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the newsletter of serle court

"As illustrated by this edition of Serle Quarterly, the tentacles of sport now reach an increasing area of legal practice, requiring chambers specialising in sports law to be able to provide legal advice in many different areas of practice, including dispute resolution, disciplinary proceedings, drugs, contracts, employment, charities, and intellectual property.

Below, Christopher Stoner analyses the Greg Rusedski case involving a positive drugs test, but which was not a doping offence under the relevant rules. Inside, Patrick Talbot QC and Giles Richardson deal with Middlesbrough's claim against Liverpool concerning the dispute over the transfer of Christian Ziege, Andrew Bruce analyses the unfair dismissal claim brought by two cricketers against Leicestershire CCC, and Will Henderson considers the implications where the owner of a sports club's ground is a charity. On the back page, Brigitte Lindner considers the progress made in the proposed WIPO Broadcasters' Treaty."

Kuldip Singh QC

The case of Greg Rusedski – not strictly correct?

On 10th March 2004 an ATP Anti-Doping Tribunal determined that Greg Rusedski was not guilty of a doping offence despite his having tested positive for the steroid nandrolone.

The Tribunal's statement was reported as saying *"The player is exonerated of the finding by the Review Board that he committed a Doping Offence under Section C1A of the Rules of the Tennis Anti-Doping Programme, there being no evidence supporting such a finding."*

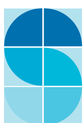
If accurate, this was a surprising statement. The Tennis Anti-Doping Program 2004, like virtually all Anti-Doping Codes worldwide is based on the principle of strict liability.

The Tennis Code refers to the recently introduced World Anti-Doping Code, the aim of which is to unify and standardise procedures in doping control throughout the world across all sports. The cornerstone of the World Anti-Doping Code is also strict liability. Like all well-drafted codes, however, the strict liability nature of the offence is ameliorated by the presence of provisions enabling an athlete to reduce or avoid a sanction if he can establish the drug was not in his body through his fault or significant fault. This is perhaps the most reasonable balance between maintaining strict liability and fairness.

Drugs scandals erode public confidence in the sport in question and also, but no less importantly, jeopardise the health of athletes. Sadly cycling, a sport which, to date, has not signed up to the Word Anti-Doping Code, has illustrated this in the last year.

If strict liability is eroded the very essence of anti-doping programmes is severely undermined. To be effective the onus must be placed on the athlete to ensure that no Prohibited Substance enters that athlete's body.

The alternatives are twofold. The first is to place the onus on the administrators of the Codes, usually the governing body, to establish that an athlete knowingly took a particular drug. In all but the most exceptional cases such an onerous burden would be impossible to discharge, given that the administrators would have to reconstruct the life of an athlete from scratch, in minute detail, relating to a period some weeks previously, in circumstances where there



is fertile ground for legal debate on the administrator's ability to obtain all relevant information.

The second alternative is to dispense with doping control and allow all athletes to take any drug they wish. The reality of such an approach will be that all athletes will not take drugs they wish, but rather will take such drugs as necessary to maintain a competitive edge.

Returning to the ATP Anti-Doping Tribunal, Rule C1(a), defines as a doping offence:

"The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E."

In the case of Greg Rusedski, the player chose to announce his intention to fight a positive result from a sample he provided at a tournament in Indianapolis on 23 July 2003. The basis of his defence was that he had the same analytical fingerprint of nandrolone as a number of players who had tested positive in the deeply unsatisfactory circumstances of the players apparently being provided with contaminated food supplements by officials. His defence succeeded.

Greg Rusedski has had a fine career. Whether he will be remembered for that or the results of a urine sample in Indianapolis remain to be seen. The stain on a player's character is the backbone of the argument in favour of abolishing strict liability in anti-doping procedures.

As matters stand, however, whilst the full details of the decision are not available for public inspection, given that the Tennis Anti-Doping Program is one of strict liability, the statement from the tribunal that there was no evidence to support a finding, as opposed to many reasons not to impose a sanction, is puzzling.

Christopher Stoner
frequently acts in cases involving issues of Sports law

Cricketers caught out over contracts

Two recent cases have highlighted serious difficulties with county cricketers' contracts of employment. In the case of Neil Burns and Carl Crowe, two players who were employed on season-long contracts claimed unfair dismissal when Leicestershire County Cricket Club failed to offer them new contracts at the end of the 2002 season. Leicestershire argued that the players were only employed from April to September and that, as such, they did not have sufficient continuity of employment to bring the claim. After 3 days of evidence in the Employment Tribunal and an indication by the Tribunal as to its likely finding, the parties reached an out-of-court settlement which was hailed by the players as "a victory for all sportsmen… on fixed-term contracts". Burns and Crowe had contended that, having played for Leicestershire for a number of seasons, they had achieved the requisite one-year's continuous employment thereby securing their statutory right not to be unfairly dismissed. They relied upon s.212 of the Employment Rights Act 1996 in asserting that the close season should be considered "a temporary cessation of work" such that it counted towards their qualifying period, alternatively that by custom they were regarded as continuing to be employed by Leicestershire during the close season. The Tribunal seems to have had considerable sympathy with these arguments. Following the House of Lords in *Fitzgerald v. Hall, Russell & Co. Ltd* [1970] AC 984, it was willing to look at the whole history of the players' employment such that, with the benefit of hindsight, the close season between, for example, 2001 and 2002 could be regarded as "a temporary cessation of work".

The case of Burns and Crowe, though, contrasts with that of Kevin Pietersen. Pietersen, a 23-year old who starred on the recent England A tour to India, had a 4-year contract with Nottinghamshire County Cricket Club which was not due to expire until September 2004. Pietersen issued Employment Tribunal proceedings in late 2003 alleging that Nottinghamshire had breached his contract and that it had thereby been discharged. Nottinghamshire, however, were intent on retaining the services of the star they had nurtured and sought to hold Pietersen to his contract. The precedents were not promising for Pietersen: (i) John Crawley had endured six months in limbo when Lancashire County Cricket Club refused to release him from the remaining 3 years of his contract and the impasse was only broken when Lancashire accepted a compensation payment from Hampshire in return for Crawley's release; and (ii) Aftab Habib had been forced to buy out the last year of his contract with Leicestershire County Cricket Club. Thus on 21st March 2004, after a period of negotiation, it was announced that Pietersen would not be pursuing his Employment Tribunal claims and that he would be playing for Nottinghamshire during the 2004 season.

Whilst the Burns & Crowe case illustrates the deficiencies of the system of short-term contracts offered to journeymen cricketers, the Pietersen case serves to emphasise the problems for star players caused by the absence of a formal transfer system within cricket. How these issues will be resolved, and whether cricket will follow the lead of football in having significant fixed-term contracts and a recognised transfer system, remains to be seen. What is certain is that the Professional Cricketers' Association and the England and Wales Cricket Board will be desperate to ensure that, this season, cricket is kept out of the Employment Tribunal.

Andrew Bruce
practises in commercial work with a particular expertise in employment matters

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Middlesbrough v Liverpool and Christian Ziege

Christian Ziege, the German international soccer player, was transferred from a very unwilling Middlesbrough to Liverpool just before the start of the 2000 / 2001 Premier League season. Having lost Mr Ziege due to a special clause in his contract whereby it was obliged to accept an offer of £5.5m for his registration, Middlesbrough commenced High Court proceedings against both Liverpool and the player, which were due to come to trial in March 2004.

In the event, the parties resolved their differences shortly beforehand. Nonetheless, the proceedings raised interesting and difficult questions about the Premier League's rules aimed at preventing "tapping up" and also about the quantification of a player's worth.

Each season's Premier League rules form a contract between, amongst others, each Premier League club and all the other Premier League clubs. The rules at the material time included provisions prohibiting each club from "making an approach" to a player (or vice versa) without the consent of the player's current club, save in the annual transfer window applicable to players whose current contracts are ending.

Middlesbrough claimed that each of Liverpool and Mr Ziege had, contrary to the rules, made an approach to the other. Both denied doing so. The position was complicated by the role of football agents, who appeared in two guises. On the one hand, there were two individuals whom Liverpool claimed were agents of Mr Ziege and by whom Liverpool claimed it was initially approached. Mr Ziege denied that they were in any sense his agents. And then there were at least two other football agents who, it may have turned out on the evidence, had brought Mr Ziege's alleged representatives into contact with Liverpool, without themselves being in any legal sense agents for either Liverpool or Mr Ziege.

The role of football agents in the football transfer market is contentious for a number of reasons. This case, however, raised further questions about the substance of the Premier League's rules on tapping up in a world where independent agents spend their professional lives trying to bring clubs and players together without being directed or employed by either of them.

Middlesbrough sought substantial damages of £2m for this alleged breach of the rules, claiming that, in the summer of 2000, when Liverpool paid £5.5m for Mr Ziege, his registration had a "market value" of £7.5m.

This part of Middlesbrough's claim depended on evidence to the effect that certain other clubs would have paid £7.5m for Mr Ziege. It was, however, to be Mr Ziege's evidence that he was simply not interested in playing for any of the other clubs which Middlesbrough claimed were interested in signing him. So, he and Liverpool asserted, there was no "market" for his registration and no "market value" of £7.5m in any meaningful sense.

The valuation of players' registrations is a controversial area and, whilst such valuations may be intelligible in certain circumstances (e.g, for accounting purposes), this case raised issues about Middlesbrough's attempts to isolate the value of a particular player for the purposes of legal proceedings.

It is, arguably, difficult to see why a particular player's registration should be treated as, in effect, a freely tradable commodity when in fact he has an effective veto on any transfer. This factor was powerfully evident in this case, due to the special clause in Mr Ziege's contract requiring Middlesbrough to accept any written offer of £5.5m or more for him, effectively removing the club's counter-veto on his transfer. Players in strong negotiating positions with prospective new clubs may come to insist more frequently on the insertion of such specially negotiated clauses in their contracts.

Patrick Talbot QC and Giles Richardson
represented Liverpool in the proceedings

charitable ground a ground for concern?

If your Club's ground is owned by a charity, then the Club's ability to redevelop the ground and its rights of occupation may be affected, even if the Club is merely the tenant of a charity. These results may follow from the statutory constraints on the disposal of charity land and/or from constraints imposed by the charity's constitution. For example a charity's objects may include maintaining the ground as an open space. If so there are obvious difficulties with obtaining the charity's consent to building a stadium on it, though depending on the terms of the trust it might still be possible to acquire the land from the charity (see Oldham Borough Council v. A-G [1993] Ch 210).

In *Bath and NE Somerset Council v.* A-G [2002] EWCA 1623 (Ch), [2002] WTLR 1257 the status of the freehold owner arose in relation to the "Bath Rec.". This land comprises some 15 acres near the centre of Bath and includes Bath Rugby Club's ground. In 1956 a company conveyed the freehold to Bath Corporation for a consideration of £11,155, subject, amongst other things, to a lease of some 3.7 acres held by the Bath Football Club. Bath Football Club was the name of the amateur Rugby Club. It used the land let to it for matches and training. It had a clubhouse and over the years various stands were erected. The terms of the lease permitted use of land by the Corporation out of season. A renewed lease was assigned to Bath Rugby Plc at or around the time that Rugby Union went professional. Most of the remainder of the Recreation Ground was open for public recreation, though from time to time parts of it were used for other sports and events.

In March 2000 proposals were made public for the redevelopment of the rugby ground so as to provide, amongst other things, a modern stadium. By this time Bath Corporation's freehold interest had vested in the Bath and North East Somerset Council ("the Council"). The 1956 conveyance provided that the ground should be held by the Corporation upon certain trusts. Broadly these required the Ground to be used for the purpose of sports and games of all kinds. They also provided that the ground should not be used otherwise than as an open space and that no undue preference should be given to any particular sport, game or club.

The Council sought the court's determination as to whether it owned the ground beneficially for its statutory purposes or whether it held the ground on charitable trusts. Particular issues were (1) whether the specified trusts were charitable and, if they were, (2) whether the Corporation's statutory powers had empowered it to acquire the ground on terms that it was to be held on charitable trusts. Hart J found in favour of the Attorney General and charity on both issues and decided that the Ground was held on charitable trusts. In consequence, in dealing with the Ground and the Rugby Club the Council was bound by the constraints of charity law.

William Henderson
represented H.M. Attorney General on behalf of the charity in *Bath and NE Somerset Council v A-G*

international protection of broadcasters' rights: past – present – future

Broadcasters play an important role in the field of sports: they ensure the live transmission of major sporting events to large audiences throughout the world. The recent developments in updating the rights of broadcasting organisations at the international level should therefore be of interest to all those who take an interest in sports.

Presently, the international protection of broadcasters' rights is based primarily on the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961. Efforts were nonetheless made during the last 40 years to modernise the protection for broadcasters, without notable success however. For instance, the Brussels Satellite Convention of 1974, although representing an important achievement with regard to the protection of broadcasters' rights, never became the international instrument for harmonised protection of broadcasts on a worldwide basis. Moreover, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994 provides only for a rudimentary protection as the TRIPS negotiations demonstrated unbridgeable disagreement over the form and substance of broadcasters' intellectual property rights at the international level. Finally, the so-called WIPO Treaties which were adopted at the Diplomatic Conference held in December 1996 under the auspices of the World Intellectual Property Organisation (WIPO) in Geneva updated the rights of authors, musical performers and producers of phonograms, but left out broadcasters alongside with audiovisual performers. It is therefore not surprising that broadcasters started to make their own case for an enhanced protection of their rights at an international level.

WIPO launched the debate on the protection of broadcasters' rights in its Standing Committee of Copyright and Related Rights in November 1998. While there is broad support for updating the legal tools of broadcasters to fight against signal piracy as effectively as possible, both the scope of a possible new treaty as well as the catalogue and nature of rights to be granted to broadcasters remain controversial. Owners of rights in the transmitted content are understandably concerned that a more extensive protection of broadcasters' rights might affect adversely their own rights in the content. On the other hand, broadcasters take the view that their enhanced protection would benefit all rightholders as it would enable broadcasting organisations to fight more efficiently against piracy.
After more than ten sessions of intense debate, the discussions have now reached a crucial stage. At the 11th session of the Standing Committee which took place from 7-9 June 2004, the Standing Committee examined a Consolidated Text for a Treaty on the Protection of Broadcasting Organisations (accessible at WIPO's website at http://www.wipo.org) in order to assess whether the time was ripe for convening a Diplomatic Conference on the protection of broadcasting organisations. After a controversial debate, the Committee adopted a compromise solution thanks to the wise guidance given by its Chairman: the WIPO General Assembly was recommended to consider, beginning with its session in September/October 2004 the possibility of convening, at an appropriate time, a Diplomatic Conference on the protection of broadcasting organisations. The grounds for a possible new treaty will be laid by further discussions in the Standing Committee which will consider a revised consolidated text at its 12th session in November 2004. In the light of these discussions, the Committee will recommend dates and further preparatory steps for the Diplomatic Conference, including the preparation of a Basic Proposal.

All stakeholders are hence given more time to reconsider all those complex issues on which consensus could not yet be reached, in particular the scope of a new treaty and the extent of protection to be granted. Broadcasters may therefore have to wait a little longer for "better days ahead" than they may have hoped.

Brigitte Lindner
is a Rechtsanwältin and Registered European Lawyer (Bar Council of England & Wales) and she has considerable experience in intellectual property matters in Germany and across Europe

chambers: news

Beverly-Ann Rogers will not be holidaying in Grenada in the near future. Following a successful appeal to the Privy Council and a EC$17m judgment for her client against the Government of Grenada, local lawyers are seeking to enforce judgment against members of the Government, including the Deputy Prime Minister, personally. This is a regular front page feature in Grenada Today and Beverly is concerned that a Grenadian welcome might be too hot for comfort!

Khawar Qureshi has become a CEDR accredited mediator and joins our already very experienced panel of six mediators.

James Behrens spoke at an ACTAPS lunchtime lecture on the 14th April on the subject of the mediation of trust and will disputes.

On Tuesday 27th April we held a successful seminar entitled "the Arbitration Act 1996 – Proposals for Reform". The evening was heavily subscribed and chaired by Lord Slynn of Hadley. The speakers were Khawar Qureshi of Serle Court and Stewart Shackleton of Eversheds. The audience included senior members of the legal profession and Judges from the Commercial Court and the Court of Appeal.

We also hosted The Bar Sports Law Group seminar on the 12th of May, entitled "Due process in football disciplinary proceedings". The seminar was chaired by Mr Justice Burton and the speakers included Maurice Watkins, a solicitor and director of Manchester United plc; Frank Clark, a member of the Football League's football disciplinary commission and a former player and manager; Mick McGuire, the Deputy Chief Executive of the PFA and Brendon Batson, a former player who is currently acting as a consultant to the FA on disciplinary matters.

We are also delighted to announce that Brigitte Lindner has joined us as an associate tenant. She is a Rechtsanwältin and Registered European Lawyer (Bar Council of England & Wales) and she has considerable experience in Intellectual Property in Germany and across Europe. She joins our existing associate tenant Thomas Krebs who is the University Lecturer in Commercial Law at the University of Oxford.