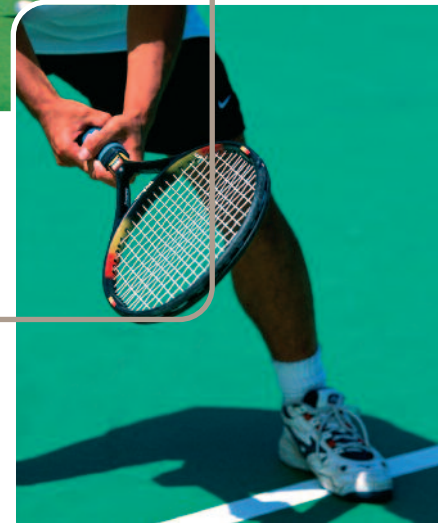
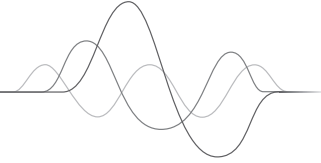


Sport and the Law Journal



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Editorial

BY SIMON GARDINER, EDITOR

This is a special issue focusing on a number of regulatory issues that have arisen out of the great Sports events of 2012 – the London Olympic and Paralympic Games. The Opinion and Practice section provides a number of different perspectives on the Games. Firstly, there are three accounts by key individuals involved in an organizing capacity.

First, Sara Sutcliffe's '**London 2012: Law and Practice**', provides a unique insight to the lead up to the Games from the perspective of the British Olympic Association. Sara is the former Director of Legal and HR at the British Olympic Association and London 2012 was her 4th Olympic Games as Counsel to Team GB. She provides particular information on the issues that can arise between the BOA and national governing bodies of the wide range of sports competing at the Games.

Second, Daniel Saoul's '**A Lawyer's Olympics**', provides an alternative perspective on legal involvement. Dan was a member of the London 2012 Pro Bono Advocacy Service. The Service was put together by the London Organising Committee of the Olympic and Paralympic Games, the Law Society and the Bar Council to provide assistance to athletes and their entourage during the Games. Dan was instructed on two urgent cases – one relating to selection, the other doping. In what follows, he shares his experiences and discusses the two cases he was involved in.

Third, Adrian Barr-Smith's '**Doping Control at London 2012**' provides an evaluation of the success of the anti-doping efforts at the Games. Adrian, Chairman of BASL, acted as a volunteer Doping Control Station Manager at the London Olympics and Paralympics Games, and he has some perceptive views of what lessons can be learnt from the Games and how matters could develop in the future.

Upholding the commercial integrity of these types of major sports events is crucial, Rachel Montagnon, Victoria Horsey and Joel Smith's '**Protecting the Olympic brand in 2012 – a retrospective**', evaluates the effectiveness of the Anti-Ambush Marketing programme of LOCOG.

There are two articles focusing specifically on the Paralympics. Jane Hatton's '**The legacy of the Paralympics for 2013 – will there be one?**' suggests that although the success of Team GB and public support for the totality of competition in the Games has helped demystify disability, the reality of everyday life of the disabled is still one of discrimination. Jack Anderson's '**Sporting risks, the law and wheelchair rugby: The case of Kylie Grimes**' provides the context and back story of Kylie Grimes who was a member of the GB wheelchair rugby team who finished fifth at the London Paralympics. In 2006, an 18-year-old Grimes sustained serious injuries, leaving her paralyzed from the chest down, when she dived into a swimming pool at the home of a friend. Her subsequent claim gives an interesting insight into the courts' perspective on sports-related risk.

Lastly, Charles Woodhouse's '**Emrys Lloyd and the 1948 London Olympics**', provides a fascinating insight into the work of Lloyd who as a partner at Farrer & Co. was the honorary legal advisor of these post-war Games. His charge for over a years work amounted to only £210 at the then prices.

The Analysis section provides two longer pieces. First, Sean Corbett's '**An evaluation of the tools available to Sports Rights Holders and event organisers in combating ambush marketing and the legal means for preventing and combating ambush marketing**' provides a wide analysis of the efforts needed to uphold the commercial integrity of major sports events such as the Olympics. He also provides an evaluation of the efforts of LOCOG in their anti-ambush marketing and brand protection programme. He also suggests what lessons can be learnt for the future and that a positive development might be the creation of a 'Competition/ Sports Organiser's Right' as a means of providing Sports Rights Owners with increased proprietary rights to an event. Second, Iain Quirk's '**The Games of the XXX Olympiad in London– The Ad-Hoc Arbitrations**' provides a detailed evaluation of the decisions of the CAS Ad-Hoc Division as it sat during the Olympics. He identifies that this body showed itself able to administer swift but well considered justice.

Both the Olympics Games and Paralympics Games have been hailed as great successes both in terms of the performance of the respective Team GBs and the range of organisational issues that need to be in place to work effectively.

The regulatory frameworks around modern large scale sports events to ensure sporting integrity and commercial integrity. The variety of articles in the issue focus in detail on both these issues. Sporting integrity and justice is arguably the more important issue as without this value intact and actively supported the whole endeavour of sporting competition is under threat. These Games highlight the inequality that is emerging between the chances of countries to win medals in certain events. It seems that there is virtually no chance that anyone from a poor country can win a medal in four sports – equestrian, sailing, cycling and swimming. On the other hand, wrestling, judo, weightlifting and gymnastics appear to be the best sports for developing nations. This exemplifies an increasing problem of financial and technological doping. Much of Team GB's success can be seen as due to Lottery funding in the 90s and its use to build up elite teams backed by cutting edge sports science.

A significant amount of time is spent on considering how sporting rules should be constructed so as ensure the integrity of sporting competition. This issue was highlighted by the badminton doubles in the Olympic competition when two South Korean pairs and one Chinese and Indonesian pair were disqualified for “conducting oneself in a manner ... clearly abusive or detrimental to the sport”. They repeatedly attempted to lose the matches they were playing by purposefully losing points, for example by deliberately serving into the net, hitting shots wide or missed easy returns. The round-robin arrangements gave players an interest in losing so that they could face easier contests at the elimination stage. But spectators booed them off the court, enraged by the farcical matches. The players' behavior reflected the shortcomings of the new rules, which highlights the continued requirement to be fully aware of all potential unintended consequences of organizational and playing rules. Not surprisingly under the ‘game rules’ principle the disqualification was not challenged at CAS.

Indeed there was only minimal litigation that arose out of these sporting events. The two articles focusing on engagement with

ambush marketing actives suggest that the 2006 Act and specifically provisions supporting the London Olympics Association Right was rarely formally enforced in terms of litigation against potential miscreants. This would perhaps suggest that there was reluctance on the part of LOCOG to have it tested in court especially in the context of some of the more creative and potentially ambushing advertising campaigns.

One notably piece of litigation on a very different issue concerned, the Ministry of Defense's decision in the lead up to the Games to site a missile launcher and military personnel on the roof of a Council tower block in Leytonstone (*Harrow Community Support Ltd v. Secretary of State for Defense* [2012] EWHC 1921 (Admin), Haddon-Cave J, 10 July 2012). The Residents' association formed by residents of the Tower, 15 storeys and containing 117 flats, decided to challenge the MoD. The challenge started out on three grounds, a failure to carry out an adequate consultation process, a failure to comply with the public sector equality duty, and a breach of Article 8 and/or Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights. As it was, the judge found that there was no interference under Article 8 because the effect on the locals was negligible, and in any event the response was necessary and proportionate.

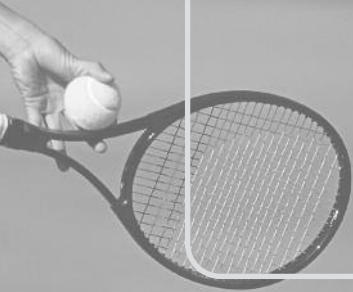
What 2012 would seem to share with 1948 is that the role of the lawyer at the amazing sports events in London in both of the years, was very much in an organizational, advising and preventative role. And although some lawyers involved in the Games in 2012 will have earned significantly more than Emrys Lloyd in 1948, the spirit of voluntarism and goodwill would seem to still be alive in the modern age of sports lawyering.

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



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Opinion and practice



London 2012 – Law and Practice

**BY SARA SUTCLIFFE, FORMER DIRECTOR OF LEGAL AND HR
AT THE BRITISH OLYMPIC ASSOCIATION**

As we celebrated in the aftermath of the vote in Singapore in July 2005, London 2012 seemed an age away. Fast forward seven years and as I took an early morning stroll from the Olympic Village through the Olympic Park, the day before the Opening Ceremony when it was still closed to the public, I finally allowed myself a moment of quiet reflection of a 'job well done'. The transformation of Stratford into a magnificent Olympic Park with its gleaming venues, cleaned up waterways and wild flower beds was a truly awe inspiring sight. But as I wandered along enjoying the vista I was also only too aware that the next 17 days was make or break for Team GB.

The six months leading up to the Games had had its challenges. In November 2011 the World Anti Doping Agency ('WADA') had declared the British Olympic Association ('BOA') non compliant with the World Anti Doping Code ('WADC'). The genesis of that declaration being that the 20 year old by-law of the BOA that provided that an athlete who was guilty of a serious doping offence was not eligible for selection to Team GB, amounted to an additional sanction for a doping offence which was contrary to the mandatory provisions of the WADC. The WADA declaration came in the wake of the USOC v IOC Court of Arbitration for Sport ('CAS') decision a few months earlier that invalidated the IOC's 'Osaka Rule' on similar grounds.

The BOA filed an appeal against WADA's decision at CAS in mid December 2011 and on 12 March 2012 the hearing was held in London in front of an eminent CAS Panel – Professor Richard McLaren, Mr David Rivkin and Mr Michele Bernasconi – the very same Panel that months earlier had invalidated the IOC's 'Osaka Rule'. To many commentators that was a strange move by the BOA but we

were only too aware of the similarities in the cases and therefore felt that the best chance of being able to differentiate the BOA's position was before the same Panel. The BOA was represented by Lord Pannick QC, Adam Lewis QC and Baker & McKenzie.

The BOA did not prevail and the Panel was firmly of the view that the BOA's by-law was an additional sanction for a doping offence (as opposed to being part of selection criteria) and found it to be contrary to the WADC. The National Olympic Committee ('NOC') reluctantly repealed its long standing by-law and as a result three formally ineligible athletes, namely David Miller, Dwain Chambers and Carl Mysercough, were selected as members of Team GB for London 2012. The National Olympic Committee (made up of representatives of the 35 Olympic sports and the Athletes Commission) vowed to continue to lobby for the right of a sports rights holder, be it an NOC, an IF, an Organising Committee to be able to protect the integrity of their own team or event by imposing eligibility standards that could include disreputable behaviour, such as previous doping violations, as part of the on-going reviewing to the WADC.

Selection for Team GB was more turbulent for London 2012 than previous Games. Much of this was as result of the NOC being eligible for 'host nation' places in a number of sports. For the Government's part all 25 summer sports (and their disciplines) received a degree of UK Sport elite sport funding for the first time. This enabled the sports that don't usually received funding to put in a place an elite programme including hiring top level coaches. The NOC supported the notion that host nation places should not however be accepted just because they were on offer. Instead it was agreed that before the BOA would accept host nation places, the relevant NGBs were required to produce a satisfactory plan outlining both a performance case (i.e. that the team and or individuals would perform credibly – given that they were

LONDON 2012 - LAW AND PRACTICE

not athletes or teams that would probably qualify by right) and that there was a legacy case for their sport in competing at the Olympic Games (e.g. how the NGB would use it to show case their sport, create sustainable elite and participation programmes and engage the next generation in their sport).

The BOA, rightly, accepted the majority of host nation places available and Team GB was represented in every sport at the Olympic Games. Team GB was the largest team at London 2012 coming in at 540 athletes. However this did create some challenges in terms of selection policies, including the need to get the right balance of objective criteria (which has more relevance in some sports than others) along with subjective criteria (which in some sports could include being able to look to development potential for Rio 2016 over an older athlete coming to the end of their international career).

The BOA enters into an Olympic Qualifying Standard (OQS) Agreement with the NGB. The NGB in turn publishes a selection policy that is consistent with the OQS Agreement. The NGB undertakes the selection process and nominates its selected athletes to the BOA. The BOA undertakes final selection of the athletes (after verifying matters such as eligibility, that the Team Members Agreement (TMA) has been signed and satisfying itself that the NGB had carried out the selection process in accordance with its selection policy – in other words that the selection was sound).

Team GB was represented in every sport at the Olympic Games. However this did create some challenges in terms of selection policies, including the need to get the right balance of objective along with subjective criteria

The majority of NGBs did receive appeals from non-selected athletes. Team sports by and large did not receive appeals but that is probably down to the more discretionary nature of selection in team sports where matters such as complimentary skill sets and dynamics within the team count for more than it would in an individual sport. A selection appeal can usually only be based on the following grounds of appeal broadly speaking – breach of procedure or bias. A post Games review of the selection appeals found a number of breaches of procedure that should or could have been avoided, including selectors voting on decisions when they were conflicted, wrong application of performance data, misuse of technical terminology, selective interpretation of the policy and last minute changes to policies.

How an appeal is dealt with has improved considerably over recent years. NGBs are required to have a published selection appeals procedure which should contain certain key elements such as impartiality and independence from the selection decision. Increasingly many NGBs are using the services of Sport Resolutions, an independent specialist dispute resolution service for sport in the UK to conduct their appeals or at least as the appointing body for an Appeal Panel. Unfortunately there are a few NGBs that still prefer to keep appeals behind closed doors and this can leave the athletes feeling like they have not had a fair hearing and, absent legal expertise on the appeal panel, the likelihood of the decision not being as robust as it should be is increased. It is not compulsory to use the services of an external agency but strong consideration should be given to it and there is certainly an argument for making it mandatory before Rio 2016.

Once the Games period starts (i.e. the Opening of the Olympic Village, 10 days or so before the Opening Ceremony), a number of Olympic Charter requirements come into force automatically, including restrictions on non Olympic sponsors not being able to use athlete imagery and Games time anti doping regulations including athlete whereabouts for all competitors. All the Games time rules apply to all accredited personnel throughout the Games period irrespective of where they are in the world (such as at training camps before coming into the Olympic Village ahead of competition). This obviously has its complications.

Almost always, despite a lot of pre Games education, athletes were not aware of the impact of statements they make on Twitter and also did not realise the extent and identity of the followers (such as journalists) they had attracted during the Olympics.

In my Games time role I had to manage the whereabouts information for athletes including providing daily updates to the IOC of any changes. I was also the designated Disciplinary Officer for Team GB requiring me to keep on top of social media such as Twitter to ensure we could take action promptly. Nearly all disciplinary matters were dealt with very quickly, escalated up to the Team Leader, coach, media officer (as relevant) and nipped in the bud as opposed to straight to formal action. Almost always, despite a lot of pre Games education, athletes were not aware of the impact of statements they make on Twitter and also did not realise the extent and identity of the followers (such as journalists) they had attracted during the Olympics.

The only incident of deliberate ambush marketing that we needed to address in conjunction with LOCOG was the distribution of branded headphones with a very distinctive Union Flag look to a selection of athletes and teams, obviously with the intention that the athletes would wear them in and around the Olympic environment including the televised field of play as much as possible. By and large the Team GB athletes were very co-operative especially once they were told they could keep the headphones, just not to use them during the Olympic Games.

The Team Members Agreement is, necessarily, a relatively long and comprehensive document but like all good agreements if the values underpinning it are strong enough the agreement itself should not have to be called upon. That proved to be the case with Team GB. The One Team GB values encompassing Performance, Respect, Unity, Responsibility and Pride were rolled out through the NGBs several months before the Games. They were brought to life in the Olympic Village itself through VTs using famous athletes (not just British) and branding applications. You could not escape the One Team GB values and it paid off. The team was inclusive, supportive and respectful. And without doubt, how you conduct yourself off the field of play has a major impact on how you conduct yourself on the field of play. And a historic 3rd place in the medal table, 29 gold, 17 silver and 19 bronze medals speaks for itself.

So much of how Team GB comes together and how it performs is linked to legal agreements, rules, regulations and policies. But in the end, that is but one part of a bigger and more complex picture. For it all to come together so spectacularly last summer is something that most of us will never forget. **BSL**

Sara Sutcliffe is the former Director of Legal and HR at the British Olympic Association. London 2012 was her fourth Olympic Games as Counsel to Team GB.

A Lawyer's Olympics

BY DANIEL SAOUL, BARRISTER, 4 NEW SQUARE

Dan was a member of the London 2012 Pro Bono Advocacy Service. The Service was put together by the London Organising Committee of the Olympic and Paralympic Games, the Law Society and the Bar Council to provide assistance to athletes and their entourage during the Games. Dan was instructed on two urgent cases – one relating to selection, the other doping. In what follows, he shares his experiences and discusses the two cases he was involved in.

London 2012 Pro Bono Advocates – A Legal Emergency Service

When I moved to the Bar in 2008, having been a litigation solicitor in a City firm, I knew I wanted to use the opportunity to (amongst other things) move my sports law practice forward. My eyes were, even at that stage, on the prize: being involved in the London 2012 Olympic and Paralympic Games. I wasn't sure in what capacity I would be able to assist, but I was keen to fuse my career with my passion for sport in some way when the Games came to town.

The London 2012 Pro Bono Legal Service put out its first advert for applicants in the spring of 2011. Administered by Sport Resolutions, this brainchild of LOCOG, the Law Society and the Bar Council was designed to provide free of charge legal advice and representation for accredited athletes, coaches, team officials, National Olympic Committees, National Paralympic Committees, International Federations and International Paralympic Sporting Federations during the Games. Its purpose was to provide a safety net for those who did not have their own legal representatives in place in the UK and who may have had difficulty in identifying representation at short notice.

It was an exciting idea: nothing like this had been attempted at a previous Olympics or Paralympics, and it seemed to present the perfect platform for a lawyer looking to participate in the Games (I had already worked out that the 100 meters was a non-starter and things didn't look much better in the other events either).

The Service split its offering into two: a "general" service, to which a selection of law firms and barristers' chambers with expertise in six different areas of practice – sport, criminal, defamation & privacy, immigration, discrimination, and personal injury – was appointed. In addition, a fast track sports advocacy service was set up to provide representation for parties before the Court of Arbitration for Sport and other expedited sports hearings (for instance those before the Paralympic Board of Appeal of Classifications) held during the Games. The service was confined to legal issues pertaining to the smooth running of the Games in one way or another.

The Court of Arbitration for Sport, in particular, plays an important role during the Olympic Games. It moves from its permanent base in Lausanne, Switzerland, to set up a temporary tribunal in the host city, taking a small selection of its panel members with it. Specific rules govern the operation of the CAS during the Olympics, and its task is to determine any live disputes in or around the Games period relating to matters arising other than on the field of play (where, in simple terms, the decisions of referees are final).

Getting ready for the Games

After completing a comprehensive application form in which I made sure to advertise my fluent French (which in theory is the first language of the CAS), and a nervous wait, later in 2011 I found out that I'd been fortunate to be selected to the Advocacy Service. I was in good company – my Chambers

colleague Graeme McPherson QC and a host of other distinguished advocates were on the list of 19 advocates in total. Things were looking good.

An induction followed: an invitation to LOCOG's offices up high in the Barclays building in Canary Wharf for a briefing, then a fantastic tour of the Olympic site, just a few months before the flame was to land on our shores. Suddenly, we felt part of it.

Still, I was slightly sceptical about how much we would get used. In the last few summer Olympic Games, there had been between 5 and 15 appeals to the CAS each time; assuming that pattern would be continued, and that a number of appellants and respondents would already have their own representation lined-up, given that there were 19 advocates available on a rota basis (with three covering every day of the Olympic and Paralympic period, from 9 July to 12 September), the prospects of getting called upon seemed slim. Still, it was nice to be in with a chance.

As the days passed and the rota was finalised, my attentions were diverted away from the Advocacy Service by a number of other (non Pro Bono Service) Olympic instructions in the weeks before the Games. I acted for the British Wrestling Association in a dispute with the British Olympic Association over host nation places; I was invited to sit as the independent Chairman of British Fencing's Olympic Selection Panel; I advised two rowers on selection appeals; and I was instructed as arbitrator on two selection challenges, one relating to shooting, the other the well-publicised dispute between Aaron Cook and British Taekwondo. I was well and truly into the swing of things and enjoying every minute, even if the deadlines were always tight with athletes' careers riding on the outcome. Whilst none of these disputes had been before the CAS, they were all hard fought and raised the kinds of issues – adherence with selection policies and codes, the rationality and reasonableness of decisions by sports governing bodies – that were likely to come up during the Games themselves. I would be hitting the ground running. If anything came my way, that is.

My first 999 Call

In the event, I was deployed far sooner than I thought I would be. Before the Olympics even started, in fact. Two days before the opening ceremony, I got a call from the case officer at Sport Resolutions asking if I was available to assist with a case likely to be heard that evening. It was a no-brainer. I cancelled my dinner plans.

I was to be instructed by Charles Russell to act for the Montenegrin Olympic Committee in a dispute over the participation of light heavyweight boxer Bosko Draskovic. An Irish boxer in the same division, Joseph Ward, had lodged an appeal with the CAS challenging Draskovic's right to participate in the Games. Draskovic had been awarded a wild card place under the rules of the Tripartite Commission – a body comprising the International Amateur Boxing Association (AIBA), the International Olympic Committee (IOC) and the Association of National Olympic Committees – which permitted the allocation of such places to countries with only limited representation at the Olympic Games.

The case was not without its drama: the weigh-in for the Olympic boxing was to take place on the evening of the opening ceremony, just 48 hours away, with the fighting starting three days later. Draskovic was flying into the UK the very evening the hearing was due to take place. Ward was in Ireland, on standby. The stage was set for sports

I was well and truly into the swing of things and enjoying every minute, even if the deadlines were always tight with athletes' careers riding on the outcome

A LAWYER'S OLYMPICS

Although I had done a number of doping cases before, including before the National Anti-Doping Appeal Panel, none had raised these particular issues, i.e. as to the application of passages in the Code to new substances, and it was a steep learning curve.

lawyers to do what they do best: argue highly technical points in cutting edge cases determining who gets to participate in major sporting events. Who says it is all about performance and merit?

Cynicism aside, it was an exhilarating afternoon and evening. Papers were emailed across to me swiftly, and I did my best to acquaint myself with unfamiliar rules and regulations, including the code under which the Tripartite Commission had set down the criteria for eligibility for the minority country invitation places. Ultimately, the case revolved around the proper interpretation of various parts of this document.

After a brainstorming session with my instructing solicitor James Eighteen and his trainee, we jumped into a cab and headed over to the Grosvenor Hotel on Park Lane, where the CAS had set up camp during the Games. Walking through security in our suits with our heavy pilot cases felt good – now we were really part of it. With the hearing not due to start until 9.00pm, CAS had been wise to provide Nespresso machines free of charge in the waiting area.

The hearing itself proceeded before three arbitrators, one Italian, one German and one American – this was a genuinely international arbitration! All parties – Ward, the IOC, AIBA and Draskovic / the Montenegrin Olympic Committee were represented. AIBA had also called upon the Pro Bono Advocacy Service, securing Paul Harris QC as their advocate.

The matter was fiercely but fairly argued – it was all submissions, with no factual or expert testimony in dispute. Over five hours, it felt like every word of the Tripartite Commission's selection policy was scrutinised. It was exhausting – not least for Ward's lawyer David Casserly, who had to defend his client's position against attacks from all sides – but very satisfying. The debate was extremely cerebral and the level of argument, and familiarity with the papers (in particular on the part of the arbitrators who like some of the advocates had been called upon at extremely short notice), was impressive in the circumstances. Equally as impressive was the rendering by the Tribunal of a full written judgment, with reasons, by 6.00pm the next day. They can't have slept much. The good news for my client was that Ward's challenge to Draskovic's selection had been rejected. The Montenegrin athlete would compete at the Olympics. It was only then that I learnt that his Chef de Mission (the head of the Montenegrin Olympic Delegation) had chosen not to mention the dispute to him at all for fear of disrupting his training... a good decision as it turned out.

Second instruction – doping rocks the boat

Roughly a week later I got another call, this time on a Saturday morning. The International Canoe Federation wanted to challenge a recent decision by one of its internal disciplinary tribunals to exonerate a world champion canoeist who had tested positive for a stimulant at a recent international event. Again, time was of the essence: the canoeist was a member of the Czech four man K4 kayak, and was due to race in a week's time. His crew was one of the favourites and clarity was urgently needed as to whether they could compete with him in the boat.

A conference followed at my instructing solicitors Farrer & Co (Julian Pike leading the team) first thing on the Monday morning. It quickly became clear that there were highly technical issues in dispute, of both the legal and scientific variety: what was it that the athlete had taken, apparently inadvertently? And did the World Anti-Doping Code prohibit that? We had to get on top of these issues fast. A number of scientists around the world were contacted to explain their understanding of the chemical composition of the substance in question (luckily, all our experts seemed to take a similar view) whilst I buried myself in case law on the question of the interpretation of section S6 of WADA's prohibited list, which had – to make matters more

The matter was fiercely but fairly argued – it was all submissions, with no factual or expert testimony in dispute. Over five hours, it felt like every word of the Tripartite Commission's selection policy was scrutinised

complicated – recently been amended. Although I had done a number of doping cases before, including before the National Anti-Doping Appeal Panel, none had raised these particular issues, i.e. as to the application of passages in the Code to new substances, and it was a steep learning curve. Having a team of people working together was invaluable.

With the written submission lodged and experts lined up (albeit there were some that I had not had time to speak to) we were set for a hearing at 6.00pm at the Grosvenor. This time our Tribunal was composed of an Israeli, a Malaysian and a Mexican arbitrator. The athlete was present, with his lawyer, and a London 2012 volunteer who spoke fluent Czech was press ganged into assisting as the athlete's translator. Factual and expert evidence was given and cross-examined, followed by involved submissions on some very novel sports law issues relating to the proper construction of the WADA Code. The evening concluded with an impassioned speech from the canoeist (through the translator) pleading for leniency from the panel.

Again, justice was dispensed swiftly – by mid-morning the following day a Judgment had been produced, upholding the ICF's appeal and finding that the athlete had indeed committed a doping offence. However, they were moved by his personal statement, and (somewhat in the face of the authorities, in my own view) elected to reprimand him rather than ban him, under Article 10.4 of the Code. Controversially he competed the following week with his crew, winning a bronze medal.

Final reflections

The opportunity to play a small part in the Olympics was immensely stimulating, as was the challenge of pitting my legal wits against sports advocates – and arbitrators – from around the world. I would like to thank all those involved, and in particular Sports Resolutions, for making this possible. I can only say that I would love to do it again! Rio, anyone...? **BSL**

Doping Control at London 2012

BY ADRIAN BARR-SMITH, CONSULTANT, SNR DENTON UK LLP

“Olympics is Babylon”. The elderly Rastafarian occupying the pavement outside St. Pancras station was giving a perspective at odds with that presented by the Mayor of London.

Irrespective of this ideological debate, public opinion has adjudged the organisation of London 2012 to be successful. Certainly the statistics and the spectators speak to the appetite for the competitions and the fantastic atmosphere enjoyed at each of the events. Informed opinion has adjudged the doping control programme to be similarly successful. This success was the more remarkable since the programme was staffed principally by volunteers, 90% of whom had not previously undertaken such a role.

Statistics

The bald facts are that 5,132 blood or urine tests across 132 nationalities were carried out at the Olympic Games, plus a further 1,200 at the Paralympics. (By way of comparison UK Anti-Doping (UKAD) typically conducts 7,500 tests in any 12 month period). In this way, 30% of all athletes participating at the Olympics were tested. 20% of tests were conducted in the pre-competition period between the opening of the Athletes' Village (16 July) and the Opening Ceremony (27 July). This was the most extensive testing programme ever conducted at a Games.

There were 8 'positive' test results at the Olympics, of which 6 occurred during pre-competition. 5 out of the 8 requested a hearing, the remainder waived their rights. The women's shot put gold medal changed hands. The 'winner' Nadzeya Ostapchuk provided samples pre and post-competition which tested positive for the steroid metenolone. She was subsequently banned from competition for 12 months by the Belarus anti-doping agency and the gold medal awarded to second-placed Valerie Adams of New Zealand. Ostapchuk

denied doping and her coach claimed that he had dusted her food with the steroid without her knowledge! Babylon indeed.

Soslan Tigiev, who had won medals at the Beijing 2008 Games, tested positive for the banned stimulant methylhexanamine. He was stripped of his bronze medal in the 74kg class freestyle wrestling and Gabor Hatos of Hungary was promoted in his stead. In the week before the start of the Paralympics, Russian powerlifters Marfin and Rakitin both tested positive for human growth hormone. The former was actually barred from competing. Along with Georgian power-lifter Omarasvili, who tested positive for steroids, they received 2 year competition bans.

Belarus was also in the news when it sent home a hammer thrower, Ivan Tikhon, silver medallist at the Athens Games in 2004. 3 other Athens medallists also lost their medals when new analysis of their samples revealed traces of steroids (Yuri Belonog of Ukraine, gold medal in shot; Irina Yatchenko, bronze medal in discus, and Svetlana Krivelyova, bronze medal in shot, both of Belarus). In all, 5 samples from Athens retested as 'positives', although questions have been asked why only 100 samples out of 3,766 were retested. The International Olympic Committee (IOC) expects to re-analyse some of the samples collected in London over the course of the next 8 years. The International Association of Athletics Federations (IAAF) was also active in handing out 9 bans for doping violations in the lead up to the London Games. 3 athletes had provided 'positives' at the 2011 World Championships in South Korea. Inna Eftimova of Bulgaria had tested positive for synthetic growth hormone and Ukrainians Nataliya Tobias and Antonina Yefremova provided samples containing traces of synthetic testosterone. In addition, 6 athletes including Moroccan marathon runner Abderrahmin Goumri were banned as a result of irregularities in their Athlete Biological Passports (ABPs).

Notwithstanding the success of these efforts, the number of 'positives' in London was a reduction from the numbers of failed tests at the 2008 Beijing Games (18) and the 2004 Athens Games (28). One interpretation of this statistic is that the incidence of doping has reduced. Another, less favourable, interpretation is that the chemists have stolen a march on the testers.

Doping news

Partly as a result of the absence of a newsworthy London doping scandal, the most significant doping story during the Games was that concerning the US cyclist Lance Armstrong. Although the USADA report was published after the end of the Paralympics, the finger was already being pointed at Armstrong by Tyler Hamilton, a former team-mate, in serialised extracts from his book 'The Secret Race: Inside the Hidden World of the Tour de France: Doping, Cover-ups and Winning at All Costs'. Hamilton's descriptions of his consistent evasion of the out-of-competition testers served only to highlight the challenges faced by the authorities. Commentators have described the way in which Armstrong's team avoided positive tests as "a template on how to tighten protocols in the future".

Partly as a result of the absence of a newsworthy London doping scandal, the most significant doping story during the Games was that concerning the US cyclist Lance Armstrong.

A total of 203 athletes who have failed dope tests are now known to the IAAF. The worst offending country is India (40) followed by respectively Russia (23), USA and Ukraine (10 each), China and Kenya (7 each). Great Britain has 3 such athletes. However, Athletics ranks only 13th out of 34 Olympic sports, when adverse test findings are expressed as a percentage of total number of tests. The 'dirtiest' sports, according to this ratings system, are Weightlifting, Cycling, Boxing, Hockey and Equestrianism.

The learning from London

So what was the learning from the experience of the London Games? The following appear to have been the principal lessons:-

The importance of intelligence. In this context, intelligence means information which creates a suspicion e.g. suspicious whereabouts patterns, biological profiles etc. The source of the information may be the International Federation (IF), a national anti-doping agency or a domestic law enforcement or border agency. There are also links to the police and to pharmaceutical companies. The gathering and analysis of information by UKAD on behalf of the IOC was primarily responsible for the fact that the majority of failed tests were conducted pre-competition. The independent observers appointed by the World Anti-Doping Agency (WADA) reported that UKAD "equipped the IOC with sources of information and intelligence that would not have otherwise been available to improve the efficacy of the IOC anti-doping program". The IOC will need the assistance of similar such collaborations at future Games.

The ABP Programme. For the first time at an Olympic Games, blood tests were taken for review by the athlete's respective IF. In this way, they could be compared with his/her existing blood profile. Notwithstanding the obvious importance of such testing, some athletes apparently failed to appear for such tests and the notification procedure will need to be improved for the Rio de Janeiro Games in 2016, perhaps by combining ABP with routine tests.

DOPING CONTROL AT LONDON 2012

Therapeutic Use Exemption (TUE). This procedure requires that any athlete with a documented medical condition which requires use of a prohibited substance or method must first have obtained a TUE. Despite this requirement, the number of applications for an exemption was low (31 prior to the Games, additionally 26 during the Games) and the procedure was clearly not followed by all concerned, for whatever reason.

Athlete whereabouts. The availability of athlete whereabouts information is key for efficient target testing based on intelligence. Some national Olympic committees (NOCs) appear not to have complied with the rules requiring them to provide athlete whereabouts information, so some sanctions may need to be introduced in order for the requirement to operate effectively. This and other measures should ensure that it becomes easier to locate athletes at Olympic venues for pre-competition testing.

Knowhow. The IOC is considering a recommendation to prepare a planning document for future Games organizers that sets out all essential criteria, timelines and resources needed to support a successful anti-doping programme.

Sample analysis. The testers adopted a risk-based approach. For example, more EPO tests were conducted on athletes competing in endurance sports. Blood samples were tested for blood variables (haemoglobin, haematocrit and reticulocytes), blood transfusion, HBOCs, recombinant Growth Hormone and, for the first time, the hGH biomarkers test. Isotope ratio mass spectrometry (IRMS) testing was conducted to differentiate between the endogenous and exogenous nature of target steroids and the method included multiple target steroid analytes, thus increasing the chances of detecting use of an exogenous steroid. The hope has been expressed that all athletes tested pre-competition at a future Games should be subject to the “full menu”, notwithstanding possible laboratory limitations.

The road ahead

Although LOCOG was justified to trumpet the smooth operation of the testing programme at London 2012, it is nevertheless sobering to reflect that there were many athletes competing who had previously failed a drugs test. One journalist calculated that, if they were formed into a single nation, they would have finished ahead of Spain and South Africa in the medals table! Gold medallists from this “nation” include Vinokourov of Kazakhstan (cycling road race, suspended for blood doping), Mellouli of Tunisia (open water swimming marathon, positive test for amphetamines), Alptekin of Turkey (women’s 1500 metres, banned for two years) and Podobedova also of Kazakhstan (women’s 75kg weightlifting, banned by her native Russia for failing a drugs test).

These winners demonstrate that the issue of doping, and its legacy, endures and that the signatories to the Unesco Convention Against Doping in Sport still have some distance to travel. However, doping control will continue to evolve. For example, Peter Vukicevic an athletics coach was suspended by the Norwegian federation. He had been accused of sending doping-related emails to the former coach of Jamaican athlete Merlene Ottey, explaining the effects of taking growth hormone and testosterone. Doping cases will increasingly involve Armstrong-style “non-analytical positives”, encompassing intelligence, interviews, other evidence e.g. ABPs where software initially highlights deviations from the norm and then experts review the results in order to check for pathological or other non-doping factors. The Anti-Doping Administration and Management System (ADAMS) electronic database maintained by WADA will ensure that a comprehensive record is maintained of all tests and other incidents. Clean athletes can continue to hope that the dopers can run, but they can’t hide. **BASL**

The author acted as a volunteer Doping Control Station Manager at the London Olympics and Paralympic Games.

Protecting the Olympic brand in 2012 – a retrospective

**BY RACHEL MONTAGNON, VICTORIA HORSEY AND JOEL SMITH,
HERBERT SMITH FREEHILLS LLP**

The Olympics and Paralympics were the “hot” legal and commercial topic of 2012, in particular in relation to the defence of sponsor interests in associating themselves with the Olympic brand and the exclusion of non-sponsor association. Ambush marketing is something that Olympic Games have suffered from significantly over the last few decades: “a planned attempt by a third party to associate itself directly or indirectly with the Olympic Games to gain the recognition and benefits associated with being an Olympic Marketing Partner” as it is described by the IOC.

How would the stringent restrictions put in place to avoid ambush marketing problems at the 2012 Games play out? Would LOCOG succeed in managing the brand in one of the busiest commercial cities in the world? Would the “storm troopers” of LOCOG, as they were described by a member of the House of Lords early on (a Stars Wars analogy surely), protect the Olympics or damage their reputation through an overly heavy-handed approach?

Restrictions, restrictions, restrictions

Perhaps we already need a reminder of what those restrictions were. In the first Games where the Paralympics had significant legislative recognition as a separate brand entity, there were three main sets of restrictions: over-arching restrictions on creating an association with the Olympic or Paralympic brands, some of which continue to apply; rights specific to the London Olympics which came to an end on 31st December 2012; and the very time-specific and geographically limited local restrictions in place covering the Olympic Park and specific events elsewhere during the period of the Games last summer.

Of course, there were also traditional intellectual property rights available to protect the Olympic and Paralympic brands. Trade marks for, inter alia, the word “Olympic” and the logos for the British Olympic and Paralympic teams were registered, as well as shape marks for the Games mascots Wenlock and Mandeville. A new, jagged, copyright protected font was used for all Games materials and publicity.

Where these traditional intellectual property rights had been found wanting in past Olympics, the concept of the protection of an unofficial association between a product, a service or business and the Games had been adopted to cover the multifarious ways in which non-sponsors had sought to ambush the goodwill of the Games and create such an association with the event. Such behaviour put the value of the investment of the official sponsors, amounting to millions of dollars in many cases, in doubt as well as having a discouraging effect on potential new sponsors and thus putting the future financial security of the Olympics at risk. Thus the IOC has been at pains to create secure, blanket protection for sponsor interests and to make ambushing of any sort an actionable matter.

The modern Games now have protection in two forms. Firstly, the Olympics Association Right (OAR), the exclusive right to be associated with the Olympics, provides general and permanent protection for the Olympic brand, in place in all States that are members of the International Olympic Movement and the equivalent Paralympic right (the Paralympic Association Right (PAR)). Secondly, the exclusive right to be associated with a particular Games in the run up to it and during the period of that Games, is a local right, in place for a limited period, until the end of the year in which those Games are being held. For London 2012 this latter right was the London Olympics Association Right (LOAR), which covered both the Olympics and Paralympics 2012 and arose on 1 January 2009 and terminated on 31 December

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2012. Rio, as the site of the next Olympics in 2016, now has the equivalent local right in place.

Infringement of the OAR and PAR is dependent on the use of “controlled representations”: the Olympic or Paralympic words (including Olympian, Olympiad and Paralympic equivalents), motto or symbol without consent. To a certain extent, use equals infringement, although use in a context not likely to suggest an association is a defence to infringement.

The LOAR was infringed where there was use of any representation of any kind (visual, verbal, oral), in relation to goods or services in the course of trade without the consent of LOCOG, in a manner likely to suggest to the public that there was an association between the London Olympics and the goods or services or the person providing them. In relation to the LOAR (as well as the Olympic and Paralympic Association Rights – of which see below) “association” was defined to mean any kind of contractual or commercial relationship, or corporate or structural connection, or the provision of financial or other support for or in connection with the Olympic Games (or the Olympic movement) for the London Olympics.

The Court in assessing whether an association had been created which infringed the LOAR, although their use was not necessarily fatal, could take particular combinations of words into account. These were the so-called “listed expressions” where any combination of the words Games and 2012 (numerically or in word form), or either of these words with any of Gold, Silver, Bronze, London, medals, sponsors, summer would be indicative of infringement, but not determinative. Thus the papers complained that the use of “Summer Games” would be such a listed expression. Early on, these expressions were to have been automatically infringing of the LOAR, but general discontent over the unreasonableness of the restrictions this would create caused the use of the phrases to be downgraded to an indicative status instead.

Nevertheless, LOCOG generated much publicity using images and references, which it suggested, taken together or used in a certain context, might trigger infringement of the LOAR. These included: depiction of the Olympic venues, use of the 5 Olympic colours, use of Olympic style torches or flames, use of words associated with Olympic qualities (spirit, endeavour, friendship, winning, determination and depiction

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of several Olympic sports (together) and even the use of 30th or XXX it being the 30th Olympiad). LOCOG also said they would look at past advertising strategies to see if the Olympics had changed the alleged infringer’s approach and the nature of the product (non-sporting goods suddenly being advertised in a sporting context being suspicious), as well as the truth or otherwise of any statement, the relevance of the Olympics to the context and any undue emphasis placed on the Olympics element of an otherwise true statement.

Lastly, there were absolute advertising and trading restrictions in place within “event zones” around the various stadia and the Olympic Park. These were identified geographical areas, usually within 100 metres of the events, but including underground stations with exits within the zones. Within these zones LOCOG could control all advertising and trading from the day before an event until the end of the day of that event. Police and Olympic officials had immediate powers to enter property and remove unauthorised material as well as to prevent unauthorised trading. Thus LOCOG hoped to achieve so-called “clean venues” within which ambush marketing could be eliminated, even going to the extent of having powers to bar from entry those wearing non-sponsor brands or to remove other non-sponsor branded items from members of the public who appeared to be part of an ambush marketing stunt.

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Restrictions on individual athletes

The now infamous “Rule 40” of the IOC Charter is certainly not drafted with the support of individual athletes in mind. It restricts the ways in which Olympic athletes can be involved in advertising and other promotion activities during the period of the Games and afterwards. Basically, no athlete can appear in advertising during the period of the Games without direct permission, which will usually only be granted for involvement with top-level Olympic partners. This meant that where individuals had been sponsored by non-Olympic sponsors, without which sponsorship often they might not have been able to get to the Games, these individual sponsors could not get any benefit from their sponsorship during the period of the Games and even afterwards could not show their sponsored athlete with his or her medal.

Now that the Games are fading in to the distance, many individual faces made famous by the London Games can be seen adorning the pages of the advertisement features of the glossy magazines or on posters around London, but this was not the case during the Games themselves and many well-known brands had to withdraw pre-Games campaigns featuring individual athletes in advance of the actual Games period.

Use of well known athletes also created a risk of association under the LOAR even without direct reference to the Games. Probably the best example of the use of an athlete without specific reference to the Olympics or any sporting event, were the Virgin adverts featuring Usain Bolt. British Airways was the official airline sponsor and ran their own successful campaign featuring individual athletes under the banner “They will fly”. Neither campaign ran during the Games themselves however, with BA changing to a “Don’t Fly” campaign with an airliner taxiing past London landmarks.

Success?

These restrictions on both businesses and individual athletes all seemed very tough and threatening at the time, but how did it work out? How consistently did LOCOG attempt to enforce these brand protection measures?

In the year or so prior to the commencement of the Olympics, the image of LOCOG in the press was far from positive. Early action made LOCOG look over-zealous and did little to encourage goodwill towards the London Games.

For instance, stories of family-run butchers being told to remove Olympic sausages from their shop windows or Olympic T-shirts being taken down from small printing shops in East London or Café Olympic being poorly advised by its local council and having to spend £3000 rebranding because it was within an event zone in West Ham, did little for the images of the Olympics.

Once the run-up to the Games had started in earnest and in particular during the period of the Games, it quickly became apparent that this was going to be a very popular event and examples of mini-ambushes began to multiply. Adverts featuring individual Olympic sports began to appear, Standard Life being one which featured a long-jumper. Others, such as Jo Malone and Photobox used medals and “golden offers” to promote their wares. There seemed to be a flurry of adverts featuring people on graded plinths or carrying batons or other subliminal references to the Games. These ads came and went, hard for LOCOG to stop and designed to be one-off in many cases. Buses and taxis were not restricted in what adverts they could carry and were also free to enter the event zones. Many non-sponsors took advantage of this, e.g. some taxis were covered in Union Jacks with “London’s calling” and the Vodafone logo and name on them.

LOCOG had to contend with the unfortunate (for LOCOG) coincidence of 2012 being the Queen’s Diamond Jubilee as well as the year the Olympic Games came to London. Many non-sponsor brands took advantage of this synchronicity and issued “celebratory” packs or editions, plastered with Union Jacks and references to 2012, with calls to celebrate Britain or being British in 2012. These neatly sidestepped the specific restrictions under the LOAR and OAR/PAR, whilst reminding the public of the great events of 2012 and effectively implicitly associating the products with these events.

Whilst any association by a non-sponsor could, potentially, have been an infringement of the LOAR, it would have been for LOCOG to demonstrate this and unfortunately, the use of the very recognisable 2012 logo on almost all “official” publicity or sponsor materials meant that it was also conspicuous by its absence on non-sponsored products, making the now educated public unlikely to consider a potential ambusher as officially connected and thus making infringement more difficult to prove.

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LOCOG also delivered one of the most successful Games ever, with a new, unified approach to Olympic and Paralympic branding, which will have made sponsors feel their investments were worthwhile

LOCOG did take action against Greentop Circus which themed a show around the Olympics and offered “Olympic entertainers” on its website. The Middleton family website “Party Pieces” which was selling 2012 celebratory products including sets of hoopla rings in the Olympic colours and similar coloured rings as paper chains was asked to remove them from the site.

Betting website Paddy Power used the self-declared “unofficial” sponsor approach and advertised on billboards around London using the line ‘Official sponsor of the largest athletics event in London this year! There you go, we said it (ahem, London France that is)’. The bill boards were outside the “event zones” and although LOCOG requested they were removed, it did not pursue the matter when Paddy Power sought a court order confirming that the adverts were not an infringement or illegitimate in any way.

Some of the restrictions, such as that on spectators wearing non-sponsor branded clothing, backfired in terms of the effect on the brand image of the official sponsors. There were reports of a pre-Olympic trend away from internet traffic of non-sponsors towards the sponsors, being reversed upon LOCOG’s announcement of these restrictions on spectators, and, amid the general media uproar about these restrictions, companies such as Oddbins capitalised on the new goodwill felt towards excluded non-sponsor brands by offering discounts to customers who came into their shops wearing 8 or more items from a non-sponsor brand.

Success for LOGOC, or any Olympic organizing committee and enforcer of Olympic rights, has to be seen in the light of the elimination of association benefits to non-sponsors, whilst also creating and maintaining a positive image for the London Olympics overall. No sponsor would wish to be associated with a failing event, as much as they would not want competitors to benefit from association with an event which they have paid significant sums in order to have an exclusive association in the minds of the public. In the end the balance LOCOG had to strike was to discourage major ambush marketing campaigns, which, with the exception of Paddy Power, they seemed effective in doing, whilst not creating bad PR for the official sponsored by a too heavy-handed approach; a difficult task, but one that, broadly, LOCOG appeared to handle well. There were no repeats of the major ambushing incidents seen in Sydney in 2000. There, thanks to Qantas’s advertising and association with the top Australian athletes of the day, Qantas was mistaken by the public for the Olympic partner at the expense of the now defunct Ansett Airlines.

LOCOG also delivered one of the most successful Games ever, with a new, unified approach to Olympic and Paralympic branding, which will have made sponsors feel their investments were worthwhile. The Olympic brand baton has now been passed on to Rio whose Organising Committee must now work hard to maintain the Olympic brand’s distinctiveness and value and not damage the valuable brand legacy handed on to them by London.

Post-2012 Olympic Script

Whilst the LOAR has now terminated, it should be recalled that the OAR and PAR are still in place and will continue to protect against the use of controlled representations without permission, unless the use is not likely to create an association or falls within one of the very limited exceptions. This includes: an honest statement that accords with honest commercial practices and does not make commercial or other use of the Olympics in a context to which they are substantially irrelevant; journalistic or information use – very restricted; incidental use (similar to copyright incidental use exceptions); or continuous use (the Little Chef Olympic Breakfast was able to keep its name on the basis of this continuous use exception). ■ **BAL**

The legacy of the Paralympics for 2013 – will there be one?

BY JANE HATTON, ASSOCIATE TRAINER FOR EQUALITY LAW

When Bradley strode up the steps to be handed Sports Personality of the Year – and Sebastian deservedly picked up his Lifetime Achievement award – we were briefly transported back to those heady August days when everything seemed possible. To some. Yes, there were mixed views from the disability world in the immediate aftermath of the Paralympics. However, even for the cynics, there were few who failed to be inspired when thinking about disabled athletes literally pushing themselves to their physical and mental limits, achieving things most non-disabled people could not even begin to dream of. As a disabled person myself I had and have nothing but admiration for them.

The Paralympics was a powerful way of focusing on what disabled people can achieve, given the right support, conditions, aspiration and effort. How does this relate to life in “the real world”? Sadly, it seems to be a different picture. Stereotypes around disabled people, particularly in the workplace, are almost always negative. Employers perceive that employing disabled people is a risk. They understandably focus on issues of concern. How productive can a disabled person be? What about sickness absence? Will there be health and safety problems to overcome (what do you do with someone in a wheelchair on the third floor of a burning building when the lifts are out of use?). We might get things wrong, and they might sue. Customers, shareholders, other employees may feel uncomfortable around disabled people – perhaps out of embarrassment and unfamiliarity rather than any malignant intention, but uncomfortable still.

In the world of work, as opposed to the heady atmosphere of the sportsfield, disability is most definitely seen as a problem rather than something to be inspired by. In many ways this

shouldn't come as a surprise. For most businesses the salary bill is the largest, and employing people is without doubt fraught with uncertainty and risk. Any responsible organisation takes their role as an employer very seriously indeed.

There is, of course, a legal imperative not to unfairly discriminate against people in employment who have protected characteristics (these include race, gender, disability, sexual orientation, age, religion and belief, marital status, and so on, under the UK's Equality Act 2010). And there is, one would hope, a desire to recruit in a way which is fair and which identifies the best talent.

Thankfully, and perhaps surprisingly, the reality around employing disabled people is a long way from the widely-held myths which still abound. A variety of research identified by the Employers' Forum on Disability illustrates that, contrary to popular belief, disabled employees are, on average, at least as productive as their non-disabled colleagues. And they have on average less time off sick. And stay in their jobs longer, increasing retention and saving money on staff turnover. And they have fewer workplace accidents. So an organisation seeking to attract productive, safe, loyal staff with low sickness absence levels would do well to focus on this particular demographic.

Additional commercial benefits should not be overlooked either. There are over 11 million disabled people in the UK – all consumers – who spend £50-£80 billion a year. Inside intelligence of this market will be beneficial to any bottom line, and there is evidence that consumers generally are more favourable towards companies who pay attention to the needs of their disabled employees and customers.

If any further incentive were required, many disabled people have also had to master a range of skills and qualities which

THE LEGACY OF THE PARALYMPICS
FOR 2013 - WILL THERE BE ONE?

It's worth making an Olympian effort to ensure that the legacy of the event is a better understanding of the contribution that ordinary men and women offer our businesses and organisations

are useful to employers – creativity in overcoming everyday obstacles, tenacity, determination, adaptability and so on.

So, despite the myths, employing disabled people turns out to have many real commercial advantages for business quite aside from the more “soft” Corporate Social Responsibility, moral, ethical, reputation management aspects. Being seen as an Employer of Choice is as important as ever, even in this economic climate – attracting the very best talent is sometimes the most competitive advantage there is.

However, this is the real world and there are harsh economic realities to face. Employing disabled people – even with all of the benefits now more clearly understood – must surely have a cost attached? What about the dreaded “reasonable adjustments”? By law, employers have to provide reasonable aids and adaptations to ensure that disabled employees have access to buildings and can carry out their jobs safely and effectively. Here, again, the reality is far more positive than the myths. The majority of disabled employees require no money spent on reasonable adjustments at all (which can include, for example, flexible working hours, the opportunity for home-working, moving office furniture around). Where there is a cost, the average spend on reasonable adjustments is £75 - £184, which is a low price for attracting the person with the right skills for the job. In the UK a scheme called Access to Work is in place to help employers both identify and pay for adaptations and equipment (including support workers) which will help people carry out their jobs effectively.

Back to the Paralympics. Not only did London attract the world's most talented and dedicated disabled athletes, there were many thousands of spectators flocking to marvel at their skills – many of whom are disabled themselves. This created tremendous issues around access for the capital city. Despite the historic infrastructure of the London Underground, Transport for London worked hard to enable disabled people to be able to navigate across the city in a variety of ways. Far from perfect (our own Paralympian, Dame Tanni Grey-Thompson recently having to literally crawl off a train as there was no-one there to help her), many volunteers were trained and in place to advise and help disabled visitors. Where there is an incentive, accessibility issues can be overcome.

This was an occasion where we could celebrate the truly remarkable performances of world-class athletes, disabled and non-disabled, who have honed their skills to perfection over many gruelling weeks, months and years of training. And it's worth making an Olympian effort to ensure that the legacy of the event is a better understanding of the contribution that ordinary men and women offer our businesses and organisations. There are talented disabled people all around us, not just in the Olympic villages. Let's hope they're able to win in 2013.

Jane Hatton is Associate Trainer for Equality Law – and founder of Evenbreak, the job service for disabled people (www.evenbreak.co.uk) 

Sporting risks, the law and wheelchair rugby: The case of Kylie Grimes

BY JACK ANDERSON, PROFESSOR, QUEEN'S UNIVERSITY, BELFAST

The GB wheelchair rugby team finished a very credible fifth at the London Paralympics. The team was mixed and included Kylie Grimes. In 2006, an 18-year-old Grimes sustained serious injuries, leaving her paralysed from the chest down, when she dived into a swimming pool at the home of a friend. Her subsequent claim gives an interesting insight into the courts' perspective on sports-related risk: Grimes v Hawkins [2011] EWHC 2006.

At the time of the incident, Grimes was 18 years old. She was healthy, athletic and a keen sportswoman and was both a very competent horsewoman and an accomplished swimmer. As a result of the injuries she sustained, she is tetraplegic. The trial judge noted (at para 2) that the impact on her life of the events of that night had been "catastrophic" but that she remained an impressive and courageous young woman who "conducted herself with great dignity throughout the trial".

Grimes' case was twofold: the defendant was in breach of his duty to her under section 2(1) of the Occupiers Liability Act 1957; the defendant either by himself or through his daughter, Katie Hawkins, was in breach of a common law duty of care to the claimant.

Facts

On the night of the 4th/5th August 2006, the defendant and his wife were away for the night, as was their older daughter. They left their younger daughter (then 18), at home. At the time of the incident, Grimes was friendly with Hawkins. They were not close but knew each other through the college they both attended. On the evening of 4th August they were both at a local pub, as were a number of other young men and women of about the same age, most of whom had been students at the college. Grimes said she had only drunk 3 or 4 small glasses of wine and that she was not drunk. The trial

judge accepted her evidence on this point (para 16).

Although there was some dispute over it, the trial judge found that the claimant was invited as a guest to a party of about 20 young people who arrived at the defendant's house from about midnight. The house was a large one and had a heated, indoor pool with an unmarked deep and shallow end. On the night in question, Miss Hawkins provided swimwear so that people (including the claimant) could go swimming and the judge found that Hawkins not tell anyone not to dive into the pool.

A number of people began jumping or "bombing" into the pool from both sides. The claimant jumped into the pool by the steps at the shallow end. She said she was in the pool for about half an hour, mostly swimming around, sometimes chatting with friends, standing in the shallow end. She knew where the deep end was, though it appears that she did not go near that end of the pool because that was where people were "bombing" at that time (paras 29-30).

The claimant then dived in. Grimes recalled that she dived diagonally towards the deep end, assuming it would be safe to do so. Further, she executed a shallow racing dive. Catastrophically, she almost immediately collided with the bottom of the pool. The trial judge held that Grimes had in fact dived in diagonally from a point nearer to the edge of the pool at the shallow end than the edge of the pool at the deep end and, although the claimant intended to execute a shallow racing dive, the dive was in fact steeper than Grimes intended (paras 42 and 43). An ambulance duly arrived. The claimant was transferred onto a stretcher and taken to hospital.

In cross examination (the following directly quotes paras 48 and 49) the claimant accepted that she knew it was dangerous to dive into shallow water but denied that she had done so. She knew, she said, that it was dangerous to dive where the

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water depth was unknown. The obvious danger, as she recognised, was the risk of hitting her head. She did not need to be told that, she had known it for years. She was a very competent swimmer with a number of qualifications. She knew how to dive. She also replied that she would have expected to be warned of any hidden dangers in the pool, and she would have heeded any such warnings. She said if Katie Hawkins had told her not to dive she would not have done so.

Expert evidence was provided to the court (paras 50-62) which noted that there are no regulations in respect of private swimming pools in the jurisdiction, though there are some national standards which apply, generally, to public and commercial pools and including recommendations for warning notices and for advice notices setting out safe diving techniques, together with depth markings. The experts noted that some private swimming pools have depth markings and “no diving” notices but that most of the many thousands of such pools have neither. Further, one of the experts observed that she would not expect such notices since in the domestic, private context given that guests could be verbally warned of any unexpected dangers. This expert witness did not accept however that there were any dangers which required warnings in this case. Both experts agreed (para 63) “that the general guidance from all bodies that issue any advice upon swimming pool safety is that the consumption of alcohol in connection with the use of swimming pools is not recommended...Common sense would in any case suggest that alcohol consumption affects judgement and the appreciation of risk”.

The Law

The claim was brought both under the Occupiers’ Liability Act 1957 and in common law negligence. The court held, conventionally in such instances, that the breaches alleged were common to the duty under the 1957 Act and at common law. The defendant, Miss Hawkins’ father, admitted (para 66) that he was the occupier and that the claimant was a visitor within the meaning of the 1957 Act and thus he “owed a duty to the claimant to take such care as in all the circumstances of the case was reasonable to see that the claimant was reasonably safe in using the premises for the purposes for which she was invited or permitted by the occupier to be there”. The trial judge was satisfied that in the circumstances, the defendant’s common duty of care owed to the claimant included while she was using the swimming pool, a purpose which included diving.

The claimant contended that the pool was not safe for diving for a number of reasons including (a) that the risk of an accident occurring with such a group in the pool in such circumstances was serious and obvious, and the consequences of a pool accident, especially a diving accident, could be catastrophic; and (b) that there were no oral or written warnings or indications that diving was unsafe in any part of the pool, or of the depth contour of the pool; and that it would have been easy to instruct users of the pool that night that diving was unsafe, and/or to forbid the guests from diving; or to lock up the pool house to prevent any access to the pool.

The claimant further submitted that the defence of willing acceptance of risk under section 2(5) of the 1957 Act was not of application on the ground that the claimant had assumed that it was safe to dive in because she had seen so many others jumping and “bombing” in the water.

The trial judge did not accept this and neither did he accept the assertion that it was impossible for the claimant to ascertain the depth of the water because of the amount of agitation on the water’s surface. He found (at para 74), “the fact that the claimant executed the dive diagonally indicates that she had given some thought to the matter and did not think the water was deep enough immediately in front of her. She was right about that. She sought to reduce the risk by diving into deeper water. She was an accomplished swimmer. She knew how much water she needed to dive in. In my judgment either she misjudged the dive, or she misjudged the depth of the water, or she did both.”

The trial judge followed (at para 76) with this:

“There is always risk in swimming and diving, in any pool. Even where an expert diver dives into a purpose built diving pool his dive is not free from risk. Much depends on the diver’s technique, the angle of entry and so on. It is well known that diving always carries with it a risk of injury (particularly to the head or neck) if the dive is badly executed, or carried out in water that is too shallow to accommodate it. None of this is specialist knowledge. Every adult of normal intelligence knows it. The claimant in this case knew it.”

The defendant’s relied on the decision of the House of Lords in Tomlinson (FC) v Congleton Borough Council and Others [2003] UKHL 47. There, the claimant had dived into a lake, which he knew well. His head collided with the sandy bottom

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of the lake and he suffered serious injuries. In dismissing the appeal, Lord Hoffmann placed particular weight on the importance of the exercise of free will and the defendants (and the trial judge) in the instant case relied particularly on paras 44 and 45 of Lord Hoffmann's judgment in Tomlinson:

"44. The second consideration, namely the question of whether people should accept responsibility for the risks they choose to run, is the point made by Lord Phillips of Worth Matravers MR in Donoghue v Folkestone Properties Ltd [2003] 2 WLR 1138 – 1153 and which I said was central to this appeal. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. By contrast, Miss Bessie Stone, to whom the House of Lords held that no duty was owed, was innocently standing on the pavement outside her garden gate at 10 Beckenham Road, Cheetham when she was struck by a ball hit for 6 out of the Cheetham Cricket Club ground. She was certainly not engaging in any activity which involved an inherent risk of such injury. So compared with Bolton v Stone, this is an a fortiori case.

45. I think it will be extremely rare for an occupier of land to be made under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so."

The trial judge further cited paragraph 27 of Lord Hoffman's speech in Tomlinson: "Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose of what he chose to do and not out of the state of the premises". In short, the trial judge's view in Grimes was the Tomlinson approach applied: there were "no hidden or unexpected dangers" and furthermore the claimant had "familiarised herself with the contours of the pool" and "the risk here (for the claimant) was the risk inherent in diving" (para 84). In contrast, at para 85, the defendant "was not required to adopt a paternalistic approach to his visitors, all

of whom were adults, all of whom were making choices about their behaviour, exercising their free will".

Finally, the claimant argued that the defendant owed to the claimant a duty at common law to take reasonable steps to ensure that the claimant was reasonably safe when visiting his home as his guest, a duty that could have been discharged by either i) putting the pool out of bounds and/or ii) forbidding diving in the pool. The claimants submitted that that the duty was established on an application of the three limbed test set out by the House of Lords in Caparo Industries plc v Dickman [1990] 2 AC 605 (proximity, foreseeability of damage, fair just and reasonable). The trial judge relying inter alia on para 46 of Lord Hoffmann's judgment in Tomlinson and on para 17 May LJ's judgment in Trustees of the Portsmouth Youth Activities Committee (A Charity) v Poppleton [2008] EWCA Civ 646 found that a duty to protect against obvious risk or self inflicted harm exists only in cases in which there is no genuine or informed choice and that a duty should in the circumstances, only exist where the defendant has in some relevant way assumed responsibility for the claimant's safety,

The trial judge found that in the present case there was an absence of an assumption of responsibility (which per Caparo would have meant that there was an insufficiently proximate relationship between those running the premises and the claimant) and neither would in be fair, just or reasonable in the circumstance, where the claimant had taken an informed risk, for a duty to be imposed.

Conclusion

The influence of Tomlinson in cases of this nature appears enduring (see also Evans v Kosmar [2007] EWCA Civ 1003). As for Giles, she was asked (in The Times on 6 September 2012 "A brutal game for fearsome hard men and one woman" by Melanie Reid, an award winning journalist who herself broke her neck in an accident) about the dangers of wheelchair rugby and replied "I've broken my neck – what more can I do." Who, Reid says, could begrudge Grimes a little nihilism. Reid goes on "Risk. Like so many of us in wheelchairs, Grimes played with it and lost. She daily swallows the bitter consequences. The dark, gladiatorial image of her sport suits the young, active, risk-losers who want a reason to keep living; who find salvation in aggression." **BASL**

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Emrys Lloyd and the 1948 London Olympics

BY CHARLES WOODHOUSE, PAST PRESIDENT OF BASL

This is an untold story of an Olympian of the old school who made a pivotal contribution to the successful London 1948 Games. He was the four times Olympic fencer Emrys Lloyd, who was the quintessential honorary legal adviser, a now extinct breed.

Today Lloyd is often remembered for two things. First he was unique in being in two teams – fencing and rowing – at the same Games. This was at the 1932 Los Angeles Olympics. This happened by chance because on the boat taking out the British team the diminutive Lloyd was challenged by the captain of the British eight for wearing the distinctive cerise coloured Leander tie and socks. When he explained he was indeed a Leander member having coxed at Cambridge he was immediately signed up as reserve cox.

And secondly he carried the British team flag at the 1948 Opening Ceremony. This was after a last minute scare when no Union Jack could be found. The flags of all the other competing nations were there but a young Roger Bannister, then an intern assisting the BOA honorary secretary Evan Hunter, had at the last minute to rush round to find a Union Jack for him. To compound matters he had been sitting on and then lost his British team beret just before the parade. He therefore led out hatless the British team, parading last as host nation in front of King George VI on a very hot day.

This was a low key and certainly low budget Opening Ceremony. It took no more than two hours but was still much praised at the time as were the Games themselves despite being “organised on a shoestring”.

But where Lloyd was truly unique in 1948 was for being a competitor in the same Olympics in which he had set up the Organising Committee and then personally handled all the legal and contractual work.

Surprisingly Lloyd’s immense contribution from late 1945 onwards in helping the BOA put together the successful 1948 Games has been largely overlooked. What he did went beyond mere legal advice and comes alive in his letters and papers of the time.

Moreover he did so for the most part on a “no charge” basis – these were the words he often wrote at the top of his BOA letters and documents at the time. He did not charge for personal attendances at meetings. His firm, Farrer & Co’s bill for more than a year’s work on the organising committee was limited to two hundred guineas (£210). They were thanked by the organising committee in January 1947 for this “very generous gesture in reducing their fees by way of contribution to the Olympic Games.” By today’s standards such modest charges as his firm made seem astonishingly low – even taking into account the change in the value of the pound.

When he died in 1987, aged 81, his Times obituary said “his character was reflected in his elegant fencing: detached, balanced, alert, and perhaps a little austere as might befit a Wykehamist. He set himself the highest standards.”

All these qualities are seen in the way he set about helping the BOA in 1945 when, after distinguished war service, for which he was awarded an OBE, he re-joined his law firm, Farrer & Co, then consisting of four partners of which he shortly became the fifth. The Olympics were the reason he joined that firm in early 1936 because unlike his then employers Clifford Turner (now Clifford Chance) they allowed him time off, albeit unpaid, to compete in Berlin.

Lloyd was one of a tight knit, small group of BOA council members, all unpaid but well-connected in sport and the establishment, who reconvened in December 1945. Their purpose was to reconstitute the BOA council and to consider

whether London could and should stage the Olympics in 1948. At that December 1945 BOA meeting were two IOC members, Lord Aberdare and Sir Noel Curtis-Bennett, and two men who were to become presidents of their international federations, Alderman Harold Fern from swimming and a young Stanley Rous from football. Then there were the BOA's three honorary officers, the splendidly independent minded Colonel Evan Hunter OBE, then 61, and a veteran of two wars, who had been hon secretary since 1925, Billy Holt, hon treasurer, who had just retired from a successful business career, and Lloyd, hon legal adviser.

Like Lloyd, Evan Hunter was a stickler for precision, clarity and getting things done properly. The two clearly worked well together and exchanged some lively correspondence, parts of which would not have been out of place in P G Wodehouse. One January 1946 letter to Lloyd, written poignantly by hand by Evan Hunter on BOA notepaper, ends "Very cold & no staff...what a life but we work on." This sums up the ethos and spirit at the BOA at that time.

These BOA colleagues in December 1945 knew of course that a scheme had been prepared by the BOA in 1936 (when Wembley Stadium had first been in touch with them) when it was thought London might apply for the Games in 1940 and again in 1940 for Games in 1944. Thus they were picking up the pieces at a time of austerity when the BOA itself had no staff or office – even its typewriter, Evan Hunter told Lloyd, was in urgent need of repair.

Evan Hunter had however received just before that meeting a remarkable letter from Arthur Elvin, the managing director of Wembley Stadium, renewing Wembley's offer to stage the Games, backed by a guarantee of the expenses of putting on the Games and a cash advance. Arthur Elvin assured the BOA that Wembley did "not desire to make any profit out of the Games". All he wanted was "the honour of Wembley being associated with the first post war games". He would do everything possible in the background to assist the BOA in making them a success. It was Lloyd who was promptly asked in January 1946 by Evan Hunter in effect to check out what this all meant and liaise with Arthur Elvin. Hunter also asked

Lloyd to do the resolutions to set up an investigating committee to decide if the BOA could responsibly offer to IOC to stage the games and to liaise with Billy Holt, the treasurer, about Lloyd's suggestion of forming a limited company for an Organising Committee.

Lord Burghley, later the Marquess of Exeter, was BOA Chairman and its dominant, controlling and charismatic figure at this time. Lloyd and Lord Burghley met and became friends at Cambridge in the late 1920s. Lloyd was selected to fence at the Amsterdam Olympics in 1928 (where Lord Burghley won gold in the hurdles) but declined to go because it clashed with exams. Both he and Lord Burghley were in the British team at the Los Angeles Olympics in 1932 (where Lloyd came fifth in the foil). They were exact contemporaries, both born in 1905, the year in which the BOA was formed. Lord Burghley was a commanding figure in the Olympic and athletics worlds. For years he was vice president of the IOC, president of the IAAF and chairman of the AAA.

By 1945 Lord Burghley had clearly come to rely on Lloyd as a trusted adviser. Having the BOA chairman's confidence must have been an important reason why Lloyd was asked to take on such a leading role.

As the most junior partner at Farrer & Co in 1971 when Lloyd was planning his retirement, I was fortunate to be invited by him to meetings where he and Lord Exeter (as Lord Burghley had by then become) were both present. I therefore saw the friendship, close understanding and trust that existed between them. Everyone incidentally always knew when Lord Exeter was visiting Lloyd's office in Lincoln's Inn Fields because of the Rolls Royce with the number plate AAA 1 parked in the forecourt.

Lloyd helped the BOA to reach its decision, led by Lord Burghley, to go to the IOC in spring 1946 and accept responsibility to hold the Games in London. Lloyd then took the initiative for the BOA in structuring and forming the organising committee. He insisted on incorporation of a separate company, limited by guarantee, advising his BOA

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colleagues about the risks of unlimited personal liability. This was not unreasonable given who they were, for example Viscount Portal, the BOA president, Lord Burghley, its chairman and the Marquess of Clydesdale, its vice-chairman. This advice was to have lasting implications for all future Olympics with the IOC requiring an organising entity separate from the host National Olympic Committee. This is an example of a lasting Lloyd legacy.

Included in the scores of Lloyd's files in the short two year period before the Games, was one dealing with a then mould breaking film contract with J Arthur Rank's film company. Other files featured many household name contracts for suppliers to the 1948 Games such as McCorquodales for printing, Omega Watches for time keeping, Burtol for cleaning and there were many interesting files for facilities such as Herne Hill for cycling, Tweseldown racecourse for eventing, Henley for rowing and Richmond Park for athletes' accommodation.

But by far the most important contract was with Wembley Stadium where Lloyd had struck up an excellent working relationship with Arthur Elvin, Wembley's managing director. Elvin was a remarkable man and something of a perfectionist with a very firm handshake who proved true to his word. He and Lloyd negotiated and concluded the key Wembley Agreement which literally underpinned the Games and made them possible. Under it Wembley provided most of the venues, for example athletics, football and hockey in its main stadium, swimming and boxing in its Empire pool with other facilities for fencing, wrestling and weightlifting. In spring 1946 White City stadium had made an alternative offer but Wembley was thought more suitable. Crucially, given the BOA did not look for or receive government funding, the Wembley Agreement also provided a guarantee against loss and an advance of working capital.

The BOA circulation list in early 1946 for correspondence, working drafts, be they resolutions, minutes, agreements or company memorandum and articles, usually comprised "Burghley, Hunter, Holt and Lloyd". A later addition to this list was Col Harry Bevan MC, who was appointed in April 1946 as general organising secretary under an agreement inevitably prepared by Lloyd. Much of the paperwork either emanated from Hunter or Lloyd himself and Lloyd's handwritten amendments and redrafting are everywhere on the files and papers of the time.

The name chosen for the company was "The Organising Committee for the XIVth Olympiad London". This befitted the precise and correct way Hunter and Lloyd liked doing things – always under Lord Burghley's watchful eye. No shorthand acronym like LOCOG then. Lloyd went to considerable trouble to get the Board of Trade's licence to dispense with the word "Limited" from the company's name. Otherwise he feared people might mistakenly believe that the organising committee "was a trading company being formed with a profit motive."

Another marked difference from today was that while the BOA and the Organising Committee, when finally incorporated in November 1946, were separate entities the same people were essentially involved in both bodies operating from the same offices, first in Victoria Street and later in 1947 in Mount Street. With Lord Burghley as chairman, all those who were at that December 1945 BOA council meeting became original organising committee members with some distinguished additions. These included Arthur Porritt, a NZ IOC member and surgeon to the Royal Household, Jack Beresford from rowing, and later the athlete Harold Abrahams who became treasurer.

Wembley provided most of the venues, for example athletics, football and hockey in its main stadium, swimming and boxing in its Empire pool with other facilities for fencing, wrestling and weightlifting.

The company's first executive committee meeting – they did not then use the words “board” or “directors” – was held on 19 December 1946 with detailed minutes closely worked on by Lloyd. He himself decides, seemingly at the last minute, not to be a member of the executive committee. The minute on this reads: “Mr Lloyd regretted that since his firm were to be appointed solicitors to the Organising Committee he did not consider it right that he should continue to serve as a member of the Executive Committee.” The words “continue to” are then crossed out by Lloyd because technically until that first meeting everything that he, the Colonels Hunter and Bevan and colleagues, had been doing in 1946 had been in anticipation of the organising committee becoming functional.

Another interesting minute of that first meeting reads: “It was resolved that an invitation be sent by the chairman to Sir Arthur Elvin inviting him...to be present at all meetings of the executive committee so that the committee should have the benefit of Sir Arthur Elvin's advice.....on any matters affecting the organisation or financing the Games.” Then significantly on the draft – but crossed out by Lloyd – was a statement saying “It should be made clear to Sir Arthur Elvin that he would not have any voting rights ...or any control of the committee's acts or expenditure.” It seems it fell to Lloyd to deal with this sensitive matter because Sir Arthur wanted and expected to be on the executive committee. Doubtless there were hurt feelings – somewhat needless with hindsight given that Wembley through Sir Arthur did everything it promised for the success of the Games. Sir Arthur was also later rather underwhelmed by not being thanked properly after the Games – but he was knighted before the Games.

Here some of Lloyd's lively correspondence is worth recalling. A classicist from Winchester and King's, Cambridge, he had been horrified by BOA colleagues for their muddling Mt Olympus and Olympia. In one letter he indignantly tells Harry Bevan, by then the general organising secretary, “they would not have satisfied the examiners” and must change the literature about the Olympic torch. He then put Sir Arthur Elvin right just in time about the correct name for the new access road from Wembley station to Wembley stadium. His letter to Sir Arthur about the difference between Olympian and Olympic elicited the splendid reply from Sir Arthur “In view of what you say I think it must be “OLYMPIC WAY”, and “OLYMPIC WAY” it shall be.” Another long lasting Lloyd legacy.

Lloyd's legacy on incorporating sports bodies went further than just advising the BOA. He was a leading company lawyer and while helping the BOA he was chosen by the Australian banks, then based in London, to lead their successful fight against nationalisation in the late 1940s.

There was almost complete identity of purpose between the BOA and the organising committee and the idea of any dispute seemed inconceivable. They saw themselves as one and the same, albeit with separate secretaries, the Colonels Hunter and Bevan, and no one seemed at all concerned that the BOA's hon legal adviser's firm Farrer & Co was acting for the organising committee.

On analysis of the contemporary papers it seems it was only Lloyd's advice about personal liability that caused a separate limited company to be formed as the operating company. It was not then essential under IOC rules for there to be an organising committee separate from the national Olympic committee of the host nation. All this was a totally different world from today's arm's length BOA and LOCOG relationship.

Lloyd's legacy on incorporating sports bodies went further than just advising the BOA. He was a leading company lawyer and while helping the BOA he was chosen by the Australian banks, then based in London, to lead their successful fight against nationalisation in the late 1940s. This involved two Melbourne visits and the creation of many lasting friendships with Australians lawyers like the eminent Sir Garfield Barwick. Throughout his career Lloyd frequently represented Commonwealth clients at the Privy Council.

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As his successor at Farrer & Co, I carried on his work incorporating dozens of sports bodies over the next 30 or so years including archery, hockey, squash, netball, canoeing, rowing, orienteering and athletics. My former colleagues and successors at Farrers, Karena Vleck, now Legal Director at the RFU, and Serena Hedley Dent, now Clerk to the Provost and Fellows of Eton College, even wrote the chapter on incorporation in the leading Sports Law textbook. We are and were all directly and indirectly indebted to Emrys Lloyd. I do not remember him ever using the phrase “sports law”. I was reluctant to use it but, with Karena Vleck’s help, prepared the original memorandum and articles for British Association for Sport and Law and, as its President in 1998, came to accept it.

Going back to 1948, Lloyd would I think prefer to be remembered more for what he did as a competitor. He epitomised the amateur ethos of the time. When he narrowly missed a bronze medal in the foil, apparently following some dubious French tactics, he turned to the British fencing team captain, the redoubtable Charles de Beaumont, and said “I’m terribly sorry, Charles”. There was typically no complaint or appeal by Emrys about his French rivals who won gold and bronze.

Many years later in 1978 the IOC awarded Lloyd the Silver Olympic Order for his lifetime contribution to the Olympic movement. Curiously neither he nor Lord Exeter received any recognition for their contribution to the 1948 Games, apparently the only award then being an upgrade to CBE from OBE for Evan Hunter, the BOA hon secretary. It was an altogether different world from today with minimal political and government involvement.

Both Lloyd and Lord Exeter lived to see the day when the IOC in 1981 opened the way to professionals. To be an Olympian it then merely became necessary to be eligible under an international federation’s rules. There was no longer need to be (or pretend to be) amateur. Lord Exeter died shortly after that momentous change and Lloyd six years later (with his widow receiving a condolence telegram from the IOC President, Mr Samaranch). It was already another era far removed from 1948. So too will be London 2012. But at the Opening Ceremony hats (or berets) should be doffed in Lloyd’s memory – and of all his splendid BOA colleagues who reconvened in December 1945 to help out the IOC and continue the Olympic Games. ■ **BSL**

Analysis



An evaluation of the tools available to Sports Rights Holders and event organisers in combating ambush marketing and the legal means for preventing and combating ambush marketing

**BY SEAN CORBETT, IP PRACTITIONER & TRADE MARK ATTORNEY
FORMULA ONE MANAGEMENT LIMITED**

Most people would agree that the London 2012 Games were an undoubted success creating a feel-good factor in the United Kingdom over the Summer of 2012. The Games provided excitement & great sporting memories in equal measure and there has been much talk about creating a lasting legacy. Whether this comes to fruition remains to be seen, however the Games certainly created a positive buzz and this is something that official sponsors will have benefited from. The Games will have created a positive association between the event and the products and services offered by a sponsor – which is of course exactly what they paid for in the first place.

The Games will have boosted the brand awareness of its official sponsors and creating added value in the exclusivity offered by an official partnership is the *raison d'être* behind the International Olympic Committees (IOC) lucrative partnership programme promoting exclusive categorisation for official partners. The London Organising Committee of the Olympic Games (LOCOG) recognises in its Brand Protection guidelines that “It is evident that many people are eager to use the Games to boost their business activities in connection with London 2012”.¹ LOCOG explain that to protect the investment of its Official partners in the Games and to “give them the exclusive association with London 2012, for which they will pay, LOCOG must prevent

ambush marketing”.² This commitment leaves LOCOG and other event organisers’ with the unenviable task of deciding what constitutes ambush marketing and how it can be prevented.

The definition of ambush marketing provided by LOCOG is as follows:

“Also known as parasitic or guerrilla marketing, ambush marketing describes a business’ attempts to attach itself to a major sports event without paying sponsorship fees. As a result, the business gains the benefits of being associated with the goodwill and public excitement around the event for free. This damages the investment of genuine sponsors, and risks the organiser’s ability to fund the event.”³

According to LOCOG, ambush marketing is “something that all major sports events have to tackle”.⁴ It is certainly not limited to the Olympics. It is a problem because it can damage revenue targets. LOCOG suggested this could affect not just the “quality of the Games” but also “the potential for leaving a financial legacy for sport”.⁵ In other words, ambush marketing damages sport.

The underlying factor in the growth of ambush marketing is undoubtedly the increasing commercialisation of sport, specifically the importance of major sporting events as a platform for businesses to advertise their products and associate their brand with the goodwill and buzz that sport can generate. The potential global reach of sporting events dwarfs that of other advertising mediums making major

sporting events an almost unrivalled brand mouthpiece. Sponsorship and advertising in sport is buoyant. It follows that competition to secure sponsorship rights is fierce.

This article attempts to identify the armoury of tools available to event organisers and Sports Rights Owners (SROs) – who together will be hereinafter collectively referred to SROs in their fight against ambush marketing by exploring the evolution of ambush marketing. The aim being to discover, not just what measures are most effective in combating ambush marketing, but also where responsibility lies in tackling this maligned form of marketing or indeed if the problem exists to the extent we are led to believe it does.

Targeting Sport

Sport is an important business accounting for more than 3% of world trade. In the EU alone sport is worth 2% of the combined GNP of the 27 member states.⁶ Sponsors are willing to pay large sums of money to associate themselves with sporting events. The differing partner categories for official sponsors of the 2012 London Games can reportedly be broken down as follows; 11 Worldwide Olympic partners reportedly paid £64 million each for the privilege, 7 Olympic Partners paid £40 million, while 7 official Olympic supporters paid £20 million each and a total of 28 Olympic Providers & Suppliers paid £10 million each for their sponsorship designations.⁷ Similarly, at the FIFA World Cup in 2006, each of the 15 official sponsors, had to pay approximately 40 million Euros for official partner status.⁸ It seems even in tough economic times, sponsorship budgets in sport have ballooned.

Sponsorship categories are defined and dominated by the concept of exclusivity. This invariably means there can only be one major sponsor for each category. Subsequently, in any category there will be an official sponsor and competing brands will have missed out on an official sponsorship opportunity. They can choose to ignore a sporting event or they can choose to associate with the goodwill an event will create via more creative means. In other words they can choose to “compete in the sponsored space without the

onerous costs”.⁹ It is easy to see how this alternative seems like an attractive option.

Defining Ambush Marketing

Ambush marketing has been described as “parasitic activity that encroaches on legitimate sponsorship”¹⁰ but often, cited examples of ambush marketing merely allude to a particular event, without suggesting an official relationship with the organisers, or participating athletes. Ambush marketing is hard to define as often, claims of ambush marketing provide no basis for legal action.

Without an obvious place within the wider legal framework, ambush marketing must be judged on a case by case basis resulting in variations in the perception of alleged ambushes dependent on the prevailing legal landscape, jurisdiction, timing, and context of the ambush. There is no catch-all definition, leaving SROs, official sponsors and the alleged ambushers, in the dark as to what will constitute ambush marketing and the extent to which this activity can be stopped. The facts and circumstances of each particular case will dictate whether marketing activity is considered “parasite marketing” or “clever marketing”.¹¹

The governance of sport is all about rules¹² however off the field of play, the commercial governance of sport, particularly relating to commercial sponsorship, is not subject to the same rules of engagement. Sponsorship within sport is dictated by the economics of supply and demand. SROs can demand huge fees for sponsors to come on board as official partners and the platform that major sporting events offer advertisers ensures that there is a healthy queue of sponsors eager to share in the goodwill that an event can evoke. Indeed, this goodwill is what official sponsorship is all about. Schmitz (2005) viewed ambush marketing as an attempt by one company to “piggyback” on the goodwill of a particular event by creating an unauthorised association “without payment”.¹³

Official sponsors are not the only party to suffer because of a successful ambush. Ultimately, if an SRO is unable to show a sponsor that it is willing to police its rights and protect a

AN EVALUATION OF THE TOOLS AVAILABLE TO SPORTS RIGHTS HOLDERS AND EVENT ORGANISERS IN COMBATING AMBUSH MARKETING

sponsor from the risk of seeing a rival piggybacking on the goodwill surrounding an event, that sponsor will be left wondering what it is paying for. It may consider joining its competitors in profiting from future events without having to pay. Unofficial associations cultivated by ambushers threaten the ability of SROs to attract sponsors. This is why SROs and sponsors alike see ambush marketing as a nuisance which has to be tackled to ensure the integrity of the event and the sponsorship agreement.

Ambush marketing can be an emotive subject. Former IOC marketing director Michael Payne posited that “Ambush Marketing is not clever marketing – it is cheating”.¹⁴ Exactly who is being cheated is open to debate. Arguably some alleged ambushes are particularly clever, especially if there is no legal recourse to stop the alleged ambush. The key component of any ambush is the element of surprise and the same is true of ambush marketing. This leaves those charged with preventing ambush marketing with the quandary of stopping the unknown.

Understanding Ambush Marketing

Even if one assumes that an ambush is likely the nature and timing of any ambush can be such that counter-measures are ineffective. In understanding what can be done to prevent or minimise the effect of a so-called ambush one needs to consider its origins and view so-called ambushes at work. To wage war on the ambushers this author would stress the importance of knowing the tactics employed by would-be ambushers. It is worth considering that the biggest enemy is not always the alleged ambusher but arguably either the failure of the SRO to cut off the potential for an ambush or the failure of the sponsor to activate the rights it acquired to maximise their investment. Inactivity leaves the door open for exploitation.

Done well, a clever ambush campaign can leave consumers with the impression that the ambusher was an official sponsor. It is clear that ambush marketing can create a buzz around an unofficial product linking it to a sporting event, to the extent that the exposure can inadvertently out-weigh the exposure given to a rival enjoying official partner status.

As alluded to above, the legal status of an alleged ambush depends on the detail. For example, a marketing campaign highlighting athletes in training, without any reference to a

specific event, coinciding with the Olympics, is somewhat different from encouraging an athlete to deliberately promote an unofficial sponsor via exposure to the TV cameras. Such an incident would be reminiscent of sprinter, Lindford Christie's, infamous Olympic press conference where he wore contact lenses displaying the Puma logo to ambush Reebok – an official sponsor of the 1996 Games.¹⁵ One might be surprised to know that such ambushes are not necessarily going to fall foul of IP laws or contractual provisions, unless suitable obligations not to undertake such actions are already catered for within the legal, and contractual framework, of participation. Rule 40 of the Olympic Charter is a classic example of the evolution of the tools at the disposal of SROs seeking to minimise ambush opportunities as far as the involvement of competitors are concerned.¹⁶

The origins of Ambush Marketing

Defining ambush marketing is not easy. The term is synonymous with illicit behaviour, however, this was not always the case. When the term ambush marketing was first coined by Jerry Welsh, former marketing director at American Express, he envisaged a legitimate marketing strategy that when “correctly understood & rightfully practiced is an important, ethically correct, competitive tool in a non-sponsoring company's arsenal of business – and image-building weapons”.¹⁷ This view is in stark contrast with the negative connotations now associated with ambush marketing. It could be argued that deceptive ambushes designed to mislead consumers are distinguishable from creative ambushes which are a “virtual necessity in modern competitive business practice”.¹⁸

It is generally accepted that the term ambush marketing covers an umbrella of marketing activity whereby an advertiser associates a product or service with an event without paying for the privilege. It doesn't follow that this activity is illegal unless, and until, it is supported by some surreptitious behaviour that creates an association between a product and an event implying some form of official endorsement. It is the implication of an official endorsement that often empowers rights holders to act.

While some might be inclined to commend the *laissez faire* attitude of some ambush marketing for its creativity, this view is unlikely to be shared by official sponsors of an event. Essentially, ambush marketing devalues their investment in

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paying to promote an official association with an event. Sponsors naturally want SROs to protect their investment, which leads us full circle to consider how one can protect against the unknown.

As the rights fees paid for official sponsorship of sports events spiral, sponsors, SROs and ambushers alike are left to fumble their way through the murky maze of IPRs capable of being protected and licensed to official partners. The problem an SRO faces is not in proving and acting against *prima facie* infringements, for instance, misuse of a trade mark, but rather in interpreting those situations where advertisers push the limits of acceptability in referring to an event without claiming an official sponsorship.

If we subscribe to Payne's zero tolerance theory that all ambush marketing is cheating and morally wrong one needs to also face up to the difficulties in policing this theory. Ambush marketing may manifest itself through trade mark infringement, passing off, breach of copyright or breaching advertising or competition regulations, but one should also be aware that not every reference to a third parties trade mark will constitute trade mark infringement. According to UK trade mark law comparative advertising referring to a competitors trade mark for the purpose of "identifying goods and services of the proprietor" is permitted, albeit with conditions qualifying the fact that use must be in accordance with "honest practices".¹⁹ Comparative advertising is not considered morally wrong and not every reference to a registered trade mark will be misleading or an infringement. It could be submitted that the same rules should apply in dealing with ambush marketing within sport.

It is generally accepted that the term ambush marketing covers an umbrella of marketing activity whereby an advertiser associates a product or service with an event without paying for the privilege

This author advocates that there is a clear distinction between misappropriating the IPRs of a third party to trade on the reputation associated with that brand for commercial gain and referring to an event to promote an advertisement campaign in a manner that does not claim an official association. It follows that there must be more to ambush marketing than simply alluding to the characteristics or even location of an event. Relying on registered trade marks it seems is no longer enough for SROs to protect their events and this is where event specific legislation comes into play. Perhaps a closer look at the origins and evolution of this type of activity as an alternative to the official sponsorship route will shed some light on why this is the case.

Ambush Marketing at work

It is a well-known doctrine permeating English law that "A sporting spectacle cannot be owned in any ordinary sense of the word".²⁰ There are a multitude of rights that exist in the content created around a sporting event. The trade marks through which an event can be protected and official designations that are offered to partners, together with access to footage, and the event itself are in essence what a sponsor has paid for – a chance to share in the goodwill of an event via an official association. This is something that thanks to exclusivity their competitors cannot share unless, that is, they choose to ambush.

Ambush marketing in its current guise is considered to have first surfaced at the 1984 Los Angeles Olympics following a major restructuring of the Olympic sponsorship platform replacing 628 official sponsors at the 1976 Montreal Olympics with a marketing plan, promoting product categorisation & exclusivity. Raising revenue by offering sponsors exclusivity and increased value in their investment also slammed the door shut in the faces of a great many companies who were interested in legitimately sharing in the Olympic spirit.

The 1984 Games reportedly generated a surplus of revenue to the tune of some \$250 million²¹ but the vast reduction in official partners also saw the birth of ambush marketing when Kodak failed to secure sponsorship rights for the 1984 Olympics.²² Fuji had won the rights to be an official sponsor of the 1984 Games ahead of its rival, Kodak who reacted by buying up extensive advertising becoming sponsor of ABC's broadcast of the Games and the "official film" of the US track

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team convincing many that Kodak, and not Fuji, were an official sponsor. Kodak had acted lawfully and while Fuji might have seen their activities as unfair there was nothing in their sponsorship contract that guaranteed that competitors would not advertise in ads broadcasted during the Games.

Ambush marketing has enjoyed an illustrious history ever since. A quick look at the Irish bookmaker Paddy Power's marketing activities around major sporting events reveal an active interest in a good old-fashioned style ambush at the heart of the sporting action, and in what Welsh described as the "thematic" and "generic space of sport".

Although derided by some as an underhand practice which devalues an event and official sponsorship, so-called instances of ambush marketing are also viewed as a legitimate marketing tool by many companies, such as Paddy Power. In 2007 for example they managed to convince Tongan rugby player Epi Taione to change his name to Paddy Power by deed poll for the duration of the Rugby World Cup tournament.²³ Players and other participants in major sporting events can be restricted as far as the use of their image rights and personal sponsorship agreements are concerned by contracts outlining the rules of participation and arguably these restraints are an important mechanism in avoiding some obvious loopholes in tying up marketing opportunities. They should certainly not be overlooked.

The same company was busy in the summer of 2012 firstly, at the EURO 2012 finals where Danish international footballer, Nicklas Bendtner chose to celebrate a goal by revealing his lucky Paddy Power pants receiving considerable press coverage and exposure for Paddy Power. Bendtner, fell foul of UEFA rules on ambush marketing banning advertising on players kits²⁴ and Rule 4 of the FIFA Laws of the Game pertaining to the use of advertising and slogans on undergarments.²⁵ Bendtner was hit with a ban and an £80,000 fine, duly paid by Paddy Power, who enjoyed additional exposure proving ambush marketing can be highly effective, even when it involves pants.²⁶

It could be argued that this type of 'ambush' might allow a sponsor to frame an argument for the "tort of inducement to breach" in such an instance whereby a third party has influenced a competitor to flaunt event rules to promote an unofficial brand. Using the example of Linford Christie's Puma-branded contact lenses, if a third party can be shown

to have encouraged an athlete to breach contractually binding provisions regarding unauthorised kit sponsorship, could that third party also be held accountable for any loss suffered to an official sponsor, wronged by the ambush.

Of particular interest in this context would be the effect of such an ambush in light of Rule 40 of the Olympic Charter.²⁷ Rule 40 states that "Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games". Participants who breached this Rule could face sanctions such as loss of accreditation, financial penalties or even disqualification. A rule such as this has clear implications on athletes and sports persons in terms of what they can and can't advertise. If this could be extended to apply to advertisers outside of the "official partner" family it would make ambushers think twice about using contracted athletes as their weapon of choice.

Exploring this option in more detail if we consider that the sponsor who encouraged the breach will not be accountable directly, being outside of the reach of Rule 40, there may be some scope for an official partner to consider not just the torts of "inducement to breach"²⁸ but also alongside that other "unlawful means" torts. It might not, for argument sake, have negated the publicity of the ambush, but if by deliberately persuading a contracting party to break a contract or breach a commercial term in that contract an ambusher becomes liable for the legal wrong, arguably the sanctions could have much sharper teeth. It might pave the way for a form of restitution and an assessment of the commercial value of the ambush which could then be payable to the wronged party. Essentially by encouraging a breach of contract, an ambusher could be argued to have injured a competitor by the use of unlawful means against a third party which is a free standing tort as recognised by the House of Lords in *OBG Ltd & Ors v Allan & Ors* [2007].²⁹

On the back of their Euro 2012 'ambush' Paddy Power also turned their attention to the London Games, seeing fit to use a billboard and the sponsorship of an egg and spoon race in the town of London, in Burgundy France, to run an advert campaign proclaiming themselves as "Official sponsor of the largest athletics event in London this year! There you go, we said it (ahem London, France that is)". The company

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anticipating a backlash from LOCOG made it known they were ready to go to court seeking a declaration that the billboard did not breach the London Olympic Association Right (LOAR).³⁰ This resulted in LOCOG confirming they would take no further action.³¹ SROs need to take note that the very action they take to stop an ambush can be what makes it front page news.

This was the case with an ‘ambush’ masterminded by Bavaria beer during the World Cup 2010 in South Africa. The media coverage of the arrest of strategically clad girls advertising Bavaria beer arguably resulted in Bavaria attracting more coverage and exposure than rival Budweiser – the official sponsor in this category.³² Bavaria had previously used a similar tactic at the 2006 World Cup issuing supporters of the Dutch national side with orange lederhosen bearing Bavaria’s name. Dozens of supporters duly watched the match in Stuttgart in their underwear after being told to remove the infringing clothing which was declared to breach official sponsor rules.³³ It is highly unlikely event organisers envisaged adopting measures to prevent ambush marketing which resulted in spectators watching an event in their underwear. Perhaps this might appease sponsors but ultimately, more often than not, this type of response tends to cast an event or an official sponsor in a bad light.

SROs need to take note that the very action they take to stop an ambush can be what makes it front page news.

Contractual Provisions

Whitehead cites “the contractual relationship between the event owner, venue provider & participants as the cornerstone of any preventative campaign to prevent unlawful association”.³⁴ This would seem to make perfect sense, since the ability of an event organiser to implement measures which could reduce ambush opportunities is very much embodied in the contracts it has with venue providers, broadcasters, participants in the event, security, catering, and of course commercial partners. Any control that can be exerted however is restricted to the activities of contractual parties accountable for their activities. Contract law alone cannot account for the activities of those outside of the remit of its contractual reach, which excludes the parties most likely to ambush.

Venues can be forced to play their part in policing the areas within their control. Clean zones can be established catering for advertising on billboards both at the venue itself and surrounding areas. Athletes, broadcasters and partners alike can be brought into line via their contractual obligations. Controlling the venue and areas of fundamental importance to an event can prevent third parties profiting from the associated goodwill around a sporting event through a combination of “the law of real property, contract and tort”.³⁵ This can relate as much to delivering a stadium free from unauthorised third party advertising as it does to making sure that ticket holders visiting the venue abide by the terms and conditions of their entry. Simple measures, such as stipulating that no photographic pictures can be taken or footage filmed, during an event, other than for personal use, can provide a contractual safeguard against a fundamental breach of a contractual term, thus avoiding the error in the case of *Sports and General Press Agency Ltd v Our Dogs Publishing Co Ltd*, known as ‘Our Dogs’.³⁶ In this case, the Ladies’ Kennel Association had attempted to prevent a publisher from publishing unauthorised photographs of a dog show organised by them. They failed because they had not stipulated that photographs could not be taken as part of the terms of entry. While the presiding judge, Lord Justice Swinfen Eady, commented that “In my opinion it is not right to talk of the right to take photographs as property” a contractual term could have catered for and prevented the objectionable behaviour.

Understanding the types of ambush that might befall an event organiser and its sponsors can help focus the

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preventative action that can be employed to minimise the surprise. Ambush marketing is not restricted to onsite activities. Global advertising campaigns that coincide with an event can use the theme of an event to promote a campaign without any proximity to a stadium venue demonstrated by the Nike 'Find Your Greatness' campaign which was seen by many as a test of the limits of the Olympic rules on ambush marketing.³⁷

Nike's campaign used everyday athletes competing around the world in places called London. It was timed to coincide with the opening ceremony and was backed by a Twitter marketing drive that enabled it to reach a huge audience using the hashtag #findgreatness without specifically mentioning the Olympic Games or using any Olympic imagery or protected terms.

Hoek and Gendall cite the following examples "simultaneous advertising and promotion campaigns, "procurement of sub-category rights", "advertising and promotion claims" and images", "trade mark misappropriation" as the main forms of ambushes employed by would be 'ambushers'.³⁸ These ambush categories are fairly self-explanatory. The characteristics that are unique to each form of ambush do not hide the fact that the aim is still universally to benefit from the goodwill in the event in question.

Promotions that run alongside, and allude to, an event without infringing trade mark laws or other IPRs may "irk the official sponsors"³⁹ but are unlikely to be illegal. A competitor of an official sponsor is free to buy whatever advertising space is readily available as if they were operating

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in any other free market. Prominent billboard space surrounding an event venue is fair game if the SRO has not secured it for its partners. Likewise, leading on to the procurement of sub-category rights, if a non-official sponsor has secured sponsorship of the official broadcast of an event an official sponsor cannot then bemoan the exploitation of legitimate media opportunities. The procurement of sub-category rights by non-sponsors has led some SROs to exert strict control over the surrounding media opportunities to make sure that official sponsors have first right of refusal to media opportunities. This is one of the few ways to ensure that this type of 'semi-official' ambush does not occur but will mean sponsors incur further costs.

Intellectual Property Rights

Traditional IPRs can play an important role in an SROs attempts to police use of its official trade marks, terms, logos and images however trade mark/copyright/passing off actions, are neither cheap or contemporaneous solutions without the support of further measures, such as immediate injunctions. That is not to say that SROs should turn their back on these IPRs, especially when trade mark misappropriation is concerned. In the UK S.1 of the Trade Mark Act ("TMA") defines a trade mark as:

"Any sign capable of being represented graphically which is capable of distinguishing the goods or services of one undertaking from those of other undertakings".

SROs would be well advised therefore to protect all that is protectable within the conceivable terms used to identify an event, having regard to the need for a trade mark to be distinctive.⁴⁰ Furthermore, the mark cannot "consist exclusively" of customary terms used in trade to designate the "kind, quality, quantity, intended purpose, value, geographical origin, the time of production or of rendering of services or other characteristics of goods/services".⁴¹

One can already see perhaps some chinks in the armoury available in protecting terms associated with sporting events by way of trade mark registration. Clearly some terms within the sporting arena might be considered to lack distinctiveness and consist of customary terms that are generic terms that are not capable of fulfilling the function of a trade mark, namely to; "guarantee the identity of the origin of the marked product to the consumer or end user".⁴²

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If we consider how this applies to sport then the registrability of terms such as “Football”, “Rugby” and “World Cup” as trade marks become questionable. Indeed according to both the German Federal Supreme Court and Board of Appeal at the Office of Harmonization for the Internal Market “OHIM” the term WORLD CUP 2006 was considered to be descriptive and devoid of distinctive character.⁴³ Generic names for events and customary terms can be difficult to protect and actually many would argue that generic descriptive terms should not be owned by one party. Consequently, SROs have increasingly turned to event specific legislation to assist their rights protection programmes.

Event Specific Legislation

The Sydney 2000 Games Protection Act 1996 formed part of a carefully orchestrated strategy aimed at reducing ambushing. It is now the norm, for major sporting events to lobby for increased protection enhancing the more traditional IPRs that an event can rely on to combat misappropriation of event marks and associated goodwill. The New Zealand Major Event Act 2007 (MEMA) adopted a similar approach but enacted “a broader framework that can be used on multiple occasions for any event declared worthy of protection”, such as the Rugby World Cup held there in 2011.⁴⁴

The aim is simple, to ring-fence marks that might otherwise elude trade mark protection. Event specific legislation allows SROs to widen the umbrella of rights they can protect. In essence one might consider this as a way of clawing back the

thematic space around an event allowing SROs to stake ownership of previously unobtainable terms. To some, event specific legislation is draconian, particularly those on the wrong end of a prosecution for breaching an “association right” but SROs and sponsors will naturally reap the rewards in protecting what might not be capable of protection outside of the “event”. Whether this should be allowed is another debate altogether.

Arguably, only the biggest events possess the financial and political muscle to persuade Governments to give legislative protection to their respective “events”. Alternatively, the idea of a “Competition/Sports Organiser’s Right”⁴⁵ has been mooted as a means of providing SROs with increased proprietary rights to an event. Such protection might prove less exclusive and elusive than petitioning for event specific association rights.

Exploring this further briefly, one could envisage a European-wide registered right of “Sporting Goodwill” in various elements pertaining to an event bypassing the classic trinity of elements required to prove a claim for passing off being namely, goodwill, misrepresentation and damage to goodwill⁴⁶ which could be used as a viable tool in the fight against genuine cases of ambush marketing. Taking its lead from the “specific nature of sport” recognised in Art 165 of the TFEU this author would suggest that if SROs united to lobby for a unique body of rights that encompassed these qualities supplementing traditional IPRs it could give birth to a unique “Competition/Sport Organiser’s Right”, culminating in a centralised Sport Clearing House which could maintain details of this registered “Sporting goodwill”. This could work alongside existing IP Registries to enable SROs to register a number of terms and symbols via qualification criteria. The qualifying criteria for such a status could take its lead from Art 6 bis of the Paris Convention recognising the fame of well-known marks⁴⁷ taking into consideration the SROs’ existing IPRs, financial and socio-economic benefits that major sporting events can provide a host.

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A look at the regulatory framework for combating ambush marketing

What then can SROs take from the impact of the regulatory framework that operates in this field to discourage and tackle ambush marketing? The most recent example we can draw from is the “London Olympic Association Right” (LOAR) which earned a brief mention earlier in this article.

The London Olympic Games and Paralympic Games Act 2006 (LOGPA 2006)⁴⁸ and the Olympic Games and Paralympic Games (Advertising and Trading) Regulations 2012⁴⁹ laid the foundations for the protection of the use of key terms associated with the Games and set in place controls concerning both advertising and trading in and around the ‘event zones’ during the Olympics. These provisions were unashamedly designed to protect the investment of key sponsors as official partners.

One of the key features of the bundle of rights encompassed within the LOGPA was the prohibition of the use of certain combinations of words which if used together by a business or advertisers could potentially infringe the London Association Right which was reserved for official partners only. These combinations included an amalgamation of the terms ‘LONDON’, ‘2012’, ‘TWENTY TWELVE’, ‘GAMES’, ‘GOLD’, ‘SILVER’, ‘BRONZE’ and also ‘SUMMER’. This is in addition to the protected terms and symbols already protected by the Olympic Symbol Protection Act 1995 creating an Olympics Association Right (OAR) which includes protection for the Olympic symbol (the five ring design) and words such as ‘OLYMPIC’ and the Olympic Motto (*citius, altius, fortius*). The regulations also prohibited a person from engaging in ‘advertising activity’ in an event zone during certain restricted periods unless exempted under the regulations or with the permission of LOCOG. It is worth noting that these provisions were not without teeth. If a breach of the Association Right or Regulations could be proven then a criminal offence would have been committed. The offence was an either way offence carrying a maximum fine of £20,000.

In many ways the ‘LOGPA’ can be seen as a taxi, hailed for LOCOG, by the IOC given that event specific legislation is now a condition of any winning bid for the modern Olympics. Once shepherded into the taxi LOCOG were expected to see the journey home. That said, the LOAR ensured that only official sponsors could use certain

combinations of these terms as part of promotional & commercial activity. Naturally, it follows that the Olympics is viewed as one of the best protected events anywhere in the world when it comes to IPRs. Together, the IOC and LOCOG, were able to limit the general ‘thematic’ space available for unofficial parties to utilise terms and expression that might allude to the GAMES by claiming ownership of terms that might otherwise have been outside of the umbrella of IP rights that one might reasonably expect them to control. The questions one might ask following the GAMES is how did this robust system of statutory rights hold up when tested and ultimately did the regulatory framework stand firm and serve its purpose?

To answer this question it is important to look at the enforcement activities of LOCOG in the run up to the Olympics and throughout the event itself. With nearly 300 so-called ‘branding police’ or Olympic ‘enforcement officers’ patrolling around venues nationwide to prevent unauthorised breaches of the association rights LOCOG certainly caused a stir. The mild hysteria in both local and national press picking up on those tales of individuals or small business’ who caught the attention of the branding police for a breach of the LOAR gave the impression that LOCOG was launching a full-scale siege on ambush marketing. So, while there were such stories as 81 year-old-granny, Joy Tomkins, being rebuked by trading standards for knitting a doll

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donning the Olympic logo⁵⁰ or a butcher from Weymouth exploiting the Olympic logo with sausage rings,⁵¹ in truth the siege never materialised and the battle against the so-called ambushers was conspicuous by its absence during the event itself.

In part it could be argued that this was down to the measures adopted by LOCOG in the run-up to the event in providing clean venues (in other words free from unofficial branding) and advertising exclusion zones not to mention the behaviour and conduct of the athletes taking part in the event which has been explored already in this article. Perhaps it was also a testament to the efforts of LOCOG to educate the public and advertisers alike on the importance of respecting the “association right”. Alternatively, it could also have something to do with the very nature of ambush marketing and how it has evolved.

As Nike demonstrated to great effect with their “Find your Greatness” campaign, which showcased ordinary athletes finding their greatness in cities all over the world, timed to coincide with the launch of the London 2012 Games, the trick to any successful ambush marketing campaign is to attract publicity and leave SROs wondering how or even if they can stop you from operating in a generic space that celebrates sport. Nike’s actions attracted the attention of LOCOG’s brand enforcement team but ultimately the legal basis for taking action was not there. Nike therefore managed to some degree to use an event like the Olympics to help push a promotional campaign celebrating sport, and in particular athletics, without using protected symbols or terminology that would see it misrepresent itself as something it was not. They were not alone.

Lord Coe speaking on behalf of LOCOG on the subject of the need to protect sponsors interests stressed that the first port of call ‘has always been education rather than litigation’. However it is worth noting that in the run-up to the Games, Lord Coe had made some comments to the BBC suggesting that anyone wearing a Pepsi T-shirt might be denied access to Olympic venues on account of the official partner status enjoyed by Coca-Cola. LOCOG was forced to clarify its position by later suggesting that only large groups of spectators wearing “visibly branded” clothing would be at risk of being banned from Olympic venues.⁵² Stories such as this kept the LOAR in the news and in the mind-set of would be infringers.

It goes without saying that it is easier to flex your muscles at what are perceived as weaker targets. That is not to say that it is wrong to implement this tactic since from a rights owners point of view the cumulative effect of allowing numerous small infringements can be as damaging as being on the receiving end of a well-organised and prominent ambush. If an ambusher can sail so close to the wind so as to create the impression of an official relationship that does not exist, then SROs should equally be able to use all the tools at their disposal to deal with any infringing activity.

The caveat for brand owners, event organisers and sports federations alike when it comes to the enforcement of their rights comes in the form of the negative publicity that overzealous enforcement campaigns might evoke. After all, in some instances an ambush by a competitor may simply highlight the inadequacies of the activation of an official sponsorship category or the marketing abilities of a legitimate sponsor. The advice to SROs and sponsors alike must be that each case must be considered on its merits. Perhaps after all by going after the easy targets LOCOG built up a reputation that made bigger targets think twice about launching ambush marketing campaigns or at least tone down the nature of the association they intended to make. Armed with the regulatory framework to cast a wide net over possible objectionable behaviour LOCOG was able to enforce the LOAR without fear of being faced with ‘unjustified threats’

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claims which is always a fear for rights holders not entirely sure of how to use the ammunition within their armoury to best effect. Meanwhile the existence of the legislation no doubt deterred many risk-averse organisations from ambushing the Games. For those well versed in practising the art of ambush marketing the reality is that the threat of legal action was inadequate in instances where the ambush was both clever and brazen and so while often only the big players, like Nike or Paddy Power, will adopt marketing campaigns that ambush an event, the regulatory framework in place to protect the LOAR were arguably unable to clip the wings of serious ambushers intent of flying in the face of an official status or threat of legal action.

It could be said that the regulatory framework introducing statutory defences of IPRs surrounding an event, encompassing the umbrella of rights for example as those protected by the LOGPA are too rigid and unable to cater for the element of surprise. Marketing, and particularly creative marketing generally associated with an ambush marketing campaign is not rigid and has evolved to swerve making the obvious mistake of referring directly to an event. It is the nature of an ambush that ambushers rarely announce themselves. Likewise, it would be rare for an ambush marketer to infringe the registered trade marks protecting the names and logos associated with an event taking place. It goes without saying that it is impossible to own the entire thematic space that lends itself to sport therefore there will always be a way to associate goods/services with an event if advertisers try hard enough without infringing an association right. It is worth remembering that where one party has exclusivity, another party – operating outside of sponsorship guidelines, has creativity.

In summary one would have to say that the regulatory framework designed to assist LOCOG was hit and miss.

To assess the real value of the regulatory framework in place for the 2012 Games, one must consider the views of those who paid for an official association and if they feel they got their monies worth, perhaps that is all that matters.

Ultimately, whether you are dealing with the OLYMPICS, the FIFA WORLD CUP, or FORMULA 1 racing the global popularity of the biggest sporting events attract the attention of sponsors looking to enhance their corporate image and increase the exposure of their own brand or brands. If a company misses out on an official sponsorship opportunity they may still choose to take part in the event in whatever capacity they feel they can get away with.

In summary one would have to say that the regulatory framework designed to assist LOCOG was hit and miss. It certainly gave them a stick with which to beat those who breached the “association right” in clear cut cases involving direct references to protected terms or symbols – not always one would have to say without criticism of their targets, however when it came to facing down the serious ambushers the jury is very much still out.

All eyes will now turn to Brazil who will be next on the list of venues to host let’s not forget, not just the Olympic Games in 2016, but also before that, the FIFA World Cup in 2014. This will no doubt see Brazil cast under the spotlight in terms of the protection afforded to the respective event organisers in the fight against ambush marketing but also in terms of the effectiveness of the event specific legislation enacted to facilitate the fight.

Conclusion

It is undoubtedly important for SROs especially those that organise events to have a policy on dealing with Ambush Marketing. This could be a simple document establishing the extent of their rights which could be applied in the context of each potential infringement allowing SROs to deal with each ambush on a case by case basis. Such a document could highlight flaws in the existing level of protection they enjoy and could help SROs bridge gaps in their IPR portfolio. It could also encompass a set of criteria for assessing the seriousness of the risk of an ambush and help SROs to implement communication channels for interested parties to report so-called ambushes to them. Often the success of a sponsorship arrangement can rest on the communication between SRO and sponsor. Knowing that they will be

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listened to is undoubtedly a comfort to a sponsor who feels aggrieved by something a competitor has done which they feel could have been stopped.

Going one stage further SROs might choose to adopt a comprehensive and fully blown set of guidelines outlining what third parties can and can't do around an event referring to event marks and in utilising (or not as the case may be) logos associated with the event, complete with a policy for sponsors, promoters, broadcaster and venue providers to refer to in order to ensure the correct use of the IPRs that exist around an event. Not only could this help sponsors activate their sponsorship agreement to the maximum, it could also prevent unofficial parties from being given the opportunity to ambush an event. A sponsor paying huge sums of money for an official partner status will want to know there are provisions in place to counter parasitic marketing and to protect their investment.

There is no quick and easy fix in defeating ambush marketing. Clearly SROs and Sponsors need to defend their rights to maintain the value of their product, and investments, respectively, but they also need to manage their own expectations of what can be done. Whether an ambush occurs by association or intrusion the reality is the public do not care about ambush marketing as much as rights owners and sponsors do. For this reason this author believes naming and shaming offenders⁵³ is not enough to deter would-be ambushers who see the added publicity as valued notoriety. Equally, event specific legislation is not able to stop creative

ambush marketing. It begs the question whether ambush marketing be counteracted at all. As outlined above "Irritation alone does not provide sufficient grounds for legal action"⁵⁴ but there are protection mechanisms, contractual provisions and practical steps that SROs can adopt and employ to minimise the scope for an ambush and therefore the irritation it causes. All hope is therefore not lost. It is in both an event organiser and SROs interests' to formulate a plan of action to minimise and combat ambush marketing and see it through but with open eyes and bearing in mind the caveats that may lean against high profile actions in every instance.

There is in this author's view a strong argument that SROs need to be more circumspect in the exclusivity they offer sponsors. Ultimately, whether ambush marketing is cheating, or otherwise, it is here to stay and perhaps managing the so-called "thematic" space available to non-sponsors might be the best way to protect official sponsors and minimise the opportunity for rivals to encroach on their official partner status. It is worth remembering not every so-called ambush will provide sufficient grounds for legal action. Effective management of an event, controlling contractual parties and formulating sensible IPR programmes to protect what can be protected will ensure that sponsors want to continue their relationship and pave the way for a lasting financial legacy for an event – and for sport.

Ambush Marketing has its own legacy and perhaps SROs need to up their game and concentrate on what they can offer sponsors instead of mourning that which they cannot stop non-sponsors from doing.

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Combating Ambush Marketing - Points for SROs to consider

Is the "event" adequately protected – Could the bundle of IPRs that protect an event and/or brand from unauthorised use or association be strengthened. Trade marks are territorial and registrable for differing classes of goods/services. SROs need to make sure they are protected for everything they think they are and in the relevant jurisdictions. Copyright, Design registration, unfair competition, domain name registrations and even Customs Registration might offer SROs a previously unutilised means to tackle ambush marketing.

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Is the sponsorship arrangement adequately protected – Sponsors can come from a vastly diverse range of industries and often would be otherwise unconnected to the interests of the SRO behind an event. SROs might need to extend protection of their trade marks to classes of goods/services not previously protected.

Event Specific Legislation – Consider whether it is a viable option and will it add value to the existing IPRs to help prevent or tackle real instances of ambush marketing? Sometimes an event may be held in a territory that was previously not on a SROs radar. Event Specific Legislation and the cooperation of the Government might be the only way to adequately protect the rights of association in these circumstances and in which case petitioning for this extra protection would be worth exploring on the basis of the positive attributes the event brings to the country.

Event specific guidelines – Produce guidelines for partners, broadcasters, ticket sellers and venue providers to follow to ensure correct use of the IPRs and designations afforded to partners/sponsors.

Manage the expectations of partners – Make sure they are aware of what they are buying into and the rights they are granted. Don't make promises that cannot be delivered upon.

Carry out risk assessments based on the event, IPRs associated with the event, jurisdiction, likely assistance from authorities, existing sponsors and likely areas exposed to an ambush. This could help appease sponsors but also greatly minimise the risk of an ambush and will certainly minimise the surprise element allowing SROs to plan a response.

Education – Advertorials reminding the public and potential infringers of the rights protected surrounding an event and highlighting those 'association rights' which cannot be used without permission can be a less aggressive way of putting would be infringers on notice than direct warnings. Alternatively promotional campaigns outlining the protected rights could pay dividends in discouraging ambush marketing.

Contractually bind those that can be bound not to take part in or assist with ambush marketing. This applies to promoters, sponsors, competing athletes, broadcasters, venue providers and all contractually bound event staff not to mention fans and paying spectators who need to abide by the

terms and conditions on their tickets. A simple provision catering for the prevention of promotional activity for non-official parties within the relevant contracts can greatly minimise the opportunities for ambush marketing.

Apply the facts to the case. Is there a legal recourse or genuine action available to prevent or quash an ambush or will a response simply give an ambush more publicity.

Encourage official partners to activate their sponsorship agreement – If official partners activate their official partnership to the maximum and increase the exposure of their official status there can be no confusion as to who the official sponsors are. A competing brand may try to ambush but given the exposure and support that an official partner can rely upon they should achieve their goals from the partnership regardless of what a competitor may try and do.

Consider the PR that any action might attract. Does the end justify the means? Sometimes being seen as tough on ambush marketing is a good thing. However a disproportionate response against a perceived innocent or weak party may damage the value of an association with a sponsor.

Work with the media to ensure a cohesive cooperation whereby the media are accredited and given access to events allowing them to report on the sporting spectacle but on the understanding that they are briefed not to give exposure to potential ambushers.

Set up communication channels encouraging official sponsors and partners to work together to report instances of ambush marketing and to help prevent further ambushes. Having a designated contact on the brand protection team can ensure that measures taken to remove ambush marketing materials or prevent an ambush are taken swiftly and with minimal fuss.

Be realistic in understanding what can be prevented – There is a general thematic space associated with sport than cannot be owned as such and trying to claim ownership over the spectacle of sport itself will prove fruitless and SROs and sponsors should concentrate on protecting what can be protected. **BAVL**

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The Games of the XXX Olympiad in London – The Ad-Hoc Arbitrations

BY IAIN QUIRK, BARRISTER, ESSEX COURT CHAMBERS

Introduction

The first Olympic Games of modern times were celebrated in Athens, Greece, in 1896. However, it is London that has been the host in 1908, 1948 (having originally been scheduled for 1944, but postponed because of World War II) and 2012, making it the only city ever to have held three Olympic Games. The Games of XXX Olympiad in London were heralded by Lord Coe as “two glorious weeks”¹, not least because of the quality of competition and the successful organisation and execution of the Games. But what was going on behind the scenes? This article peeks behind the curtain to consider the disputes that took place before the Ad Hoc Division of the Court of Arbitration for Sport (CAS) leading up to and during the Games.

The Landscape

Before we start, it is worth setting the scene. In 1996, an Ad Hoc Division of CAS was created to be present at the Olympic Games in Atlanta. It was to determine, generally within a 24-hour period, any dispute arising during the Games. The philosophy behind its creation was described by the Swiss Federal Tribunal: *‘In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events that disputes are resolved quickly, simply, flexibly, and inexpensively by experts familiar with both legal and sports related issues.’*² The Ad Hoc Division has been present at all subsequent Summer Games (Sydney 2000, Athens 2004, Beijing 2008) and Winter Games (Nagano 1998, Salt Lake City 2003, Turin 2006, Vancouver 2010)³. London 2012 was no different.

The jurisdiction of the Ad Hoc Division arises out of the entry form signed by each and every participant in the Olympic Games – athletes, coaches and officials – conferring exclusive jurisdiction on the Panel for disputes arising in connection with the Games⁴.

The arbitrations at the London Olympics were governed by the CAS Arbitration Rules for the Olympic Games (the Ad Hoc Rules) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They were further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies as a result of the fact that the seat of the ad hoc Division is Lausanne (Art. 7 of the Ad Hoc Rules).

The Ad Hoc Rules provide:

- That the jurisdiction of the Ad Hoc Division is for the resolution of any disputes arising during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Games (Art.1). This is important as a number of the cases turned on whether the Panel had jurisdiction within that time period.
- That before filing an application, the claimant must have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the Ad Hoc Division “ineffective” (Art.1)
- The arbitrators are drawn from a special list of arbitrators for the Games (Art. 3), with recognised competence with regard to sport (Art. 12). There were twelve names on the list for London 2012.
- The applicable law is in the widest terms. Art. 17 states that “The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”

During the London Olympics, the Ad Hoc Division was based at a hotel on London’s Park Lane⁵. This was the base of

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many of the Olympic officials during the Games. The arbitrators were on call throughout the Games and had to be available if they were called upon at short notice.

Finally, our view of the landscape would not be complete without mention of the Olympic Charter. This is the Bible of the Olympic Games. It sets out the fundamental principles and values of “Olympism”⁶ and the constitution of the “Olympic Movement” including the International Olympic Committee (IOC). In the context of disputes before the Ad Hoc Division, the Olympic Charter is relevant in that: (a) Art 61 provides for the jurisdiction of CAS; (b) the Ad Hoc rules provide that the Panels shall apply the Charter (see Art. 17 of Ad Hoc Rules cited above); and (c) it contains guiding principles cited and relied on by the Panels, for example in the *Peternell* case finding the conduct of the South African Equestrian Federation was contrary to the principles of Olympism.

The Statistics

There were nine Ad-Hoc Panel decisions. The first was rendered on 24 July 2012⁷, three days before the Opening Ceremony, and the last on 11 August, one day before the Closing Ceremony.

They were heard by 12 arbitrators, of whom two⁸ appeared three times, and nine appeared twice. There was one sole arbitrator case (heard by Graeme Mew in the *Russia-Spain Sailing case*); the others were panels of three.

Two of applications were allowed⁹, one partially allowed¹⁰, and six dismissed. Of those dismissed five¹¹ were dismissed on jurisdictional grounds.

As far as the substance of the cases was concerned, five (*Peternell*, *Ward*, *Lynch*, *FEP*, and *Mullera*) were selection disputes, two were doping cases (the two *Sterba* decisions) and two were field of play cases (*Russian Sailing* and *Swedish Triathlon*).

The awards varied in length: 6 pages was the shortest, 25 pages the longest.

The Panels moved speedily. One of the quickest times from application to award was 12 hours (the *Peternell* case, though that was to the decision only – reasons followed a little later). This meant sitting late and unsociable hours (for example a hearing from 9.00pm to 1.30am in the *Ward* case; and from 8.30pm to 12.30am in the *Lynch* case). But the prize for quickest decision goes to the sole arbitrator in the *Russia-Spain Sailing* case who delivered the operative part of his award 3 hours 40 mins after the application was lodged. Indeed, in at least two cases – the *Russia-Spain Sailing* case and the *Mullera* case – although applications for interim measures were made they were rendered redundant because the main case was heard so speedily.

Ad Hoc Panels like acronyms. I counted 24 acronyms used for the names of the parties alone¹².

Also interesting to note was the reliance by Panels on previous decisions of CAS tribunals and Ad Hoc Panels. The decision in *Ward* was cited twice (in *Lynch* and *FEP*) on the limitation under Article 1 of the Ad Hoc Rules, and the Panel in the *First Sterba* case relied on “constant CAS jurisprudence” regarding the requirement for an “aggrievement”. The Panel in the *Second Sterba* case also relied on CAS jurisprudence regarding the appropriate sanction, in particular distinguishing the sanction in the *Duckworth* case¹³ on the facts. And in the *Swedish Triathlon* case, the Panel cited the “long established line of CAS jurisprudence, [whereby] the CAS will only review a field-of-play decision in circumstances of the decision having been taken arbitrarily or in bad faith (“the Field-of-Play Principle”)”. This showed a willingness to cite and rely upon earlier case law, albeit probably to no greater extent than has been noted in academic writing before: “While it does not have a strict doctrine of precedent, panels will only unusually depart from interpretations of law by previous panels because of considerations of comity and mutual respect.”¹⁴

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The Cases

The landscape having been set, we turn now to the decisions themselves.

Alexander Peternell (South Africa) v South African Sports Confederation and Olympic Committee & Others (24 July 2012)

Mr Peternell was a South African equestrian event rider. He challenged the decision that another South African rider had been selected to compete in the South African team in the Equestrian Eventing discipline. That decision had been taken by the South African Sports Confederation and Olympic Committee (SASCOC).

A prior decision of CAS (before the Games) had upheld Mr Peternell's challenge. Nevertheless, the South African Equestrian Federation (SAEF) had still recommended the other rider as he was "better prepared, his horse is better and the results expected will be better in the Olympic Games than Mr Peternell." As such, SASCOC notified the Federation Equestre Internationale (FEI, the worldwide governing body of equestrian sport) that it would not be presenting a candidate. SASCOC and SAEF having thrown their toys out of the pram in this way, Mr Peternell issued a further application requesting a decision that he be nominated by SAEF and selected by SASCOC to represent South Africa at the Games.

Time wise, the Tribunal could not be criticised for being tardy. The application was filed at 8am on 24 July 2012, a tribunal formed, directions issued for the respondents' answer and comment by 2.30pm and a hearing held at 5pm. This was urgent, because the Equestrian Eventing competition was starting on Saturday 28 July 2012.

The hearing went ahead at 5.00pm, the respondents not attending (but they had filed a written response). The IOC and FEI were however represented.

The Panel held that despite not having received a recommendation for selection of Mr Peternell by SAEF, SASCOC was still able to select him. Whilst SASCOC's Memorandum of Association provided that it had the power to select "on recommendation" from the relevant national sports federations, the rationale behind that rule was that SASCOC was not in a position to know all the athletes from

all disciplines of its country. However, here SASCOC was fully aware of Mr Peternell's circumstances and his eligibility because it had been a party to the earlier CAS case.

SASCOC and SAEF were not allowed to combine together to frustrate the earlier CAS award. The Panel chided SASCOC for "hiding behind the non-receipt of a recommendation, because SASCOC itself had been a party to the CAS 2845 procedure [the earlier CAS decision] and therefore very well knew that the Applicant was to be selected."

The Panel held that SASCOC's action was contrary to the Olympic Charter, including the obligation to recognise the jurisdiction of CAS and the principles of Olympism expressed in the Olympic Charter. SAEF's retaliatory measure of not presenting a candidate was "hardly within the Olympic spirit or the promotion of ethics and good governance in sport."

The Panel therefore annulled the decision of SASCOC not to select Mr Peternell, declared Mr Peternell "selected to represent South African" and ordered SASCOC and SAEF to place him in the Olympic Team of South Africa and not to do anything which could prejudice his participation in the Equestrian Eventing competition.

The Tribunal moved quickly – the operative part of the award was delivered within around 12 hours of receipt of the application.

What do we draw from the decision? The main point is that CAS was not willing to allow a national team to avoid the effect of an earlier CAS order – it showed that the CAS Ad Hoc Division had teeth and that its orders could not be ignored.

Application allowed.

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Joseph Ward (Ireland) v International Olympic Committee, International Boxing Association and others (26 July 2012)

Joseph Ward is an Irish boxer in the light heavyweight category, and was 18 years old at time of the London Olympics. He did not qualify for the Olympics and he claimed that the qualification process had been incorrectly applied (by the IOC and the International Boxing Association (AIBA)).

Mr Ward had not qualified in any of the two world championships held in 2011 or the European Olympic Qualification Tournament held earlier in 2012 – which were the basis for selection of boxers for the Olympic Games. In addition, Mr Ward was not selected by the “Tripartite Commission”, composed of the IOC, AIBA and the Association of National Olympic Committees (ANOC). The Tripartite Commission did, however, select Mr Bosko Draskovic of Montenegro who competed at the same weight as Mr Ward.

The IOC explained that Mr Ward had not been selected because Ireland was not eligible for Tripartite Commission places, because they were reserved for NOC’s with delegations of 6 or less athletes at the last two Olympic Games. The Irish Amateur Boxing Association (referred to, not without confusion, as IABA) complained that the Montenegro delegation had also exceeded that limit and had been wrongly calculated, such that the remaining place in the 81kg category should go back to AIBA for reallocation. Mr Ward claimed that he was the next best ranked athlete and should be selected.

Mr Ward also complained that the refereeing during the European qualifying tournament held in April 2012 was corrupt and he was thus unjustly eliminated.

Time wise – the application was issued at noon on 24 July, respondents and interested parties were given until 5pm on 25 July to file their submissions, and a hearing was convened at 9pm on the same day. The hearing went on until around 1.30am. Whilst witnesses were available, the parties agreed they would not be called. The award was issued the next day (26 July).

Jurisdiction was challenged, on the basis of non-compliance with the time limits by Mr Ward. The Panel held that Mr Ward had objected to his non-selection on 11 July 2012,

and thus before the period provided in Article 1 of the Ad Hoc Rules for jurisdiction of the Ad Hoc Division of CAS, i.e. 10 days prior to the Opening Ceremony (which period began on 17 July).

In addition, the Panel found that Mr Ward had not filed his appeal within the time limit set out in the CAS Code, i.e. 21 days from the date of receipt of the decision appealed against (Article R41 of the CAS Code).

Accordingly, the Panel held that it lacked jurisdiction.

It nevertheless went on to consider the appeal on the merits (relying on the practice of a number of past Ad Hoc Division panels), and held that it would have dismissed the appeal. Applying Swiss doctrine, it said that the phrase “the next best ranked athlete at the 2011 AIBA Men’s World Boxing Championship” in the relevant AIBA rules referred to the results achieved at that championship and not ranking based also on old results. Since Mr Ward came 16th at those Championships, he was not the next best ranked – and so even if the Montenegrin boxer had not been eligible, Mr Ward would not on any view have been selected.

As for the alleged corruption at the European Tournament in April 2012, this was dismissed on the basis that that claim was out of time as provided in the CAS Code and the Ad Hoc Rules. Whilst Mr Ward had proffered an anonymous witness to support his claim that he had only recently discovered the corruption (and thus was in time), the Panel held that he had not complied with the procedural requirements established (in an earlier CAS case) for anonymous witnesses. Those requirements were to provide evidence that their personal safety was at stake and that cross examination by “audiovisual protection” was required.

What do we learn from this case? First, there is much improvement to be made on acronyms (AIBA and IABA do not make easy reading). Second, the arbitrators worked hard: sitting to 1.30am. And third, past Ad Hoc Division and other CAS case law does matter – the Panel cited a number of earlier decisions on procedural issues (time limits; hearing anonymous witnesses) and legal issues (interpretation of a contract / statute as a matter of Swiss law).

Application dismissed.

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Denis Lynch (Ireland) v Horse Sport Ireland Ltd, The Olympic Council of Ireland & Others (29 July 2012)

The next case took us back into equestrian events, albeit it was another selection case.

Denis Lynch is an Irish show jumper. Mr Lynch and his horse Lantinus had been disqualified from a show in early July 2012 in Germany, after Lantinus tested positive for hypersensitivity. This is a tenderness or pain in the horse's legs – which can either be caused 'naturally', for example as a result of a horse hitting a hurdle, or by poor animal husbandry or deliberate application of a substance to the horse's leg. A horse with hypersensitivity will lift its legs higher to avoid further pain to its legs if it hits the jump – so it can be advantageous.

This was not the only time that Mr Lynch had found himself implicated in suspicious activity. He and Lantinus had been disqualified at the 2008 Beijing Olympics. Also in the 12 months prior to the London Olympics, Mr Lynch had been disqualified from two other competitions because of hypersensitivity in Lantinus. However, Lantinus was not his horse for the London Games – that was to be (the grandly titled) *Abbervail van het Dingheshof*.

On 16 July 2012, Horse Sport Ireland (HSI), the Irish equestrian governing body, and The Olympic Council of Ireland (OCI), jointly (by way of a "Monitoring Group") refused the selection of Mr Lynch for the Irish Olympic Team on the basis that he might bring Ireland into disrepute.

His application was lodged on 26 July 2012. The hearing commenced at 8pm on 28 July 2012, and concluded at 12.30am. In circumstances where one of the respondents said that it had not received all documents, the Panel decided to hear the issue of jurisdiction first – and to give its decision on that issue by noon on 29 July – and to convene a further hearing on the merits if it found that it had jurisdiction.

The Panel applied Irish substantive law (though of course the governing law of the arbitration was Swiss law).

The Panel concluded that it did not have jurisdiction. It did so on two bases:

First, the Panel could not find any contractual provision

which conferred upon CAS jurisdiction to hear appeals from the joint decision of HSI and OCI. It said that there is no rule in sport that "everything goes to CAS" as argued by Mr Lynch. The jurisdiction of CAS is contractual, and there was no applicable contract providing for the jurisdiction of CAS in relation to the joint decision of HSI and OCI.

Second, because the dispute arose prior to 17 July 2012 and thus outside the time limit in Article 1 of the Ad Hoc Rules (i.e. more than 10 days preceding the Opening Ceremony). In reaching that conclusion, the Panel followed the decision in *Ward* albeit noting it was "not obliged to follow the decision".

Application dismissed.

Federación Española de Piragüismo v International Canoe Federation (29 July 2012)

Federación Española de Piragüismo (FEP) is the Spanish national federation for canoe kayak. Its application was brought against the International Canoe Federation (ICF), claiming that a place given up by Slovakia should have been assigned to the Spanish K2 1000m team (of Javier Hernanz Agueria and Diego Cosgaya Noriega).

The application was filed on 28 July 2012 at 2.05pm. No hearing was held.

The Panel dismissed the application for lack of jurisdiction, on the basis that the dispute arose far earlier than the period set out in Article 1 of the Ad Hoc Rules (since the dispute had started as early as August 2011). Again the Panel quoted the decision in the *Ward* case, in particular the words that "The Panel is not saying that it is up to the athlete to decide when the issue arose, but rather that the facts will be examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose."

This was a very short decision – it was time barred, short and simple.

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Jan Sterba v World Anti Doping Agency (29 July 2012)

Staying with canoeing, Jan Sterba was a Czech canoeist, as part of the K4 and K2 crews. The issue in this case was alleged doping.

Mr Sterba was found guilty of doping at a qualifier competition held in May 2012 in Poland. He had used a supplement called “Shotgun”, and a doping analysis found the presence of a substance known as “BM”. He was notified of a 6-month suspension on 9 July 2012. He appealed that decision and on 24 July 2012 was notified that his suspension had been overturned and that “No anti-doping rule violation has been committed by Mr Sterba.” The award with reasons was communicated on 29 July 2012.

Mr Sterba applied to CAS to confirm that decision – not to appeal against it. In essence, he wanted confirmation of the position in sufficient time for him to be able to compete in the Games. The International Canoe Federation (ICF) had indicated that they would appeal the decision to the CAS in due course.

Mr Sterba’s application was filed on 28 July 2012, and the respondents and interested parties were given until 6pm on 29 July to respond. No hearing was held.

The Panel said that Mr Sterba had no “concrete legal interest” in challenging the decision, because it was in his favour. There was an “Aggrievement Requirement”, namely a principle established by constant CAS jurisprudence that “only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to CAS against that decision.” Accordingly, Mr Sterba had no standing.

Query whether the decision that Mr Sterba had no “concrete legal interest” is correct. WADA had indicated that it was to challenge the appeal decision before CAS. Given the time, plainly Mr Sterba was rightly concerned about settling his right to participate in the Games – and for that reason brought his application against WADA no doubt to try to force the issue. The Panel was, however, not convinced, and WADA did not take up the bait (they took a stony-faced approach that they had not made a decision and as matters stood Mr Sterba was free to compete). One could take the view that the time factor did give Mr Sterba a “concrete legal

interest” in seeking effectively a declaration that the decision was correct. But, one can equally see the practical difficulties that this might pose if it were a general principle – namely that pre-emptive applications to CAS could become prevalent. On balance, this decision must be right – but there is some food for thought here: shouldn’t an athlete be entitled to seek a final determination on such an issue, so that he can focus his mind on preparation for the event, free of the worries that his place could still be withdrawn? This Ad Hoc Panel thought not.

Application dismissed. But we return to Mr Sterba below...

Ángel Mullera Rodriguez (Spain) v Royal Spanish Athletics Federation & Others (31 July 2012)

Mr Mullera is a Spanish runner, competing in the 3000m Steeplechase. In this, another selection case, Mr Mullera claimed to have been unlawfully excluded from the Spanish Olympic athletics team.

He was selected by the Royal Spanish Athletics Federation (RFEA) for 3000m Steeplechase. On 19 July 2012, a Spanish newspaper disclosed emails between Mr Mullera and a trainer in which Mr Mullera asked for advice on doping protocols and how to come out clean in any anti-doping controls. It then emerged that RFEA had received these emails anonymously about 6 months earlier and as a result they had subjected him to several out of competition anti-doping tests, with no adverse analytical findings.

However, on 20 July 2012, the RFEU informed Mr Mullera that he would not be part of the Spanish Athletics Team in the London Olympics. The RFEU Disciplinary Committee stated that the evidence was not sufficient to ascertain an anti-doping rule violation, but proceedings were also pending before that Committee as to whether Mr Mullera had engaged in “notorious and public acts going against the dignity and decorum of sports” pursuant to the Spanish Sports Disciplinary Regulation.

The RFEU said that it had a technical reason for exclusion of Mr Mullera, namely that the spirit of the Spanish team would be disrupted should he be part of the team.

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The Panel held that this was not a technical reason, and that Mr Mullera was in terms of his form and athletic performance entitled to his place. The RFEU's decision was an arbitrary one – and “the discretion that a national federation can exert in selecting or de-selecting an athlete may not go as far as to become arbitrary”. Mr Mullera had a legitimate expectation that, once he had been selected in accordance with the national selection process, he would be permitted to enter and participate in his competition absent some new or other reason for excluding him from the team.

The Panel was at pains to stress that it did not condone Mr Mullera's “inappropriate behaviour”, and the exchange of emails asking how to dope and how to escape anti-doping controls “strikes at the very heart of the fight against doping”; and that many would “consider Mr Mullera to be extremely fortunate to be the beneficiary of the RFEA's improper procedural course and of the lacuna in the RFEU's selection criteria” to provide for exclusion on grounds such as this.

The Panel also held that it did not have jurisdiction over the Superior Sports Council (CSD), a public institution which exercises the competences of the Kingdom of Spain in relation to sports (and which had claimed immunity). The CSD was not bound by the Olympic Charter nor any other rules providing for CAS.

Given the urgency, the procedure was equally speedy. The application was lodged in the evening of 29 July 2012, the Panel formed and procedural directions issued at 1am on 30 July, respondents written responses by 6pm on 30 July and a hearing held on 31 July at 11am (which lasted until 2.30pm). The decision was notified to the parties a few hours after the hearing (and therefore within less than 48 hours from the time of the application).

Application allowed. Mr Mullera's request for costs was denied (applying Article 22, para. 2 of the Ad Hoc Rules providing that each party shall bear their own costs).

International Canoe Federation v Jan Sterba (1 August 2012)

Back to Mr Sterba: the Czech canoeist, whose doping suspension (by the ICF Doping Control Panel) was overturned on appeal to the International Canoe Federation Court of Arbitration (ICFCA).

The International Canoe Federation (ICF) submitted an application on 29 July 2012, and the Panel was appointed on 30 July 2012 (including an ad-hoc Clerk to the Panel). This was, sensibly, the same Panel that had heard the *First Sterba* case. Mr Sterba had until 10am on 31 July to file an answer, and a hearing was set for 31 July at 6.00pm. The Panel heard opening and closing submissions and expert evidence.

Unusually, the ICF applied to set aside the decision of its own Court of Arbitration (ICFCA). It was accepted that Mr Sterba did not intend to cheat, that he had an unblemished record and that he had openly disclosed his use of the “Shotgun” supplement in the Doping Control Form. Indeed, Mr Sterba's evidence was that his doctor had approved its use, as not falling within any prohibited category.

The Panel applied the Anti-Doping Rules of ICF (ICF ADR). It found that BM was a stimulant and therefore a Prohibited Substance under S6 of the WADA 2012 Prohibited List; and that its use by Mr Sterba (irrespective of fault, negligence or knowing use) was an Anti-Doping violation of the ICF ADR.

As regards sanction, the Panel particularly took into account that he had (by the time of use of the supplement) qualified for the Olympics and had no need, or intention, to enhance his performance. This case was less serious than the *Duckworth* case¹⁵ cited by the Panel because Mr Sterba had sought independent medical advice before taking the supplement, had mentioned on his Doping Control Form that he was taking it, and most importantly the supplement was not expressly listed on the Prohibited List at the time (as it was in *Duckworth*).

Mr Sterba was at fault because he could have sought medical advice from the Czech Olympic Committee (COC) and Czech Canoe Union (CCU). The Panel expressed some concern that the confusion could have been avoided had BM been listed on the WADA Prohibited List. Notably, the Panel

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also said that use of a nutritional supplement itself is not a “fault” because use of supplements of this type is widespread. What might be an obvious answer therefore – for an athlete to refrain from using nutritional supplements altogether – was not, in the Panel’s view, the right answer.

In conclusion, the Panel considered Mr Sterba’s degree of fault to be so small that it justified the full reduction of the period of suspension to zero, and the sanction of a reprimand only – the lowest possible sanction available. Whilst that was no doubt welcome, Mr Sterba was nevertheless found guilty of the offence of using a Prohibited Substance. Mr Sterba went on to win a Bronze in the Canoe Sprint (Mens K4).

Application allowed in part.

Russian Olympic Committee v International Sailing Federation & Spanish Olympic Committee (11 August 2012)

Following a hiatus for a period of harmonious sporting play which lasted for almost the whole of the Games themselves – and during which the services of the Ad Hoc Division were not called upon – on 11 August a Panel was convened to hear this case.

This was a dispute over the results of a women’s match racing sailing competition (in the Elliott 6m class – a three person dinghy) on 10 August. It was the semi final between Russia and Spain and after three races, Spain were 2-1 up. Then the weather off the Dorset coast turned and the International Sailing Federation (ISAF) cancelled the further two planned races (the winner ordinarily being the first to win 3 races), and Spain was declared the winner. The Russians appealed.

Time wise, the application was filed at 8am on 11 August, seeking an order that ISAF be obliged to conduct the fourth and (if necessary) fifth additional races later that day. The respondents had until 10.45am to respond, and the sole arbitrator rendered the operative part of his award at 11.40am. The bronze and gold medal finals were to start at midday. No hearing was held due to the urgency.

The Arbitrator held that he had no jurisdiction because the Russian team had not sought to challenge the decision before

the ISAF jury office within two hours of the decision – and had therefore not exhausted all international remedies (and without good reason).

In any event, the Arbitrator held that it was a field of play decision and there was no evidence that it had been taken in an arbitrary or capricious manner.

Dismissed for lack of jurisdiction.

Swedish National Olympic Committee & Swedish Triathlon Federation v International Triathlon Union (11 August 2012)

We move finally to the women’s triathlon competition, and to the final. It was won by a Swiss athlete, Ms Nicola Spirig; a Swedish athlete, Ms Lisa Norden was awarded the silver medal. The race had a tight finish, the results showing that both gold and silver places achieved the same time of 1:59:48 (and bronze was only a whisker behind at 1:59:50). The referee had called a photo finish and on that evidence had called the Swiss athlete first.

The Swedish National Olympic Committee (SNOC) and its Triathlon Federation appealed the referee’s decision, on the basis that the referee had “assessed the finish by reference to the whole of the upper body and, in particular, the athlete’s belly, rather than by reference to the foremost part of the torso crossing the line” (the torso being the relevant part of the body by reason of Rule 6.2(a) of the International Triathlon Union (ITU) rules). Apparently the Swiss athlete had crossed the line leaning backwards rather than leaning forwards as usual, and it was argued that the referee had assessed the finish from the time the athlete’s stomach crossed the line rather than the torso as defined in the rule (being the “section of the body extending from the base of the neck to the base of the sternum.”)

The application was filed on 9 August 2012 at 6.30pm, the respondents had until 10 August at 2pm to respond, and a hearing commenced on 10 August at 6.00pm.

The Panel said, “pursuant to a long-established line of CAS jurisprudence”, the CAS will only review a field of play decision in circumstances where the decision has been taken

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arbitrarily or in bad faith. The referee had applied the correct rule (Rule 6.2(a) of the ITU rules, providing that that an athlete has finished “the moment any part of the torso reaches ...the finish line”). The referee had decided that the Swiss Athlete’s torso had crossed the line first and this was a field of play decision, which had not been shown as arbitrary or in bad faith.


Belly leading or not, the referee’s decision really was final.

Application dismissed.

So what did we learn?

Swift justice is possible and works. International arbitrators everywhere take note – cases that last from issue to award a matter of days (even hours) are achievable. There is much to be learned from this, given the criticisms levelled more generally at arbitration these days that arbitral proceedings are no quicker than national courts.

Ad Hoc Panels also show a large willingness to be flexible on procedural issues. This includes the holding of split trials (jurisdiction followed by merits if necessary) as in the *Lynch* decision, or not holding a hearing at all if it is not required (for example in the *First Sterba* and *Russia-Spain Sailing* cases).

More than anything perhaps, what is surprising is how few cases there were. Given the number of competitors and the range of possible disputes, the fact that there were only nine cases is testament to the organisation of the Games and the spirit in which they were conducted (if not also the lawyers who drafted the numerous contracts and regulations in place for the conduct of the Games). For those cases that were put to it, the Ad Hoc Division showed itself capable of convening at very short notice and responding with urgency where required, and the fact that clear and well-reasoned awards were produced in such circumstances is a credit to the arbitrators. 

- 1 *Lord Sebastian Coe, Chairman of the London Organising Committee for the Olympic Games (LOCOG), from his speech at the Closing Ceremony*
- 2 *Damilov and Lazutina v IOC and FIS [2003] 3 Digest of CAS Awards 649, SFT*
- 3 *As well as at the Commonwealth Games: Kuala Lumpur 1998, Manchester 2002, Melbourne 2006 and Delhi 2010*
- 4 *The Ad Hoc Division’s jurisdiction also arises from Rule 61 of the Olympic Charter. Rule 61(2) provides that “Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.”*
- 5 <http://www.tas-cas.org/d2wfiles/document/6042/5048/0/London20-20General20Media20Release.pdf>
- 6 *Which, for those interested, is “a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind...Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.” Worthwhile principles indeed.*
- 7 *Dates of awards refer to the date of publishing of the operative part of the award, even if the reasons came a day or so later*
- 8 *Efraim Barak and Ricardo de Buen Rodríguez*
- 9 *Peternell and Mullera*
- 10 *The Second Sterba Case: ICF v Sterba, CAS No. OG 12/07*
- 11 *This includes the First Sterba Case (Sterba v WADA, CAS No. OG 12/05) where the Panel held that Mr Sterba had no standing because he was not seeking to challenge a decision.*
- 12 *SASCOC, SAEF, IOC, FEI, AIBA, ANOC, HIS, OCI, FEP, ICF, WADA, ICF, COC, RFEA, COE, CSD, LOCOG, IAAF, ROC, ISAF, SOC, SNOG, STF, ITU*
- 13 *CAS Case No. 120036*
- 14 *Beloff et al, Sports Law (2nd edition, 2012), para. 8.155*
- 15 *CAS Case No. 120036*

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