove any perception of prejudice in the decision of tribunals. If the move were undertaken with support and control from the government (thus guaranteeing a claim under

A responsible approach would be for an organisation, such as UK Sport, to take full control of all sports doping tribunals in the UK

the judicial review procedure should an athlete consider that necessary) it would remove any doubt that the rights guaranteed under the ECHR would be applicable to the application of doping control in sport.

Sports doping legislation must not only be drafted in line with WADA but, first and foremost, it must accommodate European Human Rights law. The European Court of Human Rights has not hesitated to intervene where an independent disciplinary panel has sought to suspend a professional person for a period of one year²⁸, there is no reason why a suitable challenge by a professional sportsperson would not have the same result. As the revolutionary case of *Bosman*²⁹ has shown; sport is not a special case immune from the law. Should action not be taken then, it is the authors' opinion (and an opinion shared by those lawyers involved in drafting the WADA code³⁰), that it may not be long before a sporting association is successfully challenged in the Courts of the UK or Europe.

- 1 Health Newswire Consumer 21st July 2003
- 2 see for example *Baxter v IOC* CAS 02/1/376 wherein the Appeal panel found that "[Baxter] appears to be a sincere and honest man who did not intend to obtain a competitive advantage in the race"
- 3 Charles Woodhouse, "Sport and Law in Conflict: Role of Sports Governing Bodies", conference paper at Stamford Bridge, 25 November 1996.
- 4 R v Secretary of State for the Environment, Transport & the Regions (Defendant), ex parte William Adlard & Others (Claimants) & (1) Fulham Stadium Ltd (2) Hammersmith & Fulham London Borough Council (Interested Parties) [2002] EWCA 735
- 5 Gough and Smith v Chief Constable of Derbyshire: Miller v Leeds Magistrates Court: Lilley v Director of Public Prosecutions [2002] EWCA 351
- 6 R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan (1993) 1 WLR 909
- 7 Hansard, HC col 1018 (20 May 1998)
- 6 Poplar Housing and Regeneration Community Association Ltd v Donohue [2002]
- 7 Clayton and Tomlinson, *The Law of Human Rights* Volume 1, at 5.35
- 8 Hansard, HC col 1018, 20th May 1998
- 9 R v Disciplinary Committee of the Jockey Club exp Massingberd-Mundy (1993) 2 All ER 207, at 219: "if the matter were free from authority I might have been disposed to conclude that some decisions at any rate of the Jockey Club were capable of being reviewed by the process of judicial review";
- 10 Preamble of the Universal Declaration of Human Rights
- 11 Olympic Charter, Fundamental Principles, No.8, p.9
- 12 Rigozzi, Kaufmann-Kohler and Malinverni; Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World-Anti-Doping Code [2003] ISLR 39, at p.49
- 13 Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1 para 48
- 14 see Michael J. Beloff, *Drugs, Laws and Versapaks*, in John O'Leary (ed.) *Drugs Doping in Sport: Socio-Legal Perspectives*, (Cavendish, London-Sydney, 2001), p.44 wherein it is stated that a strict liability offence "disables the athlete from providing any exculpatory explanation of the circumstances in which the substance was found in the body fluids"
- 15 *Ibid* 2
- 16 *Korda v ITF Ltd*
- 17 *Salabiaku v France* A/141-A (1988) 13 EHRR 379
- 18 *Stammer*; *European Human Rights Law*, at 8.47
- 19 *Attorney-General of Hong Kong v Lee Kwong-kut* (1993) 3 All ER 939
- 20 *Blackstone* (1753-1765) 2 Bl. Com. c. 27, margin page 358, ad finem
- 21 *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455, para 95
- 22 see the Times, 8th May 2003 "Caborn dismayed by FA's leniency on drugs": "(t)he minister said, 'The FA has not lived up to the spirit of the [WADA] code.' ... Caborn will now write to the FA, repeating his threat to withdraw £20 million in public money and tax breaks if it does not follow the protocol adopted by other sports bodies."
- 23 see the Guardian, 10th November 2003, "Interview: Dick Pound": "[Dwain] Chambers was officially suspended by the International Association of Athletics Federations on Friday and, though a date for his disciplinary hearing has yet to be set, a minimum two-year ban on the British sprinter is inevitable. Pound, one of the most influential members of the International Olympic Committee for two decades, would prefer an even more stringent sentence. Yet he has learnt the value of hard-edged pragmatism. 'A life ban,' he says, 'would be a tempting and satisfying conclusion. But the courts of the land would not stand for that judgment'"
- 24 *Fey v Austria* (1993) 16 EHRR 387, para 28
- 25 *Gasser v Stinson and anor* ILR 20.6.88
- 26 *Scott J* relied upon *Greig v Insole* where the rules of the International Cricket Committee were held to be answerable to UK restraint of trade law where they applied to English cricket.
- 27 see particularly recently the widespread media coverage that has revolved around the matters involving Rio Ferdinand and Dwain Chambers
- 28 *Gucheze v Belgium* (1984) 40 DR 100; notably this was not in relation to a short sporting career
- 29 *Union Royale Belge des Societes de Football ASBL v Bosman*, C-415/93, [1996] 1 CMLR 645
- 30 *Ibid* 12, at p.42: "It is only a matter of time before human rights issues in the context of sports will be brought before the European Court of Human Rights or another international judicial body", see also Flint, Taylor and Lewis; *Sport: Law and Practice* (London, 2003) E4.1, p.908; "The Regulation of Drug Use in Sport": "adopting a strict liability approach to doping charges, with a tariff of substantial fixed or minimum sanctions, including suspensions from the sport for lengthy periods, without any ability to take into account of the relative culpability of the individual athlete - risks compromising basic fairness and respect for participants' individual rights. The regulators are challenged with resolving these conflicting imperatives in a manner that both respects the interests of the athletes and vindicates the broader public interest in the sport itself. If the regulators fail to get the balance right, their anti-doping programmes will be subject to forceful challenge"

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The law reports in the Sport and the Law Journal are compiled by barristers at 11 Stone Buildings, Lincoln's Inn, under the editorship of Murray Rosen QC. The individual reporters (indicated by their initials after the date of the judgment) are Tim Penny, Nick Parfitt, Jamie Riley, Iain Pester, Damian Murphy, Martin Ouwehand and Reuben Comiskey. The Reports are published in chronological order and should be cited by their "SLJR" number.

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(2003) SLJR 10

Australia – Elite netballer prevented from playing in competition by interim ban by governing body – whether ban discriminated on grounds of pregnancy under Sex Discrimination Act 1984 – whether conduct lawful under “freedom of association” exemption in s 39 of Act

GARDNER v ALL AUSTRALIAN NETBALL ASSOCIATION LTD

Federal Magistrates Court of Australia, Raphael FM
[2003] FMCA 81
13 March 2003 (Reporter:MO)

Facts

1. Trudy Ann Gardner, the Applicant, was an elite netball player and captain of the Adelaide Ravens during the 2001 season. From April 2001 to August 2001, the Ravens took part in a competition organised by the Respondent called “The Commonwealth Bank Trophy” (“the Trophy”). The Respondent was the federal body for netball in Australia.

2. On 18 June 2001 the Respondent imposed an interim ban preventing pregnant women from playing in the Trophy. At the time, the Applicant was pregnant and therefore prevented from playing in three matches for the Trophy. As a consequence, she lost match payments and sponsorship the recovery of which she claimed in a complaint to the Human Rights and Equal Opportunity Commission along with damages for hurt and humiliation. Her claim was on the basis of discrimination in breach of the Sex Discrimination Act 1984 (Cth) (“the Act”).

3. The Respondent accepted for the purposes of the proceedings only that the interim ban discriminated against the Applicant on the grounds of pregnancy but claimed that by reason of s39 of the Act this conduct was not unlawful.

4. Section 39 of the Act provided that: Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person’s sex, marital status or pregnancy, in connection with:

- (a) The admission of persons as members of the body; or
- (b) The provision of benefits, facilities or services to members of the body.

5. The Respondent and its member, SANA, who was

responsible for the Ravens, were voluntary organisations and all the parties agreed that the purpose of section 39 was to protect the right of freedom of assembly so that a voluntary organisation could choose and deal with its members in any way that the members agreed.

6. The Applicant contended that she was not a member of Respondent or SANA, nor could she be, and was therefore not covered by the exemption in s39. The Respondent contended that s39 should be construed so as to give a liberal and beneficial construction to its words. The Respondent’s case was that:

- (a) the right to field a team in the Trophy was exclusively offered to the Respondent’s members
- (b) those members in turn field teams from their own members either directly or indirectly through a member club or division such as SANA
- (c) it could therefore be that a player was a member of a club which is a member of SANA which is a member of the Respondent.

HELD (granting judgment for the Applicant)

7. The Respondent discriminated against the Applicant pursuant to the Act by preventing her from playing the three netball matches;

8. Exemptions in anti-discrimination cases should be construed narrowly and in accordance with the purposes of the legislation and the international conventions on discrimination. The Respondent’s conduct did not fall within the exemption in s39 of the Act because the Applicant was not a member and the opportunity to play was not the provision of a service to a member;

9. The Respondent was ordered to pay the Applicant the agreed damages of \$6,750 plus costs.

Commentary

10. The Court accepted that the words “in connection with” extended the scope of s39 so that the meaning of “admission” could include non-admission and the term “the provision of benefits, facilities or services” could include the refusal to provide those things to members. However the Court did not accept that those words could be used to extend the definition of members.

11. The Court relied on High Court authority making it clear how important it was that those who interpret statutes should do so consistently with the terms of the overseas conventions and obligations entered into by Australia: *Minister for Immigration and Ethnic Affairs v*

Teoh (1995) 183 CLR 273; Plaintiff S157 v Commonwealth of Australia (2003) 195 ALR 24.

12. The objects of the Act were:

- (a) To give effect to certain provisions of the Convention on the Elimination of all Forms of Discrimination against Women
- (b) To eliminate, so far as possible, discrimination against persons on the grounds of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs...

13. The Court came to the view that it was entitled to assume that Parliament intended only the most narrow construction of the exemption in s39 because it offended against the "generally accepted proposition that discrimination in any shape or form is wrong" for the higher purpose of freedom of association. The Court said that if a voluntary organisation wished to take advantage of the exemption it could do so because the exemption was limited to the organisation's relationship with its members.

14. The Respondent submitted that it would be difficult for the Respondent to change its constitution so that all persons affected by its decisions could be classified as members. But the Court thought that had Parliament intended such persons to be covered by the exemption then it would have drafted section 39 differently.

15. In this case the Court held that it would strain the construction of s39 and be contrary to the purposes of the Act and international conventions to find that the Applicant was a member of the Respondent or that the provision of an opportunity to play in the Trophy was a service provided to a member. It was simply unfortunate for the Respondent that it had constituted itself in such a way that people such as the Applicant could not be its members.

16. Had this case occurred in the UK it would have been interesting to know the extent to which the Respondent could have relied upon s51 of the Sex Discrimination Act 1975 which includes effectively an exemption for any act done for the purposes of protecting women as regards pregnancy or maternity.

(2003) SLJR 11

Cycling – Doping – FFC – testing procedures – authorised laboratories – procedural non-compliance with national statute – CAS appellate jurisdiction – national public policy vs international anti-doping policy

L'UNION CYCLISTE INTERNATIONALE (UCI) V ROUX, LA FEDERATION FRANCAISE DE CYCLISME (FFC)

**TAS 2003/A/431 Court of Arbitration for Sport ("CAS")
Judges Rasquin (President), Carrard and Karquillo
23 May 2003 (Reporter: RC)**

Facts

1. The UCI is the association of national cycling federations, of which the FFC is a member. M. Roux is a French cyclist. On 27 April 2002 M. Roux was tested for drugs. The testing was carried out by the UCI.

2. The first specimen was tested at the laboratory at Châtenay-Malabry, France, and was found to contain banned substances. The UCI reported this to the FFC and requested that it commence disciplinary procedures against M. Roux.

3. M. Roux then requested that the B-sample be tested in a different laboratory authorised for the purpose by the French Sports Ministry. However, no such laboratory had been authorised (except for the one at Châtenay-Malabry), so the UCI refused. M. Roux then asked for the second test to be delayed and the B-sample preserved until a second laboratory was approved.

4. The UCI refused and had the B-sample tested at Châtenay-Malabry. M. Roux objected and took no part. The B-sample also tested positive, and so M. Roux appeared before a disciplinary tribunal of the FFC. This found that the testing had occurred in contravention of French public policy in that contrary to French legislation the tests had not been carried out at separate authorised laboratories. Accordingly the tribunal found that it could impose no sanction.

Held (allowing the appeal) applying Swiss law

5. CAS first considered the question of jurisdiction, which had been raised by M. Roux. He argued that the UCI did not have the right to appeal to CAS because the UCI rules which gave rise to the appeal were contrary to French law, and because even if the arbitration clause were applicable he could not be taken to have agreed to it just because he knew about it.

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6. CAS dealt with those points shortly. As to the first, it held that no provision of French law could prevent the right of appeal to CAS, particularly since CAS, as well as the arbitration clause, were subject to Swiss law. With respect to the second it held that having signed a licence confirming his acceptance of the regulations of the UCI, and taking part in events organised under the aegis of the UCI, M. Roux was bound by the regulations of the UCI.

7. CAS then went on to consider the merits of the appeal. The original decision had been based upon art. 124 of the FFC regulations, which mirrored French national legislation in providing that anti-doping procedures carried out in French territory could only be carried out on the instruction of the Minister for Sport or at the request of the national federation. It had been considered that this raised an issue of French public policy, being designed to protect a fundamental freedom of French sportsmen and women, namely the freedom from being tested for drugs by foreign authorities while in France.

8. CAS found that the relevant legislation bore none of the hallmarks of public policy designed to protect fundamental freedoms. Such rules of public policy are those which touch upon the fundamental principles of civil society, and no others. The relevant legislation failed to do so. Accordingly the reasons given by the FFC's disciplinary tribunal were inadequate and the appeal was allowed.

9. M. Roux was a repeat offender, having tested positive for amphetamines in 1999. Accordingly he was suspended for a period of four years.

Commentary

10. Central to CAS' reasoning were pronouncements on the necessity for a concerted international effort in tackling doping in sport. In particular it considered the anti-doping convention signed in Strasbourg on 16 November 1989. Paragraph 1 of Article 7 states that the contracting parties undertake to encourage their sporting organisations and, through them the international sporting organisations, to take all appropriate measures to fight doping in sport. Paragraph 2 then continues that those sporting organisations should be encouraged to harmonise their anti-doping regulations and procedures.

11. Given that, the decision cannot be considered to be a surprise. After all, if M. Roux was in breach of the regulations of the UCI, and if the UCI had carried out its testing in accordance with its own regulations and fairly, then there is no reason why it should not be allowed to suspend him.

(2003) SLJR 12

Cross-country skiing – Bias or appearance of bias – Impartiality of Court of Arbitration for Sport where International Olympic Committee party

A & B v INTERNATIONAL OLYMPIC COMMITTEE & OTHERS

*Swiss Federal Tribunal, 1st Civil Chamber
Judges Corboz (President), Walter, Klett, Nyffeler, and Favre
27 May 2003 (Reporter: IP)*

Facts

1. This was an appeal from a decision of the Court of Arbitration for Sport ("CAS") of 29 November 2002.
2. The appellants, A. and B., were cross-country skiers, who had failed anti-doping tests at international cross-country skiing competitions organised by the International Ski Federation ("the FIS") and at the Salt Lake City Olympic Games. The International Olympic Committee ("the IOC") therefore withdrew the awards which the two athletes had won (a gold medal in the case of A. and a diploma in the case of B.) and excluded both athletes from the 2002 Olympic Winter Games, and the file was passed to the FIS. At a meeting on 3 June 2002, the FIS suspended both A. and B. from international ski competitions for a period of two years.
3. A. and B. challenged the decisions of both the IOC and the FIS before CAS. On 29 November 2002, CAS dismissed the appeals and upheld the decisions of the IOC and the FIS.
4. A. and B. then lodged public-law appeals in accordance with Article 191, para. 1 of the Swiss Federal Code on Private International Law and Article 85(c) of the Federal Statute on the Organisation of the Judiciary, requesting that the awards against them be set aside.
5. The Appellants claimed that the awards against them infringed their rights of equality of the parties, the right to a fair hearing, and public policy. The principal ground of the appeal was the alleged lack of independence of CAS to pass judgment in a case involving the IOC. This inherent defect, argued the Appellants' lawyers, should also invalidate the awards relating to the decisions of the FIS, since the four appeals were heard jointly by the same panel of arbitrators. The Appellants also advanced a subsidiary line of argument, challenging the awards not on the ground of CAS's alleged lack of independence where the IOC was a party, but on that of the particular arbitrators on the ad-hoc panel hearing the dispute.

Held (dismissing the appeals) applying Swiss Law

6. Following the reforms to the structure and procedure of CAS introduced in 1994, CAS was sufficiently independent of the IOC, as well as of all other parties which call upon its services, to escape a challenge to its award based upon an allegation of lack of independence.

7. In reaching its conclusion, the Court began by sketching the history of CAS and its historic links to the IOC. CAS was set up in 1984 as an independent arbitral body without legal personality, composed of 60 members, of whom 15 were appointed by the IOC, 15 by the International Federations, 15 by the National Olympic Committees, and 15 by the IOC President. CAS' function was to resolve sports related disputes. The operating costs of CAS were borne by the IOC, which was entitled to modify the CAS statute.

8. In a judgment issued in 1993, the Swiss Federal Supreme Court expressed reservations concerning the independence of CAS in relation to the IOC because of the organisational and financial links between the two bodies. As a result of the judgment, major structural and procedural reforms were introduced to CAS. The two most important reforms were the creation of the International Council of Arbitration for Sport ("the ICAS") and the drafting of the Code of Sports-related Arbitration ("the Code") to govern the procedure of CAS.

9. ICAS is composed of 20 members, "high-level jurists" selected in the following way: four members are appointed by the Summer Olympic and Winter Olympic Federations, four by the National Olympic Committees, four by the IOC. The 12 members then select a further four members after consultation among themselves, and the 16 members then select a further four members, to reach the total of 20 members. ICAS is charged with safeguarding the independence of CAS and the rights of the parties (Art. S2 of the Code), adopting and amending the Code, managing and financing CAS, drawing up the list of CAS arbitrators, deciding on challenges to and removal of arbitrators and appointing the Secretary General of CAS. CAS is to have at least 150 arbitrators, persons with legal training and possessing recognised competence with regard to sport. CAS sets in operation panels with the task of resolving disputes in sport.

10. In selecting arbitrators to CAS, ICAS selects one-fifth from candidates proposed by the IOC, one fifth from those proposed by the International Federations, one fifth from the National Olympic Committees, one fifth from persons unconnected with those bodies, and one fifth after appropriate consultations "with a view to

safeguarding the interests of the athletes". Only arbitrators on the ICAS panel may serve on CAS.

11. Turning to the substance of the appeal, the Court pointed out that under Swiss law the Appellants did not have to prove prejudice on the part of the tribunal. It would be sufficient were the Appellants to show that there were circumstances producing the appearance of prejudice and casting doubt upon the objectivity of the judge, based upon objective factors (para. 3.3.3).

12. The Appellants raised the following arguments:

- (a) Many ICAS members are subordinate to the IOC on account of the role which the members play within the Olympic movement. The ICAS president is a former Vice-President of the IOC and remains an honorary member of the IOC. Two ICAS members were members of IOC commissions. The President of the Appeals Division of CAS is an IOC Vice-President and his deputy was a member of an IOC commission. Thus, on an individual level, there were all sorts of links between the IOC and ICAS
 - (b) The Appellants had to choose arbitrators from the ICAS approved list, and complained that this list was very narrow, particularly if one wanted to choose an arbitrator who was familiar with the language and sport of the appellant to CAS
 - (c) The IOC was said to have complete control over the financing of ICAS and CAS. Moreover, the IOC paid for the travel and accommodation of those arbitrators who work for the ad-hoc divisions of CAS, which are set up to deal with certain major sports events, such as the Olympic Games, Commonwealth Games, and European Football Championships.
13. The Court dismissed these complaints as being based partly on false premises, and as being unconvincing.
- (a) In 2002, the ICAS members included one former IOC member, one IOC Vice-President, and one IOC member. This was not sufficient to enable the IOC to control ICAS. ICAS did not take orders from the IOC and was not obliged to abide by the IOC's decisions
 - (b) Whatever the Appellants sought to argue, parties to a dispute before CAS had a wide choice of names to choose from, even taking into account the language, nationality and range of sports practiced by athletes who appealed to CAS. Moreover, the Court stressed that athletes had no right to demand that their case be heard by an arbitrator who once practiced the same sport as them. The most important thing was that the list contain a wide range of competent

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arbitrators with a certain level of experience of competitive sport

- (c) The establishment of an independent body, ICAS, to draw up the list of arbitrators meant that the IOC could not influence the composition of the list, given that at most the IOC could only propose, not select, one fifth of the candidates for appointment to the list
- (d) It was wrong to suggest that the IOC had complete control over the financing of ICAS and CAS. In accordance with Article S6 para. 5 of the Code, ICAS looks after the financing of CAS and approves its budget and annual accounts. One third of the financing of the ICAS and CAS came directly from the IOC, and the other two thirds from the International Federations and National Olympic Committees. It was hard to imagine any other structure to ensure the financial stability of CAS, and the Court pointed out that the Appellants had failed to suggest any other structure for financing CAS
- (e) Finally, the Court emphasised that there was not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence. In a telling analogy, it was said that national courts are financed by the State, but this does not prevent national courts ruling on disputes between private individuals and State organisations.

14. The Court also by rejected the argument in relation to the awards relating to the FIS. There was no reason to assume, even assuming that it could be said that CAS lacked sufficient independence vis-à-vis the IOC, that the same should apply to the FIS. The Appellants may have claimed this, but, in the words of the Court, “they offered no convincing arguments to support this point of view”.

Commentary

15. This is an important decision. Ever since 1993, when the Swiss Federal Court had expressed the view that, although CAS could be considered a truly independent arbitral tribunal for cases where the IOC was not a party, the same could not necessarily be said about cases where the IOC was a party, there have been doubts about whether CAS decisions would withstand challenge where the IOC was a party. The current decision practically eliminates those doubts.

16. The Court went out of its way to acknowledge CAS’ role as a true “supreme court of world sport”, stating that: **“... CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve international sports-related disputes**

quickly and inexpensively. Certainly, the plaintiffs have not suggested one... CAS, with its current structure, can undoubtedly be improved. This has already been noted in relation to the legibility of the list of arbitrators (see rec. 3.3.3.2 above). Having gradually built up the trust of the sporting world, this institution which is now widely recognised and which will soon celebrate its twentieth birthday, remains one of the principal mainstays of organised sport.”

16. It is true that, as the Court recognised at the outset, the merits of the Appellants’ case were always limited, in the sense that the Appellants failed to raise arguments about CAS’ independence when they themselves sought to challenge the decisions of the IOC and FIS. Only when an adverse decision had been handed down, did they seek to raise the point about the alleged partiality of CAS where the IOC was a party. Thus, the Court could have avoided having to rule on the question of the independence of CAS, as it has done on a number of occasions since 1993. The fact that it has chosen to go out of its way to underline the independence of CAS as a result of the reforms introduced in 1994 merely serves to emphasise the growing prestige of CAS, and its importance in resolving international disputes involving sports law.

17. Nevertheless, the Court did mention a few remaining areas of concern. The most significant concerned the list of arbitrators drawn up by ICAS. The Court ventured the opinion that this list was not as “transparent” as it might otherwise be. The Court suggested that it would be preferable if the published list of arbitrators were to indicate, alongside the name of the arbitrators, which of the five possible categories of bodies mentioned in Article S14 (the IOC, the International Federations, the National Olympic Committees, arbitrators independent of the three previous bodies, and arbitrators chosen to safeguard the interests of athletes) had proposed the given arbitrator. This would ensure, thought the Court, that parties may choose an arbitrator with full knowledge of the facts. It will be interesting to see whether ICAS adopts this suggestion.

18. The Court also noted that ICAS did not exercise any influence on CAS’ arbitral procedures “as such”, except where there was a challenge to the appointment of an arbitrator. But in the case where there was such a challenge, and the ICAS member was also a member of a party (such as the IOC) which was involved in a pending arbitration, the ICAS member should voluntarily disqualify himself or herself from hearing the dispute.

19. Moreover, the Court was careful not to shut the door completely on the possibility of a challenge to the independence of an arbitrator. The Court was prepared to envisage that there might be "exceptional circumstances whereby, on account of the specific nature of the object of a dispute and of the issues involved, it proved necessary to appoint an arbitrator specialising in the sports discipline practiced by the athlete involved in proceedings before CAS, and where the arbitrator concerned was not sufficiently independent of the IOC." (para. 3.3.3.2)

20. Thus, it is suggested that a situation may yet arise where a party to a dispute finds grounds for challenging the objectivity of an arbitrator. But such grounds would need to be a great deal more specific and focused than the blanket objections which the Appellants advanced before the Court in the current decision.

(2003) SLJR 13

CAS – Doping – FINA – athlete contending that prohibited substance was due to injections of food supplements – burden of proof – doping sanctions – conflict between FINA 4 year ban and World Anti-Doping Code 2 year ban

DEMETIS v FINA

CAS 2002/A/432, Court of Arbitration for Sport sitting in Lausanne

President: Mr John Faylor, Arbitrators: Mr Pantelis Dedes, Mr Denis Oswald.

27 May 2003 (Reporter: TP)

Facts

1. The Appellant is a member of the Greek National swimming team. The Respondent is the International Federation governing sports relating to swimming worldwide. FINA has issued specific Doping Control Rules, which contain strict liability doping offences, that is to say, offences which are committed when a prohibited substance is found within a competitor's body tissue or fluids. The list of prohibited substances included anabolic agents, and in particular, norandrosterone. The sanctions set out in FINA's Doping Control Rules include, for a first offence involving the use of anabolic agents, a 4 year suspension and a 6 month retroactive cancellation of all results achieved in competition. They also provide that the sanction may be lessened if the competitor is able to prove that the prohibited substance did not get into the competitor's body as a result of any negligence of the competitor.

2. In September 2001, the Appellant participated in the Mediterranean Games as part of the Greek Team. He was placed second in the 400m and awarded the silver medal. Immediately after the competition, he was requested to submit to a doping control, which resulted in the discovery of a prohibited substance, norandrosterone, in his body. He was held by the Greek Swimming Federation to have committed a doping offence. Considering that this was a second positive test, the first having involved the use of caffeine, he was sanctioned with a lifetime expulsion and a retroactive cancellation of all results during his career.

3. The Appellant appealed to the Supreme Sports Arbitration Council, which reduced the sentence to a 20 month ban and a 3 month retroactive cancellation of all results in competition. The Greek Swimming Federation reported the result to FINA. The FINA Executive held that the FINA Rules had not been followed properly, and referred the matter to the FINA Doping Panel for review. On 26 September 2002, the Panel issued a declaration banning the athlete for 4 years and applying a retroactive cancellation of all results for 6 months.

4. The competitor appealed before CAS. The following submissions were made on his behalf:

- (a) he challenged the jurisdiction of the FINA Doping Panel on the basis that it only had jurisdiction to challenge the decision of the Supreme Sports Council if it had failed to follow FINA rules regarding doping control, and since there had been no such failure, the FINA Doping Panel did not have jurisdiction.
- (b) he contended that he had no intention to enhance his performance unlawfully. He asserted that his doctor and coach would give him vitamins and supplements either in injectable form or not, which were taken by all the athletes in order to overcome the effects of the competition and training. He asserted that he could not be deemed to be negligent if he relied upon the assurances of his coach.
- (c) he asserted that, based on the Copenhagen Declaration issued after the World Conference on Doping in Sports held in March 2003, the maximum sanction for a first offence would be a 2 year suspension, and accordingly the FINA Doping Panel decision to ban him for 4 years must be deemed disproportionate.

Held

5. CAS held as follows:

- (a) the reference in the FINA Rules to "any member or individual member .. may be sanctioned" must include a swimmer, although strictly speaking individual swimmers were not individual members of FINA.

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- (b) the FINA Doping Control rules are directly applicable to the Appellant.
- (c) the power of international federations to secure the application of their own rules by review of decisions taken at national federation level or by an appeal body has been confirmed by CAS on many occasions.
- (d) what gave rise to an entitlement for a review by the FINA Doping Panel was a belief by the Executive that the member federation had not complied with the FINA Rules, and since the evaluation lay within the sole judgment of the Executive the Panel had no jurisdiction to question that judgment. Therefore, the reference to the FINA Doping Panel was valid and not open to review.
- (e) once a prohibited substance was found in the athlete's body tissue or fluids, there is a legal presumption that an athlete has committed an offence, regardless of the athlete's intention. It was well established in CAS jurisprudence that this presumption and allocation of burden of proof is legally valid and enforceable, and the strict liability rule was part of such jurisprudence. FINA had met the burden of demonstrating that an offence had been committed.
- (f) as to the issue whether the 4 year sanction should be reduced, the Appellant put forward circumstances relating to how the prohibited substance might have entered his body. He stressed his absolute trust in the skill and reliability of his coach. He said it could have been as a consequence of injecting certain substances including Actovegin and Creatine, on the recommendation of his doctor. The injection was administered by his coach.
- (g) however, the evidence suggested that the use of Actovegin was forbidden in Greece and is regarded as a dangerous substance. The evidence also included an oral statement from a doctor who emphasised the danger of food supplements as their composition is extremely unclear. CAS held that the Appellant clearly acted with negligence in not specifically querying with his physician and his coach regarding the identity of the substances which were administered to him. He should not have ignored the warnings of ingesting food and vitamin supplements;

6. The Panel stated:

"If an athlete who competes under the influence of a prohibited substance in his body is permitted to exculpate and reinstate himself in competition by merely pleading that he has been made the unwitting victim of his or her physician's (or

coaches) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat. It is the trust and reliance of clean athletes in clean sports, not the trust and reliance of athletes in their physicians and coaches which merits the highest priority in the weighting of the issues in the case at hand. If such a defence were permitted in the rules of sporting competition, it is clear that the majority of doped athletes will seek refuge in the spurious argument that he or she had no control over the condition of his or her body. At the starting line, a doped athlete remains a doped athlete, regardless of whether he or she has been victimised by his physician or coach."

7. As for sanctions, CAS held that the four year suspension and 6 month retroactive period were justified and should continue to stand. It held that the four year ban for a first doping offence under the FINA Rules does not comply with the shorter sanction to be imposed under the World Anti-Doping Code, which imposes a 2 year ban for a first violation, but that CAS had no authority to compel FINA to address the prevailing discrepancy between these sanctions.

8. The Panel noted that FINA should introduce transitional arrangements to address situations such as the one posed in this case. It noted that the four year term "must be shortened within the framework of such transitional rules to harmonise with the shorter sanctions under the WAC Rules", and that if on the date that the WAC becomes effective, there is a remaining period of ineligibility under the former rules, FINA should consider whether the time already served should be credited to the term which would be served under the WAC rules.

Commentary

9. This decision is significant for two reasons. First, it provides a timely reminder to those involved in the current doping scandals involving THG and other "designer" drugs, that athletes' reliance upon their coaches, doctors and physicians will not (by itself) provide any mitigation to the mandatory sanctions for first time offenders imposed by the various international federations and under the WAC. It is the athletes' responsibility to ensure that he or she does not take a banned substance – "a doped athlete remains a doped athlete, regardless of whether he or she has been victimised by his physician or coach". There are increasing demands for regulation or licensing of the coaches, physicians and doctors who are so closely involved in advising so many of the top athletes. The fact that CAS has held that these parties' involvement

will afford the athlete no mitigation must be the correct approach in the continuing fight against doping in Sport.

10. The decision is also significant in raising the issue of the discrepancy between the sanctions imposed by FINA for a first time offender and that imposed by the WAC. As yet, although various bodies have adopted the WAC, including the British Olympic Association, their rules continue to impose sanctions far more stringent than those imposed by the WAC. It is imperative that international federations and national Olympic associations consider now their policy towards this apparent discrepancy during the transitional period leading up to the worldwide implementation of the WAC.

(2003) SLJR 14

Football – Racist behaviour of supporters – nature of obligation imposed on Club to control its supporters’ behaviour

EINDHOVEN NV PSV v UNION DES ASSOCIATIONS EUROPEENNES DE FOOTBALL (UEFA)

TAS 2002/A/423, Court of Arbitration for Sport sitting in Lausanne

*Panel: Gerard Rasquin (President), Jean-Pierre Karaquillo, Maître Jean-Pierre Morand
3 June 2003 (Reporter: IP)*

Facts

1. On 25 September 2002, PSV NV Eindhoven (“PSV”) and Arsenal FC met in a Champions League Game played at PSV’s home stadium. The game was marred by some PSV supporters making “monkey noises” directed at certain Arsenal players and throwing plastic lighters onto the pitch.

2. On 10 October 2002, UEFA’s Control and Disciplinary Body fined PSV 30,000 Swiss francs, citing three separate racist incidents by PSV’s supporters, and the throwing of lighters onto the pitch, which was said to have created a danger to players. The Control and Disciplinary Body also noted that PSV’s supporters had on previous occasions been involved in racist incidents. UEFA’s disciplinary inspector appealed against this decision, and on 25 October 2002 UEFA’s Appeals Body increased the fine to 50,000 Swiss francs and gave the club a serious warning that if such racist incidents were to reoccur, the club would be “severely” punished.

3. PSV challenged this decision before CAS. At issue was the correct interpretation and application of Article

6 of UEFA’s disciplinary code, which provides that:

(1) Member associations and clubs are responsible for the behaviour of their players, officials, members, supporters as well as any other person carrying out a function at a match on their behalf.

(2) The host association or home club is responsible for order and security in the stadium’s perimeter and its immediate vicinity, before, during and after the game. They may be called to account for incidents of any kind, and may be subject to disciplinary measures, which may be accompanied with directives.”

4. The principal ground of appeal was that Article 6 could not subject the club to a strict liability (“une responsabilité de nature objective”) as such a liability would be contrary to the Swiss Code of Obligations, article 20, on the grounds of public policy. Moreover, it was argued that, given the security measures which the club had put into place, and the steps which it had taken after the game to investigate the racist incidents, identify the culprits and punish them by excluding them from future games, the club was in no way at fault. The club also raised arguments that the fine imposed on them was in the nature of a “contractual penalty”, and that there had been an abuse of a dominant position by UEFA, under both European Union and Swiss Law.

Held (allowing the appeal in part, applying Swiss law)

5. CAS drew a distinction between Article 6(1) and Article 6(2) of the disciplinary code. Article 6(1), by imposing a strict liability on clubs for the acts of their supporters, fulfilled a preventive and deterrent function. It was designed not to punish the club, which might have done nothing wrong, but was designed to have the club pay for the wrongful acts of its supporters. In effect, it was the club’s supporters, who (in their quality of fans) would suffer from the punishment meted out to their club. There was nothing contrary to Swiss law in this interpretation of Article 6(1).

6. On the other hand, Article 6(2) did not impose a strict liability. It would be “shocking” were a member association or a club to be punished without fault for the organisation of games, or for the maintenance of order and security. Accordingly, Article 6(2) also did not infringe Swiss law.

7. CAS also dismissed the suggestion by PSV’s lawyers that UEFA’s statutes in some way infringed European Union or Swiss competition law. This argument does not seem to have been very vigorously pursued, as the panel characterised PSV’s arguments on this point as “terse” and lacking in clarity.

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8. However, CAS did hold that the fine imposed by the Appeals Body was too high. There was a clear distinction between the effect of Article 6(1) and Article 6(2). Once it was established that racist incidents did in fact occur at a match, Article 6(1) applied automatically, whatever preventative measures have in fact been put in place by a club or UEFA member association.

9. However, where security or public order measures were involved, before a sanction could be inflicted pursuant to Article 6(2), some fault must be shown on the part of the member association or the club. In the circumstances, while it was established that racist incidents did occur at the match on 25 September 2002, UEFA had not proved that PSV should have put any other security measures in place. Moreover, it had not been shown that safety or security had at any point been put at risk during the match, apart from the isolated and limited incident when lighters had been thrown onto the pitch. Thus, while there had been a breach of Article 6(1), there had been no breach of Article 6(2).

9. UEFA's Appeals Body had wrongly increased the fine imposed on PSV. The Appeals Body had not taken into account the fact that there had been no failure to maintain order and security, and therefore PSV should only be fined for the racist behaviour of a relatively small number of its supporters. Had it not been a case of a repeat offence, the appropriate fine would have been 20,000 Swiss francs. However, PSV's supporters had been involved in previous racist incidents in 2001. Thus, the fine would have to be somewhat increased from the level which would otherwise have been appropriate. The decision of the Control and Disciplinary Body to fine PSV 30,000 Swiss francs was correct. Moreover, the serious warning given to PSV by the Appeals Body was superfluous, and would be set aside.

Commentary

10. The central point which emerges from this decision is the distinction drawn between the nature of the liability imposed on club's for the acts of third parties, which is strict, and that imposed for the maintenance of security and order, which depends on showing fault on the part of the club. At first sight, this is a surprising construction of Article 6(1) and (2) of UEFA's disciplinary code.

11. However, CAS pointed out that UEFA has no direct means of punishing a club's supporters. It is the clubs who agree to abide by the principles of "loyalty, integrity, and the sporting spirit", breach of which is defined to include acting in a racist, discriminatory, politically extreme, or insulting manner (see the UEFA Disciplinary Code, art. 5(1) and 5(2)(b)). If member clubs

could escape all liability for the acts of their fans by saying that "we did all that we could" there would be no effective way of punishing racist behaviour at football matches. Seen in this light, the conclusion reached by CAS becomes understandable.

12. The case also illustrated the somewhat arbitrary way in which the level of fines are assessed in football, and in sports law generally. CAS can be criticised for, on occasion, seeming to pluck figures from the air. In this decision, CAS is to be commended for at least attempting to explain its reasons for altering (in this case reducing) the amount of the fine in the decision being challenged.

(2003) SLJR 15

Australia – Amateur Australian Rules Football – teenage female players – prevented from playing by governing body – unlawful sex discrimination – injunctions – balance of convenience

SMITH v FOOTBALL VICTORIA LTD

*[2003] VCAT 936, Victorian Civil and Administrative Tribunal Administrative Division, Anti-Discrimination List – President, Stuart Morris
23 July 2003 (Reporter: MO)*

Facts

1. This was an application to the Tribunal for an interim injunction pending the determination of complaints made to the Equal Opportunity Commission by three teenage girls. Girls aged 14 and 15 had each played a significant number of matches for junior amateur football teams in the Moorabbin Saints Junior Football League ("League"). Each of the girls was the only girl in her team. The League was a member body of Football Victoria.

2. At a risk management strategy meeting with representatives of Football Victoria part of the way through the season, an officer of the League was reminded of a Football Victoria rule called The Female Participation Regulation ("Regulation"). The Regulation stated that girls aged over 12 years must be excluded from playing save where the Football Victoria board gave specific approval to girls reaching 12 years of age during a given season to complete the remainder of that season.

3. As a result of the reminder the officers of the league discovered that the complainants were registered players and told each girl in early June that she could no longer play. The girls' complaints challenged the

lawfulness of the Regulation but they also sought an injunction to allow them to play until the final hearing.

Held (granting interim injunctions against the League and the Respondent)

4. The traditional test in the granting of interlocutory injunctions, however stated, is such that if the strength of the claim is extremely weak then, despite very strong factors otherwise in favour of a grant of an injunction, it would not be appropriate to grant relief.

5. A fundamental principle of the grant of interlocutory injunctions is that the court should take whichever course appears to carry the lower risk of injustice should it turn out to have been the “wrong” decision given the outcome at trial: *Films Rover International Limited v Cannon Film Sales Limited* (1987) 1 WLR 670 adopted in *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318.

6. There were two possible situations of injustice. First, where the girls were prevented from playing the balance of the season yet succeeded in establishing they had been unlawfully discriminated against. This is because they would be denied the fruits of their victory, at least in relation to that season, and in particular in relation to the exciting and thrilling time of the finals. Secondly, where the girls were allowed to play yet failed to establish their case: the football associations would have been forced to allow the girls to play notwithstanding that the Regulation was lawful.

7. The answer as to which was a greater injustice was obvious unless it could be shown the girls’ case was hopeless. It would have been a substantial injustice for the girls to have been unlawfully prevented from playing in the finals, the memories of which remain with one for life.

8. On the material before the Tribunal there appeared to be a substantial case which could have lead to an ultimate conclusion that Football Victoria may exclude teenage girls from playing football but it was not so overwhelming that the complaints of unlawful discrimination were unlikely to succeed. It may have depended on the statutory onus on the Respondent and on the strength of an authority that held that exclusion of one sex from a sport was only permitted where relative strength, stamina or physique of each sex is relevant. The girl’s case was, therefore, not strong but prima facie in the circumstances.

Commentary

9. The President of the Tribunal was faced with applying the test for granting interim relief in relatively unusual circumstances and needed to approach the question of relative injustice by focussing on the emotional effect

on the teenage girl complainants. In the President’s words, the significance of the case to the girls could be summed up as follows: “Football careers are often short, but the memories of finals appearances, especially finals victories, remain with one for life. There is a famous football expression which applies here. It is this. “You are a long time retired””.

10. The President placed such great significance on the possible injustice to the complainants that he thought it sufficient to outweigh what he acknowledged to be their relatively weak (though not hopeless) case.

11. The other circumstance which influenced the President’s decision was that “each of the girls [were] veterans of junior football and, more importantly, have played regularly for their clubs during the first half of the football season. Footballers, even, no doubt, teenage female footballers, naturally think of their participation in the game in terms of seasons”. The President thought that the decision to prevent the girls from even finishing the season was, in those circumstances, unfair.

12. An important feature of this case is that the President did not require undertakings as to damages because he regarded the circumstances as “exceptional, having regard to the nature of the relief being granted, the comparative circumstances of the parties and the nature of the issues involved, which are essentially concerned with human rights and not money or property”. The President said he had taken into account the absence of such undertakings in determining where the balance of convenience lay.

(2003) SLJR 16 Income tax – Section 556 Income and Corporation Taxes Act 1988 – Professional tennis players – Endorsement payments – UK non-resident – Trade within UK

SET, DEUCE, BALL v S ROBINSON (HM INSPECTOR OF TAXES)

SPC No.0373 2003
Special Commissioners (Dr John F Avery Jones, Theodore Wallace)
29 July 2003 (Reporter: MO)

Facts

1. The Appellants were three non-resident professional tennis players who played in the UK for a small number of days each year, principally at Wimbledon. Each of the Appellants or their non-resident companies had granted

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endorsement rights to non-resident companies. They each submitted UK self-assessment tax returns for the relevant years which the Respondent amended so as to increase the share of world-wide endorsement income which was taxable in the UK. The increase reflected the payments of endorsement income paid to the appellants and/or their non-resident companies by the other non-resident companies. In B's case endorsement payments had also been made by a UK resident company.

2. The agreed issues for determination at the appeal were:

(a) did the fact that the appellants and the endorsing non-resident companies were resident outside the UK prevent the application of Chapter III Part XIII of the Taxes Act 1988 ("Chapter III") and the Income Tax (Entertainers & Sportsmen) Regulations SI 9187 No 530 ("the Regulations") ?

(b) were payments received from the endorsing companies chargeable to tax by virtue of section 18 of the Taxes Act 1988 (as amplified by Chapter III and the Regulations) ?

3. Arguments were heard on the basis of the facts of B's case. The central provisions of Chapter III were sections 555 and 556. Section 555, a collection mechanism, provided that:

(1) Where a person who is an entertainer or sportsman...performs an activity... ("a relevant activity") in the United Kingdom, this Chapter shall apply if he is not resident in the United Kingdom in the year of assessment in which the relevant activity is performed

(2) Where a payment is made...and it has a connection...with the relevant activity, the person by whom it is made shall on making it deduct out of it a sum representing income tax and shall account to the Board for the sum

(3) Where a transfer is made...and it has a connection...with the relevant activity, the person by whom it is made shall account to the Board for a sum representing income tax....

(6) This section shall not apply to payments or transfers of such a kind as may be prescribed.

4. Section 556, a deeming provision, provided that:

(1) Where a payment is made...and it has a connection...with the relevant activity, the activity shall be treated for the purposes of the Tax Acts as performed in the course of a trade, profession or vocation exercised by the entertainer or sportsman

within the United Kingdom, to the extent that (apart from this subsection) it would not be so treated.

(5) This section shall not apply unless the payment or transfer is one to which section 555(2) or (3) applies...

5. Section 18 of the Taxes Act 1988 provided that tax shall be charged in respect of annual profits or gains arising or accruing "to any person...although not resident in the United Kingdom from... any trade, profession or vocation exercised within the United Kingdom..."

Held (dismissing the appeals)

6. Section 556 could apply to payments made by non-residents to non-resident companies regardless of any territorial ambit.

7. Endorsement payments by a UK company to a player personally (on the facts, B) were taxable because they were connected with his performance in connection with a commercial occasion or event, namely, Wimbledon.

8. A proportion of endorsement payments relating to Wimbledon by a non-resident company were taxable because, whilst they were not made or received in the UK, they arose from the exercise of a player's trade which took place in the UK, namely playing at Wimbledon.

Commentary

9. Section 556. The dispute was as to the effect of section 556(5) and to what payments/transfers sub-section 555(2) and (3) applied. The Appellants contended that sub-section 555(2) and (3) had an implied territorial ambit, and that they applied only where the payer could be made to deduct tax, which is where the payer had a "tax presence" in the UK. They relied on the fact that the Regulations linked the collection mechanism of section 555 to liability by providing that the tax deducted be set against the taxpayer's tax.

10. The Respondent contended that any territorial limitation was a matter of construction of the section and relied on the speech of Lord Wilberforce in *Clark v Oceanic* (1982) 56 TC 183.

11. The Special Commissioners suggested four possible answers to the question of what kind of payments were caught by section 556 by virtue of sub sections 555 (2) and (3):

(a) the "case" to which the subsections applied: a

payment or transfer having a connection with the relevant activity

- (b) the "legal subject" and "legal action" of the subsections: where the person by whom the payment or transfer is made accounted for the tax
- (c) a variation of (b) where the person should have deducted and/or accounted whether or not he did
- (d) payments or transfers within subsections (2) and (3) taking into account the other relevant provisions of section 555, namely the inclusion of loans and temporary transfers and transfers of a right, and the exclusion of prescribed payments and transfers in subsection (6).

12. The Commissioners discounted answer a) because section 556 contained the same "case" yet was limited by reference to section 555. The Commissioners discounted answer b) because they thought it adopted an implied territorial limitation which Parliament would have expressly provided for if it had intended one to apply. The Commissioners also discounted answer c) because it contained no separate limitation. They thought that the interpretation in answer d) meant that section 556(5) had the effect of excluding only payments of a kind that may be prescribed in section 555(6). The Commissioners found this unconvincing because they thought that Parliament could have merely referred to subsection 555(6) instead of subsections (2) and (3).

13. The Commissioners considered that there was sufficient ambiguity in section 556(5) to entitle them to look at the pre-consolidation legislation in Schedule 11 to the Finance Act 1986. The equivalent pre-consolidation provision was paragraph 6(2) of Schedule 11 which provided that:

"This paragraph [corresponding to section 556] shall not apply unless the payment is one to which paragraph 2 [corresponding to section 555] applies."

14. The Commissioners saw this as a cross-reference to the whole of section 555 and that Parliament did not intend an interpretation which concentrated on subsections (2) and (3). While they still found it odd that the draftsman did not refer to section 555(6) the Commissioners adopted answer d) because it was the "less bad" of the interpretations and did not focus on subsections (2) and (3). On this basis they found that section 556 applied to payments made by non-residents to non-resident companies.

15. Payments to Ball Enterprises by Net International ("Net") Net was a UK resident company so the above

issue did not arise however B contended that the payments were not caught by the Income Tax (Entertainers and Sportsmen) Regulations 1987 ("the Regulations"). Regulation 2 defined "entertainer" as: Any description of individuals...who give performances in their character as entertainers or sportsmen in any kind of entertainment or sport; and "entertainment or sport" in this definition includes any activity of a physical kind, performed by such an individual, which is or may be made available to the public...and whether for payment or not"

16. Regulation 6(2) defined a "relevant activity" as one "performed in the United Kingdom by an entertainer in his character as entertainer on or in connection with a commercial occasion or event..."

17. Regulation 6(3) provided that a "commercial occasion or event" includes one for which an entertainer might receive or become entitled, for or by virtue of the performance, to receive anything; or which is designed to promote commercial sales or activity by advertising, the endorsement of goods or services, sponsorship, or other promotional means.

18. Regulation 3(2) provided that a payment made for, in respect of, or which in any way derives either directly or indirectly from, the performance of a relevant activity, has a connection of a prescribed kind with the relevant activity.

19. B contended that the payments under the Net contract did not fall within Regulation 6(2) because although B may have played at a commercial occasion such as Wimbledon, he did not promote Wimbledon. While B conceded that any winnings or bonus under the Net contract for winning or for the finals would be caught by the definition of "commercial occasion" he argued that no other payments would be included because Wimbledon is not an occasion designed to promote commercial sales by advertising, the endorsement of goods etc. under Regulation 6(2).

20. The Respondent focussed on the opening words of Regulation 6(2) and argued that once it is shown that Wimbledon is (a) an activity, (b) performed in the UK, (c) by a sportsman, (d) on, or in connection with, a commercial occasion or event, then there is a "relevant activity". The Respondent argued that there was no need to consider the words of inclusion that were the basis of B's argument and the Commissioners agreed. They found, in accordance with Regulation 3(2), that the payments needed only to be connected with B's performance.

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21. Payments from Linesman, a non-resident company, to B personally. The contract under which those payments were made was for the endorsement of Linesman's sportswear. Section 18 of the Taxes Act 1988 provided that tax shall be charged in respect of annual profits or gains arising or accruing "to any person...although not resident in the United Kingdom from... any trade, profession or vocation exercised within the United Kingdom...".

22. The issue here, therefore, was whether B exercised a trade within the UK. B contended that he did not because he was based in South Africa, played tennis throughout the world, had no base of operations in the UK and received no income in the UK from the contract. He said that playing tennis in the UK was trading with, rather than within, the UK. The Respondent argued that the correct test was "where do the operations take place from which the profits in substance arise?" *Smidth & Co v Greenwood* 8 TC 193, 204. The Commissioners found that when B played in Wimbledon he was exercising his trade and that Wimbledon was the place of his trade during that time. They therefore held that a proportion of payments under the Linesman contract were taxable receipts.

(2003) SLJR 17

Betting – judicial review – setting of levy by Horserace Betting Levy Board – duty to consult with betting exchanges – approach to consultation manifestly flawed

R on the application of SPORTING OPTIONS PLC v THE HORSERACE BETTING LEVY BOARD

EWHC 1943 Admin, High Court of Justice, Queen's Bench Division, Hooper J.
31 July 2003 (Reporter: DM)

Facts

1. The Horserace Betting Levy Board ('the Board') exists by virtue of section 24 of the Betting, Gaming and Lotteries Act 1963 ('the 1963 Act'). Its duties include setting the levy payable by bookmakers for betting transactions relating to horse races. The Bookmaker's Committee ('the Committee') exists by virtue of the 1963 Act to make recommendations to the Board as to the levy. It consists of 12 members selected from the traditional bookmakers (e.g. Ladbrokes) and gaming bodies. Sporting Options plc is an internet run betting exchange which does not offer odds but brings together backers (who bet on a particular outcome) and layers

(who bet against a particular outcome). It makes money by charging commission on the winning bet for having brokered the transaction.

2. On 31 October 2002, the Board set the levy to be paid by betting exchanges during the period covered by the 42nd levy scheme (i.e. from 1 April 2003 to 31 March 2004). Under the scheme, betting exchanges are required to pay a levy of 10% of the gross profits achieved by individual successful layers on British horseracing with no offset for any losses made by such persons backing horses or for any losses made by such persons laying horses through other exchanges. Under the previous scheme (the 41st levy scheme), betting exchanges were required to pay a levy of 10% of the gross commission they earned from layers or backers. The Claimant applied for judicial review of the decision. The Bookmaker's Committee was an Interested Party who sought to uphold the decision of the Board.

3. By section 1 of the Horserace Betting Levy Act 1969, if five months before the beginning of a levy period the Board has not approved the recommendations of the Committee, the Board must report the circumstances to the Secretary of State who will then determine the levy (as happened for the 41st levy). Generally, the Committee's first recommendations are submitted in September, revisions are made and revised submissions are considered by the Board at a meeting in or around 23 October. Not infrequently, approval only occurs on 31 October, the deadline after which referral must be made to the Secretary of State.

4. On 12 September 2002, the Committee sent its recommendations to the Board. The Committee had not consulted with the betting exchanges before submitting its recommendations which included a recommendation that betting exchanges should face an increased levy (10% of gross profits from commissions and a further 10% of the gross profits achieved by individual successful layers).

5. The Board met to consider the recommendations 18 September 2002 and in the light of its concerns about the lack of consultation, the Board wrote to Betfair, the dominant betting exchange with some 90% of the market, enclosing some of the recommendations. Betfair made submissions to the Board. On 16 October, the Committee informed the Board it was seeking legal advice in respect of its statutory remit in making recommendations and also explained it would not be submitting revised recommendations (as would normally have happened) in time for the next Board meeting on 23 October.

6. On or around 20 October, Sporting Options found out about these developments through an article in the *Racing Post* and contacted the Board and Betfair who were preparing a response for the Committee meeting scheduled for October 25. Sporting Options made submissions at that meeting to explain the unfairness of the levy recommendation. On 28 October the director of Sporting Options met with the chief executive of the Board and explained his concerns.

7. On 30 October, the Committee agreed its final recommendations which changed the proposed levy on betting exchanges. It still recommended betting exchanges pay 10% of the gross profits earned by winning customers but the proposal to include 10% of the exchanges' gross profit was dropped.

8. At the Board meeting on 31 October, the Board had nothing in writing reflecting the views of the betting exchanges and made the decision to adopt the recommendations of the Committee including the recommendation relating to the levy on betting exchanges.

Held

9. The procedures adopted were not conducive to good decision making. No opportunity was given to the betting exchanges to see and comment on the Committee's revised proposals of 30 October (the exchanges never even saw the original proposals in full). The Board was not provided with minutes from the Committee meeting of 25 October which would have contained Sporting Options' concerns.

10. In two regards the information given to members of the Board was materially false. Firstly, from the minutes, the Board was informed by the chairman of the Committee that the betting exchanges were willing to pay either on an assessment of the profits of their successful layers or on their gross commissions but not on both. In fact, the Committee was fully aware that Sporting Options was not willing to pay on an assessment of layers' profits. Secondly, the Board was informed the Committee's recommendations in relation to betting exchanges differed only in detail to the way in which Customs & Excise calculated VAT payable by the exchanges. In fact, Customs & Excise calculated VAT based on an aggregation of all layers accounts (i.e. offsetting non-profitable accounts against profitable accounts).

11. The approach adopted by the Board to the issue of consultation was seriously flawed. Fairness required consultation with those liable to be adversely affected by the imposition of a tax by a statutory body such as the Board. The Board knew the Committee did not

represent the views of the betting exchanges as evidenced by the concerns expressed by the Board that the exchanges had not been properly consulted.

12. The consultation that did take place did not cure the procedural defects. The only consultation with Sporting Options occurred at the short meeting on 28 October. Sporting Options were not given adequate time to calculate the financial impact of the proposals nor were its views transmitted to all the members of the Board. The suggested guidance from the Court of Appeal on the issue of consultation in *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 at 661 was not followed.

13. Given the flawed procedural approach the onus was on the Board to show what happened cured any procedural defects. The Board had failed to do this. There was no discussion of why the levy should relate to successful layers; or how the betting exchanges were to implement the levy on successful layers; or the volatility of the liability to which the exchanges would be exposed; or their vulnerability to sabotage. The financial impact on the exchanges was not considered nor was there discussion of the effect on competition between traditional bookmakers and the exchanges, particularly important given the traditional bookmakers disliked the exchanges and saw them as a threat.

14. The manner in which the Board reached its decision on 31 October was manifestly unfair.

Commentary

15. This was a clash between the old and the new. The 'old' (traditional bookmakers) fear the 'new' (betting exchanges) because with their greatly reduced overheads (e.g. since they do not place the bet they do not need to employ anyone to calculate odds) they can offer backers and layers a more lucrative gamble. In fact, the Committee (composed largely of traditional bookmakers) was of the opinion (which might have coloured the fairness of its recommendations) that in the context of betting exchanges the activity of the layer was illegal (since he was acting as a bookmaker but not complying with any relevant legislation on bookmakers) and therefore the activities of the betting exchanges were illegal.

16. The significance of the change from a levy calculated on gross commissions and a levy calculated on the gross profits of successful layers was estimated to mean Sporting Options would have needed to increase commissions paid by its clients by 34%. This could have dramatically affected the competitiveness of

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the betting exchanges and tilted to balance back in favour of traditional bookmakers.

17. In a judgment stretching to 60 pages, Hooper J. had little difficulty in uncovering a catalogue of procedural defects. In essence, the Board had made a decision that seriously affected the betting exchanges without hearing any submissions on their behalf. The Board had blindly followed recommendations given to them by the Committee which largely comprised representatives from traditional bookmakers with an obvious axe to grind against the betting exchanges. The minimal consultation (e.g. the financial impact had not even been considered at all) that had taken place was insufficient to cure the procedural defects.

(2003) SLJR 18

Formula One Sponsorship – Damages for Defendant’s Contract to Sponsor Team – Misrepresentation – No Binding Agreement – No Representation – No Reliance Upon Representation – Authority of Agents

JORDAN GRAND PRIX LTD v
VODAPHONE GROUP PLC

EWHC 1956 (Comm) Queen’s Bench Division (Commercial Court)
– Langley J
4 August 2003 (Reporter: NP)

Facts

1. On 22 March 2001 Eddie Jordan, managing director of the Claimant (“Jordan”), the Formula One (“F1”) team, had a telephone conversation with David Haines, the global brand director of a subsidiary of the Defendant (“Vodafone”). Jordan claimed a contract was made during this conversation for Vodafone to be the F1 grand prix title sponsor of Jordan for three seasons 2002 to 2004 for a total of \$150 million.

2. On 25 May 2002 Vodafone announced their agreement to sponsor Ferrari for the 2002 to 2004 seasons. Jordan brought a breach of contract claim against Vodafone for the difference between the \$150m promised under the Vodafone contract and the value of Jordan’s actual title sponsorship. Jordan made an alternative claim in misrepresentation, that in reliance upon statements leading them to believe that Jordan would be sponsored by Vodafone they had failed to negotiate title sponsorship with their previous sponsor (“Gallaher”) and were only able to obtain title sponsorship at a significantly reduced sum.

3. The main claim centered around the resolution of conflicting factual accounts about the conversation on 22 March 2001. There was a further issue as to whether, in any event, Mr Haines had the authority to bind Vodafone to such a contract. Jordan’s case was hampered by the poor credibility of their witnesses. The judge invariably believed the version of events advanced by Vodafone, because he found their witnesses truthful whereas Jordan’s witnesses tended toward “increasingly absurd” explanations, “blatant inaccuracies” and evidence “in stark conflict with and indeed belied by the documents”.

4. Jordan claimed the terms of the sponsorship agreement were established in negotiations prior to March 22, but the court found no such terms had been agreed. Not only were important issues such as intellectual property rights, performance bonuses and contract renewal options left open to further discussion, the fundamental benefits each party hoped to receive were not agreed upon. Jordan had quoted different prices during negotiations but the quote immediately prior to the telephone conversation was not within Vodafone’s price range and had not been accepted. Also there was considerable doubt as to whether Vodafone’s branding requirements, including the use of the brand colour red could be reconciled with a contractual obligation of Jordan to have a predominantly yellow and black livery.

5. The content of the telephone conversation was itself disputed. Jordan claiming the deal was sealed with the phrase “Eddie, Eddie, stop, you’ve got the deal”. Mr Haines disputed ever making this comment, recalling his effort to remain non committal in the face of Mr Jordan’s persistent sales pitch. The context of the conversation supported Vodafone’s case. It was common knowledge at Vodafone that the decision would be made by the board of directors in mid April. The terms of Jordan’s most recent proposal were either unsuitable for Vodafone or too vague to form an agreement. It seemed unlikely that Mr Haines would enter into a contract in these circumstances.

6. Jordan attempted to explain this anomaly by claiming Vodafone’s negotiations with other F1 teams had fallen through and the threat of Orange (a rival telecommunications company) poaching Jordan from Vodafone had forced Vodafone to act quickly. Evidence of continuing negotiations between Vodafone and three other F1 teams dismissed this theory, and the existing sponsorship obligations of Orange revealed the intimations of an Orange menace to be a naïve negotiating tactic. Vodafone was under no pressure to make a deal.

7. The conduct of the parties following the telephone conversation indicated neither side believed a legally binding contract had been formed. A letter from Vodafone to Jordan stressed that the decision would not be made until mid April, and in subsequent correspondence and documents Jordan referred to “the proposal” not “the deal”. Jordan continued to make persistent endeavours in order to secure a deal up until the time of the announcement.

8. At trial Jordan was forced to abandon their claim that Mr Haines had actual authority to bind Vodafone to an agreement in the face of overwhelming evidence to the contrary. The claim that as Mr Haines could negotiate with F1 teams and communicate the decision to them he therefore held ostensible authority to bind Vodafone was pursued without success. It was defeated by evidence of both parties referring to the decision making power of the board of directors, and tactics used by Jordan in order to influence this decision: for example by asking Dr Volker Jung, managing board director of Infineon Technologies AG to recommend Jordan to the chief executive officer of Vodafone, Sir Christopher Gent.

9. The allegation of misrepresentation was also unsupported by the evidence. There was no representation that a contract would be made between Jordan and Vodafone, and statements were made to the contrary. Mr Harris, Vodafone’s director of media and sponsorship had made it clear that the decision would not be made until April and Jordan should not miss a sponsorship opportunity with Gallaher due to waiting for the Vodafone decision. There was also no evidence of reliance as alleged. Gallaher had decided not to be title sponsor of Jordan before 22 March, and no mention was made of a contract with Vodafone which would prevent Jordan obtaining secondary sponsorship from tobacco companies such as Gallaher.

Held (dismissing Jordan’s claim)

10. The breach of contract case failed for several reasons, beyond the implausibility that a contract worth \$150 million would be agreed in such an informal manner, with all terms to be determined. All the evidence of events before, during and after the telephone conversation on 22 March indicated no contract was made then or at any other time. It was apparent to both parties the Mr Haines had no authority to make such a contract. The claim in misrepresentation failed as the judge found on the evidence there was no representation, no reliance, and no loss.

Commentary

11. A further example of a growing number of cases in these reports which while not containing any new law provide ample demonstration that the existing law and practical commercial common-sense as to the likely outcome of speculative litigation are no the less applicable to even the most glamorous of sports.

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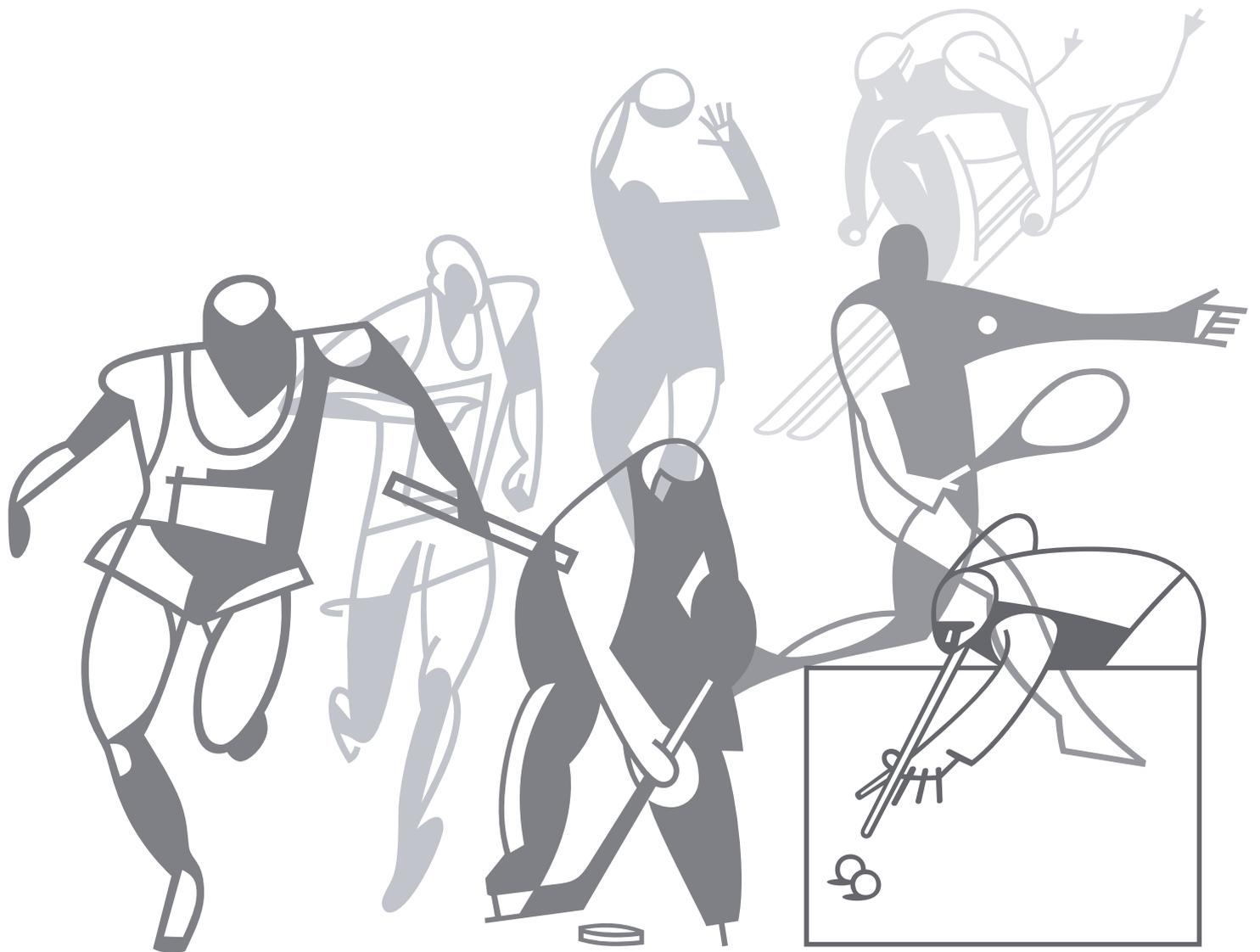
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