

## SPORTS LAW

When considering the issue of sports governance, it is necessary as a starting point to address the importance of good governance and of governing bodies to act fairly towards sports participants. It will be necessary to consider the obligations owed to a sports participant, and the obligations owed to Kieron Fallon by the Jockey Club, and whether the application of these obligations regarding the recent dispute have been lawful, and if not, the possible remedies available to sports participants such as Fallon.

As governing bodies are responsible for the internal running of a sport, clearly confidence in the way sports are governed is essential, so to fundamental for governing bodies to comply with their obligations and act fairly and professionally given the fact that governing bodies hold significant control over the livelihoods of participants involved with that sport. The importance of good governance was outlined in the case of *Modahl v British Athletic Federation Ltd* 2001 WL 1135166. In this case the participant tested positive for a performance enhancing drug due to the conduct of the test being unreliable.

It was the inadequate governance demonstrated by the BAF that not only threatened the career of the sports participant but also led to their downfall and contributed to their bankruptcy. Therefore, clearly good governance is needed to ensure the continuing success of sports governance and secondly to prevent participants being susceptible to injustices.

For this reason, sports governing bodies, such as the Jockey Club, owe certain obligations to sports participants.

One of these obligations is not to impose an unreasonable restraint of trade upon a sports participant. The doctrine outlines that competitors should not unreasonably be restricted from earning a living by the governing body. However, a breach of this obligation will only occur if the restraint is unreasonable. Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 outlined three elements that must be satisfied for the imposition of the restraint to be reasonable. Firstly, there must be an interest meriting protection, the restraint must be reasonable and must not be contrary to public interest. If the above criteria are not satisfied, the sports participant may seek action against the governing body.

This was evidenced in *Eastham v Newcastle United Football Club Ltd* [1963] 3 All ER 139. Eastham was a footballer whose contract had ended. The FA's rules meant that Newcastle could prevent him from moving to another club without their consent. Eastham had been unable to earn a living for three months and consequently argued an unreasonable restraint of trade. The court held the restrictions imposed upon Eastham were in unreasonable restraint of trade as it prevented him from pursuing "further employment" (Gardiner et al, 2005, p211)

In addition, the case of *Greig v Insole; World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449 also concerned the restraint of trade doctrine. Again it was held the governing bodies involved had breached their obligations regarding the restraint of trade doctrine and an important principle was established from the case by Slade J. He recognised that the TCCB and ICC were reasonable to want to protect the legitimacy of the sport and prevent the sport from "suffering at all

levels." (Gardiner, 2004, p213)

Applying this to the recent Kieron Fallon dispute, in which the jockey has been banned domestically from horseracing pending an investigation of accusations he has been fixing races via Betfair, which allows punters to bet via the internet on horses losing races. As established by Slade J, above, it is reasonable that the Jockey Club on imposing the ban would want to protect the integrity of horse racing, which would be "impugned by such conduct" (<http://www.thehra.org/doc.php?id=42061>) if that conduct was not dealt with adequately.

Indeed the main interest for the Jockey Club will be the fans of horse racing, as it is the continuing betting that greatly funds horse racing, and clearly if fans lose confidence with the way in which racing is governed or suspect races are being fixed, they will be dissuaded from betting, eventually meaning horseracing will suffer significantly, both on a financial and integral basis.

If in fact Fallon has been cheating, and thus acted in a way contrary to his obligations as a sporting participant, this will obviously pose a threat to the integrity of the sport, in which case a domestic ban may be reasonable to rectify this threat. However, it must be noted that there is no solid evidence to suggest Fallon has been fixing races, and although he has only been banned domestically, the fact that any ban at all has been imposed without evidence to prove his guilt would suggest the ban is in unreasonable restraint of trade as he is incapable of earning his usual income.

Furthermore, it is expected that no trial will take place for "at least 12

months and possibly longer." (<http://www.thehra.org/doc.php?id=42061>) This means that, not only will Fallon suffer significant financial loss, but as he has reached the height of his career, and his contract runs out with Coolmore at the end of the season, the ban imposed on him could in fact be career ending, which certainly raises doubts as to whether the ban is proportionate.

A further obligation owed by a governing body stems from the principle of natural justice; to allow a sports participant to defend themselves. This was an issue in *Gasser v Stinson and Another (1988)* in which the rules of the governing body in question did not allow for Gasser to argue her innocence.

There are two main rules to natural justice, the rule against bias and need for a fair trial in which "no man shall be condemned unheard". (Halsbury's Laws of England, 4th ed, vol.1, para 64 p76.) Lord Denning reiterated this in the case of *Russell v Duke of Norfolk* 1949 1 All ER at 119-120, he stated "common justice requires that before a man is found guilty of an offence carrying such consequences (as taking away his livelihood) there should be an enquiry at which he has an opportunity of being heard." (Grayson, 2000, p391) Also, the case outlined that due to the "monopolistic nature of the Jockey Club combined with the significant effect that its decisions could have would be reason enough to subject it to the requirements of natural justice." (Gardiner, 2005, p195)

Given this and the fact that, like Gasser, Fallon has not been given the opportunity to defend himself or deny the accusations against him would again suggest that the decision of the Jockey Club to ban Fallon domestically, possibly having serious consequences on his livelihood, without allowing him an

opportunity to be heard seems to be in breach of their obligations to him regarding natural justice.

Indeed the obligation to be granted a fair hearing by governing bodies has been increased since the introduction of the Human Rights Act in 1998 and the right to a fair trial under section 6. Section 6 (3) (a) states that it is "unlawful for a public authority, including a court or tribunal, to act in a way that is incompatible with a convention right." This section states that a public authority is one whose functions are of "a public nature". Stanley Burton J suggested in the case of *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197 that the functions of the Jockey club were not those of a public nature and would thus fall outside the scope of s.6 (3)(b).

In contrast however, on the Human Rights Acts passage through Parliament, the former Home Secretary, Jack Straw suggested that sports governing bodies would in fact fall within the scope of the section. He identified that the Jockey Club did exercise public functions and thus "it would be regarded as falling within (this classification)." (Gardiner, 2005, p218) As this implies that originally, it was intended that governing bodies were to be regarded as public authorities, carrying out public functions, this would imply that decisions of governing bodies, and the decision of the Jockey Club could be susceptible to further scrutiny by the courts because of the Human Rights Act.

Further scrutiny, may involve the amenability of governing bodies to judicial review. The courts have been reluctant to subject governing bodies to judicial review, due to the private nature of governing bodies. The requirements for judicial

review to apply were set out by Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 375. He stated that in order to qualify, a decision must affect a person by

"Depriving him of some benefit or advantage which...he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment." (Gardiner, 2005, p 182)

From this dictum it would seem acceptable that Kieron Fallon could subject the Jockey Clubs decision to judicial review, on the grounds that firstly he has been deprived of some benefit he had previously been permitted to enjoy, namely the ability to race domestically. And secondly he has not been given an opportunity to comment and defend himself against the allegations.

However, there are limits to judicial review, for example the existence of a contract between the governing body and participant. The existence of a contract between Law and the NGRC (*Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300) "served to exclude the application for judicial review." (Gardiner, 2005, p184). As Kieron Fallon has a contractual relationship with the Jockey Club, the susceptibility of their decision to judicial review would be unlikely.

A further limitation was outlined in *R v Jockey Club ex p Aga Khan* [1993] 1 WLR 909. Aga Khan had entered into a contract with the competition and was a horse owner. One of his horses was found to have a prohibited substance in its system and so Khan was fined. He applied for judicial review claiming the Jockey Club were exercising public functions. Although he lost the appeal, Hoffman LJ recognised that "power can be private as well as public." (Gardiner, 2005, p193)

meaning judicial review should, in theory be available to Fallon.

Although, as outlined above, there has been a move towards the idea that governing bodies do act in a public nature, nevertheless, the courts are yet to intervene on this matter, and the fact that Fallon had entered into a contract with the Jockey Club and thus entered into the rules of that sport, it is almost certain that the decision of the Jockey Club in the Kieron Fallon dispute, if indeed it is unlawful, would not be subjected to judicial review. Yet this could invite criticism, given the inconsistency demonstrated above as to whether the Jockey Club exercises functions of a public nature or private.

As well as the possibility of governing bodies owing participants obligations under the Human Rights Act, they may also owe obligations under European Union (EU) Law. The involvement of EU Law began with the case of *Walrave and Koch v Association Union Cycliste Internationale* (Case 36/74 [1974] ECR 1405) In this case; the ECJ confirmed that Community Law did apply to sport only "in so far as it constitutes an economic activity." (Gardiner, 2005, p222) Therefore, given the commercial nature of horse racing, it would be reasonable to argue the Jockey Club have breached an obligation not to restrict him from undertaking his normal economic activity. Thus he may find a remedy via EU Law given this restriction despite the lack of evidence against him.

In conclusion, it would seem, given the fact that there is no solid evidence to suggest Kieron Fallon has been cheating, and he has not been given the opportunity to defend himself, it is reasonable to say the Jockey Club has breached the obligations owed to him; the doctrine of restraint of trade and natural

justice.

In which case, there are a number of remedial tools available to him, although it is unlikely he will find a remedy by way of judicial review due to previous reluctance demonstrated by the courts. Fallon may be able to claim damages for the loss of income he could have earned if he had not been subject to the domestic ban. (However, the latter remedy is not available under the restraint of trade doctrine.)

Due to the fact that sports governing bodies, like the Jockey Club have considerable control over those individuals who agree to be bound by the rules of that particular sport, the need for governing bodies to act fairly and within the obligations owed to sports participants is important.

"Governance is about clarification between the "rules of the game" and the economic and commercial dimension related to the management of a sport. Because sports is based on ethics and fair competition, the governance of sport should fulfil the highest standards in terms of transparency, democracy and accountability." (The Rules of the Game, Europe's first conference on the Governance of Sport, 2001)

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