Neutral Citation Number: [2011] EWHC 179 (QB)

Case No: HQ09D04378

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Dean McKeown	**Claimant**
- and -	
Attheraces Limited	**Defendant**

- -
- -

Ian Winter QC and Andrew Monson (instructed by **Christopher Stewart Moore**) for the **Claimant**
Mark Warby QC and Catrin Evans (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 20-21 January 2010

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The Claimant is a senior and experienced jockey. On 23 October 2008 a Disciplinary Panel appointed by the British Horseracing Authority ("BHA") found him guilty of deliberately failing to ride a horse on its merits in four races, and conspiring with a trainer, a horse owner and various gamblers to commit a corrupt practice, by providing inside information to enable the gamblers to place lay bets against horses ridden by him in eight races. The findings were of breaches of two of the rules of racing, rules 157 and 201(v).

2. There is a breach of Rule 157 if a rider intentionally fails to ensure a horse is ridden on its merits. This can occur for a variety of different reasons and in many different circumstances of varying gravity.

3. Rule 201 provides:

> "Any person may be declared as a disqualified person or otherwise penalised by the [BHA] Stewards in accordance with their powers under Rule 2 of these Rules who … (v) is guilty of or conspires with any other person for the commission of, or connives at any other person being guilty of, any corrupt or fraudulent practice in relation to racing …."

4. The Claimant has never accepted that he was guilty of the breaches of the rules of racing. He has always maintained his innocence.

5. On December 17 2008 an appeal board appointed by the BHA dismissed the Claimant's appeal against the decision of the Disciplinary Panel. The Claimant then brought proceedings in the High Court seeking a declaration that the BHA had acted unlawfully in finding that he acted in breach of the Rules, and an injunction restraining it from continuing the penalty, namely a four year disqualification from racing horses which the Disciplinary Panel had imposed. The penalty was imposed on 23 October 2009 and upheld on appeal. The Claimant was unsuccessful in his claim for a declaration and injunction. Full reasons are to be found in a judgment handed down by Stadlen J on 12 March 2010 [2010] EWHC 50 (QB).

6. The present libel proceedings are part of his continuing efforts to clear his name.

7. The Defendant operates a TV channel devoted to horseracing. On 4 November 2008, that is less than two weeks after the finding by the Disciplinary Panel (but before the disqualification took effect), the Claimant rode Rascal in The Mix at Southwell. The same day the Stewards held an inquiry into the running and riding of that horse. They interviewed the Claimant and the trainer, they viewed video recordings of the race, they received a report from the Veterinary Officer, and they recorded their findings in a one paragraph document. It concluded:

> "The panel found the rider to be in breach of Rule 157 and therefore referred the running and the riding of the horse to the British Horseracing Authority".

8. The next day the Claimant was interviewed by Mr Sean Boyce on the Defendant's TV channel.

These proceedings

9. On 23 October 2009 the Claimant issued these libel proceedings in respect of some passages from the questions asked of him by Mr Boyce. On 5 November 2010, following service of a Defence and a Reply, the Defendant issued an application notice. It asks that the claim be struck out or dismissed pursuant to CPR 3.4(2), or for summary judgment under CPR 24.2, alternatively that there be a stay pending the outcome of further proceedings before the BHA.

10. Mr Warby advances the strike out points under four heads:

    i) The Defendant is bound to succeed on one or other or both of his defences of qualified privilege and honest comment;

    ii) If there is an arguable complaint to which those defences are not a clearly sufficient answer, it is a complaint which is not of a real and substantial tort, and is thus an abuse of the process of the court (*Jameel (Yousssef) v. Dow Jones* [2005] QB 946);

    iii) (Linked with the previous point) the Claimant had no reputation worth vindicating at the time of the publication complained of;

    iv) This libel action is an abuse of the process of the court for the further reason that the Claimant is seeking to re-litigate issues that have been finally determined on their merits against him in circumstances where he is bound by that determination (*Hunter v Chief Constable of the West Midlands* [1982] AC529).

11. The Particulars of Claim include the following:

> "4. On the 5 November 2008 the Defendant published or caused to be published on the At the Races digital television channel the following words defamatory of the Claimant ("DM") in a live television broadcast of an interview with the Claimant conducted by Sean Boyce ("SB"):
>
> 'SB: Let's start at the beginning – Let's start with yesterday – the ride on RASCAL IN THE MIX – What on earth were you doing Dean?
>
> DM: Yeah – what on earth was I doing? Can I just give you a brief history about Rascal?... They bought it off me – they put it in training - she had a bad accident and she ripped all the flesh off her leg – she had 80 stitches in her leg and was box rested for six weeks.
>
> SB: Yeah with respect Dean – regardless of her history she was on the racecourse yesterday in a horserace. The object of that exercise is of course to race and to find out which

horse can reach the finishing line in front. With that in mind Dean, I'll repeat the question: what on earth were you playing at?

DM: Well I'll tell you – the horse missed the kick.

SB: OK let's start with that shall we? – I'm just going to show you - can you see TV Dean?

DM: Remember you've got a nervous filly her who had had a bad accident- had only been back in training for two months?

SB: OK Dean but…

[VIDEO OF RACE SHOWN]

….

DM: Now is her head higher than the rest of the other horses?

SB: Well, not least because you're still sitting on the filly's back, aren't you?

DM: Because the stall gates have opened and when they open some horses are shocked by the gates opening…

…

SB: Yeah yeah well Dean some would argue if you're drawn in that stall you need to drop in quickly whereas if you're drawn in 1 you want to break quickly – I mean we'll move on but just quickly for the star – she missed the break because you didn't ask her to jump!

DM: I did ask her to jump – but you've just spotted it the same as me – the head is in the air the same as it is now with the kickback.

SB: OK. In terms of what the stewards found, the stewards found that you haven't asked her for sufficient effort. Most people watching this, Dean, I think it is fair to say, would reach the same conclusion. Your filly is travelling very strongly even at this stage. Even at two and a half furlongs out you're still not asking her for sufficient effort. What's going on?

DM: Like I said she's had these problems…

…

SB: The problem is Dean that the Stewards have found that you haven't made sufficient effort. In fact they go further than that – you've purposefully and intentionally prevented that filly from running on her merits, is the finding – and the reason they have found that is that you've clearly made no effort to get her into contention in the race. As I said to you when I visited you at your home Dean, this is not the first case of this, is it? And had this been the only case, I think many people would be sympathetic to your argument Dean. But you personally have been found guilty by the authorities to have been in breach of 157 by riding a non-trier and it's the fifth time that there have been betting patterns which have highlighted the problems with the riding on that horse. In all seriousness, we are all, many of us are punters who watch this show Dean, which means most of us, most of the people watching this show are over 18 years old. In other words, we're adults. You don't expect grown up, adult people to sit there and accept your explanations, given everything that's gone before...

…

SB: The Disciplinary Panel will now have a full investigation into the betting patterns. In fact people were willing to lay this horse at 20/1. Dean, to win a moderate maiden, a horse that had been backed in to 3/1, 5/2, in the morning – and people were willing to lay it at 20/1 and that of course is something which is going to raise alarm bells and that is why it is going to be looked at. It's also going to be looked at, Dean, because of your track record. Because this is the fifth time you have been found guilty. I get emails and texts every day of the week that I'm in the booth here about rides that jockeys give horses, often accusing them of all kinds of skulduggery and its's because of cases like this that people don't trust other jockeys. Isn't it time that you were a man about this, held up your hands, and said "I'm sorry for what I've done", and take it on the chin?

…

[VIDEO OF "ONLY IF I LAUGH" RACE SHOWN]

SB: … We've just watched again the ride on ONLY IF I LAUGH. It's clear that you are holding your stick half way down. It's clear that you're not hitting the horse. It's one of many examples unfortunately, Dean, during the last four or five years where you've employed those kinds of tactics. You've been caught. It's as simple as that, isn't it?

5. …

> 6. In their natural and ordinary and/or inferential meaning the words complained of meant and were understood to mean that:
>
> 6.1 On many occasions over the past four or five years the Claimant has, or clearly appears to have, employed the tactic of only pretending to hit his horse, or other similar kinds of tactic designed to stop his horse surreptitiously, and he has thereby cheated the racing public on many occasions over the past four or five years, or at least there are reasonable grounds to suspect that he has done so;
>
> 6.2 In his most recent ride on RASCAL IN THE MIX the Claimant had made no effort to ask the filly to jump out of the stalls or to get into contention for the race because his dishonest objective was to prevent the horse from doing her best, or at least there are reasonable grounds to suspect that this was his objective; and
>
> 6.3 The Claimant's motive in stopping RASCAL IN THE MIX was probably to honour a corrupt bargain with some people who had layed the horse at long odds of 20/1, whereby he ensured that their otherwise risky lay bets would be successful in exchange for financial kickback, or at least there are reasonable grounds to suspect that this was his motive".

12. There is no application before the court for a ruling on meaning. I shall therefore proceed on the footing that the words complained of are capable of bearing each of the three meanings pleaded by the Claimant.

13. There are three defences pleaded. The first is statutory qualified privilege. It is said that the words complained of consisted of a fair and accurate report of the findings of the Southwell Stewards on 4 November 2008 and of the Disciplinary Panel on 23 October 2008, pursuant to the Defamation Act 1996 Section 15(1) and Schedule 1 Part 2 para 14(c). These provisions read as follows:

> 15(1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice, subject as follows.
>
> (2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant—
>
> (a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and
>
> (b) refused or neglected to do so.

> For this purpose "in a suitable manner" means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances.
>
> (3) This section does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed—
>
> (a) as protecting the publication of matter the publication of which is prohibited by law, or
>
> (b) as limiting or abridging any privilege subsisting apart from this section….
>
> Schedule 1 Part 2
>
> 14. A fair and accurate report of any finding or decision of any of the following descriptions of association, formed in the United Kingdom …, or of any committee or governing body of such an association—…
>
> (c) an association formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime; …"

14. The second defence relied on is that, insofar as the words complained of expressed comment, they constituted honest opinion on true facts and facts stated on a privileged occasion. The third defence relied on is justification. There is no plea of malice in the Reply.

15. At the start of the hearing the Defendant applied for permission to amend the Defence. Mr Winter did not object to the proposed amendments in principle, but he submitted that whether or not they should be allowed might depend upon the rulings that I came to on the applications to strike out or the summary judgment. Accordingly, and without dissent from Mr Warby, I indicated that I would reconsider the application for permission to amend the Defence at the end of this judgment.

Functions of judge and jury

16. The functions of judge and jury in relation to the defences of qualified privilege and honest comment are set out in Gatley 11th edition ch 36. The editors state at para 36.19 that if the existence of privilege is dependent on the words being a fair and accurate report, the fairness and accuracy of the report containing the words is a question of fact for the jury. No regard should be paid to minor inaccuracies or

omissions of a mere trifling character. It would seem that it is for the judge to decide whether the matter complained of can be regarded as "a report".

17. The editors state at para 36.15 that it is for the jury to decide whether the words complained of are allegations of fact or comment, and, if expressions of opinion, whether such comments are honest comment or not. Comments must be on facts truly stated. The judge cannot rule on the availability of the defence of honest comment if there are disputed issues of fact which the jury has not yet resolved, unless on the undisputed facts the objective tests are satisfied, to the extent that it would be perverse for the jury not to find the comment honest. It is also for the jury to apply section 6 of the Defamation Act 1952. This provides:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

Qualified privilege

18. It is plain from the citation above that not all of the words complained of are a report. By itself that is not fatal to a defence of statutory privilege: see *Tsikata v Newspaper Publishing Plc* [1997] EMR 117. As Ward LJ said at page 135:

> "In my judgment it is a report if it is an account or a résumé of the proceedings. There is no limitation of time or editorial purpose… Nor do I see any justification for a distinction between a report as a news item and a report as a political commentary. The role of the press is to inform the public of fact as well as by comment based on fact… fairness is essentially a matter of balance. A certain degree of selectivity is given to the reporter who, subject to malice, can report a résumé only provided that the impression he recounts would approximate with the opinion of the reader of the whole of the document thus summarised".

19. However, there are a number of other ways in which a defendant can fail on a plea of statutory privilege. Two are relied on by Mr Winter in this case. They were discussed by Arden LJ in *Curistan v Times Newspapers* Ltd [2008] EWCA Civ 432; [2009] QB 231. She summarised the position as follows at para 22:

> "ii) One of the requirements of a fair and accurate report is that the quality of fairness must not be lost by intermingling extraneous material with the material for which privilege is claimed;
>
> iii) The maker of a report will be liable in defamation for allegations entitled to reporting privilege if he adopts them as his own".

20. See also paras 26 to 36 and 37 to 40 of her judgment. If a jury properly directed could find that what is said to be a report within the meaning of the 1996 Act is unfair, or that it has been adopted by Mr Boyce, then I must leave the defence of statutory qualified privilege to the jury.

21. The first part of the words complained of relates to what the Stewards had found. I am prepared to assume that there are passages which are a report of what the stewards found. For example

> "… the Stewards found that you hadn't asked her for sufficient effort…"
> and
> "the Stewards have found that you haven't made sufficient effort, in fact they go further than that, you purposefully and intentionally prevented that filly from running on her merits is their finding"…

22. On that assumption the next question is whether the jury would be perverse if they found that Mr Boyce had adopted the finding of the stewards as his own, or had made the report unfairly.

23. In the Reply it is pleaded that the privilege in this case is lost on both counts in relation to the Stewards' findings. Reliance is placed on the fact that Mr Boyce went on to say, after the second of the above two passages,

> "and the reason they found that is that you clearly make no effort to ask the filly to jump out of the stalls and you clearly make no effort to get her into contention in the race…"

24. As the Particulars of Claim plead, those words were spoken at a stage of the interview after the Defendant had broadcast a video of the race at Southwell.

25. Further, it is submitted that the report cannot be fair because these words are original to the broadcast: there is nothing corresponding to these words in the written findings of the Stewards' Inquiry.

26. As to the earlier findings of the Disciplinary Panel, Mr Boyce said in the words complained of

> "… this is the fifth time that you have been found by the authorities to be in breach of 157 – of riding a non trier… this is the fifth time you have been found guilty… the Disciplinary Panel has sat and they have found you guilty and they have done so with a large amount of evidence including video evidence…".

27. The main point taken by Mr Winter in respect of the passages in the words complained of concerning the Disciplinary Panel is that Mr Boyce adopted the findings. As appears from the Particulars of Claim, during the broadcast of the words complained of the Defendant showed a video of the race in which the Claimant was riding "Only If I Laugh". That is one of the races in respect of which the Disciplinary

Panel made its findings. It is the five lines spoken by Mr Boyce set out in the Particulars of Claim at the end of the words complained of that are relied on as the adoption by him of the allegation.

28. I must bear in mind that what is complained of in these proceedings is not a newspaper article but a TV broadcast. Where the words complained of are written words, the court is simply interpreting written words. In the case of a broadcast, what must be interpreted includes not just the words spoken, but the tone of voice and the body language of the speaker. There may be more scope of a difference of view as to how a reasonable viewer would understand a TV broadcast.

29. In his written argument Mr Warby accepts that there were, unquestionably, suggestions made to the Claimant that the BHA's findings were correct, but he submits that these suggestions were not factual (requiring proof that they were true) but opinion.

30. In my judgment in this case the Claimant has a real prospect of persuading the jury that Mr Boyce did adopt the findings of the Disciplinary Panel so as to lose the benefit of the statutory privilege.

31. For the same reasons I find that there is a real prospect of the Claimant persuading the jury that Mr Boyce also adopted the findings of the Stewards. See for example the words:

> "Isn't it time that you were a man about this, held up your hands, and said "I'm sorry for what I have done" and take it on the chin"?

Honest comment

32. The Defendant advances its case on honest comment on two bases: comment on facts reported under privilege and comment on true facts. Given my conclusions on privilege, it is only the second basis that need now be considered. Subject to the separate point on re-litigation abuse of process, the Defendant has to accept that, if there is an issue of fact, then the Claimant's factual case on cheating may succeed on the evidence.

33. But Mr Warby does not accept that the application must therefore fail in so far as it is based on the defence of honest comment, by reason of his submission set out in para 29 above.

34. Mr Warby enlarges this submission. He argues that Mr Boyce's suggestions that the findings of the Disciplinary Panel and of the Stewards were correct are expressions of opinion, not fact. He refers to the cases on inferences as to person's motives being opinion: *Branson v Bower* [2001[EWCA Civ 791; [2001] EMLR 32 and the discussion in Gatley at para 12.7. He also referred to *British Chiropractic Association v Singh* [2011] EMLR1, at paras 2 and 32, to draw an analogy between scientific controversy and controversy concerning professional sporting activity. Here the question of whether the Claimant intentionally failed to ensure his horse ran on its merits is a question about his state of mind, which is to be inferred from his outward conduct.

35. All I have to decide at this stage is whether this argument is bound to succeed. I cannot so find. Intention is a state of mind, as is motive. But the law treats intention as a matter of fact not only in the criminal courts (where it is a necessary constituent of numerous common offences) but also for the purpose of pleas of justification in libel.

Re-litigation abuse

36. Mr Warby's starting point for this submission is that, in respect of the four races considered by the Disciplinary Panel, the allegations have been dealt with by three tribunals already: that Panel, the Appeal Board and Stadlen J in this court. He relies on the decision of the Supreme Court in *Coke-Wallis, R (on the application of) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 delivered on 19 January 2011. At para 31 the Court cited with approval Spencer Bower and Handley on *Res judicata* (4th ed) at para 2.05 where the editors say:

> "Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside."

37. At para 27 the Court said:

> "it was not submitted in the course of the argument that the principle did not apply to non-statutory disciplinary proceedings of this kind. In any event, the principle does in my opinion apply to such proceedings. There is no doubt that it applies to what may be called ordinary civil proceedings."

38. The Court also cited at para 34 the following passage from the same work at para 1.02 to the effect that that there are a number of constituent elements in a case based on cause of action estoppel. They are that:

> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was - (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem".

39. There are two complicating factors in relation to this submission. One is that the decision on the race on Rascal in the Mix was taken by the Stewards, and not the subject of any other hearings before the BHA or the court. A Stewards' Enquiry is clearly rather different from each of the three tribunals which considered the other four races. This is so, even allowing for the fact that this Stewards' Enquiry was final in the sense that the Claimant did not appeal the finding, and the BHA chose not to take the findings of the Stewards any further, as each of them had the choice to do. I have received little by way of evidence or of submission on the status of a Stewards' Enquiry for this purpose, save that Mr Winter submitted the Stewards were not

considering a matter in respect of which it could be said that points (v) and (vi) referred to in para 37 above were satisfied.

40. A second complicating factor is that the Disciplinary Panel remarked (and was plainly concerned) that it did not have a full set of the recordings of three of the races in question (cf Stadlen J at para 181). Some of the missing recordings have now been obtained, as it happens from the Defendant. So far as concerns any attempt to reopen the findings of the BHA, these recordings are what would be called fresh evidence. But for the purpose of these libel proceedings they are simply evidence like any other evidence that may be available to be adduced, if there is a trial.

41. The video evidence which was not before the BHA tribunals was obtained in November and December 2010 from the Defendant's archives. It is not suggested that this is evidence that the Claimant could with reasonable diligence have obtained before the BHA proceedings. The Claimant is supported by a witness statement of Mr O'Gorman dated 7 January 2011. He gives his opinion as an expert who has viewed the videos. In his opinion the evidence of the videos of the various races does not support a finding that the Claimant was in breach of Rule 157 in any of the five races in question.

42. I shall consider these complicating factors separately.

43. The principle Mr Warby relies on is stated in *Hunter*. In that case, as is well known, those convicted of the Birmingham bombings sought to clear their names by bringing a civil claim for assault (not libel) against the police officers who they alleged had assaulted them, notwithstanding that the judge at the criminal trial had determined that issue against them. The principle is stated as follows at p541B:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.
>
> … I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J. [in *Stephenson v. Garnett* [1898] 1 Q.B. 677, 680-681]:
>
> > "… the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court."
>
> The passage from Lord Halsbury's speech [in *Reichel v. Magrath* (1889) 14 App.Cas. 665, 668] deserves repetition here in full:

> "… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."
>
> In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the voir dire in the murder trial, that Hunter's confession was admissible."

44. There is a factual distinction: in *Hunter* the plaintiffs had not sought to appeal their conviction on the basis of fresh evidence, and Lord Diplock explained why such an appeal would have been doomed to failure. The Claimant states that it is his intention to apply to re-open the BHA proceedings. Mr Warby submits that the test for success on an application to reopen the BHA proceedings is the same as in an appeal in a criminal case, rather than the lower test for appeals in civil proceedings, citing Lord Diplock at p545A-E.

45. Mr Warby also referred to *Secretary of State for Trade and Industry v. Bairstow* [2003] EWCA Civ 321; [2004] Ch 1 at para 38 where Sir Andrew Morritt V-C said:

> "In my view these cases establish the following propositions. (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801, 814, cf the cases referred to in paragraphs 32, 33 and 35 above.) (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute".

46. It is principle (d) in that passage that applies here. It is not suggested that there would be any manifest unfairness to the Defendant. The argument can therefore only succeed if to allow this libel action to proceed would bring the administration of justice into disrepute.

47. The relevant proceedings in the present case are the non-statutory proceedings before the BHA, and the challenge to them in this court before Stadlen J. As Mr Winter submits, the proceedings before Stadlen J were in effect by way of review, and did not involve a consideration of the merits. To this Mr Warby responds that taken as a whole the BHA proceedings and the challenge to them in this court sufficed to meet the Claimant's right to a fair hearing under Art 6, and so they should separately, alternatively collectively, be considered as equivalent to proceedings before a court.

48. There is force in Mr Warby's submission. There are now many disciplinary bodies in sport, and much turns on what they decide. The proceedings of such bodies may, in the past, have left much to be desired. But now they are commonly formal, with, as here, QCs and other distinguished lawyers presiding over proceedings. A trial of this libel action would be likely to involve evidence from expert witnesses. Juries are well able to decide issues between expert witnesses, and regularly do so in serious criminal cases (although in some libel cases involving expert evidence a party may apply for the trial to by judge alone, pursuant to the Senior Courts Act s.69). But whether the trial be by judge sitting with a jury, or alone, the court procedure is different from the procedure before the BHA tribunals. And the evidence may be different at different hearings. So there is a real risk of inconsistent decisions.

49. Against that is the fact that Parliament has intervened on this topic on a number of occasions, and has not adopted a policy that re-litigation, and so inconsistent decisions, are to be avoided. As Mr Winter points out, it is only s13 of the Civil Evidence Act that makes a previous finding conclusive in defamation actions. But that section, and s.11, apply only to convictions before "a court in the United Kingdom or by a court-martial there or elsewhere". So s.13 does not apply to findings by disciplinary tribunals such as the BHA's. And in s.11 and in other similar provisions the previous finding only creates a rebuttable presumption.

50. There seems to me to be a comparison with PACE s.74(3) as amended by the Criminal Justice Act 2003, and s103(2) of the 2003 Act. Under these sections, in a criminal trial, even previous convictions are not conclusive evidence of bad character. See JR Spence Evidence of Bad Character 2nd ed paras 5.11 to 5.13. In the present case Mr Boyce was in effect referring to the findings of the BHA Disciplinary Panel as evidence of bad character and propensity.

51. Moreover, the statutory privilege on which I have held that the case must go to trial is derived from the Defamation Act 1996. This, and the other statutory provisions mentioned above are thus relatively recent, and the 1996 and 2003 Acts post-date *Hunter*. As Mr Winter submits, the effect of Mr Warby's submission would be surprising. It would give the Defendant something close to a defence of absolute privilege where the 1996 Act gives only qualified privilege. For this purpose I must assume that the conditions for relying on statutory qualified privilege are not fulfilled (for otherwise the Defendant would be relying on that). As was noted in argument, reasons why a defendant cannot rely on the statutory privilege include matters such as a failure to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, as required by s.15(2)(a).

52. Mr Winter also notes that Mr Warby's submission, if correct, would give the Defendant something close to the irrebuttable presumption provided in s.13 of the

1968 Act, which it cannot rely on. And in other statutory provisions referred to above Parliament has enacted only a rebuttable presumption.

53. Unless I have to do so, I think it preferable not to decide this issue. And I conclude that I do not have to decide it.

54. I do not need to decide what test would be applicable for the purpose of reopening the BHA proceedings. Whatever the test, I cannot say that that course is doomed to failure. In other words, even if I were to treat the findings in the BHA proceedings as raising a rebuttable presumption, I cannot say that the Claimant has no real prospect of succeeding in rebutting the presumption.

55. And this case does not turn solely on the findings upheld by Stadlen J. As already noted, and as Mr Winter submits (whether or not the finding by the Stewards in relation to Rascal in the Mix is comparable in status with the findings of a court of competent jurisdiction), the meanings set out in paras 6.2 and 6.3 of the Particulars of Claim embrace matters which go far beyond anything that the Stewards decided. The Stewards made no finding of dishonesty, or of any motive.

56. For these reasons I am not persuaded that the proceedings are an abuse of the process of the court on the basis that "the identical question sought to be raised has been already decided by a competent court".

Jameel abuse and whether the Claimant had a reputation worth vindicating

57. In the light of the conclusions I have reached on the foregoing points, this argument cannot succeed. It will be open to the Claimant to ask the jury to vindicate his reputation, including by rejecting a defence of justification. If he succeeds the vindication will be of real value to him and be substantial. The jury will be aware of the findings of the BHA tribunals. But that will not mean that any damages will necessarily be very low.

Stay

58. In the light of the conclusions I have reached on the foregoing points I would also decline to stay this libel action pending the reopening of the BHA proceedings. It is uncertain what will happen in relation to that. And in any event the scope of this action includes the Rascal in the Mix Race, which was not the subject of the findings of dishonesty which were made in relation to the other races, but which arise on the meanings complained of in this action.

Conclusion

59. The Defendant will have permission to amend the Defence, but its other applications will be dismissed.