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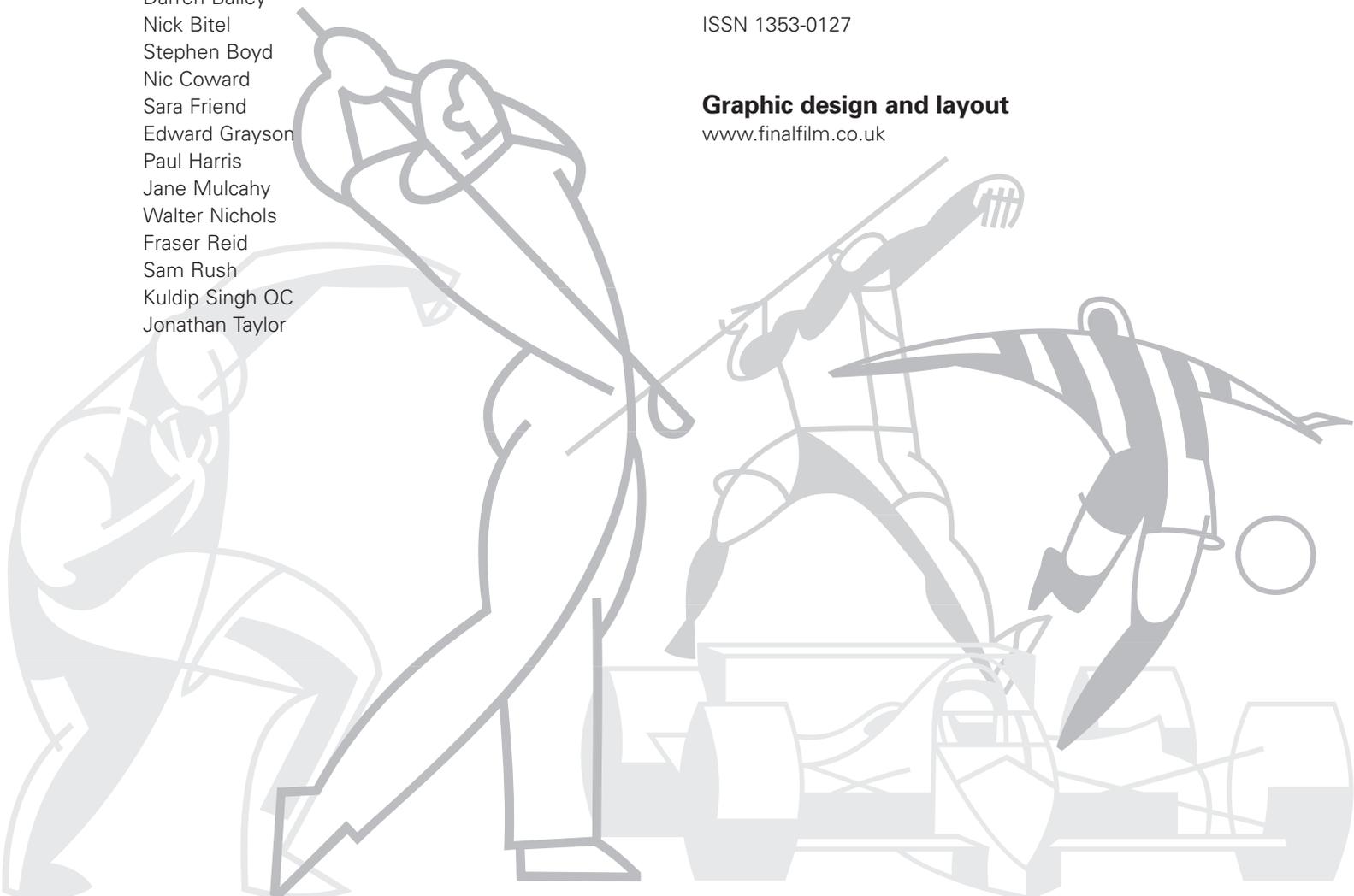
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Editorial

By Simon Gardiner, Editor

This issue of the Sport and the Law Journal covers a number of on-going and current issues. The Opinion and Practice section has a specific focus on issues around image rights. This continues to be an area where the piecemeal approach found often in the common law fails to bring certainty. Stephen Boyd's article 'Image Wrongs: Causes of Action for Misappropriation' is the second of a two-part analysis on the protection of image rights under English Law.

There is also another interview carried out by Stephen, this time with Murray Rosen, the outgoing chairman of BASL, who provides an evaluation of his achievements during this period. I am sure you will join me in thanking Murray for his forceful leadership of BASL over the last few years. Finally there is a short discussion of the ethical issues involving sports sponsorship by the alcoholic drinks industry.

The Analysis section features two articles. Jon Bett's "Not in the Wider Interests of Football": was the Decision of the Football Association's Independent Football Commission to Approve Wimbledon Football Club's relocation to Milton Keynes Correct? Have Football's Wider Interests Suffered as a Result?' evaluates the legal and sporting issues around movement and re-location of sports clubs, in this case Wimbledon FC and its metamorphosis into Milton Keynes Dons. Secondly, Ian Lynam's 'UEFA's Homegrown Player Rule – Does it Breach Article 39 of the EC Treaty?', evaluates the legality of UEFA's move to require clubs to play a certain number of 'homegrown' players.

As far as the rest of the Journal, the regular contributions of the 'Sport and the Law Journal Reports' can also be found together with a Book Review of a recent publication on Sports Law.

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



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Opinion and practice



Image wrongs: Causes of action for misappropriation – Part 2

By Stephen Boyd, Barrister

IV Regulatory codes

There are regulatory bodies overseeing both print and broadcast media, some of whose regulations would appear to encompass and prohibit the unauthorised commercial exploitation of a celebrity's image.

However, these bodies are largely toothless and are unlikely to provide much comfort to an aggrieved celebrity; in particular, there is no scope for any award of damages to compensate for the celebrity's loss.

Non-broadcast media

The Advertising Standards Authority ("ASA") oversees and administers the British Code of Advertising, Sales Promotion and Direct Marketing (the 'Code')

The Code¹ provides that all marketing communications should:

- be legal, decent, honest and truthful (paragraph 2.1);
- should be prepared with a sense of responsibility to consumers and to society (paragraph 2.2);
- should respect the principles of fair competition generally accepted in business (paragraph 2.3).
- Further, no marketing communication should bring advertising into disrepute (paragraph 2.4).
- Paragraph 13.1, dealing with "protection of privacy", provides that:

"Marketers should not unfairly portray or refer to people in an adverse or offensive way. Marketers are urged to obtain written permission before: ...

(a) referring to or portraying members of the public or their identifiable possessions; the use of crowd scenes or general public locations maybe acceptable without permission

(b) referring to people with a public profile; references that accurately reflect the contents of books, articles or films may be acceptable without permission

(c) implying any personal approval of the advertised product; marketers should recognise that those who do not wish to be associated with the product may have a legal claim"

An individual who believes his said rights have been infringed by an advertisement may complain in writing to the ASA. If a complaint is upheld, however, the sanctions are limited:

"Adverse publicity may result from the rulings published by the ASA weekly on its website. The media, contractors and service providers may withhold their services or deny access to space. Trading privileges (including direct mail discounts) and recognition may be revoked, withdrawn or temporarily withheld. Pre-vetting may be imposed and, in some cases, non-complying parties can be referred to the Office of Fair Trading for action, where appropriate, under the Control of Misleading Advertisement Regulations".

In 1999, footballer Jamie Rednapp successfully complained to the ASA under paragraph 13 in respect of the unauthorised use of his image by two radio stations.

The ASA observed that the campaign could damage Mr Rednapp's reputation or affect his future income from endorsements².

However, in 2003, Major Charles Ingram and his wife, who caused 'Who Wants to be a Millionaire' to 'cough up' a million pounds, objected to an advertisement for easyJet in a Sunday newspaper that showed a photograph of them under the headline "Need a cheap getaway?" Beneath the photograph it stated (No Major fraud required!) Lowest fares to the sun..." They complained that the advertisement constituted an invasion of their privacy because the image was used without their permission and was offensive and distressing to them. The complaint was not upheld. The ASA noted that, although the Codes urged advertisers to obtain written permission before referring to or portraying individuals in advertisements, they were not required to obtain it. It noted the image was already in the public domain and concluded that the advertisement portrayed the Ingrams in a way that was consistent with the verdicts in their recent court case.

Control of Misleading Advertisements Regulations (CMARs)

CMARs are aimed at protecting the interests of consumers and traders from misleading or unacceptable comparative advertising.

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Complaints are handled by the ASA and the trading standards service. The role of the OFT is mainly to support and reinforce the controls exercised by other bodies where they have been unable to take effective action. In most cases the OFT will step in only when these bodies have been unable to deal adequately with a complaint and where it is in the public interest that an advertisement is stopped.

Regulation 2(2) of the Control of Misleading Advertisements Regulations 1988 provides:

“For the purposes of these regulations an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interest the advertisement seeks to promote”

Regulation 4(1) imposes a duty on the Director General of Fair Trading to consider any complaint made to him that an advertisement is misleading. Where the Director considers that an advertisement is misleading, and is satisfied the complainant has exhausted all alternative avenues of redress, he may bring proceedings for an injunction to restrain further publication of the advertisement. By Regulation 6(5): “the court shall not refuse to grant an injunction for lack of evidence that:

- (a) the publication of the advertisement in question has given rise to loss or damage to a person;
- (a) the person responsible for the advertisement intended it to be misleading or failed to exercise proper care to prevent it being misleading.”

Broadcast media

The Broadcasting Act 1990 made it the statutory duty of the Independent Television Commission (“ITC”) to draw up and enforce a code covering standards and practice in television advertising and the sponsoring of programmes.

Paragraph 6.5 of the ITC Advertising Standards Code (the ‘ITC Code’), dealing with the “Protection of Privacy and Exploitation of the Individual”, provides that “with limited exceptions, living people must not be portrayed, caricatured or referred to in advertisements without their permission.”

The ITC ceased to exist with effect from 18 December 2003. By virtue of the Communications Act 2003, Ofcom took over its duties and those of four other regulators³ The ITC Code continued to have effect as if it were an Ofcoms Standards Code.

On 1 November 2004, the ASA, which up to then had responsibility for standards in non-broadcast media only, assumed powers in respect of TV and radio advertisements, under contract from Ofcom. The ASA system works in a co-regulatory partnership with Ofcom, and there is now a ‘one-stop shop’ for all advertising issues and complaints. Day-to-day responsibility for the TV and radio codes has been contracted out to the Broadcast Committee of Advertising Practice (BCAP), an industry body also known as CAP (Broadcast). Ofcom’s licensees, the commercial TV channels and radio stations, must continue to observe the codes, but, if advertisements mislead or cause harm or distress, the matter will be dealt with first by the ASA, and not Ofcom. In the event that a complaint is upheld, the ASA may enforce the code by, for example, issuing formal warnings to, and fining, the licensee. Further, it can order that a TV campaign is discontinued in its current form.

On 27 January 2004, Ofcom ruled that the 118 118 Runners featured in The Number’s TV advertisements were a caricature without permission of David Bedford, the 1973 10,000 metre world champion, and therefore a breach of Rule 6.5. However, Ofcom refused to order the withdrawal of the advertisements because Mr Bedford had delayed six months before making his complaint and because they were not satisfied that he had suffered actual financial harm.

Could Mr Bedford have pursued a claim for passing off? Probably not. It would have been necessary for him to show that:

- (a) at the material time, he had a significant reputation or goodwill: perhaps in 1973, but unlikely in 2004.
- (b) he had a substantial income from granting endorsements: he did not.
- (c) the advertisements gave rise to a false message which would be understood by a not insignificant section of the Number’s market that he endorsed, recommended or approved of 118 118: this would have been difficult given the probable argument that this was a case of association rather than endorsement.

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V Trade Descriptions Act 1968

Section 1(1) of the Trade Descriptions Act 1968 provides that:

“[a]ny person who, in the course of a trade or business
a) applies a false trade description to any goods; or
b) supplies or offers to supply any goods to which a false trade description is applied, shall, subject to the provisions of this Act, be guilty of an offence”.

Section 2 defines “trade description” as “an indication, direct or indirect, and by whatever means” given of any of a number of matters with respect to the goods, including:

“(g) approval by any person or conformity with a type approved by any person”.

Section 4 provides similar protection in respect of services. Section 3(4) of the Act defines “false trade description” to include “a false indication, or anything likely to be taken as an indication which would be false, that any goods comply with the standards specified or recognised by any person or implied by the approval of any person”.

On its face, it appears that this might cover a case of use of a celebrity’s name or image to imply falsely that he or she has endorsed the products or services in question. However, I am not aware of any case in which such an approach has been followed.

VI Trade Marks

Section 1(1) of the Trade Marks Act 1994 defines a trade mark as “any sign capable of being reproduced graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging”.

Thus, image or likeness of a celebrity may be instantly recognisable, but it will not qualify for registration as a trade mark unless it is “capable of distinguishing goods or services of one undertaking from those of other undertakings”.

Alan Shearer and Ryan Giggs are two famous footballers who have been allowed to register their names as trade marks. Wayne Rooney has registered his name and number – ‘Rooney 18’. In contrast, Mark Hughes’ application to register his name was rejected on grounds of lack of distinctiveness. To circumvent such lack of distinctiveness, some players have registered nicknames: Paul Gascoigne Promotions

Limited registered “Gazza” as a trade mark; David Seaman registered “Safe Hands”. Jacques Villeneuve and Damon Hill each registered images of themselves, in Hill’s case an image of his distinctive eyes viewed through the visor of his helmet.

The main problem with trying to use trade mark law to protect against the unauthorised use of a celebrity’s name or image is that that use is likely to be merely descriptive of the character of the goods to which the name is attached, rather than an indication of trade origin, and therefore not an infringement of the trade mark owner’s rights. For example, the owner of the copyright of footage of Alan Shearer playing football could include his name in the packaging of a video of that footage, notwithstanding the fact that Shearer’s name is registered as a trade mark, because it would be being used merely to describe what was inside the packaging, not to indicate that Alan Shearer himself had produced or authorised the production of the video.

Indeed, in the case of sports and character merchandising, where the name and image of the celebrity are reproduced on products as diverse as key-rings and bars of soap, people buy the products not because they see the name and image as indicating that the product is produced or endorsed by the celebrity, but simply because the name and image are on the product. As stated in the following passage from the Court of Appeal’s judgment in the leading case of the Elvis Presley Trade Mark Application:

“the judge was right to conclude that the Elvis mark has very little inherent distinctiveness. That conclusion was reached by a number of intermediary steps, one of which was the judge’s finding that members of the public purchase Elvis Presley merchandise not because it comes from a particular source, but because it carries the name or image of Elvis Presley. Indeed, the judge came close to finding that for goods of the sort advertised by Elvisly Yours, the commemoration of the late Elvis Presley is the product and the article upon which his name appears (whether a poster, a pennant, a mark or a piece of soap) is little more than a vehicle”.⁴

To make out a claim for infringement of a registered trade mark, it is necessary to show that the defendant is using the mark “as a trade mark”, i.e. as a badge of origin, and in certain cases it is also necessary to show a likelihood that use of the mark will confuse the public. Neither will be possible if the case involves production of merchandise bearing the celebrity’s name and image and the public are buying the merchandise solely because it bears the likeness of the celebrity, and not because they believe the reproduction of that likeness

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indicates that the celebrity him or herself is associated with the production of the merchandise:

“[W]hether a registered trade mark comprising the name of a celebrity is infringed by use on china, posters, t-shirts and the like will depend on the circumstances, both of the use by the proprietor and the type of use by the alleged infringer. If the public has been educated that the mark is a badge of origin (in the widest sense including approval, selection and endorsement) perhaps by the use of words such as “licensed by” or “official”, there will be infringement. However, if the purchaser of a mug with the name (and/or photograph) of their hero or heroine decorating it is indifferent as to who makes it or who is responsible for the name being on it, this should not constitute infringement of the trade mark”.⁵

A case in point is that of Sir Alex Ferguson who recently applied to register his name as a trademark for a range of products, including clothing and commemorative coins. However, he was denied the exclusive right to the use of his name on posters and stickers depicting his image because he is too famous.⁶ People who are not famous are allowed to protect their names on posters because the public will assume that the name refers to the trade origin of the poster as well as the person depicted; in other words, would a potential buyer assume that an “Alex Ferguson poster” referred to its subject or the person who produced it? Apparently, Mr Ferguson is claiming that the rejection of this aspect of his application constitutes a breach of his human rights. Joe Cole was able to protect poster trademarks for his name because they were registered before he was famous.

The recent authority of Arsenal Football Club PLC v. Reed⁷, although addressing the sale of merchandise bearing a Club crest rather than a player’s image, nevertheless supports the proposition that the mark must be used in a trade mark sense, i.e. to indicate trade origin, for an infringement action to lie. The Court of Appeal also held that use of signs identical to the registered marks, whether or not the mark was being used as a badge of allegiance, was liable to effect the function of Arsenal’s marks because it was likely to jeopardise the guarantee of origin which constituted the essential function of the trade mark right.

VII Human Rights Act 1998 (HRA)

Art 8 of the Convention provides that “everyone has the right to respect for his private and family life, his home and his correspondence”.

In *Von Hannover v Germany*⁸, which concerned the publication by German magazines of photographs of Princess Caroline of Monaco going about her private business, the European Court of Human Rights considered that:

- a) the concept of private life extended to aspects relating to personal identity such as a person’s picture;
- b) there was a zone of interaction of a person with others, even in a public context, which might fall within the scope of private life;
- c) Although the object of Art.8 was essentially that of protecting the individual against arbitrary interference by public authorities, it did not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there might be positive obligations inherent in an effective respect for private or family life. These obligations might involve the adoption of measures to ensure respect for private life even in the sphere of the relations of individuals between themselves;
- d) Regard must be had to the fair balance between the competing interests of the individual and of the community as a whole;
- e) A fundamental distinction needed to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society and reporting details of the private life of an individual who did not exercise official functions;
- f) The decisive factor in balancing the protection of private life against freedom of expression lay in the contribution that the published photographs made to a debate of general interest. In the instant case they made no such contribution since Princess Caroline exercised no official function and the photographs related exclusively to details of her private life.

The boundaries of fairness and unfairness in the area of business life remain to be clarified. However, in *Durrant, Auld LJ* recognised that individuals exist in different spheres, including domestic, business and professional capacities, and in *Douglas*, the court accepted that a celebrity may have a legitimate interest in controlling the photographs which are released of him or her. The court recognised the value of image:

“the claimants here had a valuable trade asset (the photographs of their wedding), a commodity the value of which depended, in part at least, upon its content at first being kept secret and then made public in ways controlled

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by Miss Zeta-Jones and Mr Douglas for the benefit of them and the third claimant. I can quite see that such an approach may lead to a distinction between the circumstances in which equity affords protection to those who seek to manage their publicity as part of their trade or profession and whose private life is a valuable commodity and those whose is not but I am untroubled by that

The claim by the claimants in that case was in confidence, but the recognition that fairness may require protection should be afforded to those whose image is part of their “stock-in-trade” can be applied outside the boundaries of confidentiality.

It remains to be seen how broadly the courts will construe the Art 8 right, but the right to control the use of one’s image may one day be held to be part of a celebrity’s private life.

In addition, Art 1 of Protocol 1 of the Convention provides that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”. A person can have a property right in his goodwill⁹. Accordingly, a valuable image right would constitute a “possession” for these purposes. Given the positive obligations referred to in paragraph 54(c) above, it seems probable, in my view, that a court will one day rule that an aggrieved celebrity can rely on Art 1 of Protocol 1.

VIII Data Protection Act 1998 (“DPA”)

The DPA¹⁰ regulates the processing of information about individuals. In my opinion, it may, in certain circumstances, provide a remedy, not only in false endorsement cases, but also where there is unlicensed commercial association (falling short of endorsement) and possibly even character merchandising and the use of look-alikes.

It is necessary to consider some of the definitions in the DPA:

“data” means information which (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose; (b) is recorded with the intention that it should be processed by means of such equipment; (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system.

“personal data” is defined as: ‘data which relate to a living individual who can be identified: (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual’

In the recent case of *Durant v Financial Services Authority*¹¹ the Court of Appeal considered the meaning of the term “relate to” and concluded that not every piece of data which has a connection with an individual can be said to “relate to” him. It went on to comment that there are two notions which may assist in establishing whether or not data are personal data:

“whether the information is biographical in a significant sense (which a photograph will not be) or whether the person is “the focus” (which a photograph used in a commercial association will be).

In both the *Douglas v Hello!*¹² and *Campbell v MGN*¹³ cases it was held that the dissemination of photographs which were the end result of the processing of personal data could be protected under the Act.

In order for the DPA to apply, the data must be “processed”.

“Processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including (a) organisation, adaptation or alteration of the information or data; (b) retrieval, consultation or use of the information or data; (c) disclosure of the information or data by transmission, dissemination or

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otherwise making available or (d) alignment, combination, blocking, erasure or destruction of the information or data”.

“[T]he definition of processing is so wide that it embraces the relatively ephemeral operations that will normally be carried out by way of the day-to-day tasks, involving the use of electronic equipment, such as the lap-top and the modern printing press, in translating information into the printed newspaper”¹⁴

Importantly, in the Campbell case, the Court of Appeal held that the publication of material in hard copy, where it had been previously been automatically processed, formed part of the processing and falls within the scope of the DPA¹⁵.

The requirements of the DPA are imposed on the “data controller”. A data controller is defined in s.1(1) as “a person who (either alone or jointly or in common with other persons) determine the purposes for which and the manner in which any personal data are, or are to be, processed”. The individual to whom the data being processed relates is known as the “data subject”.

A data controller must comply with the data protection principles. Under principle 1, the processing of personal data must be justifiable, that is meet at least one of the conditions under schedule 2 and, if the data are “sensitive” personal data, at least one of the conditions under schedule 3, ie:

- Be carried out lawfully;
- Be carried out fairly;
- Meet the requirements set out in paragraphs 2 and 3 of Part II of schedule 1 to ensure that the data subject is informed of the identity of the data controller, the purpose of the processing and “any other information necessary to make the processing fair”, either before the processing takes place or, in limited circumstances, before disclosures of the data are made.

Under principle 2, personal data which have been obtained for specified and lawful purposes (and under principle 1 all personal data should have been obtained in accord with this standard) must not be further processed in a manner incompatible with those purposes.

Individual rights

Under s.10, an individual is entitled by written notice to the data controller to require him to cease processing any personal data on the grounds that, for specified reasons:

- a) the processing of the data is likely to cause substantial damage or substantial distress to him or another, and
- b) that damage or distress would be unwarranted.

If the data controller fails to comply with the notice a court may, if satisfied that the notice was justified, order the data controller to comply.

This right does not apply when the data controller is processing the personal data on a limited number of grounds, for example, that the controller is carrying out a legal obligation.

Under s.13, an individual who suffers any damage by reason of any contravention of the DPA by a data controller can claim compensation. Moreover, by s.13(2), an individual who suffers distress by reason of any contravention is entitled to compensation for that distress if:

- a) the individual also suffers damage by reason of the contravention, or
- b) the contravention relates to the processing of personal data for the “special purposes”¹⁶

There are a number of exemptions from the DPA, ie national security, the prevention or detection of crime, health education and social work, regulatory activity, journalism literature and art, research history and statistics, disclosure required by law or made in connection with legal proceedings, domestic purposes and other miscellaneous exemptions.

It seems unlikely that an unscrupulous marketer, using a celebrity’s image without consent, would be able to rely on any of these.

Application

Wide Boy Ltd has made unauthorised use of Carlos Kickaball’s image in the following ways:

- a) his picture in a newspaper advertisement for its services;
- b) his picture on a mug offered for sale;
- c) his name on a T-shirt;
- d) the use of “his” voice in a “talking” birthday card;
- e) the use of a lookalike in a newspaper advertisement.

Does this constitute breach of the DPA?

The following questions fall to be considered:

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(1) is the material “data which has been processed by the producers”?

In all cases the answer is probably yes, as Wide Boy is likely to have taken a digital rendering and used that. However, if there has simply been a reproduction by mechanical means of a hard copy with no processing involved, then the claim would fall at the first hurdle.

(1) is the material personal data?

a) does the material enable the identification of the particular individual? Yes. Carlos can be identified from the picture and his name – that is the whole purpose of using them. In the case of scenarios (4) and (5) above, the data involved are not “real” material; nevertheless, as they depend on the identification of the particular individual, there is a strong argument that they are within the definition;

b) does the material “relate to” Carlos? Applying the test in *Durant*, the data does relate to him. The individual is the focus of the data.

(2) How was the personal data (that is the digitised image or recording) first obtained and where? If it was obtained outside the UK, the DPA may not be applicable to the circumstances of the obtaining; however, as long as it was processed within the UK, the DPA will apply to that processing.

(3) If it was obtained in the UK, was it obtained fairly and lawfully? If there was an unlawful obtaining, for example, by a breach of confidence, there may be a remedy against the original obtainer.

(4) If it was lawfully obtained, in other words, with the knowledge and consent of the individual, was it fairly obtained? Carlos may have been told of and accepted the possibility of subsequent use for commercial purposes, in which case both the obtaining and the subsequent processing are likely to be fair. Alternatively, the image may have been obtained for another purpose (news reporting or general publicity, for example) but is nevertheless being used for marketing.

(5) Is the present processing fair? This is the key issue – whether it is unfair to use a person’s image to advertise/endorse/place on a product when the person, the subject of the image, either has no knowledge of it or does not agree. In my opinion, the above uses would be found unfair. In assessing whether processing is fair or unfair, it is relevant to consider what, if any, regulatory codes cover the issue. It is relevant, for example, that paragraph 6.5 of the ASA’s TV Code

provides that living people must not be portrayed, caricatured or referred to in advertisements without their permission.

(6) Has the celebrity suffered damage? Possibly, for example, the loss of royalties he might have earned, the depreciation in value of his image by association with inferior goods or services, or loss of exclusivity leading to a lucrative contract going elsewhere.¹⁷

4. Summary overview

As late as 1990, the Calcutta Committee on Privacy concluded there was “no pressing social need to provide any additional remedy for those such as politicians and actors, whose images or voices are appropriated without their consent for advertisement or promotional purposes”.

However, this really seems too unrealistic and outdated a view in the modern marketplace. As McCarthy says:

“English law often seems tied to the legal categories of the past and, up to the present, unable to accommodate itself to the modern commercial realities of licensing and merchandising”¹⁸

In *University of London Press Limited v University Tutorial Press Limited*, finding a copyright in examination papers, Peterson J said:

“There remains the rough practical test that what is worth copying is worth protecting”¹⁹

As Abell points out:

“In the modern age, this principle should arguably apply to names and likenesses as much as it did to literary works in 1916: if the image of a personality is worth exploiting without authorisation, it should be protected by the law.”²⁰

However, there have recently been some positive signs in this regard. In particular, the *Irvine* case has made clear that a celebrity has a property right in his goodwill that he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party’s goods or services. In the same case, Laddie J also alluded to the possibility that the time may be coming for the reassessment of merchandising cases, either by reference to the HRA 1998 or by the development of the common law. Further, it is early days but, potentially, the DPA may have a material impact in this area. BASL

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- 1 11th Edition, 4 March 2003
- 2 see ASA Monthly Report, June 1999
- 3 The Broadcasting Standards Commission, Ofcom, the Radio Authority and Radiocommunications Agency.
- 4 *Elvis Presley Enterprises Inc. v. Sid Shaw Elvisly Yours* 1999 RPC 567, 597-598
- 5 Kerly's Law of Trade Marks and Trade Names, 13th edition, paragraph 22.56
- 6 *The Times*, 7 October 2005, p9
- 7 2003 RPC 39
- 8 [2004] EMLR 379
- 9 see *Irvine v Talksport*
- 10 which was described by the Master of the Rolls as "a cumbersome and inelegant piece of legislation"-*Campbell v MGN* 2003 2 WLR 80, paragraph 72. It was passed to implement Directive 95/46 in the UK
- 11 [2003] EWCA Civ 1746
- 12 obiter, per Brooke LJ, 2001 2 WLR 992, paragraphs 55-56
- 13 [2003] 2 WLR 80 (the CA' view on data protection has not been affected by the H/L's reversal of their decision on breach of confidence.
- 14 per Lord Phillips MR, *Campbell v MGN* paragraph 122
- 15 paragraph 106
- 16 ie any one or more of the following: (a) for the purposes of journalism; (b) artistic purposes; (c) literary purposes
- 17 see Steele, *Personality Merchandising, Licensing Rights and the March of the Turtles*, (1997) 5 SATLJ 14
- 18 McCarthy, *The Rights of Publicity and Privacy* (2nd Edition) paragraph 6-286.
- 19 1916 2 Ch 601 at 610.
- 20 Abell "Protecting Personalities: Time for a New Form of Copyright" 1998 82 Copyright World 33.

Interview with Murray Rosen

7 September 2006

By Stephen Boyd, Barrister

SB I understand that you are to retire as chairman of BASL. When is it going to happen?

MR I think probably at the AGM, although I may not be there because I am starting a six week trial on 3 October. However, that it is when it will be announced.

SB Does 'Sports Law' exist?

MR I think sports law does exist in a number of senses (and notwithstanding the Bar Council's refusal, when I was Chairman of the Bar Sports Law Group, to admit it as a practice area deserving a specialist Bar association). It exists, I think, primarily because of the aspects of life that sports bring out. I'll tell you what I mean.

Sports bring out areas of activity, morality, business, human inter-relations that provide a very fertile ground for legal regulation and legal resolution, but in a way which is different from other types of activity, presenting its own special problems and special sensitivities. I think that for me is why sports law is such an interesting subject. There are some philosophical points here, which you may not want to spend time on, but let me enunciate them and then you can tell me what you think.

Sport has obviously been around for a very long time, but its importance for society has fluctuated at various periods and in various different parts of the world. It isn't exactly a religion, and I think people who talk about sports as the opium of the masses have probably got it wrong, but it is enormously important to participants and to its audience. I think we are just going through a period where it is the focus for what matters deeply to a lot of people. Participation has become tremendously intense and has spun off many types of ancillary activity, from business and media and so on, and I think the audience follow sport now in a way that years ago it wouldn't have done. Obviously you would have had sportsmen who loved sport and fans who may have participated in sport and followed sports, but probably without the bifurcation between those who are professionals, and active in displaying their skills, and those who are totally inactive but very, very intense in their support and in their observation of it. I think that

has developed over a period of time and has led to all these spin offs, which call for legal regulation.

Why I think it requires special sensitivity is because some of the issues – moral issues, professional issues and so on – are issues which our normal type of dispute resolution and contractual and regulatory frameworks have found it difficult to cope with. Almost every day, in relation to every area of sport, we see those difficulties and so you need a specialist practitioner, someone who is familiar with those issues, and can perceive what is going on in a different way perhaps from those who practise in other areas.

So that is my feeling about sports law as a subject, without getting too esoteric or idealistic about it. Funnily enough, some of the things that have happened in the development of sports legal issues have fed into other things as well. I think some of the ways we resolve our disputes has actually been picked up in other areas. In many ways you can regard sports, and fair competition and fair business as it comes under the spotlight in sports, as knocking into other areas; similarly with alternative dispute resolution. Some of the ways sport has gone about it have been picked up in other areas as well. So I don't see sports law as an isolated subject, but I do see it as one that is entitled to be treated as separate and in its own right.

SB Do you have any reflections on your time as Chairman?

MR I have many reflections and many good memories. I think BASL has had a very interesting three years. It has probably matured a bit in some ways. I think putting it into a corporate structure, having a very active broad responsibility and appointing proper professional administrators, and an editor of the journal, Simon Gardiner, responsible for setting up the website as well, and Kings College providing some of the administrative help, have been important developments.

We have had, I think, some wonderful events. The quality has been very good and very interesting, for example, Daryl Hare talking about the problems of

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umpiring at the 2004 Conference: it might be worth someone hauling out the tape of that – maybe we'll review it as even more topical at the next conference! We have had some very knowledgeable people talking about aspects of sports related law and sports generally that I knew nothing about. Ocean sailing for example, at the commercial level – it seemed like Formula One, except they go across water. That sort of thing is a real education.

Apart from the events, the evolution of the literature (with your contributions as well, Stephen) has been pretty memorable. I expect the Journal to go from strength to strength. We have had some very, very good pieces in that and Simon has done some amazing work.

The three years has made me realise how diverse the views on most public topics are within the sports law community.

Having said that, I think that the diversity of views has not in any way stopped it being a community. I think when we go along to these events, we usually find that people's attitudes to sport, and to the legal regulation of sport, are very similar. And the great thing about sports lawyers on the whole is that they really love the values of sport. It is not a bad place to come from as a lawyer, actually finding yourself, enthusiastic about the culture which the law is there to protect and enhance and so on, and that is what probably makes sports lawyers such happy people. They are working in an area where they actually believe in their subject and the subject, which the law that they practise, is going to advance – because lawyers are needed and they are certainly needed in sports. There are many, many areas of law where people are not that happy about the subject matter, the people and the values, the culture that they are working with. In sport you feel that the lawyers want to have a positive role.

Having pulled ourselves through a period of management consolidation and technological advancement, so far as our publications are concerned, hopefully it is well set for BASL to party for a bit, which I think is probably what we need to do. We'll probably talk a little bit later about what might happen going forwards to 2012, and whether we will end up not being so much sports lawyers

but more infrastructure project advisers. But I think that there are all sorts of things that might be interesting as far as BASL is concerned, including perhaps looking a little bit more to expand our international network. So it's been an interesting three years and quite a transformation.

SB So far as the future of BASL is concerned, what do you mean by more of an expansion into international areas?

MR We are the British Association and historically many of the people who were actively involved in the Association in the early years were very interested in the traditional sports structure and valued it very much. Now, after some 12 years or so, we have fairly active members who are not based in Britain and others who have moved to international bodies. There are a number of directors who are on international committees, who work abroad and so on, and this creates its own question for us in clarifying the identity and defining the mission of the Association.

International networking, and harmonisation of some of the rules and some of the problem solving techniques that we have evolved as lawyers in Britain, are important. The clashes that we have seen over the last five or ten years between international regulation and domestic regulation need to be addressed, and not just allowed to repeat themselves going forward; I have in mind some of the ways in which doping controversies have been dealt with over the last decade. Some of the ways in which market problems have evolved and they crop up in all sorts of areas. People in different countries have different ways of dealing with things. For example, something in the news, which I was interested in last week, was the reaction to the idea of promotion companies or agencies who control players and players' rights.

SB The new West Ham players?

MR Yes. Some of those questions have been around for 20 years. I remember many years ago there was a dispute where the players' rights had been split between a number of entities. They were then dealt with as freely transferable between off-shore companies and the like, and then ended up with different people who were arguing with a club that

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thought they were paying this player – who was obliged to stay with the club for which he played, and to which he owed his allegiance. But when a distant company then jumps up and says ‘well actually you can’t use this player’s image on your team merchandise’, it can be a bit of a problem.

Different jurisdictions deal with questions of players’ rights, and how they can be dealt with commercially, in very different ways, so I was just amused by the shock that was expressed by the papers over some rumoured aspects of the West Ham arrangements. I just thought to myself – well it’s happened at intervals over the last 20 years, and if someone wants to open it up and regularise it, they have had plenty of chance – so get on with it. Anyway, there are questions of international harmonisation that the Association could help with. If there is going to be more international legal harmonisation in relation to sports, then we have got a role to play.

SB Is there any liaison presently between BASL and similar organisations overseas?

MR Only on a very informal level, simply because we have people who straddle more than one organisation. As you know, on the Board we have directors who are involved for example in the Olympics movement and international rugby. Richard Verow, who has just retired as a Board member, was based in Switzerland for UEFA and has now gone to Dubai for the International Cricket Council. But there are no formal contacts. I’m not against informal contacts, which are terrific, but it may be that we should think about structuring it a little bit now.

SB Do you think BASL has a role to play as a ginger group that has an interface with Government? Or should it concentrate on seeking to educate its membership about issues relating to sports law? What do you see as the role of BASL particularly going forward?

MR I don’t see BASL for myself as a ginger group, in the sense of presenting itself to lobby, or to act in some collective capacity for the sports law “industry”, representing it in stimulating or advising governmental or other organisations. There are members within BASL who do lobbying, and we are an effective forum for issues which might arise on which some of us may think that governmental or other official action is required. But it doesn’t have that unified political standing which would, I think, allow it to fulfil a role collectively.

BASL’s primary purpose can be expressed as more educational, in the sense that all those who join want to be at the coal face, with as much knowledge of what is going on in sports law as possible, both to improve their own individual abilities and also to ensure that they contribute to the development of the law through interaction with other members and those to whom BASL gives them access. So in the broadest possible term, it is about education. Whether or not anyone feels particularly educated after having a chat with a specific member, or whether or not they feel educated listening to one of our talks, or reading one of the articles in the journal, depends on the quality of the particular piece, and what the audience is interested in; but that is probably the best summary I think of what BASL is here to do.

SB So far as dispute resolution, particularly in a sporting context is concerned, there have obviously been a number of developments so far as litigation is concerned, particularly since the advent of the CPR. It’s well known that there is not as much litigation around as there used to be. Mediation appears to be growing. Arbitration seems to be growing along with the use of CAS. How do you see the future of sports disputes?

MR The public justice system has never been particularly comfortable with sports disputes, and by which I mean sports participation disputes, and sport has never been very comfortable with the public justice system. I think there are a number of things about this prospective potential incompatibility that remain and possibly have been highlighted in attempts to have sports problems deterred and resolved in the civil courts. There have been enough disastrous cases, I think, for people to see the warnings, but on the other hand those who have been badly damaged in very important activities for them sometimes have no alternative, or feel they have no alternative, but to go through that system with the formalities and the publicity and the other things involved. They may not welcome it, but that is where they have ended up.

The interesting thing is that a lot of those problems are probably now recognised in other practice areas for dispute resolution as well. I think there are all sorts of areas where people can now see the disadvantages of having to get your dispute resolved in the Courts and, at the same time, I tend to think that, whether deliberately or not, the Government and the powers that be in control of

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civil justice have actually given litigants and prospective litigants very good reason not to go through the civil justice system. I'm not suggesting that the civil justice system has been made deliberately more difficult, because quite plainly the aim has been to manage it better and to provide a different balance to what ultimately should still be a just resolution of people's problems.

But, deliberate or not, there are so many pitfalls and difficulties in civil litigation, which other parts of society and business have recognised more and more over the last ten years, that the call for mediation, arbitration and other forms of alternative dispute resolution, which Woolf recognised so vividly, is one which has been reinforced by the cost constraints, the admin problems and the judicial problems which we see all the time in the civil justice system. So again, to some extent, the rest of the legal world is following some of the things that we have been seeing in sport.

There is still potential, for creative dispute resolution outside the civil justice system in sports related matters. The quality of alternative dispute resolvers, arbitrators and mediators, and indeed formal disciplinary panels and disciplinary appeals, has on the whole improved. I can remember when going before a disciplinary tribunal really was to put yourself into the hands of the local solicitor, who was on the board of a club, and some other "blazers", and they would know little about the practical needs in dispute resolution, or certainly nothing about the procedures to ensure a fair dispute resolution. I'm not suggesting that their motives were poor.

I smile a little bit when I see journalists still trying to foster the idea that any private resolution of high profile sports disputes can be treated in a derogatory way as being the great and the good in private putting out a few blazers in order to stop the press actually having even more of a field day. I think we saw that, to some extent, in what was going on over the recent ball-tampering allegation. The press showed a certain degree of very old-fashioned characterisation of labelling to what was going on – it was an amazing story in a summer where they had not had much, and they were furious at not being able to carry on extracting every ounce of it through the week. The fact that the powers-that-be were trying to deal with it in a more orderly way behind the scenes did not seem to matter because they could not get their claws in every little detail, so it was very upsetting for them.

But to me, that's probably the way it should be, and none the worse for the sport if that is how it goes on, so long as it is fair, prompt and efficient.

SB Do you see CAS playing more of a role in domestic disputes?

MR One hopes, as the Sports Dispute Resolution Panel continues its development, with its new management now in place, that we can move forward in another bound on the domestic front. CAS has been a good model in some ways on the international level and there has been a lot of work on a domestic equivalent. It has to be an equivalent because I cannot for myself see CAS just taking on that role for umpteen sports in umpteen different jurisdictions with umpteen domestic governing bodies. However, it is not beyond the bounds of possibility that CAS could up a separate administration at a local level.

There is still a huge number of sports disputes which are resolved ad hoc in this country which could do with some CAS or SDRP style management, frankly – that is what they lack. The timescales vary so enormously. The quality of tribunal varies so enormously. You can have a wonderful local disciplinary tribunal, with a chairman who knows exactly what he wants and just gets it all done quickly and cheaply and fairly and so on, and then you can have one that just ends up bogged down in nonsense. The only way they ever speed up just by cutting the knot and delivering a result without people really understands quite why they have done that. That is not the right way. People are entitled to follow how and why their dispute has been resolved in a particular way even if they do not agree with it.

So I think there is a need for more CAS or SDRP management. By that I mean having a panel of proven people, who can explain very clearly, based on experience, exactly what is going to happen and then make it happen. I think that would be a very good idea generally and it will probably come about eventually. SDRP has ambitions – justified ambitions I think – to spread its net wider. I would like to see it capture the more local levels.

SB That may be a good springboard to consider how sports lawyers should be preparing for the 2012 Olympics.

MR That is a huge question and one which sports

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lawyers and firms who have sports practices have been wrestling with over the last year or 15 months. In most cases, there is still considerable uncertainty as to the foundations for 2012. I have no reason at all to doubt that we will get there but, in terms of building both the physical infrastructure and the regulatory and contract structure, there is far to go. It doesn't really feel as though we have even started.

As far as individual sports lawyers are concerned, they need probably a five-year plan to get themselves into the work that has to be done. I don't simply mean by pitching for it, I mean by making sure that they have the intellectual skills and knowledge and so on to do what it is that they want to do. Certainly, as regards the sorts of areas that you and I know about in terms of regulatory, disciplinary and sports players disputes, it will be absolutely essential for the system to be well in place and resourced at both Olympic and British level well before 2012. The Olympic Association has tremendous experience and they will make absolutely certain that it is very successful event. Sports lawyers should be getting themselves up to speed and putting themselves forward for what is going to be a massive effort.

SB So the Olympic Committee ought to be working to put in place a framework for resolving the various types of disputes that are likely to arise out of the games.

MR The Olympic Committee will have its usual games structure to ensure that disputes that arise during the event are dealt with and over the last few Olympics I think that has worked extremely well. But there are all sorts of other disputes that are going to break out leading up to the event, during the event and after the event. For example, one of the things that is still bubbling away is the financial arrangements between international associations and those who normally benefit from players' and sports participants' activities.

I imagine that by 2012 we have to have sorted out the arguments which have been taking place in football and rugby as regards compensation for players' injuries when on international duty, and how you call upon a player to fulfil international duties. We will see it probably happening in all sorts of sports including, I expect, some Olympic sports. As different sports evolve into very popular, commercially profitable, activities, the relationship

between normally the club, who benefits from the player, and his country, which benefits from him when he's called upon, needs to be better defined, properly negotiated and properly regulated.

It is a shame that the rugby question has not been clarified. Whatever the negotiations were, you would have expected that we would all have known exactly what is now going to happen in that sport, and that would then be available as a precedent to other sportsmen. As far as football is concerned – and the three or more cases in Europe starting with Charleroi, we still don't know what is happening as far as injuries are concerned. I would not want those issues still to be live in five years time. It is amazing that those issues have been around for such a long time.

One of the things that is frustrating in sports law is that often you do not get the sort of clarification that you need when there is a cause celebre. Then, sure enough, within a matter of months, or at most years, you get exactly the same issue arising again in another sport or even in the same sport. It's good for dispute lawyers, in the sense that there's another dispute, but it's not great in terms of smoothing the path of sport and its industry.

SB What, if anything, do you think needs to be done to deal the likelihood of ambush marketing?

MR I don't have a ready solution for that one. I have a sense that it is the sort of ancillary or parasitic human endeavour that you do not solve in absolute terms, and I certainly do not have a quick fix on one side or the other. One of the points with this type of problem is that the ambushers will always be one step ahead of the game; it's too big, there are too many tentacles, you can't protect the venue, the images, the ticketing and all the other aspects that enable someone just to clamber onto it and make something out of it for themselves.

Yes, you can have a legal regime in place which tries to stop degrees of misappropriation of good will, and we have seen that develop in the sports world. But you always come down to the competing freedoms of commerce and someone will always find a way to benefit from an event simply by picking up on the interest in the occasion or a particular sportsperson. The alternative is to go for complete dictatorship, and just say no-one

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will refer to the Olympics, and no-one will be able to say that they will provide unofficial coverage of this match, sponsored by whoever may be the marketeer.

The opposite of dictatorship is maintaining an ad hoc balance and that is where we are. It is not good enough for many because it leaves loopholes and uncertainties. But sometimes, I find myself thinking with alleged ambush marketing, well what's wrong with that? If there are a thousand million people who are interested in this, what is wrong with someone saying to them, well I would like some of you to know about my product as a result of your interest in this event. But anyway I do not have the answer.

SB What are your plans after you have retired as Chairman?

MR Well, I am doing a fairly demanding job at present at Herbert Smith, heading the advocacy unit and I intend to concentrate mainly on that. As far as sports law is concerned, I hope to carry on with the arbitration, disciplinary tribunal and appeal work, which I value very much, and to remain closely involved with BASL. Probably the thing I would like to concentrate on for BASL is the international aspect, but that depends on the Board and the next Chairman of the Board.

Our president, Maurice Watkins, who was a founder of the Association and has been a mainstay, is also retiring. That is the end of an era really. But with Michael Beloff QC arriving as our new President, there will be a good continuation there. He is an outstanding lawyer – almost one of the fathers of sports law, a great advocate and no mean academic – one of the people who has made sports law into a respectable, or at least self respecting, subject and he is a charismatic figure. He has been on CAS for years and has dealt with the disciplinary tribunal work at many Olympics. So I have no doubt our future will be in good hands.

SB Good, well it's a pleasure talking to you Murray and, on behalf of all the membership, thanks for your efforts on our behalf and we wish you the best of luck. 

Alcohol-related sponsorship of sport

The issue of alcohol sponsorship of sport has been highlighted in a recent Report by the Advisory Council on the Misuse of Drugs (www.drugs.gov.uk/drugs-laws/acmd/). Entitled, 'Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy', this Government funded body, calls for a range of increased measures to respond to a consumption rise amongst teenagers in all these three substances.

By Simon Gardiner

The Report estimates that among the 6.8 million 16-24 year olds in the UK, there are an estimated 2.1 million daily smokers, 1.9 million who drink more than twice the recommended daily alcohol limit at least once a week and 1 million who have used an illegal drug in the past month. A particularly high rise in alcohol consumption is highlighted in women aged 16-24 having doubled from 7 to 14 units on average per week in England between 1992 and 2002. The Report provides clear evidence that alcohol advertising encourages the consumption of alcohol by young people. It makes the charge that the "alcohol industry seeks to increase sales by fostering an attractive image of youthful vigour and carefree pleasure through its advertising themes and sponsorship of sport."

The Report estimates that the alcohol industry in the UK spends around £200 million annually on advertising and sponsorship. One of the recommendations is that the Government should introduce a "much stricter code for advertising and sponsorship." This would include "prohibiting sponsorship by alcohol companies of sports or music events or watched by under-18s."

Sports Sponsorship

Alcohol companies continue to be major sponsors of sport. In football, Liverpool has had a long relationship with Carling lager. In Rugby Union, Heineken has also had a lengthy relationship with the European Club competition. There is also evidence that sponsorship from the alcohol industry has partly replaced tobacco advertising banned under the European Union tobacco sponsorship ban. Last year, Formula 1 racing team McLaren signed a multimillion pound sponsorship deal with whisky manufacturer Johnnie Walker. Not surprisingly the McLaren team's global deal was immediately condemned by alcohol-concern groups who feared the move would herald the start of alcohol replacing tobacco advertising as a major source of

revenue for the sport. The Johnnie Walker drinks brand, owned by the world's largest spirits company Diageo, is estimated to spend between £10m and £15m annually on the three-year deal. This clearly is about developing brand awareness of this drink with Diageo stating the hope that sponsorship of formula one will be a 'perception interrupter' and overcome the widespread belief among its target audience (mainly males in their 20s) that they don't like the taste of whisky.

However, as with most alcohol advertising, this message has been 'spiked' with some positive warning of the potential problems involving alcohol consumption. When the deal was first announced, the company was reported to have pledged a further £2m a year on responsible drinking campaigns. A spokesperson stated: "At the same time we will use the sponsorship to communicate individual choice and what we believe responsible drinking is really about. We will do this through advertising themed on responsible drinking which will be capable of working around the world. In individual markets, we will invest in locally led programmes to address the issues of greatest importance in each market."

Social Problems of Alcohol and the Young

At a time when the social consequences of excessive alcohol consumption are increasingly highlighted, there is rightly some concern over the ethical basis of sport receiving this type of financial support. The social problems of excessive alcohol consumption are clear. In March 2004, the UK Prime Minister's Strategy Unit, published an Alcohol Harm Reduction Strategy for England. It reported a number of indices to measure the annual cost of alcohol misuse including:

- 1.2m violent incidents (around half of all violent crimes);
- increased anti social behaviour and fear of crime – 61% of the population perceive alcohol-related violence as worsening;

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- expenditure of £95m on specialist alcohol treatment;
- over 30,000 hospital admissions for alcohol dependence syndrome;
- up to 22,000 premature deaths per annum;
- at peak times, up to 70% of all admissions to accident and emergency departments;
- up to 1,000 suicides;
- up to 17m working days lost through alcohol-related absence;
- between 780,000 and 1.3m children affected by parental alcohol problems; and
- increased divorce – marriages where there are alcohol problems are twice as likely to end in divorce

British teenagers are some of the heaviest drinkers in Europe: more than a third of 15 year-olds report having been drunk at age 13 or earlier compared to around one in ten French or Italian children. By the age of 15 just under half of all teenagers report drinking in the previous week, and the number of units consumed has doubled from 5.3 in 1990 to 10.5 in 2002.

Social Responsibility of Sport

There is a real danger of alcohol sponsorship of sport linking alcohol consumption with sporting prowess, fitness and success. This can be particularly an issue for the young, who see a sporting brand whether it be a league or team closely aligned with an alcohol brand. For the alcohol companies, children and young people constitute an important target group because they represent the market of tomorrow, the drinkers of the future. Creating brand allegiance among children and young people is an investment the industry is sure to cash in on. The temptation to advertise alcohol to youngsters is too strong to resist.

Can the alcohol industry be left to exercise responsible self-regulation or is there an argument for external intervention? Together with European Union provisions, the Tobacco Advertising and Promotion Act 2002 comprehensively banned the advertising and promotion of tobacco products, including the use of brand sharing and sponsorship of cultural and sport events. Is there an argument for similar provisions concerning alcohol related advertising or can the drinks and sports industry be trusted to responsibly self-regulate?

The response of the Department for Culture, Media and Sport to the recent Report has been that there are no plans to introduce restrictions on sports sponsorship by

In the UK, the Institute of Sports Sponsorship has published a code of conduct calling for the maintenance of the highest ethical standards of conduct and professional integrity.

alcohol companies. So it looks as though changes will only occur if both the sports and alcohol industries accepting that they both need to accept greater social responsibility towards this issue. In the UK as in many European countries, regulation of sports sponsorship is carried out essentially on a voluntary self-regulatory basis. In the UK, the Institute of Sports Sponsorship has published a code of conduct calling for the

maintenance of the highest ethical standards of conduct and professional integrity. The drinks industries' own organisation, the Portman Group, has a voluntary code, but where producers are deemed to breach its provisions, there are no sanctions that can be used to force them to comply. Decisions about compliance with the code are made by a Panel, many of whose members and funders are themselves producers of the drinks being considered. It is hard to see how objective judgements can be made.

Although it needs to be accepted that future consumption rates of all the substances highlighted by the Advisory Council on the Misuse of Drugs cannot be predicted with confidence. For example since 1998, there have been significant declines in the use of cannabis and amphetamines but an increase in the use of cocaine by those 16-24. Alcohol is however clearly a greater part of the UK's social and cultural life and together with the recently liberalised licensing system, it is likely that alcohol-related problems amongst young people in the UK will continue to rise. Sport needs to accept that it has a social responsibility in examining how best to continue its financially lucrative but ethically challenging relationship with the drinks industry. **BASL**

Analysis



Not in the wider interests of football

“[N]ot in the wider interests of football”: was the decision of the Football Association’s Independent Commission to approve Wimbledon Football Club’s relocation to Milton Keynes correct? Have football’s wider interests suffered as a result?

By Jon Bett, Foreign Legal Adviser in the Sports & Media Practice, Arfat Selvam Alliance LLC, Singapore.

Introduction

“It was as if my whole family had been shot down in front of me and I began to cry uncontrollably”¹: on 28 May 2002, an Independent Commission of Inquiry (the IC) appointed by the English Football Association (the FA) decided in favour of the relocation of Football League (the FL) club Wimbledon Football Club (WFC or the Club) from its frosty foster home at Selhurst Park in South London to the open arms of the renovated National Hockey Stadium in Milton Keynes, Buckinghamshire, a remarkable journey of over 60 miles and, more significantly, light-years away from the community from which it takes its name. The Club’s first game in its new home against Burnley FC on 27 September 2003 marked the culmination of an unprecedented and extraordinary series of events that captured the imagination and curiosities of the football and legal fraternities alike.

As the dust settles and the Club, now known as Milton Keynes Dons FC, kicks off a new football season in League Two under an ambitious new management team, perhaps a moment of reflection is appropriate. Let us begin by exploring the most compelling of the legal issues thrown up by, and kicked back and forth during, the story of the Club’s relocation, and close by examining the scars that football has been left to nurse as a result of the crunching tackle that was this bizarre episode.

There are a number of legal issues. First, the ability that the FL was given under its rules² to exercise a discretion when considering the relocation of one of its members to a new ground, and demonstrate that it would have been open to the FL legitimately to refuse the relocation on a proper exercise of such discretion needs to be considered.

Secondly, the ability of WFC to have mounted a claim that any such refusal by the FL would have been void and thereby unenforceable under the common law doctrine of restraint of trade needs to be examined. It is arguable that such a claim would most probably have been unsuccessful.

Finally, the extent to which the Club could have brought an action under European Community law is relevant. Any such claim would probably have failed, although this conclusion must be qualified somewhat by noting that as football becomes an increasingly commercial business, one day a similar claim under competition law might be successful. Further, similar regard must be had to the possibility of a claim that the FL’s rules on ground relocation³ are, or a decision such as that in the WFC case to refuse permission is, contrary to fundamental EC free movement rules⁴.

There are also organisational consequences for British football. One of the most fundamental facets of British football is its pyramid structure, preservation of which is one of the vital objectives behind the rules of the sport and the actions of its governing bodies. Rather than preserving this pyramid structure by ensuring the Club an opportunity of survival⁵, WFC’s relocation offended this sacred structure by gifting Milton Keynes a place in one of the most sought-after leagues, just outside of English football’s elite FA Premier League.

Does this historic decision set a dangerous precedent for the franchising of football clubs? Although it is unlikely that the decision will open the floodgates to a trend of franchising in British football, it is not unlikely that upon a similar set of facts, WFC’s fate may one day serve as the blueprint for the sale of a struggling football club to the highest bidding city.

Background

The decision that was reached by the IC⁶ was made in light of “exceptional circumstances”⁷ that were peculiar to WFC. In order to understand these exceptional circumstances, and thereby the decision itself, a brief capitulation is required regarding the background of the Club. Originally formed in 1889 as Wimbledon Old Centrals, WFC initially played its matches on Wimbledon Common. The Club later moved to a stadium in Plough Lane in Wimbledon, a place it would call ‘home’ for

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nearly 80 years until 1991 when it moved to Selhurst Park, a transition forced upon the Club when its stadium at Plough Lane was not converted to all-seating according to the requirements set out in the Taylor Report⁸ following the Hillsborough disaster in 1989. WFC had been elected to the Football League in 1977 and in 1986 gained promotion to the First Division, a feat acknowledged by the IC as “an example to all as to the footballing success that can be achieved by a relatively ‘small’ club”⁹. The Club was a founder member of the FA Premier League in 1992, where it remained until it eventually lost its battle to compete both on and off the field of play with the English footballing elite and was relegated in 2000. At the time of the soap opera surrounding the move to Milton Keynes, the Club was floundering, struggling to keep its head above the choppy waters of FL Division One¹⁰.

The legal issues

Exercise of discretion by the FL

The relevant rules with which the Club was concerned were the Rules of the FL, and most notably the obligation¹¹ for clubs to comply with the following criteria:

3 Location of Ground

The location of the ground, in relation to the conurbation, as defined by the Board, from which the club takes its name or with which it is traditionally associated, must meet with the approval of the Board.

4 New Stadium

The club must disclose, as soon as practicable, plans and details of any proposed future move to a new stadium. The location of the proposed new stadium must meet with the approval of the Board.¹²

In addition:

Registration of Ground

Each Club shall register its ground with the Executive and no Club shall remove to another ground without first obtaining the consent of the Board.¹³

These regulations do not impose an absolute prohibition against relocation, but rather provide that the FL has a discretion to approve such a move. Therefore, when faced with a club that wishes to relocate, the FL may either approve or decline that proposed relocation under its rules. The FL has an obligation to follow its rules in much the same way as does a public body, and

particularly, if one of its rules provides it with a discretion then that discretion must be exercised and, in this instance, the FL must not refuse permission on the basis of an inflexible policy¹⁴. Indeed, the FA Arbitration Panel, to whom the case was referred under Rule K¹⁵ of the FA Rules, decided that the FL had “decided the application, not on its merits, but on the basis of an inflexible view or policy that the rule should not be used to sanction a move of such a distance”¹⁶. The FA Arbitration Panel made no decision as to whether the relocation should be approved or otherwise, but ruled that the FL had acted outside the powers conferred on it by its rules in dismissing the application by the Club to relocate simply on the basis that the move was “a bridge too far”¹⁷, and without any analysis of the competing arguments put forward by the Club in support of its application.

The FL should not be criticised for having adopted a policy that a relocation of such distance should not be permitted. There is nothing unlawful about the adoption of such a policy and indeed to do so promotes “consistency and certainty”¹⁸. However, once the FL has adopted such a policy, it must then consider whether that policy should or should not be applied in the circumstances of the particular case with which it is faced¹⁹; it is this obligation to which the FL failed to adhere. In providing the FL with a discretion in such circumstances, the rule conferred a positive obligation upon the FL to consider the arguments put forward by the Club in support of its application to relocate.

The FL should properly therefore have made its decision by weighing up the objections to the relocation²⁰ against the “exceptional circumstances”²¹ surrounding the Club’s rather perilous plight. Once it had performed this analysis, the FL should have considered its conclusion in light of its policy on such relocations, and ultimately have decided whether, given the competing arguments it had analysed, the policy should be applied to the Club’s particular case or not.

An analysis of the competing arguments is required in order to ascertain whether or not the facts provided the FL with a sufficient spectrum of outcomes in order to refuse the Club’s application under a proper exercise of its discretion.

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1. The community argument

Mr Nicholas Coward, the Company Secretary to the FA, remarked that:

“...football clubs are not regarded by the FA solely in the same terms as would other ordinary businesses. Although legal ownership resides in the club’s shareholders, it is the view of the FA that other stakeholders include the supporters of the club, as well as the community in which it has grown and for which it provides a focal point for civic pride.”²²

To continue the analogy (or rather, the lack thereof) of football clubs to other businesses, the relocation of a football club outside of its community would be tantamount to a misappropriation of community assets. Mr Coward then proposed that it is this unique relationship between a football club and its community upon which English football is based, and further, that it is the “bedrock of the value of the football club ‘brand’ upon which club owners are able to base their commercial programmes”²³. Having considered the evidence before it, the IC rebutted this argument on the premise that the Club’s relationship with the community of the London Borough of Merton was not so profound that it could justify refusal of the proposed relocation²⁴. This conclusion loses its credibility when one steps back from the statistical surveys: when playing its home matches in its ‘conurbation’ at Plough Lane, WFC enjoyed a core of support from within its local community, and continued to do so after 1991 and the move across South London to Selhurst Park. The Selhurst Park era coincided with the inception of the FA Premier League, and as the entertainment provided by top-flight English football cast its net over a wider section of the population, WFC gradually began to enjoy a steady increase in its attendances²⁵. The osmotic dilution of WFC’s fan base was a product of the Club being frog-marched to its temporary new home outside its community and the success enjoyed by both the Club itself and the FA Premier League as a collective. Clubs such as Manchester United, Arsenal and Liverpool, along with the rest of Europe’s elite football clubs, enjoy a national and global appeal²⁶, resulting in a fanatical following worldwide; to argue that such appeal could be used to justify uprooting their grasp on their respective communities is a dangerous and ultimately unconvincing one.

2. The pyramid argument

As discussed further in Paragraph E.1 below, the sacrosanct pyramid structure upon which English football, both professional and amateur, is modelled is fundamentally based on promotion through sporting merit. As noted in Paragraph C above, the success that WFC achieved in a short period of time epitomised the pyramid system and it is sadly ironic that a discussion of the nature of such system is set against the backdrop of WFC’s case. By relocating to a city that did not have a professional football league club of its own, the Club effectively circumvented the pyramid structure by tapping into “the largest population in Europe without a professional football team”²⁷. The IC was of the opinion that the pyramid would be better preserved by ensuring the survival of the Club, noting in support for this view that were WFC to go into liquidation, another club would replace WFC in Division One for the following season “not on its own sporting merit but as a result of WFC’s predicament”²⁸. To view such a set of events as being undesirable on account of factors outside of sporting merit does not sit comfortably with history: in December 2004, Wrexham FC was docked ten points for going into administration and was ultimately relegated from League One as a result²⁹. That football clubs are required to keep their financial affairs in order is inextricably linked to sporting merit in this sense, and history has shown that the onset of administration or liquidation has a real effect on promotion and relegation within the pyramid. Further, whilst the FL states amongst its objectives to “represent the interests of its members”³⁰, precedent shows that such an objective does not extend to assisting individual clubs on a case-by-case basis in preventing the onset of liquidation³¹.

3. The precedent argument

Those who objected to the proposed relocation were concerned that approval of such a move would create a precedent of football clubs in severe financial difficulties³² being auctioned and sold to the city with the most lucrative offer. Notwithstanding that the relocation of football clubs was nothing new to English football³³, the IC believed that such franchise opportunities would be averted because the permission to relocate was confined to WFC’s “unique” and “exceptional facts”³⁴. Indeed, the IC noted that it “cannot conceive of another club in WFC’s league position (or which is comparable to WFC)”³⁵ which would meet the criteria to which it referred as “exceptional circumstances”³⁶. The IC was indeed correct that, when it reached its decision, those exceptional facts could not be found to apply to any

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other comparable club³⁷. What the IC did not go on to say, however, is that it is inconceivable that those exceptional circumstances might one day befall another club in the future. It is difficult to comprehend how the footballing authorities would not concur with the approach adopted by the IC should they be presented in the future with a club on the verge of liquidation, in a temporary home, whose sorry roots are deemed not to have embedded themselves so deeply in the local community that they are powerless to resist rather more fertile soil elsewhere. An unlikely set of facts they may be, but possibility falls short of inconceivability.

In summary, of these three principal objections raised to the proposed relocation, no single one may have provided an impact so substantial as to derail the Club's application, but the compounded weight of all three should have been sufficient to provide the FL with a spectrum within which it could have exercised its discretion, and had it properly considered all of the above during the Club's initial application, it could have properly used its discretion to refuse the relocation, severe though the consequences of such refusal may have been for the Club.

Restraint of trade

As discussed above, the FA Arbitration Panel remitted the case to the FL based on a procedural flaw in the FL's decision, namely its failure to have considered the particular circumstances surrounding the Club's case. An argument advanced by the Club at arbitration that to refuse the relocation would be unenforceable under the common law restraint of trade doctrine was discussed but ultimately not decided upon. Upon an analysis of the particular facts of the case with regard to the common law doctrine of restraint of trade³⁸, it is unlikely that the Club would have succeeded with such a claim. The doctrine, which is based upon the premise that all restraints are void unless justified, has three limbs, as set out in the preceding paragraphs:

Was there a restraint of trade?

The starting point for WFC would have been to prove that either the relevant FL rules concerning ground location³⁹, or the decision by the FL to refuse the relocation, served as a restraint on their ability to trade. The tension at this stage between the Club's and the FL's respective positions is apparent: on the one hand, the Club was restrained from trading in Milton Keynes as it wished to do⁴⁰; whilst on the other, the Club's business was to enter a team to compete in Division One, together with the exploitation of all the opportunities that flow from that business, and the FL had not restrained the Club's ability to do so merely by refusing relocation to Milton Keynes. It is apparent from the line of case law that the sword wielded by the doctrine is an extremely broad one, and that the restraint does not have to be an absolute bar and may instead only be a partial restraint in order to capture the attentions of the doctrine. In *Newport Association Football Club Ltd v Football Association of Wales*⁴¹, Jacob J held that a resolution passed by the Football Association of Wales that effectively prevented Newport from participating in English league football by banning the club from playing its home English league matches in Wales "does fetter the free choice of Welsh clubs... as to how they exercise their trade"⁴². Similarly, in *Stevenage Borough Football Club Ltd v The Football League Ltd*⁴³ Carnwath J held that a rule restricting the club's ability to qualify for promotion into the English football league from the GM Vauxhall Football Conference (as it was then known) was a restraint for these purposes. Carnwath J admitted that the club was not "prevented from its business of playing football within the Vauxhall Conference or any other group of clubs which was prepared to have it as a member" but was of the opinion that such a partial restraint may nevertheless be an actionable restraint of trade.

The conclusion that must be drawn from these cases⁴⁴ is that the FL's decision would be caught by the first limb of the doctrine of restraint of trade, and the next issue that must be addressed is whether the restraint was reasonable and justified in the interests of the parties at the time.

Was the restraint justified in the interests of the parties?⁴⁵

In *Nordenfelt* Lord MacNaughten recognised that the notion of "interference with the individual liberty of action in trading"⁴⁶, and thereby restraint of trade, on its own is almost by definition contrary to public policy, but that in certain circumstances, interference by way of such restraint is capable of justification if it is reasonable, and that 'reasonableness' in this context is

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determined with reference not only to the interests of the public but also to the interests of the affected parties⁴⁷. In order to escape this second limb of the test, it is for the sports governing body to satisfy the court that the restraint not only pursues a legitimate aim that should be protected, but also that it does so in a reasonable and proportionate manner. In WFC's case, the FL would need to have demonstrated that its decision to refuse the relocation must have been necessary to achieve its legitimate aim⁴⁸ and that it had no less onerous alternative options than to refuse the proposed relocation in order to achieve that aim. It is evident that the greater the potential harm caused to the Club, the more difficult it would have been for the FL to justify a restraint on the balance of the interests of the parties: this would have presented a substantial hurdle for the FL to overcome when one considers the potentially fatal consequences of the FL's decision for the Club. Essentially the question to be asked is whether the damage caused by the probable folding of a football league club would have been sufficient to tip the scales in favour of the Club's survival and thereby justify the potential compromising of football's pyramid structure. The scales are finely poised, and it is arguable that the integrity of the pyramid would have been compromised regardless of whether the Club relocated or went out of business.

For the reasons discussed above⁴⁹, the scales would probably have tipped in favour of the FL's interests since the harm done to WFC would not have justified an interference with the integrity and geographic structure of the sport. The IC was of the opinion that the decision of the FL went too far in achieving its fundamental objective and that the decision was disproportionate to the harm caused to the Club. In forming that opinion, the IC proposed several measures aimed at preserving the "essential identity" of the Club⁵⁰. That next to none of these measures are now in place or were ever implemented⁵¹ serves to cement the view that the IC was wrong to decide that the FL's decision to refuse the application was a bridge too far, and it is, albeit with hindsight, apparent that anything less than to refuse the relocation would fail, and indeed has failed, to preserve both the "essential identity" of the Club and integrity of the sport in this country.

Was the restraint justified in the interests of the public? If the party challenging the restraint fails to succeed at the second limb, at the third limb of the Nordenfelt test the pendulum swings back towards the 'victim' of the restraint and provides it with an opportunity to prove that, despite being justified in the interests of the parties, the restraint should be void and unenforceable

by reason of it failing to be reasonable and justified in the interests of the public. It is at this stage that the analysis raises an important issue, and one that has been borrowed from the jurisprudence on public law judicial review: that the party that is best placed to act in the public interests of the particular sport in question is nearly always the governing body of that sport⁵². It is for this reason that the courts should, and indeed do, demonstrate a certain reluctance to impose their views as to the public interests of a particular sport⁵³. In this particular case, it would have been open to the IC to find it extremely difficult for the Club to overcome this burden of proof.

Therefore, whilst the FL's decision was quite plainly a restraint on the Club's ability to ply its trade in Milton Keynes, the FL may have been able to justify such restraint on the balance of the interests of the parties and the Club would probably have failed to overturn the decision on the basis of the interests of the public.

The Application of EC Law

Whilst quite plainly very different to any other industry, such is the mass global appeal of sport that it is at the same time equally obviously very much big business. This increased commercialism has inevitably attracted far more intense legal scrutiny and in no other sport is this more apparent than in football. The two areas of EC law that have found themselves almost magnetically drawn to the shiny new world of sport in recent times are those of competition law and of the various freedoms enshrined in the EC Treaty⁵⁴. The result of this attraction is that a discussion of the various legal angles from which WFC's case may be viewed would not be complete without some discourse on the ability of the Club to have mounted a claim based on EC law rules.

It is important to consider whether the FL's decision would actually have engaged Community law. The European Court of Justice has established that EC law is indeed capable of applying to private sporting associations, such as the FL⁵⁵. However, the extent to which sport is subject to EC law has been confirmed by the European Court of Justice as being only "in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty"⁵⁶. The corollary is that certain purely sporting rules and decisions of the FL do not attract EC law, even though they may give rise to economic consequences⁵⁷. Because of the interdependence between the socio-cultural and economic aspects of sport, it is often difficult to draw a line between a purely sporting rule or decision and one that relates to "economic activity".

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In the Mouscron case⁵⁸, the Commission took the view that the UEFA rule in question was a sporting rule that did not fall within the scope of EC competition rules. The Commission was of the view that in adopting the rule UEFA "has exercised its legitimate right of self-regulation as a sports organisation in a manner which cannot be challenged by the Treaty's competition rules"⁵⁹. The basis for this conclusion was the fundamental principle that the UEFA rule was merely one of many "rules of sports organisations that are necessary to ensure the equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions"⁶⁰. The Commission held that there was not sufficient Community interest in examining the rule in question, a stance that it justified on the grounds that EC law does not call into question the "national geographical organisation of football". The Commission had previously considered⁶¹ a complaint from Clydebank FC in relation to a league rule that prohibited cross-border movement of clubs contrary to the EC law principle of freedom of establishment, stating that "the organisation of national football leagues on a territorial basis is not related to the economic issues in this sport but to the very nature of the sport in question"⁶².

The theme running through the Commission's jurisprudence is that whether challenged by EC competition rules or the principle of freedom of establishment, the Commission is not, and should not be, prepared to step into the shoes of the sports governing body when faced with a dispute over certain rules that are purely sporting. The difficulty with cases such as WFC's is that while the rules on ground location at first glance appear to fit within the above definition of sporting rules formulated by the Commission in Mouscron, it is difficult to see how the FL's decision was not "related to economic issues", especially given the potential implications of the FL's refusal for WFC, teetering as it was on the brink of liquidation. Taken to an extreme, one could very easily find a titanic economic consequence for even the most purely sporting rule⁶³, yet such pecuniary prize - or peril - will not, of itself, engage EC law. In Mouscron, that UEFA prevented Belgian football club Excelsior Mouscron from using the stadium of Lille-Métropole for a 'home' game resulted in Communauté Urbaine de Lille being unable to hire out the stadium to the club, thereby causing financial detriment to both parties. The decision to prevent Clydebank FC from playing its home games in Dublin as discussed above carried similar financial implications. Indeed, some form of economic motive will almost necessarily be predominant when a club seeks to challenge such a rule or decision. The

Commission has been quite clear that in such circumstances, it will not step into the domain of the governing body, and quite rightly so. The conclusion that one reaches is that had the Club complained against the FL's original decision on an EC law basis, the Commission would not have intervened.

The consequences for English football

The Pyramid

Football in England is organised in a structure that resembles a pyramid with a hierarchy⁶⁴. One of the most salient features of this structure is the interdependence between the various levels within it which has been created by a system of promotion and relegation based solely on sporting merit⁶⁵. The result is that "a football club playing at a regional level can qualify for championships on a national or even international level (e.g. the UEFA Cup) by winning promotion"⁶⁶. It is ironic that no club has been a more shining example of promotion based on sporting merit than WFC⁶⁷: a team representing the community of Wimbledon was able to gain promotion from playing football at a regional level ultimately into the FA Premier League itself. Milton Keynes had previously been represented in the pyramid of non-league football by Milton Keynes City FC until that club closed in 2003 and suddenly the city found itself with a golden ticket to Championship-level football upon the advent of WFC.

It is precisely this behaviour from which the FL's role is to protect football: clubs "ditching their communities and metamorphosing into new, more attractive areas"⁶⁸. That the community of Milton Keynes did not have a FL club is a reflection of a lack of popular and financial support for its former local team, Milton Keynes City FC; to introduce a successful team before it has developed a fervent local following is to put the cart before the proverbial horse. Whereas Wimbledon formerly enjoyed pyramid success through sporting merit, Milton Keynes will benefit from sporting merit through exploitation of WFC's success in the pyramid. In this sense, the IC's decision has struck a blow to the very heart of the structure of English football by not only endorsing the disassociation of a team from its community but also undermining the vital element of sporting merit that underpins success or failure in the sport⁶⁹.

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Football franchising

That the IC justified their decision on the basis that, *inter alia*, “Milton Keynes provides a suitable and deserving opportunity in its own right where none exists in South London”⁷⁰ rather smacks of the motives behind the relocation of sporting franchises in the North America. Indeed, during the 1990s, there were several relocations within the National Hockey League⁷¹ (the NHL) which were deemed by NHL Commissioner Gary Bettman and other team owners to be “beneficial to the NHL in its effort to secure broader exposure in southern and western markets that were without teams”⁷². The similarity between these two statements does not sit comfortably alongside the IC’s intention that it “does not wish... for franchise football to arrive on these shores”⁷³. While one should probably accept that this decision, on WFC’s very specific set of circumstances, will not open the floodgates to an influx of sporting franchises upon English football, in the best interests of the game, the IC would have been safer to avoid flavouring its decision with more than a pinch of seasoning that was borrowed from a North American recipe for sporting franchise.⁷⁴

Conclusion

In reaching its ground-breaking decision, the IC had two main concerns for football’s wider interests: the potential damage to the sacrosanct structure of English football; and the possibility of creating a dangerous precedent tantamount to franchise football in England. In reality, however, the IC’s decision has had the effect of undermining the integrity of the pyramid structure of football, and while there is little danger of an introduction of the US-style franchising of football clubs, it is not inconceivable that the extraordinary set of facts with which the FL, and ultimately the IC, was faced could bring about a similar relocation of another club in the future.

The FL could properly have exercised its discretion to refuse the relocation, and any appeal against such refusal by the Club under either the doctrine of restraint of trade or EC law would have been unlikely to succeed. One important caveat to bear in mind is that as sport in general, and especially football, becomes increasingly dependent upon viewing figures rather than ticket sales, the likelihood of such claims can only increase, and the analysis may change as case law evolves. So, while little AFC Wimbledon continues its arduous climb up the pyramid⁷⁵, and Milton Keynes Dons FC begins to lose its footing on the upper echelons of it⁷⁶, who would bet against these two communities soon once again crossing swords and preparing to do battle, the arena this time being not off the field of play but rather very much upon it? **BASL**

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- 1 Quotation from WFC supporter Dean Parsons, taken from “The Spirit of Wimbledon: The living memories of the Dons from 1922-2003” by Niall Couper, at page 214.
- 2 Regulations 8 and 13 of the Regulations of the FL, together with the criteria set out in Appendix I thereof (see paragraph D.1 below).
- 3 See Note 2 above.
- 4 Article 43 (ex 52) of the EC Treaty.
- 5 As put forward by the IC and discussed further in paragraph D.1.
- 6 After the initial application had been refused by the FL, the Club and the FL agreed to proceed to arbitration under the FA Rules. The FA Arbitration Panel unanimously decided that the FL’s decision had been procedurally flawed, and remitted the matter back to the FL on 29 January 2002, who subsequently referred the case to the IC.
- 7 These were at paragraph 118 of the Decision of the IC re WFC’s application for permission to play home matches at Milton Keynes, dated 28 May 2002, (unreported) as (1) WFC has no stadium of its own, and has been a secondary tenant, for some 11 years and its shareholders are not prepared to continue to finance its operation in its present financial circumstances.
(2) WFC needs to relocate to have a commercially viable future or, given the level of losses it will continue to sustain, it will go into liquidation. There is no viable South London alternative.
(3) Milton Keynes provides a suitable and deserving opportunity in its own right where none exists in South London.
(4) WFC’s links or roots in its community are of a nature that can be and are agreed should be retained by WFC and MKSC (the Milton Keynes Stadium Consortium), albeit in a new location. The Football League can ensure these links are put in place and preserved.
- 8 Specifically, the requirement that clubs in the top two divisions should play in all-seater stadia that was later implemented by the Football Licensing Authority.
- 9 At paragraph 3 of the Decision of the IC (ibid).
- 10 In 2004, the FL Divisions One, Two and Three were renamed the Championship, League One and League Two respectively as part of an extensive rebranding exercise.
- 11 Regulation 8 of the Rules of the FL.
- 12 Paragraphs 3 and 4 of Appendix I of the Rules of the FL.
- 13 Regulation 13.1 of the Rules of the FL.
- 14 Blackler v NZRFL [1968] NZLR 547 at 552 [the player argued *inter alia* that the league had not given due consideration to the facts of his particular case and instead had just applied the rigid policy that it had adopted].
- 15 Rule K of the FA Rules stipulates that any dispute concerning, *inter alia*, the rules and regulations of the FL must be referred to and finally resolved by arbitration under the FA Rules.
- 16 At paragraph 54 of the Award of the FA Arbitration Panel (unreported) on 29 January 2002.
- 17 At paragraph 60 of the Award of the FA Arbitration Panel (ibid).
- 18 Per Lord Woolf in *R v Secretary of State for the Home Department ex parte Venables* [1997] 2 WLR 67 at 90B.
- 19 Per Lord Reid in *British Oxygen Company Limited v Minister of Technology* [1971] AC 610 at 625: “The general rule is that anyone who has to exercise a statutory discretion must not ‘shut his ears to an application’... What the authority must not do is to refuse to listen at all.”
- 20 The objections to the proposed relocation generally fall into three categories:
a) the identification of a football club with its community;
b) the sacrosanct nature of the pyramid system based upon sporting merit; and
c) the possibility of creating a precedent.
- 21 As set out in Note 7 above.
- 22 At paragraph 15.1 of his statement of 13 May 2002 to the IC.
- 23 At paragraph 15.1 of his statement to the IC (ibid).
- 24 The most compelling of the evidence being that the vast majority of WFC supporters do not live in Merton or Wimbledon and that since 1991 when the Club moved to Selhurst Park, there has been no stadium serving as a focus for the community in Merton (at Paragraph 109 of the Decision of the IC (ibid)).
- 25 WFC’s average attendance was 8,400 in the FA Premier League’s first season in 1992-1993 compared to 17,115 in the 1999-2000 season, the year WFC was relegated from the FA Premier League.
- 26 In a letter dated 24 June 2002 from Kris Stewart, the Chair of the Wimbledon Independent Supporters Association to Professor Derek Fraser, the Chair of the IC, in response to the IC’s decision, it was noted that during the season ticket applications for Arsenal FC’s new stadium, only around 10 percent. were residents of the London Borough of Islington.
- 27 At paragraph 74 of the Decision of the IC (ibid).
- 28 At paragraph 116 of the Decision of the IC (ibid).
- 29 Wrexham FC was relegated on 43 points. Ironically, Milton Keynes Dons FC (formerly WFC) survived relegation from League One in the same season with 51 points. Had Wrexham FC not been docked 10 points, it would have remained in League One and Milton Keynes Dons FC would have been relegated instead.
- 30 The list of the FLs objectives are found in the FL Mission Statement contained within its Handbook.
- 31 FL club Aldershot FC folded in 1992, as did Accrington Stanley FC in 1962.
- 32 Indeed the concept of financial difficulties is one that is synonymous with the vast majority of FL clubs that play professional football outside the FA Premier League.
- 33 Examples include Arsenal FC moving from Woolwich to Islington and Queen’s Park Rangers FC unbelievably relocating 18 times to 14 different locations in and around London. In Scotland, in 1996

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- the Scottish Football League approved the relocation of Meadowbank Thistle FC away from Edinburgh to new town Livingstone over 18 miles away, changing its name at the same time to Livingstone FC. Whereas previously the club had been languishing in the bottom division of the Scottish Football League, since the relocation, the club now competes in the Scottish Premier League and has even qualified for the UEFA Cup, with fans easily able to travel to games, and the club's prospects have improved considerably. In England, in recent times the FL has approved numerous temporary relocations, many outside the particular club's communities, including Charlton Athletic FC, Fulham FC, Middlesbrough FC, Brighton & Hove Albion FC and Bristol Rovers FC.
- 34 At paragraphs 117-118 of the Decision of the IC (ibid).
- 35 At paragraph 118 of the Decision of the IC (ibid).
- 36 As listed above in Note 7.
- 37 The report by Deloitte & Touche that was put before the IC showed WFC to be running at an operating loss of £10.8 million, greater than all but two of the other 91 professional clubs in England (significantly, those two clubs with greater operating losses were Blackburn Rovers FC and Fulham FC, both of which benefit from considerable investment and financial support).
- 38 The conventional common law test is set out in *Thorsten Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535.
- 39 See paragraph D.1 above. This discussion will focus on the actual decision itself rather than the relevant FL rules.
- 40 In addition, as argued by the Club, the decision or the rule itself could ultimately have resulted in the liquidation of the Club, thereby restraining the Club from trading altogether, whether in Milton Keynes or anywhere else.
- 41 [1995] 2 All ER 87.
- 42 At page 97.
- 43 (1996) Times, 1 August.
- 44 In further support of this conclusion, a ban on participation in particular matches only (*Greig v Insole* [1978] 1 WLR 302) and a transfer system that did not stop players from participating altogether (*Buckley v Tutty* (1971) 125 CLR 353) have also been held to be restraints.
- 45 In *Stevenage Borough Football Club Ltd v The Football League Ltd* (ibid) *Carmwath J* suggested that this step in the analysis should be omitted in the context of sports governing bodies, so that once the restraint has been established, the onus remains with the party challenging the restraint to convince the court that the restraint is not in the public interest. For the purpose of this discussion, it shall be assumed that the three-limbed test in *Nordenfelt* should be engaged in full with relation to the facts of WFC's case.
- 46 *Ibid*, at page 565.
- 47 *Ibid*, at page 565.
- 48 In this case, the FL's legitimate aim being the preservation of the integrity of the sacred pyramid structure of English football.
- 49 See paragraph D.1.
- 50 At paragraphs 112-114 of the Decision of the IC (ibid), the IC specifically recommended that the FL take measures to ensure:
- * continuity of the Club's name, nickname, logo, colours, playing strip and other merchandise as well as its players, staff, shareholders, directors, academy, community schemes, websites and Club shop in Wimbledon;
 - * subsidised/free travel to matches between Wimbledon and Milton Keynes;
 - * discounted tickets for existing fans at the new stadium in Milton Keynes;
 - * a ticket outlet in Merton;
 - * continued communication with existing fans;
 - * local Merton press coverage of WFC and its results;
 - * promotional material regarding maintenance of identity as WFC;
 - * a club museum at the new stadium in Milton Keynes;
 - * stadium branding at the new stadium in Milton Keynes; and
 - * re-naming of local areas/streets in Milton Keynes to associate with WFC.
- 51 For example, by the start of the 2004/05 season following the relocation, the Club had changed its name to Milton Keynes Dons FC and its nickname to MK Dons and had abandoned its former logo, colours and playing strip.
- 52 This reflects the principal of judicial review that it is not for the court to step into the public body's shoes by assessing the case on its merits. This principal is fundamental to judicial review, as neatly asserted by *Sir Thomas Bingham MR* in *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (at 556D-E): "It is not the constitutional role of the court to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so... the court must properly defer to the expertise of responsible decision-makers".
- 53 The analysis here is similar to that in the context of the application of EC law in paragraph D.3 below.
- 54 This discussion will focus on the extent to which EC law competition rules, namely Arts 81 and 82 of the EC Treaty, apply to the Club's case, together with the relevance of the rule on freedom of establishment, namely Art 43 of the EC Treaty.
- 55 At paragraphs 123-125 of Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* [1996] All ER 97, where the ECJ again referred to *Walrave*.
- 56 At paragraph 122 of *Bosman*, where the European Court of Justice referred to the jurisprudence established by the earlier cases of *Walrave v Association Union Cycliste Internationale* C-36/74 [1974] ECR 1405 and *Doná v Manero* C-13/76 [1976] ECR 1333.
- 57 An example of such purely sporting rules would be the on-field rules of football, or the rule that a national member state team may only comprise of individuals who are nationals of that member state. In the latter case, while it would be impossible to turn a blind eye to the considerable financial value that is generated by international football, the rule in question is quintessentially sporting in its nature and objective to preserve the integrity and competition of international football.
- 58 'Limits to application of Treaty competition rules to sport: Commission gives clear signal' Commission Press Release IP/99/965 dated 9 December 1999 where the Commission was asked to consider the UEFA Cup rule that each club must play its home matches at its own ground.
- 59 *Ibid*.
- 60 *Ibid*.
- 61 [1996] OJ C217/87.
- 62 *Ibid*.
- 63 Surely the rules that are the most purely sporting are the 'rules of the game'. But a disallowed goal or a last-minute penalty decision, for example, can affect promotion to, or relegation from, the FA Premier League, or perhaps qualification for the UEFA Champions League, which would undoubtedly carry substantial economic consequences.
- 64 The FA Premier League sits on top, with the FL Championship and Divisions One and Two beneath it. Nation-wide non-league semi-professional and amateur football feeds into the FL through a complex web of regional leagues that culminate in the Conference and commence on the nation's local parks every Sunday morning.
- 65 This is generally the case even though some leagues require new entrants to fulfil basic technical and economic criteria in addition. An example of such requirements was provided by *Stevenage Borough Football Club* (ibid) where the FL required that in order to be admitted, *Stevenage Borough FC*, who had finished top of the Conference, had to ensure a ground capacity of at least 6,000, as well as meet certain financial criteria.
- 66 "The European Model of Sport", a Consultation Document of the Directorate-General X of the European Commission, at page 4.
- 67 As noted above in paragraph C.
- 68 At paragraph 108 of the Decision of the IC (ibid).
- 69 As discussed above in paragraph D.1, the IC argued that the pyramid was better served by ensuring WFC's survival. In fact, the pyramid concept would dictate that WFC slip back down the leagues until it reaches a level that can be sustained by its local community. In this sense, perhaps it could be said that the Club 'over-achieved' during its run of success in the 1980s and 1990s. Amidst negotiations to relocate the Club, in November 2001 supporters of WFC began to cultivate the idea of establishing a new club, to be owned by the fans of WFC. The new club, called AFC Wimbledon, was conceived as a continuation of the 'spirit' of WFC, and currently plies its trade in the non-league Ryman's Premier League at a level that is comfortably sustained by support from its local community.
- 70 At paragraph 118 of the Decision of the IC (ibid).
- 71 During this period, NHL teams moved from Minnesota to Dallas, from Quebec City to Denver, from Winnipeg to Phoenix and from Hartford to Raleigh.
- 72 "Sports and the Law" by *Weiler & Roberts*, at page 457.
- 73 At paragraph 108 of the Decision of the IC (ibid).
- 74 That the consortium dedicated to bringing WFC to Milton Keynes had already entered into talks with fellow FL clubs Luton Town FC, Barnet FC, Queens Park Rangers FC and Crystal Palace FC before focusing on WFC only adds to the undertones of sporting franchise that run rather too conspicuously beneath an attempt to save the Club.
- 75 AFC Wimbledon was promoted from the Combined Counties League in 2004 and subsequently from the Ryman Football League Division One in 2005 into the Ryman Football League Premier Division where it currently competes.
- 76 Milton Keynes Dons FC was relegated from the Championship in 2004 and subsequently from League One in 2006. It currently competes in League Two, three divisions above the Ryman Football League Premier Division in the pyramid.
- 77 Other than those specifically referred to herein.

UEFA's Homegrown Player Rule – Does it Breach Article 39 of the EC Treaty?

By Ian Lynam, Solicitor, Slaughter and May

Introduction

The homegrown player rule (the "Rule") was signed into effect last Spring by UEFA's Executive Committee and is being introduced for the Champions League and UEFA Cup on a staggered basis over the next three seasons. It is UEFA's "hope and recommendation" that its member associations will adopt the Rule for domestic club competitions.¹ For the current 2006/2007 season, the Rule provides that four places on each club's 25 player A list must be reserved for homegrown players. The number of reserved places will increase to six for the 2007/2008 season and to eight from the 2008/2009 season onwards. The Rule defines two categories of homegrown player:

- "club-trained players" – players who have spent three seasons or 36 months with their current club between the ages of 15 and 21; and
- "association-trained players" – players who have spent three seasons or 36 months with a club or clubs in the same association as their current club between the ages of 15 and 21). Not more than half of the reserved spots can be filled by association-trained players.

The Rule had its genesis in the immediate aftermath of Euro 2004 when UEFA announced proposals "aimed at fostering the development of homegrown players by European clubs"². UEFA stated that the proposals were intended to address:

- (i) a lack of investment in player training;
- (ii) a reduction in competitive balance (both at club and national team level);
- (iii) the hoarding of players by clubs;
- (iv) the weakening of national teams; and
- (v) the erosion of regional and national identity within the sport.

UEFA's Chief Executive acknowledged, however, that the proposals were at least in part motivated by the poor performance of certain sides in Euro 2004, a tournament in which many of the larger footballing nations struggled.³ UEFA's initial proposals required

clubs to include at least seven homegrown players in each match squad of 18 players for both UEFA and domestic competitions.⁴ The effect of these proposals would not have been far removed from the "3+2" rule which found the disfavour of the ECJ in *Bosman*.⁵ UEFA realised that this proposal would be extremely unlikely to withstand legal scrutiny and, over a slightly clandestine consultation period, amended their proposal to the less obviously restrictive current formulation.

Is the Rule Subject to European Law?

Sport's special status under European law is well established. In *Bosman*,⁶ the ECJ recognised sport's "considerable social importance" and the Nice Declaration of 2000 stated that the Community must "in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."⁷ Notwithstanding this special status, the ECJ has confirmed that sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty.⁸ Furthermore, once a sport falls within the scope of Community law, all of its rules (of both economic and purely sporting nature) are subject to the provisions of Community law. This principle has been confirmed in the recent *Meca*⁹ decision. Professional football clearly constitutes an "economic activity"¹⁰ and its rules, including the Rule, are therefore subject to Community law.

The scope of this article is limited to considering the application of Article 39 of the EC Treaty¹¹ to the Rule. It is worth noting, however, that the Rule may also be susceptible to challenge under other heads of European Law. In particular, the Rule may constitute illegal discrimination on the grounds of age for the purposes of the EU Framework Directive for Equal Treatment¹² and the relevant implementing legislation in each Member State.¹³

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Does Article 39 of the EC Treaty Apply to the Rule?

In *Walrave*,¹⁴ the ECJ confirmed that Article 39 applies not only to actions of public authorities but also extends to rules of any other nature aimed at collectively regulating gainful employment and services. The ECJ approved this principle in *Bosman*¹⁵ and confirmed that Article 39 applies to "rules laid down by sporting associations such as RBSFA, FIFA or UEFA which determine the terms on which professional sportsmen can engage in gainful employment".¹⁶ UEFA has stressed that the Rule represents a "sporting rule".¹⁷ The ECJ recognises that Article 39 does not apply to certain categories of "sporting rules", namely rules which are of purely sporting interest and, as such, have nothing to do with economic activity.¹⁸ This maxim was restated in the ECJ's recent *Meca*¹⁹ decision. Nationality restrictions on club sides, both direct and indirect, go to the essence of the activity of professional players and are not, therefore, of "purely sporting interest".²⁰ The Rule is aimed at collectively regulating gainful employment and services and represents an indirect nationality restriction and is therefore subject to Article 39.

Article 39 reads:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

In order to establish whether the Rule is in breach of Article 39 it is necessary to apply a three step test:

- (i) Is there a restriction on the free movement of workers?
- (ii) If so, can it be justified?
- (iii) If so, are the restrictions proportionate?

Is there a restriction on the free movement of workers?

UEFA does not believe that the Rule constitutes a restriction on the free movement of workers as it has "nothing to do with the nationality of players and (it is) not trying to impede free movement. To the contrary, (UEFA) are trying to create more opportunities for more players whilst also protecting the interests of the game."²²

(i) A Direct Discriminatory Restriction?

A direct discriminatory restriction is a rule which explicitly imposes nationality restrictions on participation in a team or competition. Sporting examples include the "3+2" rule in *Bosman* and the "Italians only" rule in *Dona v. Mantero*. The Rule does not expressly restrict players on the basis of nationality and do not, therefore, constitute a direct discriminatory restriction.

(ii) An Indirect Discriminatory Restriction?

An indirect discriminatory restriction is a rule which, although not expressly imposing any nationality restrictions, nevertheless has the effect of discriminating on the grounds of nationality. It is settled jurisprudence of the ECJ that Article 39 prohibits indirect discrimination so that a restriction which operates to make it more difficult for a non-national to obtain work is likely to fall foul of the Treaty.

In *Ugliola*,²³ an Italian worker challenged a German law which protected a worker's security of employment by including periods of services in the German army when calculating the duration of employment. The ECJ held that the law was in breach of Article 39 as non-nationals were much less likely to satisfy the requirement to have served in the German army. The ECJ decision stressed that Article 39 allowed for no restrictions on the free movement of workers other than on the grounds set out in Article 39.3 (public policy, public security and public health). In *Scholz*,²⁴ the ECJ held that awarding job candidates points for prior employment in the Italian public sector constituted indirect discrimination as Italians were much more likely to satisfy the

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requirement. In *O'Flynn*,²⁵ the ECJ held that in order to show indirect discrimination, it is not necessary to prove that a measure actually affects a higher proportion of non-nationals but only that the measure is "intrinsically liable" to affect non-nationals more than nationals.

Applying the principles established in the above cases to the Rule, non-nationals will clearly be less likely to have satisfied the criteria to be treated as a homegrown player. UEFA has effectively admitted that the majority of homegrown players will be nationals by acknowledging that they intend the Rule to create "a system whereby homegrown players would be given a greater opportunity to play regularly – thereby ensuring a large reservoir of talent for national teams as a result".²⁶ The retention of squad places for homegrown players will act as a hindrance to non-homegrown players (the majority of whom will be non-nationals) seeking to obtain squad places. The fact that the Rule would restrict the ability of non-nationals to gain inclusion in squads, as opposed to their ability to gain employment, is irrelevant. As inclusion in such squads, and the resulting opportunity to participate in matches, is the essential purpose of a professional footballer's activity, a rule which restricts a player's inclusion in such squads also restricts his chances of employment.²⁷

UEFA's homegrown player requirement clearly constitutes, therefore, an indirect discriminatory restriction on the freedom of movement for workers and, as such, represents a *prima facie* breach of Article 39.

(iii) A Non-Discriminatory Restriction?

A non-discriminatory or "indistinctly applicable" restriction is a rule which, even though it applies without regard to the nationality of the worker involved, nevertheless deters that worker from leaving his Member State to work in another Member State. The ECJ, at paragraph 96 of the *Bosman* judgment²⁸, has confirmed that such a rule represents a *prima facie* breach of Article 39.²⁹ Any rule which restricts workers from moving to another Member State, notwithstanding the fact that it is as much a restriction on workers moving within their own state, attracts the application of Article 39.³⁰

The retention of the existing 25 player squad limit constitutes a non-discriminatory restriction as it will limit the number of players employed by clubs and will therefore limit the opportunities for footballers to move to another Member State. Restrictions of this type may be justified on a number of grounds (see below) but will nevertheless, on their face, represent a breach of Article 39.

Can the restriction be justified?

Justification of Indirect Discriminatory Restrictions

The traditional view has been that indirect discriminatory restrictions on the free movement of workers can only be justified on the grounds set out in Article 39(3) - public policy, public security or public health. This was confirmed by the decision in *Ugliola*³¹ in which the ECJ stated that: "Apart from the cases expressly referred to in paragraph (3), Article [39] of the Treaty does not allow Member States to make any exceptions to the equality of treatment and protection required by the Treaty for all workers within the Community by indirectly introducing discrimination in favour of their own nationals alone..." The Rule clearly cannot be justified on the grounds of public health or public security; the public policy justification would seem to offer greater potential. The ECJ, however, has resisted attempts to interpret "public policy" in a manner which would interfere with the objectives of the Treaty. An attempt to bring consumer protection concerns within the ambit of the public policy justification to restrictions on the free movement of goods was rejected by the ECJ who held that the justification must be interpreted strictly and cannot be extended to objectives which are not mentioned in the EC Treaty.³²

More recently, however, some commentators³³ have interpreted the ECJ's decision in *O'Flynn*³⁴ as authority that "mandatory requirements" of the type first recognised in *Cassis de Dijon*³⁵ and developed as regards sport in *Bosman* can be used to justify indirectly discriminatory restrictions on the free movement of workers. This argument is based on the section of the decision in which the ECJ stated that an indirectly discriminatory restriction will not breach Community Law provided it is "objectively justified and proportionate to its aim"³⁶. Barnard states that: "It is likely that the term 'objectively justification' is the functional equivalent of the 'public interest' requirements, which in turn are the persons equivalent to mandatory requirements in the field of goods."³⁷ Similarly Wyatt & Dashwood's latest edition cites *O'Flynn* as authority that "imperative requirements" (another name for mandatory requirements) can be used to justify indirectly discriminatory restrictions.³⁸ It seems to me, however, that the *O'Flynn* decision more accurately represents a continuation of the line of ECJ decisions such as *Sotgiu*³⁹ and *Schumacker*⁴⁰ which provide that objective differences between classes of workers can be used to justify indirect discriminatory restrictions. In *Sotgiu*, for example, an allowance was paid only to employees who were ordinarily resident in

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Germany. This was justified because the allowance was coupled with an obligation to transfer residence to the new place of work whereas those employees resident outside Germany were not subject to such an obligation. In *Schumacker*, the ECJ clarified that unequal treatment which reflects the likely difference in position between workers in different Member States can be justified. Is it not more likely that, in referring to objective justification in *O'Flynn*, the ECJ were simply following this established line of case law rather than seeking to make a grand leap and extending the role of mandatory requirements to justify indirectly discriminatory restrictions.

The Rule cannot be justified on Article 39(3) grounds, no objective differences exist and, in my view, mandatory requirements are unavailable. I believe, therefore, that the Rule cannot be justified and is in breach of Article 39 of the EC Treaty. In light of the uncertainty which surrounds this issue, out of respect for the contrary views set out above and to fully respond to UEFA's arguments, I have considered below whether the Rule could be justified in the event that UEFA's aims are accepted as legitimate objectives capable of justifying an indirectly discriminatory restriction.

Justification of Non-Discriminatory Restrictions

It is an established principle of Community law that non-discriminatory restrictions on the four fundamental freedoms can be justified by "mandatory requirements".⁴¹ This principle is justified on the basis that some rules which are capable of restricting the free movement of goods/services/workers serve objectively justifiable purposes and should not, therefore, be deemed illegal.⁴²

Can UEFA's Aims Constitute Legitimate Objectives?

There is no exhaustive list of "mandatory requirements" and the ECJ continues to recognise new examples. In *Bosman*, the ECJ identified the maintenance of competitive balance between clubs and the encouragement of the training of young players.⁴³ As the jurisprudence develops it seems inevitable that the list of sporting "mandatory requirements" will greatly increase. With this in mind, the justifications put forward by UEFA from the perspective of whether the ECJ would be likely to accept them as "mandatory requirements" capable of justifying the Rule can be examined.

(i) Encouraging the training of young players

As mentioned above, the aim of "encouraging the recruitment and training of young players" has been accepted by the ECJ as a legitimate objective "in view of the considerable social importance of sporting activities and in particular football in the Community".⁴⁴ This position is supported by the Nice Declaration of 2000 which states that "Sports federations, where appropriate in tandem with the public authorities, are justified in taking the action needed to preserve the training capacity of clubs affiliated to them and to ensure the quality of such training, with due regard for national and Community legislation and practices"⁴⁵

(ii) Improving the competitive balance at club level

As also mentioned above, the aim of "maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results" was accepted as a legitimate objective by the ECJ in *Bosman*.⁴⁶

(iii) Preventing the hoarding of players

UEFA will presumably seek to use this ground to objectively justify the retention of the 25 player squad limit. An argument could be made that the hoarding of players limits the opportunities of young players to develop and that, therefore, its prevention could be justified on the grounds of encouraging the training of young players.

(iv) Improving the standards of national sides

UEFA's proposals were, at least partly, inspired by the poor performance of some national sides (particularly those of some of the established footballing nations) at the European 2004 Championships in Portugal.⁴⁷ Lars-Christer Olsson, Chief Executive of UEFA, has stated that the lack of local training of young players could cause national sides serious problems and that "in Portugal, it is clear that some were already suffering from this phenomenon".⁴⁸ There is no jurisprudence directly on point but the concept of national sports teams has been supported by the ECJ in *Dona v. Mantero*⁴⁹ and *Bosman*⁵⁰ and, given the considerable social importance of football recognised in *Bosman*,⁵¹ it is reasonable to conclude that the ECJ might recognise the development of national sides as a legitimate objective.

(v) Improving the competitive balance at national level

As a corollary of the points I have made above in relation to improving the competitive balance at club level and improving the standards of national sides, it seems likely that this would also be recognised as a legitimate objective.

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(vi) The erosion of regional and national identity within the sport

The ECJ rejected a similar argument in *Bosman*.⁵² The link between a club and its local community goes far beyond the nationality of its players and, given that the popularity of football does not appear to have been adversely affected by the cosmopolitan nature of the top clubs' squads, there is no reason to believe that this would now be accepted as a legitimate objective.

Is the restriction proportionate?

A restriction which is capable of being justified by a legitimate objective will remain unlawful unless it is proportionate. For a restriction to be proportionate it must satisfy two tests:

- (i) it must be an appropriate method for the attainment of the legitimate objective; and
- (ii) it must not be possible to achieve the same objective by less restrictive means.

The proportionality of the Rule will depend on whether they are likely to be effective in achieving the legitimate objectives identified above and whether those objectives could be achieved by less restrictive means.

(i) Encouraging the training of young players

In order for a restriction to be proportionate, it must meet an existing need. There is no evidence to suggest that clubs are neglecting the training of young players. In fact, clubs are spending ever increasing amounts of money on youth development. The FAPL has estimated that the annual cost of running an academy at an English Premiership club is between £500,000 and £1,500,000.⁵³ Furthermore, UEFA already has a licensing system in place which requires any club wishing to compete in UEFA competitions to run an approved youth development scheme. In any event, the Rule is a clumsy method of achieving the objective. Properly targeted attempts to encourage training might include:

- (i) expanding UEFA's licensing system to require clubs to spend a certain percentage of football turnover on the training of young players. Clubs could be required to produce an auditor's certificate to prove that they had met the requirement. Any shortfall, and perhaps a penalty payment, would be paid to the national association for use in a youth development programme;
- (ii) imposing a requirement that clubs field a certain number of young players (e.g. under-21s) in secondary domestic competitions;
- (iii) introducing incentives (such as those used in UEFA's "fairplay" scheme) for clubs whose training

- programmes reach certain targets; or
- (iv) further developing FIFA's training compensation system which provides clubs with financial encouragement to clubs to train young players.

Furthermore, the Rule would actually have the effect of inhibiting the development of talented players aged between 15 and 17. Such players will not qualify for either the homegrown or B player categories and will therefore be much less likely to be selected in club squads. This restriction would, if national associations follow UEFA's recommendation, cover all national competitions (including, for example, secondary domestic cups). The development of precocious young players in the mould of Wayne Rooney, Freddy Adu or Theo Walcott would be seriously hindered.

(ii) Improving the competitive balance at club level

There is no evidence that the local training of young players will improve the competitive balance of club competitions. It is hard to see how the mandatory inclusion of a certain number of homegrown players within each squad will narrow the gaps between sides as the larger clubs would still be free to:

- (i) sign the best homegrown players;⁵⁴
- (ii) invest more in their training academies and recruitment of young players. Lars-Christer Olsson has acknowledged that "training is expensive; it sometimes costs even more than talent scouting";⁵⁵ and
- (iii) pay the high salaries demanded by the best players (especially the best homegrown players whose salary demands will increase).

Far from improving the competitive balance between clubs, the Rule would actively skew the balance between clubs in different associations due to the uneven impact of the proposals across the Member States. This effect would be caused by the differing national immigration controls in each Member State. English clubs, for example, may only recruit non-Europeans who qualify for a footballing work permit. These players, in the majority of cases, will be older established internationals who will never qualify as homegrown players. By contrast, Belgian clubs may recruit non-European 18-year olds and train them so that they will qualify as club-trained players.⁵⁶ Transfers, unlike youth training, redistribute wealth between clubs. Reducing transfers will reduce a crucial source of revenue for poorer clubs and make it harder for them to compete with the wealthier clubs. The Rule would also struggle to pass the "less restrictive alternative" test in relation to this objective. The introduction of a collective

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wage agreement or a system of income redistribution represent better targeted, less restrictive attempts to address any perceived competitive imbalance. These alternatives, which are in place in the major American team sports, were cited by Advocate-General Lenz in his Opinion in *Bosman*,⁵⁷ and subsequently approved by the ECJ as less restrictive alternatives.⁵⁸

(iii) Preventing the hoarding of players

Large squad sizes are essential in modern football due to the number of fixtures that a successful club plays each season: between eight and 10 friendlies and summer tournament games, 38 or so domestic league games, up to 13 Champions League games and up to 12 domestic cup games. An international player who remains uninjured throughout a season could be eligible for over 80 matches (including approximately 10 international matches per season). Large squads are therefore essential for clubs aiming for success at the highest level. There is no evidence that clubs are hoarding excess players, above those actually required by the demands of the lengthy season. The hoarding of players would be both expensive and disruptive and would leave players disenchanted as a result of a lack of first team opportunities. Furthermore, FIFA's Regulations for the Status and Transfer of Players prevent players from being kept 'on-the-shelf' by allowing players who are not playing for their clubs to terminate their contracts for "sporting just cause".

(iv) Improving the standards of national sides

The argument that the number of non-nationals in club sides needs to be limited to maintain the standard of national sides was rejected in *Bosman*⁵⁹ and there is no reason to believe that the ECJ's position would have changed. A properly targeted attempt to improve the standards of national sides would involve allocating more time during the season to national team training sessions and friendlies or providing compensation to clubs for the release of their players on international duty. Not all homegrown players will be eligible for the national side in any event and clubs will simply be encouraged to import non-nationals at an earlier stage of their career. Rick Parry, Chief Executive of Liverpool FC, has stated that "the danger is that this type of ruling will force clubs to look abroad for players earlier and earlier".⁶⁰ The German Football League have been reported as having similar concerns.⁶¹ This effect would be a clear contravention of the EU's stated desire to protect young players from commercial exploitation.⁶²

(v) Improving the competitive balance at national level

The Rule will upset the competitive balance at national level and greatly benefit richer countries with strong domestic leagues. Players from poorer countries will be restricted from pursuing a career in the major leagues and the opportunity to develop their skills that this would bring. This will obviously have a detrimental knock-on effect on the national sides of the poorer countries.

Conclusion

The homegrown player requirement represents an indirect discriminatory restriction on the freedom of movement for workers and is therefore a prima facie breach of Article 39 of the EC Treaty. The restriction cannot be justified by objective differences nor on any of the grounds set out in Article 39.3 (public policy, public health and public security). It is, at best, unclear that *Cassis de Dijon*-type "mandatory requirements" are legitimate justifications for restrictions of this type. Even if "mandatory requirements" are available, the Rule will still be illegal as it represents a disproportionate means of attaining UEFA's aims.

The 25 player squad limit is a non-discriminatory restriction on the freedom of movement for workers and is therefore a prima facie breach of Article 39 of the EC Treaty. The squad limit is not a proportionate means of attaining UEFA's aims and could not be justified. 

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- 1 Letter from UEFA to its member associations dated 28 February 2005. The FA and FAPL have indicated that they will not be implementing the Rule for domestic competitions.
- 2 www.uefa.com article titled "Giving youth a chance" dated 3 July 2004
- 3 Quotes from Lars-Christer Olsson in the July 2004 edition of "uefadirect".
- 4 As set out in www.uefa.com article titled "Giving youth a chance", *supra*.
- 5 *Union Royale Belge des Societies de Football Association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921.
- 6 *Bosman*, *supra*, paragraph 106.
- 7 Paragraph 1 of Annex IV to the Presidency Conclusions of the Nice European Council Meeting 2000.
- 8 *Walrave v. Union Cycliste Internationale* [1974] ECR 1405, paragraph 4; *Dona v. Mantero* [1976] ECR 1333, paragraph 12; *Bosman*, *supra*, paragraph 73.
- 9 *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, Case C-519/04P (18 July 2006), paragraph 28.
- 10 *Bosman*, *supra*, paragraph 73; *Dona v. Mantero*, *supra*, paragraph 12.
- 11 Formerly Article 48 of the EC Treaty.
- 12 EU Council Directive 2000/781EC.
- 13 To give a practical hypothetical example - Harry Aikines-Aryeetey (18) is the most promising young sprinter in the United Kingdom. Harry does not develop as expected and fails to make it out of his qualifying heat at the 2008 Olympics in Beijing. He feels overburdened by expectation leading into London 2012 and decides to retire from athletics to concentrate on football. Harry's age (he will turn 20 soon after the 2008 Olympics) would prevent him from ever qualifying as a homegrown player. His non-homegrown status would restrict his likelihood of getting signed as a professional footballer. The Rule would therefore discriminate against him because of the age at which he started playing football. Such discrimination is not permitted under the EU Framework Directive for Equal Treatment unless it can be shown to be objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. The Rule is neither "appropriate" nor "necessary", as will be demonstrated later in this article, and the Rule is therefore in breach of the Framework Directive/its implementing legislation.
- 14 *Walrave*, *supra*, paragraph 17.
- 15 *Bosman*, *supra*, paragraph 82.
- 16 *Bosman*, *supra*, paragraph 87. See also *Deutscher Handballbund eV v. Maros Kolpak* [2003] ECR I-4135, paragraph 31.
- 17 Key messages of "Investing in Local Training of Players" a paper issued by UEFA circa August 2004.
- 18 *Walrave*, *supra*, paragraph 8; *Dona*, *supra*, paragraph 14.
- 19 *Meca*, *supra*, paragraphs 25 and 31.
- 20 *Bosman*, *supra*, paragraph 128. Approved in *Kolpak*, *supra*, paragraphs 52-56 and *Igor Simutenkov v. Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol* [2005] ECR I-2579.
- 21 This three step test is the analysis generally undertaken by the ECJ. For an example of its use in a case involving sporting rules see *Lehtonen v. FRBSB* [2000] ECR I-2681.
- 22 Extract from "Investing in Local Training of Players - Q&A", *supra*.
- 23 *Wurtembergische Milchverwertung-Sudmilch-AG v. Salvatore Ugliola* [1969] ECR 363.
- 24 *Scholz v. Universitaria di Cagliari* [1994] ECR I-505.
- 25 *O'Flynn v. Adjudication Officer* [1996] ECR I-2617.
- 26 Extract from a www.uefa.com article titled "Homegrown issue on Nyon agenda" dated 28 January 2005.
- 27 *Bosman*, *supra*, paragraph 120; *Lehtonen*, *supra*, paragraph 50.
- 28 *Bosman*, *supra*.
- 29 See also *Masgio v. Bundesknappschaft* [1991] ECR I-1119, paragraphs 18-19.
- 30 *Bosman*, *supra*, paragraphs 98-100; *Lehtonen*, *supra*, paragraph 49.
- 31 Confirmed in *Ugliola*, *supra*. See also Taylor and Lewis "Sport: Law and Practice" (first edition, 2002, Butterworths) at B3.48.
- 32 *Commission v. Ireland* [1981] ECR 1625.
- 33 *Wyatt & Dashwood "European Union Law"* (fifth edition, 2006, Sweet & Maxwell), page 729; *Barnard "Substantive Law of the EU"* (first edition, 2004), page 240.
- 34 *O'Flynn*, *supra*.
- 35 *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* [1978] ECR 649.
- 36 *O'Flynn*, *supra*, paragraph 20.
- 37 *Barnard*, *supra*, page 240.
- 38 *Wyatt & Dashwood*, *supra*, page 729.
- 39 *Sotgiu v. Deutsche Bundespost* [1974] ECR 153.
- 40 *Finanzamt Koln-Alstadt v. Roland Schumacker* [1995] ECR I-225.
- 41 *Cassis de Dijon*, *supra*.
- 42 See *Craig & de Burca "EU Law"*, *supra*, page 659.
- 43 *Bosman*, *supra*, paragraph 106.
- 44 *Bosman*, *supra*, paragraph 106.
- 45 Paragraph 11 of Annex IV to the Presidency Conclusions of the Nice European Council Meeting 2000.
- 46 *Bosman*, *supra*, paragraph 106.
- 47 As noted in a www.uefa.com article titled "EXCO's last date of 2004" dated 14 December 2004.
- 48 Extract from the editorial of the July 2004 edition of "uefadirect".
- 49 *Dona v. Mantero*, *supra*, paragraphs 14-15.
- 50 *Bosman*, *supra*, paragraph 127.
- 51 *Bosman*, *supra*, paragraph 106.
- 52 *Bosman*, *supra*, paragraphs 131-134.
- 53 FAPL's response to UEFA's proposals dated 1 September 2004.
- 54 See similar point made by the ECJ at paragraph 135 of *Bosman*, *supra*, regarding the failure to the old "3+2" rule to encourage competitive balance.
- 55 Extract from the editorial of the July 2004 edition of "uefadirect".
- 56 The uneven effects of the Rule caused by the differences between the national immigration controls which apply in each Member State are examined in more detail in paragraphs 4.1.1.9-4.1.1.14 of the European Parliament's working paper on "Professional Sport in the Internal Market" published in September 2005.
- 57 Opinion of Advocate General Lenz in *Bosman*, paragraph 226 et seq.
- 58 *Bosman*, *supra*, paragraph 110.
- 59 *Bosman*, *supra*, paragraphs 133-134.
- 60 Extract from an article titled "UEFA optimistic over quota system" in *The Times* dated 17 December 2004.
- 61 As reported in Gerlinger, "UEFA's Declaration on Homegrown Players" (ISLJ) 2005/3.
- 62 Paragraph 13 of Annex IV to the Presidency Conclusions of the Nice European Council Meeting 2000.

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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 Alan Gourgey QC. The individual reporters (indicated by their initials after the date of the judgment) are Tim Penny, Jamie Riley, Martin Ouwehand and Sarah Clarke. The Reports are published in chronological order and should be cited by their “SLJR” number.

Sport and the Law Journal Reports

(2006) SLJR 1

Negligence – Standard of care – Amateur football league – Dangerous sliding tackle – General damages for loss of pain, suffering and loss of amenity

ROLLASON v MATTHEWS

*Bristol County Court (District Judge Watson) LTL 2 June 2006
31 January 2006 (Reporter: MO)*

Facts

The case concerned an accident that occurred at an amateur Sunday league football match on 17 March 2002 between FC Arle and FC Real Hatherley in the Cheltenham and Gloucester Sunday League.

The Claimant played centre back for FC Arle and the Defendant played centre back for FC Real Hatherley. The Defendant made a run with the ball to somewhere in the mid-point of FC Arle's half when he lost control of the ball. The Claimant's case was that he ran in and cleared the ball to his left and saw the Defendant sliding towards him to tackle with two feet in the air and his studs facing up. One of Defendant's feet struck the Claimant's left leg and broke it at the top of his shin pad.

The Defendant's case was that he successfully made a sliding pass and kicked the ball to his right mid-fielder when the Claimant ran towards him and they collided. The Defendant could not recall whether either of his feet made contact with the Claimant's leg. He accepted that even a one-footed tackle with studs up would be dangerous but denied performing any such manoeuvre.

Held (Giving Judgment for the Claimant)

The Defendant executed a dangerous sliding tackle by positioning his legs and boots too high when they came into contact with the Claimant's leg. This was more than momentary misjudgement or fleeting clumsiness and therefore negligence which caused the injury to the Claimant's leg: *Caldwell v McGuire* [2001] EWCA Civ 1054 applied.

The Claimant would be awarded £8,000 general damages for pain, suffering and loss of amenity together with special damages.

Commentary

The District Judge accepted the evidence of the Claimant's witness and found that the Defendant made a sliding attempt to nudge the ball to his right midfielder but that the Claimant got to the ball first and cleared to his left. The District Judge found that the Defendant was sliding in on his back or bottom with his two legs in the air and his studs facing the Claimant's legs. He also found that one of Defendant's boots made contact with the Claimant's shin pad but that the Claimant's leg snapped when it received the full weight of the Defendant's body. The District Judge therefore found that the Defendant's tackle was dangerous and that the Defendant had sufficient control over the position of his legs to have kept his boots down and away from the higher part of the Claimant's legs.

The District Judge accepted the Defendant's submission that, by itself, the location of the Claimant's fracture in the mid-shaft of his leg did not indicate negligence by the Defendant. He relied on the principles of law summarised in *Caldwell v McGuire* [2001] EWCA Civ 1054, that is, that the standard of care required to be exercised by players in a football match towards each other must be judged in the particular circumstances of the game and that liability does not follow from a mere lapse in skill or an error in judgment. In practice, therefore the threshold of liability would be high.

The District Judge found that, on the facts, the Defendant's act was more than a piece of momentary misjudgement or fleeting clumsiness because the Defendant did not need to have his legs and boots so high and should have known this was dangerous. It was accepted by the parties that such a tackle was contrary to FA laws and that the Defendant should have known this was the case. The District Judge therefore concluded that the Claimant's injury was caused by the Defendant's negligence.

In determining the quantum of general damages, the District Judge had regard to the Judicial Studies Board Guidelines of comparable awards and awarded £8,000 for pain, suffering and loss of amenity. This was based on the Claimant's evidence that he was off work as a postman for a total of 6 weeks for surgery, which involved the insertion and removal of a nail in the bones of his leg, and experienced symptoms of leg pain after exertion and numbness adjacent to the knee.

(2006) SLJR 2**Contracts – Arbitration – Human Rights**

PAUL STRETFORD V (1) FOOTBALL ASSOCIATION
AND (2) BARRY BRIGHT

Ch D (Sir Andrew Morritt C) [2006] EWHC 479 (Ch)
17 March 2006 (Reporter JR)

Facts

The First Defendant, the Football Association (FA), and the Second Defendant, who was the chairman of the FA's disciplinary committee, applied for a stay of proceedings brought by the Claimant (S), who was a players' agent operating pursuant to an FA licence. The ground of the application for a stay was that the dispute fell within the arbitration agreement constituted by rule K of the FA's rules of association.

According to S's FA licence, he was required to observe the FA's rules of association. The FA's rules contained an arbitration clause in rule K which provided that all those concerned with playing or administering association football consented that their disputes would be submitted to arbitration.

The FA had commenced disciplinary proceedings against S. In response S had threatened to issue proceedings seeking a declaration that the disciplinary commission appointed by the FA under the rules would not comply with Article 6 of the European Convention in Human Rights ("the Convention"). Subsequently S held a meeting with the FA at which it was agreed that the disciplinary proceedings would be deferred if S instituted proceedings. S then issued his claim in relation to which the FA acknowledged service, claimed that rule K applied to the disputes and applied for a stay of the proceedings brought by S.

On the hearing of the application of the FA and its chairman, it was common ground that the disputes between the FA and S fell within the terms of rule K. However, S submitted that:

- rule K had not been incorporated into any agreement between S and the FA and its terms were so onerous that it should have been brought to S's specific attention;
- the FA was precluded from relying on rule K as it was inconsistent with what had been agreed or represented at the meeting with S; and
- rule K was in any event null and void for the purposes of section 9(4) of the Arbitration Act 1996 ("the 1996

Act") in that it did not comply with Article 6 of the Convention as the appointment of an arbitrator was not independent and the arbitration award was not public.

Held (allowing the application for the stay)

As a players' agent, S was obliged to keep himself up to date with the FA's rules including rule K which applied not just to disputes between a player and his club but also between a players' agent and the FA. Moreover as S was in possession of the FA handbook in which the FA's rules including rule K had been published, he was on notice of the terms and effect of the FA's rules.

In the context of an arbitration agreement, a private arbitration hearing and confidential award were far from being onerous or unusual.

The obligation to observe the FA rules became a term of the contract between S and the FA and Rule K had been incorporated into that agreement in three ways:

- the obligation to observe the rules was a continuing obligation;
- the FA's supply of the licence and S's acknowledgement of its receipt constituted offer and acceptance; and
- the terms expressed on the face of the licence had constituted acceptance of the terms by conduct.

It was clear from the meeting that the parties had agreed that S would institute court proceedings and that the disciplinary proceedings would be stayed until the court proceedings had been disposed of. However there was no basis for concluding that there had been any agreement, representation or assumption that the court proceedings would not be stayed by reliance on rule K and s.9 of the 1996 Act and no such agreement could be implied. Accordingly, there was nothing to preclude the FA from relying on rule K.

The contract between S and the FA in which rule K was incorporated constituted a waiver by S of his rights under Article 6.1 of the Convention in favour of the arbitral process for which rule K provided. The contract was voluntary and informed because S had had its terms in his possession and his consent was unequivocal. The fact that S had waived his right to go to court in favour of arbitration would not necessarily mean that he had waived his right to a public judgment. Even if the provisions of rule K 6(b) had not complied with Article 6 of the Convention that would not be a reason for invalidating the whole arbitration. Rule K was therefore not void or inoperable within the scope of s.9(A) of the 1996 Act.

Commentary

This decision is a clear and unsurprising endorsement of the right of parties to select the jurisdiction of their contractual disputes. It also serves to highlight the contractual nature of the relationship between those involved in sport under licence and the governing bodies of sport which grant such licences.

(2006) SLJR 3

Criminal law – Intellectual property – Broadcasting – Television licences – Premiership football – s.297 Copyright, Designs and Patents Act 1988

GANNON V FEDERATION AGAINST COPYRIGHT THEFT

*Crown Ct (Bolton) (Judge Warnock)
24 March 2006 (Reporter: SC)*

Facts

This was an appeal by the proprietor and licensee of a public house against his conviction for an offence contrary to s.297(1) Copyright, Designs and Patents Act 1988 ("the Act"). The Appellant had purchased a decoder and enabling card which enabled him to screen a live Premier League football match for his customers by receiving a satellite signal from a Greek broadcast that had originated from the UK. This method allowed the Appellant to evade the controls placed upon such transmissions by UEFA, the Football Association Premier League ("FAPL"), and the English licensees of the intellectual property rights to such transmission in the UK, namely BSkyB TV and the BBC. The Appellant not only avoided the charge payable for the transmission but was able to broadcast the transmission in the "closed period" during which broadcast of matches was prohibited in the UK.

Section 297(1) of the Act provides that "A person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence..."

Held (for the Appellant)

The court found for the Appellant on the basis that the Respondent had not established that the Appellant had acted dishonestly, applying the test in *R v Ghosh* [1982] QB 1053 [1982] 2 All ER 689. The Appellant had signed a copy of a document entitled "Legal Advice Notice" which had been presented to the Appellant by an employee of the Respondent with the intention of

informing the Appellant of the legal implications of his action. Whilst the first limb of *Ghosh* was established in that the court considered that the Appellants action was objectively dishonest, the court found that the "Legal Advice Notice" did not fix the Appellant with subjective knowledge of the law on the basis that the advice therein was confused and erroneous, incorporating a reference to a non-existent criminal offence.

Having determined the appeal on this point the court proceeded to make obiter findings on the following points.

The Court did not doubt that there had been an unlawful use of and interference with the intellectual property rights of UEFA and FAPL but such criminal offence, if it exists, was not alleged against the Appellant.

The Court was not satisfied that the chain of satellite communication amounted to an uninterrupted transmission as required by s.297(1). The encrypted multipoint transmission broadcast to the Greek broadcasters was not a broadcast to customers as such and there was insufficient evidence to establish that the chain was uninterrupted. Although there was no evidence to establish that the signal received by the Appellant was not a retransmission from Greece, this was unlikely to be significant in light of s.299(1)(a) and (b) of the Act.

As the rights to broadcast the transmission within the UK during the closed period were not for sale it was argued on behalf of the Appellant that there was no charge to be avoided. The prosecution contended that the charge was that which FAPL would have demanded had they chosen to negotiate with the Appellant for the broadcast rights. The Court did not accept there was sufficient evidence of a charge to establish an intent to avoid payment of a charge.

Commentary

As was noted by the court, the financial implications of this case are potentially great. At the time judgment was given, several similar prosecutions brought by the Respondent were outstanding but the Court was at pains to weaken the impact of the judgment on those prosecutions by indicating that the central issues would be better determined by the Chancery Division of the High Court or the Technology and Construction Court and stressing that its findings should not be more than "mildly persuasive".

(2006) SLJR 4**Horse racing – Jockey Club – application for declaration that disqualification of horse was invalid**

WILLIAM P MULLINS v THE JOCKEY CLUB

High Court, Queen's Bench Division (Mr Justice Stanley Burnton)
*[2006] EWHC 986 (QB)**31 March 2006 (Reporter:SC)***Facts**

On 30 November 2002, Be My Royal, a horse trained by the Claimant, was first past the post in the Hennessy Gold Cup at Newbury. Following a finding of morphine in the urine of Be My Royal, the Disciplinary Panel of the Jockey Club decided that there had been a breach of Rule 180(ii) of the 2002 Rules of Racing and Be My Royal was therefore disqualified. The Appeal Board of the Jockey Club upheld the decision. The horse second past the post was declared the winner and awarded the prize money.

The Claimant sought a declaration that the decision of the Jockey Club Disciplinary Panel was unlawful on the ground that it was arbitrary, capricious and plainly contrary to the Rules of Racing. The claim had been started by way of application for judicial review, but in an earlier decision the Court held that such proceedings were not amenable to judicial review as the Jockey Club was not a public authority for the purposes of CPR Part 54, and accordingly the claim was transferred to the Queen's Bench Division and continued by way of a private action for declaratory relief.

The presence of morphine in the urine of the horse had been caused by a batch of horse feed which had become contaminated with morphine through no fault of the owner or trainer of the horse. Between 6 December 2002 and March 2003, morphine was detected in the urine of a large number of horses, and the source of the morphine was found to be contaminated foodstuff, and the contamination was not deliberate. Be My Royal was one of those horses.

Morphine is a prohibited substance under the Rules of Racing. It does not have a threshold level under the Rules, thus the mere presence of morphine is ordinarily sufficient to make out a contravention of the Rules. However, during the course of the hearing before the disciplinary panel, the Jockey Club disclosed 2 emails from the Jockey Club's chief veterinary officer to the laboratory, HFL, in which the Jockey Club recommended temporarily revising the "cut off" level

for morphine and instructed HFL not to confirm morphine in post-race urine samples which are unlikely to contain more than 50ng/ml of morphine.

It seemed likely that the levels of morphine in Be My Royal did not exceed this level, but of course the testing of Be My Royal had taken place before this instruction had been received by HFL.

Mr Mullins contended that these emails amounted to a de facto threshold under the Rules for the presence of morphine. This was rejected by the Disciplinary Panel and by the Appeal Board.

Held (dismissing the Claim)

The Court did have a supervisory discretionary jurisdiction to review the decision of the Appeal Board, notwithstanding that the disqualification arguably might not amount to a penalty.

The only real questions in the case were whether the emails from the Jockey Club to HFL constituted a de facto threshold under the Rules for the presence of morphine, notwithstanding that the Rules themselves contained no such threshold, and whether the decision of the Disciplinary Tribunal could be said to have been capricious, arbitrary or a clear failure to apply the Rules of Racing. The Court recognized that due weight had to be given to the decisions of the Disciplinary Panel and Appeal Board, which included individuals far more experienced in the sport of racing than the Queen's Bench Division Judge.

The Court had no difficulty in rejecting the contention that the emails constituted a de facto threshold. Either there was a threshold for the purposes of the Rules, or there was not. The establishment of the threshold would have been in the nature of a legislative act, but the emails were not published; rather they were communicated by an executive officer of the Jockey Club. The Court drew a distinction between an administrative act that affects the detection or reporting of an infringement or regulation and one that modifies the law or regulation itself. By way of example, police officers may be instructed not to report drivers who speed in a 30mph zone unless they are driving at more than 35mph, but such an instruction does not change the speed limit itself. Furthermore, the emails were not sent with the authority of the Stewards of the Jockey Club. In conclusion, the sending of the emails was no more than the executive act of an executive officer. No threshold for morphine had been established, and the reference to "de facto" threshold was unhelpful as there was no such thing under the Rules.

Further, the Court held that the instructions in the emails could not be said to be applicable to testing that went on before the emails were sent.

Accordingly, the decisions below were not unfair, nor were they capricious or arbitrary. It was not capricious or unfair to disqualify a competitor by reason of a strict liability offence of having a prohibited substance in the urine: many sports had such rules and such rules were lawful.

Commentary

Whilst the Claimant ultimately failed, the case is of note because of the finding that the Court had jurisdiction to review the findings of the Appeal Board.

(2006) SLJR 5

Insurance – Accident insurance – Perils insured against – Footballer suffering injury during training – Permanent total disablement

BLACKBURN ROVERS FOOTBALL AND ATHLETIC CLUB PLC V AVON INSURANCE PLC AND OTHERS

Queen's Bench Division (Dobbs J) [2006] EWHC 840 (QB), 12 April 2006 (Reporter: SC)

Facts

The Claimant sought to claim under a Personal Accident Policy underwritten by the Defendant insurers in respect of Martin Dahlin, a footballer who was injured during training in October 1997. Following the injury Dahlin was not totally prevented from playing football; he was declared fit in spring 1998 but was not the player he used to be. He retired from professional football in 5 July 1999 as a result, it was claimed, of permanent total disablement within the terms of the policy.

The Defendant refused to pay out on the policy on the basis that the policy only covered permanent disablement caused by accidental bodily injury independent of any other cause, whereas Dahlin's disablement was caused in whole or part by constitutional degenerative disc disease.

The issues in the case included whether Dahlin suffered permanent total disablement within the terms of the policy and whether the disablement suffered was caused by the injury suffered.

Held (finding for the Defendant)

The Court adopted favoured a broad interpretation of "Permanent Total Disablement", which was defined in the policy as "permanent total disablement which entirely prevents the Insured Person from engaging in his usual occupation as a football player with the Insured in The FA Premier League, (or at all) the Football League...". In the absence of medical evidence to establish that Dahlin had been entirely prevented from engaging in his usual occupation as a football player it was sufficient that the experts were agreed that Dahlin was prevented from engaging in engaging in his occupation at the requisite level. Even though Dahlin played in some 28 matches following the incident the court considered that the evidence of a substantial deterioration in the quality of his performance in those matches demonstrated that he was not engaging "effectively" in his usual occupation and was therefore deemed to suffer permanent total disablement within the meaning of the policy from the date of the incident.

With regard to causation, the Claimant argued that the injury sustained would have caused permanent disablement regardless of the pre-existing degenerative disease, that the degeneration exhibited was commonplace amongst footballers and would not on its own have permanently disabled Dahlin. The Defendant contended that the degenerative disease was a necessary pre-requisite to the injury sustained and therefore had an essential role in the causation of his symptoms.

The Court preferred the Defendant's approach which was supported by the majority of the evidence in the case. Dobbs J extracted the following proposition from Claimant's submissions: it was unlikely that the prolapsed intervertebral disc which caused the disablement was caused in the absence of the degenerative disease but, in the absence of evidence to the contrary, on the balance of probabilities the prolapsed intervertebral disc was caused independently of the degenerative disease in this case. The Court deemed this a "startling proposition" and further rejected the implicit assertion that the incident was so serious it could have caused the symptoms without any pre-existing degeneration.

The terms of the insurance policy were such that it was sufficient to establish that the degenerative disease was a cause of the permanent disablement, it need not have been the cause and the court accordingly found for the Defendant.

Commentary

An interesting element of this case is the interpretation of “engaging in his usual occupation”. Whilst it is to be expected that the “usual occupation” of top flight athletes and sportspeople would necessarily incorporate a qualitative component, in this instance the court appeared to construe the definition as “engaging in his usual occupation at performing to his usual standard”. This enabled the court to find that evidence that Dahlin had played in a number premier league football matches, literally “engaging in his usual occupation”, did not prevent him being deemed to suffer permanent total disablement because his performance in those matches was below his previous standard. Whilst there was evidence to suggest this deterioration in performance was a result of the symptoms suffered, it is difficult to see how the insurance policy in question could be deemed to cover this risk.

(2006) SLJR 6

Competition – Articles 81 and 82 of EC Treaty – Grand Slam Tennis Tournaments – Player Dress Code – Whether distinctive design elements were banned “manufacturer identification” – Whether application of dress code amounted to discrimination

ADIDAS – SALOMON AG v DRAPER

*Chancery Division (Sir Andrew Morritt C) [2006] EWHC 1318
7 June 2006 (Reporter: MO)*

Facts

This was the hearing of applications to strike out a claim by Adidas – Salomon AG (“Adidas”) against the owners, organisers and promoters of the “Grand Slam” tennis tournaments (“the Organisers”) and the ITF. The claim concerned the alleged discriminatory application of the Organisers’ and ITF’s dress codes to the use by Adidas of its “3-Stripes” motif on clothing worn by players in tennis tournaments. Put simply, the interpretation of the relevant rules in the dress codes effectively banned any manufacturer identification from appearing on a player’s clothing other than “manufacturer’s standard logos” not exceeding a specified size, usually two square inches but, in a few cases, three to four square inches.

There were complaints by the competitors of Adidas, namely Reebok, Puma, Pentland and Nike, that the use of the 3-Stripes motif in the design of Adidas’ clothing infringed the dress codes. They argued that, as a registered trade mark, it must be a manufacturer’s identification yet the way it was incorporated into

Adidas’ clothing meant it exceeded the size limits applicable to manufacturer’s standard logos. The Organisers resolved to amend their dress code and informed Adidas in May 2005 that beginning with the 2006 Australian Open, the 3-Stripe would be considered a manufacturer’s logo for the purpose of enforcing size restrictions. The ITF did similarly in June 2005. In January/February 2006 the Organisers and the ITF amended its dress code so that a “manufacturer’s identification” rather than a “manufacturer’s standard logo” must comply with certain size limits.

The Organisers produced a working definition of “Manufacturer’s Identification” which applied not only to the name and standard logo of a manufacturer, but also to the continued use of identification such as design patterns, themes, colourings and markings which the Organisers in their sole discretion decided were a “Manufacturer’s Identification”. It also provided that registration of any such design as a trademark would be prima facie evidence of a “Manufacturer’s Identification”.

Adidas’ claim was based on the competition provisions governing the European Community; articles 81 and 82 of the EC Treaty. Adidas alleged that the Organisers’ and ITF’s decisions to amend their dress codes would have the effect of putting Adidas at a competitive disadvantage vis-a-vis its competitors in the incorporation of distinctive design elements in its tennis clothing; specifically because the use of the 3-Stripes has been a key element in Adidas’ designs which has identified the clothing as Adidas’ for over 30 years and the decisions would prevent the use of 3-Stripes while allowing Adidas’ competitors to continue to incorporate their own distinctive design elements. Adidas claimed that this would cause it significant loss because of the loss of the promotional value attaching to its clothing.

The claim alleged that the decisions were void under the EC Treaty because they affected trade between Member States and either constituted an unlawful agreement between undertakings or were the product of such an agreement. Adidas’ claim sought injunctions and other relief. The Organisers and the ITF brought applications to strike out the claim, or for summary judgment, on the basis that the claim had no real prospect of success.

Held (for the Claimant):

Except for one part of the claim which was effectively abandoned by Adidas and was summarily dismissed, there was no order on the applications. The injunctions sought by Adidas were granted. There was a direction for an expedited trial.

The applications were brought on a number of grounds. One of those was that even if the dress code affects competition (a) it is objectively justifiable and (b) it is not being nor is it intended to be applied in a discriminatory fashion. Adidas' case was that the 3-Stripes motif was a manufacturer's identification to which the dress code could always have been applied but that the interpretation put on the dress code effectively limited its application to manufacturer's standard logos which were permitted if they were less than a certain size. Adidas argued that the Organisers' and ITF's decision to revise this interpretation singled out Adidas and that there had been a consistent failure to enforce the code against all manufacturers indiscriminately. Adidas produced a number of photographs of tennis clothing incorporating other manufacturers' design elements which may well have become manufacturers' identification yet nothing had been done about them.

The Organisers argued that they were not discriminating because unless the distinctive design element was a registered trade mark, protected by some other intellectual property right, or proceedings for its enforcement had been taken by the manufacturer, then it was unlikely that it would be a "manufacturer's identification". However Adidas contended that this criteria was inadequate because the absence of intellectual property protection was irrelevant and that the failure to attempt to prevent others using a distinctive design element may indicate no more than the absence of any reason to do so.

The Judge held that Adidas had a real prospect of successfully establishing that there had been and are other manufacturers who incorporate distinctive design elements in such a way as to constitute manufacturers' identifications. The Judge also held that if the Organisers and the ITF sought to apply the criteria relating to intellectual property then it was likely that they would fail to apply the dress code to those other manufacturers. This, the Judge concluded, would give rise to discrimination against Adidas.

The claim could not therefore be struck out on that ground and the Judge came to the same view in relation to the various other grounds relied upon by the Defendants. Except for one allegation in the claim which was not pressed by Adidas and was therefore summarily dismissed, the Judge made no order on the applications for strike out/summary judgment and granted the injunctions sought by Adidas until the conclusion of an expedited trial.

(2006) SLJR 7

Professional negligence – claim by Football League arising from failure to obtain guarantees of the obligations of ONDigital

FOOTBALL LEAGUE LIMITED v EDGE ELLISON (A Firm) (Defendant/Part 20 Claimant) & (1) ACTIVE RIGHTS MANAGEMENT LTD (2) CLIVE STEPHEN TOWNLEY (Part 20 Defendants)

Chancery Division (Rimer J) [2006] EWHC 1462 (Ch)
23 June 2006 (Reporter: TP)

Facts

The Football League Limited ("FLL") administers the interests of its member clubs, and owned the broadcasting rights to matches played by member clubs. In June 2000, FLL granted a licence of these broadcasting rights to ONDigital PLC ("ONDigital") for 3 years in consideration for the licence fee of £315m payable over 3 years. ONDigital was a subsidiary of 2 FTSE 100 companies, Granada and Carlton. In 2002, with 2 years of the licence unexpired, ONDigital went into administration and then liquidation, with much of the £315m licence fee remaining unpaid.

FLL issued proceedings against Granada and Carlton alleging that each had guaranteed payment of the licence fee. This action was dismissed in the Commercial Court.

FLL then brought proceedings for professional negligence against the solicitors who had acted for them in the licence transaction with ONDigital ("Edge Ellison"), alleging that the solicitors were under a duty to raise with their client issues relating to the solvency and financial standing of the licensee and that, had such a duty been complied with, Carlton and Granada would have provided such a guarantee. Accordingly, FLL alleged that it had lost the chance of bringing a claim on such guarantee.

Edge Ellison denied that any such duty arose and denied that any such breach caused loss, and brought Part 20 proceedings against Active Rights Management ("ARM") and its director. Edge Ellison alleged that ARM had been retained by FLL to advise FLL, that it was under a duty of care similar to that alleged against Edge Ellison and that ARM was liable for the loss.

Held (dismissing the claims by FLL against Edge Ellison and the Part 20 Claims by Edge Ellison against ARM and its director). The Court reached the following conclusion on the various issues before it.

(i) Did Edge Ellison owe a duty to FLL to obtain instructions on whether it wanted parent company guarantees for ONDigital's obligations? The Court concluded that there was no implied duty on Edge Ellison to obtain such instructions. At para 252 the Judge noted that, ordinarily, it is no part of the solicitors' duty to prompt his client to turn his mind to commercial considerations, and in this case the commercial viability of ONDigital's covenant was a commercial matter for the representatives of FLL. In this case, FLL was an experienced commercial client, which further militated against extending the implied duty of skill and care so as to include proffering advice on commercial matters. Therefore, the Court concluded that Edge Ellison did not owe the implied duty alleged against it, and the case was dismissed on this ground.

(ii) Was expert evidence from a solicitor in the sports industry admissible? The Court held that such evidence was inadmissible and ignored it, noting that usually in professional negligence cases evidence of expert solicitors was not admitted and this case was no exception.

(iii) Would parent company guarantees have been given had they been asked for? Although little evidence was called in relation to this issue, the Court concluded that there was a high chance that a substantial portion of ONDigital's liabilities would have been secured by the parent companies (a 70% chance) and a lower chance (40%) that all ONDigital's liabilities would have been guaranteed by Carlton and Granada, had those guarantees been asked for at the material time.

(iv) Did the inclusion of the financial arrangements paragraph in the ONDigital bid document of 7 June 2000 make a difference to Edge Ellison's duties? The Court held that the solicitor did come under a duty to read the bid document and advise FLL, but only immediately prior to the signing of the deal on the evening of 15 June 2000.

(v) Would parent company guarantees have been obtained if first sought on the evening of 15 June 2000? The Court concluded that parent company guarantees would not have been obtained had they been requested at this late stage of the process, and most importantly that, had such guarantees been sought and refused that evening, FLL would have continued with the deal

without parent company guarantees. Accordingly, although there was a breach of duty in failing to raise the issue of parent company guarantees at the very late stage on 15 June 2000, such breach of duty did not cause FLL any loss.

(vi) Were Edge Ellison in breach of duty by not seeking to negotiate the inclusion of guarantees in The Long Form Agreement? The Court concluded that the solicitor was in breach of his duty in this regard, but that such breach caused no loss as, at this stage, Carlton and Granada would have refused to agree to provide such guarantees at this stage.

(vii) On the issue of the contributory negligence of FLL, the Court held that FLL contributed substantially to its own loss and that, had such a finding been material to the outcome, FLL would have been 75% liable for causing its own loss.

(viii) On the Part 20 claim, all allegations made by Edge Ellison against ARM and its director were dismissed.

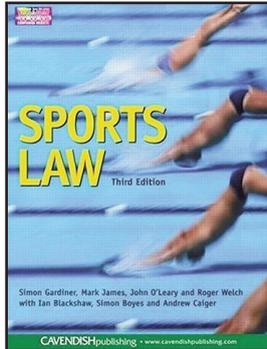
Commentary

The most important element of the decision was the finding that the solicitors did not owe a duty of care to obtaining instructions from their client on whether they required a parent guarantee. In reaching such finding, the Court took a restricted view of the extent of the solicitors' retainer. In doing so, a material factor was that FLL was an experienced commercial client. BASL

Reviews



Reviews



Simon Gardiner, Mark James, John O'Leary, and Roger Welch with Ian Blackshaw, Simon Boyes and Andrew Caiger (2005) Sports Law 3rd Ed., Oxford: Cavendish Routledge (p.724).

The eagerly awaited third edition of Simon Gardiner's Sports Law arrived in the bookshops earlier this year to present students and lecturers with an up to date and authoritative textbook. As with his previous editions, the author has assembled a team of leading Sports Law academics in order to provide additional expertise within the major areas of this publication.

The third edition follows the format of the last one with the book being divided into five major sections, each containing contributions from the co-authors. The publishers have helped to keep the text within reasonable bounds through a change of printing format through a reduction of seventy four pages which enables the price to be kept in line with that of the second edition.

The aims of the book remain the same i.e. to reflect the growing importance of Sports Law as a subject, and to provide an exposition, analysis, and critical evaluation of this area of law. This edition is cited as being an up-date of the many issues contained previously, but it is suggested that this book is more than a mere up-date as it encompasses the meeting of legal theory with practice combined with a thorough examination of the main principles of the subject.

As stated above, the text is divided into five sections, each of which is further divided into chapters. Section one looks at the general context within which the law relating to sport operates. This section is compiled by the principal author and delves into the historical and cultural matters which underpin the regulation of sport. The question of theoretical models of sport's regulation is discussed and results in the provision of a framework which helps the understanding of the role of law within the sports industry. The reader is introduced to the question of commercialisation as a prelude to its discussion in later chapters. The section ends with an examination of the role of the State concerning the promotion and regulation of sport, questions of policy relating to State intervention in these matters including social issues such as the protection of child athletes from abuse and other anti-social behaviour.

The second section concerns the governance of sport, including dispute resolution, the impact of sports governing bodies together with the regulation of doping in sport. Within this section there is an input from co-authors. Simon Boyes, in chapter five, deals with the regulation of Sports Governing Bodies including the ways in which their decisions may be challenged. Relevant case law is analysed together with the impact of EU Law and the Human Rights Act concerning governing bodies. Ian Blackshaw looks at dispute resolution and also examines the processes of the Court of Arbitration for Sport. He gives examples of the various functions of this court. The section concludes with John O'Leary's contribution on the question of doping in sport. He focuses on the regulation of drugs and doping and also on the workings of the World Anti-Doping Agency. The conflict between the needs of the regulators and the rights of the athletes is covered and backed up by relevant case-law and academic opinion.

The Commercialisation of Sport is covered in Section three. Simon Gardiner takes a look at the finances in sport together with the accountability of the financiers. He also examines the complex area of corruption in sport. These sporting scandals e.g. match fixing are dealt with in a very readable manner and his arguments are strengthened through the use of relevant articles as well as reference to the IOC Code of Ethics. The question of Competition Policy within sport is the province of co-author, Andrew Caiger who skilfully uses the EU Treaty articles together with the major case law to provide a thorough explanation of this important sporting issue. Ian Blackshaw concludes this section with two chapters, the first of which looks at Intellectual Property rights, whilst the second concerns questions arising from commercial exploitation e.g.

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'ambush marketing'. Once again the use of examples of the use of new technology and its effectiveness in this area and relevant source material is to be commended.

Section four contains detailed treatment of the regulation of the sports workplace and this compilation is the work of Roger Welch. He analyses the impact of contract law in relation to the employment

contracts and other agreements concerning athletes. This part of the section contains an in-depth study of the ramifications of the European Court of Justice's decision in the Bosman case. Included are some comparative academic views on this case. The whole area relating to player transfers is also covered with particular reference to national and international rules on these matters. The remaining chapters deal effectively with the termination of playing contracts and the regulation of discrimination in sport.

The fifth and final section of this book concerns safety in sport. The criminal and civil liability in relation to sporting violence, negligence and safety matters is presented by Mark James. His work includes the vexed question as to how far should the ordinary criminal and civil courts intervene with matters involving sporting violence by participants. In the chapter on criminal liability, Mark James comments on the major cases especially *R v Brown* and *R v Barnes*. His analysis of these is particularly instructive. On the question on civil liability he provides an informative view of the main issues including the playing culture of sport and the 'duty of care' owed by participants to each other. The discussion on the leading case of *Caldwell v Maguire* is extremely valuable. The section, and also the book, concludes with a chapter by John O'Leary on spectator and stadium safety. In this chapter there is substantial treatment of the important statute law relating to stadium safety which is very readable. In addition he analyses the causes and effects of the Hillsborough disaster as well as consideration of matters affecting those who live in the immediate vicinity of sporting events.

The reviewer of this book was fortunate to be able to obtain the views of eighty five students who earlier this year were surveyed after using this work as their main text for their Sports Law module. These views were generally favourable with comments such as the book was "very readable", "easy to follow", "well referenced", "good use of up-to-date material". It is suggested that the comments of readers are always extremely valuable when assessing the merits of any major work.

In conclusion, it is felt that the third edition of Sports Law by Simon Gardiner makes a formidable addition to the available texts on this important area of law. The reviewer has tried to highlight the way in which the material has been presented by the author and his co-authors especially through the use of varied materials backed up by detailed referencing. The publishers have also contributed to this favourable review by their introduction of a revised format and useful indexing which has enabled the price of the text to be kept within reasonable bounds.

To summarise, it is suggested that this book is essential reading for all those who study, teach and practice Sports Law as well as providing material for those readers who are just generally interested in the subject. 

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