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# Update: sports law

Katherine Apps reviews recent developments including anti-doping, television rights, anti-corruption measures and liability for personal injury

## Doping and the Olympics

With the Olympics shortly to start in Beijing, WADA (the World Anti-Doping Agency) and the IOC (International Olympic Committee) have put in force a strict regime of measures and testing requirements to seek out use of prohibited substances and prohibited methods. The specific 'IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008' (IOC Anti-Doping Rules) will enter into force on the day the Olympic Village opens (27 July 2008) and will continue in force until the closing ceremony on 24 August 2008.

Meanwhile, the newspaper backpages were covered the High Court challenge by Dwain Chambers to the policy of the British Olympic Association to enforce a lifetime ban on him competing in the Olympics (*Chambers v British Olympic Association* [18 July 2008, unreported] – I should confess my involvement in this case; however any views expressed in this column are my own).

In 2003 Chambers received a two-year ban for testing positive to the banned substance THG. Chambers challenged the BOA bylaw which prevents him from being eligible to compete in Team GB. Chambers applied for an interim injunction on the basis that it was (a) an unlawful restraint of trade (b) contrary to European and domestic competition law and (c) engaged the court's supervisory jurisdiction.

On 18 July 2008 Mackay J declined Chambers' application for an injunction. Mackay J held that the prospects were "not good" of showing that the ban on Chambers competing in the Olympics had sufficient effect on his right to work to engage any of these heads of claim. Furthermore, on the issue of

proportionality, Mackay J held that in all the circumstances he was unable to give the degree of assurance necessary to grant the injunction. Mackay J then went on to consider that that he would have denied relief on the issue of delay alone. On the balance of convenience he held it would take a "much better case than the claimants' to persuade me to overturn the status quo and to give relief". There was no order as to costs.

This answers the short question of whether Dwain Chambers can compete in Beijing. The wider question of the lawfulness of the bylaw remains listed for full hearing next March.

## The specificity of sport: from the Commission White Paper to Lisbon, and back again?

One of the most significant legal developments a year ago was the adoption by the European Commission on 11 July 2007 of a White Paper on Sport. Since then, the White Paper has been presented to the Community Institutions in October 2007, considered by the UK Parliament's EU Scrutiny Committee and the Select Committee on Culture Media and Sport and steps have begun to form a resolution in the European Parliament.

The White Paper had concluded that "in line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law".

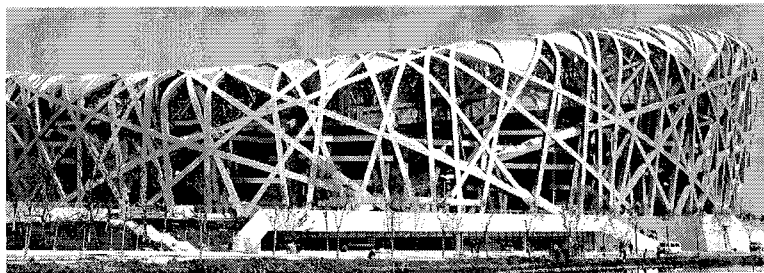
In this regard, it arguably did not go a great deal further than existing case law of the ECJ. Most importantly, it preserved the wide application of EC law principles in the sporting context recognised in the key case of *C 519/04 Meca Medina & Majcen*.

The Lisbon Treaty seemed to go further than the White Paper, including, for the first time in a Treaty, a specific provision stating that: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function" and that the action shall be aimed at "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen".

The Lisbon Treaty was signed on 13 December 2007 by representatives of the EU member states. However, the second hurdle of ratification of the Lisbon Treaty has, as has been widely reported in the press in past couple of weeks, been thrown into some turmoil by the Irish 'no' vote. In the UK the ratification process is now again underway despite the failure of a British businessman to challenge the government's refusal to hold a referendum (*R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) Divisional Court, judgment of 25 June 2008).

So, is the Irish 'no' vote the end for the 'specificity of sport'? On balance this seems unlikely. If anything there appears to be a growing mood for an even more radical position than the 'specificity of sport' article in the Lisbon Treaty. The UK Select Committee on Culture Media and Sport, in its report published on 8 May 2008 advocates a more radical approach than the Lisbon Treaty proposing that: "we do believe that sport has distinctive characteristics which need to be taken into account in the application of EU law. The simplest way to achieve this would be to draw up a specific exemption from the application of EU law".

This approach would most likely require a Treaty amendment which goes further than the current provision in the Lisbon Treaty. However, if the approach of the Culture, Media and Sport Select Committee is taken, this would have a fundamental effect on the duties of sporting regulatory bodies. It would in effect operate as an immunity from,



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for instance, EC competition law and free movement law. The next six months is likely to be an interesting time.

### Nationality discrimination in sport

This issue has leapt back into the public spotlight with the vote by FIFA, football's international governing body, to introduce a '6+5 rule' which requires national clubs in the football leagues to field six players on the pitch at one time who would be eligible to play for their national squad.

This announcement was criticised almost immediately by the Commission as likely to be discriminatory on grounds of nationality and contrary to the free movement of workers under Article 39 EC (see *Solicitors Journal* 152/25, p18 'FIFA's 6+5 rule').

UEFA on the other hand has pursued the more moderate stance of advocating the 'home grown players'. This has a handle within the White Paper on Sport, which suggests that rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality. The FIFA proposal uses nationality and not 'home grown' as a proxy, so would be considered directly discriminatory on grounds of nationality, and therefore could not be lawful under EC law without a treaty amendment stronger than that in the Lisbon Treaty. Nevertheless, as noted above, the Lisbon Treaty cannot now be assumed to be the last word on the subject.

### TV broadcasting rights

Another area in which free movement principles have recently been argued to break down national boundaries is in relation to rights to televise sporting events. On 24 June 2008 the High Court referred several questions to the ECJ concerning the use of foreign-bought decoder cards to watch Premier League Football matches on satellite television within the UK (*Football Association Premier League Limited v QC Leisure* [2008] EWHC 1411 (Ch) Kitchin J).

Kitchin J summarised the conflicting positions of the two sides at para 371 in which he stated: "The claimants submit the defendants' case is effectively a challenge to the way in which sports (and indeed virtually all) broadcast rights are licensed in the EU. The defendants say there are millions of expatriate workers in member states who want to watch satellite television from their own country and that the claimants are seeking to bolster a system of barriers against the

free circulation of decoder cards between member states to the commercial advantage of programme providers and broadcasters who want to maintain price differentials between the markets in different member states, to the serious detriment of consumers as regards both price and choice. Moreover, they continue, the whole trend of EC Directives in this field has been to try and create a single audiovisual area – a process which the claimants are trying to frustrate."

The parties were given time to submit drafts for the proposed questions which will deal with the interplay between European free movement principles, competition law and the framework of Directives regarding copyright and television broadcasts (Directive 89/552 'the Television without Frontiers Directive', Directive 93/83 the 'Satellite and Copyright Directive', Directive 98/84 on 'Conditional Access' and Directive 2001/29, the 'Copyright and Information Society Directive'). The questions are yet to be entered onto the register of the ECJ in Luxembourg. Once it has, it is likely to take between 12 and 18 months for a judgment.

### Closer to home

The Divisional Court handed down judgment in Portsmouth FC manager Harry Redknapp's challenge to the search warrant on his home granted in the midst of the highly publicised police investigation into alleged corruption in football (*Redknapp v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin) Div Court Latham LJ and Underhill J).

The police were granted a warrant to search the Redknapps' home in Dorset in November 2007. The police search was witnessed by a number of reporters from the *Sun* newspaper and was widely reported. The judgment of Latham LJ is most notable for its outspoken attack on the formalities of the warrant application as "wholly unacceptable" and "slipshod" (para 13) and the outspoken criticism of the failure to show Mrs Redknapp a copy of the warrant, including the schedule showing it applied to her address (para 21).

### FA sanctions Luton Town FC directors

Keeping with the theme of eradicating corruption in the sporting world, another notable case, which has appeared in several forms in the course of the last year, has involved Luton Town FC. In round one Mike Newell, the former manager of Luton Town, began the year by claiming unfair dismissal and whistleblowing against Luton Town Football Club. These proceedings were stayed due to the club entering administration.

In round two, the FA began disciplinary proceedings against the club, its managers and several agents for breach of the FA's rules regarding the payment of football agents. The club was fined £50,000 for 15 charges of misconduct. The club's former chairman, Bill Tomlins, was banned from football for five years and fined £15,000, while three other former board members were also punished, and six agents warned about their future conduct.

The FA's Regulatory Commission nevertheless stated that: "After exhaustive enquiry, the Regulatory Commission is satisfied that there were no 'bungs' and/or 'backhanders' passed on to Agents to facilitate the transfer of players and no corruption."

([www.thefa.com/TheFA/Disciplinary/NewsAndFeatures/Statement4Jun08.htm](http://www.thefa.com/TheFA/Disciplinary/NewsAndFeatures/Statement4Jun08.htm))

### Vicarious liability for fights on the pitch

On 18 June 2008 the Court of Appeal handed down judgment in *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689, the first case on vicarious liability in rugby or football (see *Solicitors Journal*, 152/25, p5).

Mr Gravil and Mr Carroll were both semi-professional rugby players. Mr Gravil was a prop forward for Halifax, Mr Carroll was playing in the second row for Redruth. During the game Mr Carroll punched Mr Gravil above the eye in a "melee" which started when the scrum was separating, breaking the bone of Mr Gravil's eye socket.

Sir Andrew Clarke MR, giving the judgment of the Court of Appeal, held that "there was a very close connection between the punch and the first defendant's [Carroll's] employment" (para 23).

He further held that the answer to the question of whether it would be fair and just to hold the club liable was "plainly yes" (para 26). He held that it was incumbent on clubs to take "proactive steps" to stamp out foul play, "the temptation for players to cross the line in the scrum may be considerable unless active steps are taken by clubs to deter them from doing so."

Interestingly, the facts of the case were not in dispute as the match had been recorded by cameras. In what is likely to become increasingly common in such cases, the trial judge and Court of Appeal reached judgment having seen the DVD.

Katherine Apps is a barrister practising from Littleton Chambers in sports law, employment, European and commercial law. She is instructed as part of the team representing Dwain Chambers against the BOA, but any views expressed remain entirely personal