Neutral Citation Number: [2004] EWHC 2164 (QB)

Case No: HQ 03X01658

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 October 2004

Before :

THE HONOURABLE MR JUSTICE RICHARDS

- -

Between :

GRAHAM BRADLEY	**Claimant**
- and -	
THE JOCKEY CLUB	**Defendant**

- -
- -

Mr Timothy Higginson (instructed by **Mishcon De Reya**) for the Claimant
Mr Mark Warby QC (instructed by **Charles Russell**) for the Defendant

Hearing dates: 28-30 June 2004

- -

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.

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Approved Judgment

Mr Justice Richards :

1. The claimant, Mr Graham Bradley, was a successful steeplechase jockey licensed by the defendant Jockey Club from January 1982 until December 1999, when he retired. He now carries on a successful business as a bloodstock agent. In June 2002 he was charged by the Jockey Club with a number of breaches of the Rules of Racing alleged to have been committed during his time as a licensed jockey. The Disciplinary Committee found certain of the charges proved and imposed penalties which included disqualification for a period of eight years. An Appeal Board dismissed an appeal on liability but, on an appeal against penalty, substituted a five year period of disqualification. That penalty of disqualification, which has been suspended pending the outcome of the present proceedings, will almost certainly bring the claimant's business to an end and will have an extremely serious effect on his livelihood and his family. By the present proceedings he challenges the imposition of the penalty, contending that it was disproportionate and unlawful. It is said on his behalf that a proportionate penalty would have been measured in weeks or months rather than years.

2. It is common ground that the court has jurisdiction to review the Appeal Board's decision. There is, however, a substantial dispute as to whether the basis of that jurisdiction in the present case is contractual or non-contractual and about the precise nature of the court's role. Beyond those arguments, however, there is a fundamental divide between the parties as to the appropriateness of the penalty imposed. In effect, the claimant submits that on any view the penalty was disproportionate and unlawful, whereas the Jockey Club submits that on any view it was proportionate and lawful. Acceptance of one or other of those extreme positions would provide a short-cut for my judgment. I think it right, however, to take the longer route.

Factual background

3. During the period when the claimant was a licensed jockey, he was friendly with a fellow jockey called Barrie Wright, who in fact lived for a number of years with the claimant and the claimant's then girlfriend (now his wife). Through Barrie Wright the claimant met a professional gambler called Brian Brendan Wright ("Mr Wright Snr", who was no relation of Barrie Wright) and various associates of Mr Wright Snr, including his son Brian Anthony Wright ("Mr Wright Jnr"), his son-in-law Paul Shannon and a man called Ian Kiernan.

4. On 21 June 1999, at a meeting with members of the Jockey Club's Licensing Committee, the question of the claimant's association with people including Mr Wright Snr was raised. The claimant told the members that he had done nothing wrong with any of those people.

5. In 2001 Mr Wright Jnr, Mr Shannon and Mr Kiernan were convicted of offences of importation or supply of cocaine. Barrie Wright was also charged with involvement in a conspiracy to import cocaine. Part of the prosecution case against him was that he had received cash payments from Mr Wright Snr (who did not stand trial) in

connection with a drugs operation. Barrie Wright's defence was that his involvement with Mr Wright Snr and the others had related not to drugs but to the provision of information about racehorses for the purposes of a gambling organisation led by Mr Wright Snr. On 28 September 2001, at Barrie Wright's trial at Southampton Crown Court, the claimant was called to give evidence in support of the defence.

6. The evidence given by the claimant at Southampton is summarised as follows in a decision of the Appeal Board to which I refer below. It is a convenient summary, although one of the issues I will need to address later in relation to the question of penalty is whether the Appeal Board made unwarranted inferences going beyond the evidence given at the trial:

> "5.16 Mr Bradley's Evidence given at Southampton …
>
> (i) In his evidence to the Southampton Crown Court, Mr Bradley said that it was not just Mr Barrie Wright who was providing confidential information to Mr Wright Snr. and his team, but that he also was himself providing such information …. Mr Bradley went on to describe the sort of information which he himself was providing as 'very privileged' and as information for which punters would give their 'eye teeth' …. At an earlier stage in his evidence, Mr Bradley had given a detailed account of Mr Barrie Wright's regular practice of passing well researched information to assist Mr Wright Snr.'s team to bet profitably …. Mr Bradley described this information as 'privileged, sensitive information which the public generally can't get hold of' and 'sensitive, privileged information like the wellbeing of a racehorse, if it has been coughing, how fit it is …' ….
>
> (ii) In his evidence at Southampton, Mr Bradley went on to confirm that members of Mr Wright Snr.'s betting organisation held his telephone and/or mobile numbers for the purpose of obtaining confidential information from him. The names of such members he identified as Mr Wright Snr., Mr Wright Jnr., Mr Kiernan and Mr Shannon. In reference to these contacts within the Racing Organisation, and in regard to related matters, Mr Bradley went on to say, in cross-examination …:
>
> Q 'You would expect them to ring you or at one stage when you were riding, did they ring you regularly and you ring them regularly for this exchange of information?'
>
> A 'Yes'
>
> Q 'Let us be clear – it is not only Barrie John Wright who is providing information to Brian Brendan and his team, you were as well, were you not?'
>
> A 'Yes.'

Q 'The sort of information which, let us all be quite clear, the average punter would probably give his eye teeth for?'

A 'Yes, very privileged information.'

Q 'Information which the yards and the owner you were riding for expect you to be giving to Brian Brendan Wright?'

A 'Not generally, no.'

Q 'What you are actually doing, Mr Bradley, is providing information which is, in essence, in confidence to you, you are giving it to other people for their financial advantage.'

A 'Yes.'

Q 'In the end, also for your own financial advantage.'

A 'Yes.'

Q 'Because when you give a good tip to someone like Brian Brendan Wright, you get 'a present' do you not?'

A 'Yes.'

Q 'Thousands of pounds sometimes?'

A 'Not that sort of money.'

Q 'What is the biggest amount he has paid?'

A 'Different nights out and hotels etc. etc. I can't recall the exact biggest present he has given me.'

Q 'Let us see how this system works. It is known that you and others like you have access to this privileged information which you should not be disclosing.'

A 'Every jockey in the country, numbering 300-400 has the same and probably does the same.'

Q 'Who they give it to of course depends, on who they know and how they are treated by the people they know.'

A 'Yes.'

Q 'Because it is quite simple – it is you scratch my back, I'll scratch your back situation, is it not?'

A 'You could say that.'

Q 'And how you got your back scratched, was, apparently, nights out at expensive night-clubs?'

A 'Yes.'

Q 'All the drinks paid for, all the meals paid for, all the rest of it paid for by Brian Brendan Wright?'

A 'Yes.'

Q 'Envelopes handed over with cash if you had given him a good tip?'

A 'Occasionally.'

Q 'Holidays paid for?'

A 'Flights occasionally, not generally holidays, no.'

Q 'Flights to Spain? Did you ever go out to his villa down there?'

A 'Yes, a few times.'

…

(iii) A little later in his evidence Mr Bradley went on to say that in the '1990s' he was providing Mr Wright Snr. with 'lots' of confidential information ….

…

(v) Mr Bradley received from Mr Wright Snr. by his own account in his evidence to the Southampton Court: -

(a) Nights out at expensive hotels and night clubs with all expenses met …. This was confirmed by the evidence of Mr Wright Jnr. in the transcript of his evidence before the Crown Court ….

(b) Envelopes handed over with cash to reward a good tip …. We infer that this involves at least sums in hundreds of pounds, see the various instances cited and Mr Bradley's account of what Mr Barrie Wright received ….

(c) Payment for occasional airline flights ….”

7. By letter dated 18 June 2002 the claimant was given formal notification by the Jockey Club of an intended inquiry into a number of matters, the most serious of which arose out of the claimant's evidence to Southampton Crown Court. The letter stated that there were two options as to the form the inquiry would take:

> "(A) An enquiry as to specific breaches of the Rules of Racing. You are invited to submit to the Rules of Racing for this purpose, and to consent to be treated as if at all material times you were bound by the Rules of Racing in force from time to time. If you do, then the Jockey Club's intention would be to conduct an enquiry into whether you acted in breach of the following particular Rules of Racing ….
>
> (B) If you decline the above invitation to submit to the Rules of Racing then the Jockey Club will be unable to proceed with an enquiry of the kind mentioned at (A). It will however consider the same conduct in the context of an enquiry into whether, under Rule 2(v)(a) of the Rules of Racing, you should be excluded for an indefinite period from premises owned, controlled or licensed by the Jockey Club on the grounds that your presence on such premises is undesirable in the interests of racing.
>
> For your guidance, the significance of the differences between these options includes the following. If at the conclusion of an enquiry in form A above the Stewards concluded that you had broken any of the rules mentioned then they would have a discretion as to penalty, which could include declaring you a disqualified person and/or imposing a fine: see Rule 2(i). You would have a right of appeal against any decision imposing a penalty on certain grounds: see Appendix J. If at the conclusion of an enquiry in form B above the Stewards concluded that your presence on the specified kinds of premises was undesirable their only option would be to direct your exclusion and you would have no right of appeal under the Rules of Racing: see Appendix J paragraph 13(iv).
>
> I invite you to confirm … whether you accept the invitation set out above."

8. By letter dated 4 September 2002, after some intermediate correspondence, the claimant's solicitors wrote to the Jockey Club confirming that the claimant "has considered his position and accepts your invitation to be subject to the Rules of Racing".

9. The charges to be considered at the inquiry related to various breaches of the Rules of Racing in force at the material times, including:

> "(1) Rule 204(iv) by giving or offering to give on various dates during the term of his licence information concerning horses entered in races under the Rules of Racing in return for monetary consideration, other than the receipt of a reasonable fee for giving an interview to the Press or other legitimate

> news gathering organisation for the purposes of general publication …
>
> …
>
> (3) Rule 62(ii)(c) by receiving presents in connection with a race on various occasions during the term of his licence from persons other than the Owner of the horse ridden by him in that race …
>
> (4) Rule 220(vii)(b) by providing false information to the Licensing Committee of the Jockey Club on 21 June 1999, namely statements to the effect that he … had never done anything wrong with Mr Brian Brendan Wright …
>
> (5) Rule 220(viii) by means of the statements mentioned above, endeavouring by an overt act to mislead the members of the Licensing Committee ….”

10. I think it unnecessary to set out the text of those rules. Their substance is sufficiently clear from the wording of the related charges.

11. The inquiry was held in late November 2002, by a Disciplinary Committee comprising three members of the Jockey Club with a legal assessor. In relation to the provision of information the Jockey Club’s case before the Committee was that the claimant had regularly provided information for material reward between 1984 (when he met Mr Wright Snr) and 1999. That case was based primarily on the transcript of the claimant’s evidence to Southampton Crown Court. The claimant himself was represented by counsel and solicitors. After hearing and rejecting preliminary arguments relating to bias and breach of article 6 of the European Convention on Human Rights, the Committee heard oral evidence, including evidence from the claimant himself and supporting witnesses. The claimant sought to explain his Southampton evidence in a number of ways, saying that he had been under pressure and taken by surprise in cross-examination; that he had not in fact provided information to Mr Wright Snr about other people’s horses in return for cash, presents or hospitality, and if his evidence had amounted to an admission to that effect it was unintended; that he had dressed up or dramatised, for maximum impact with the jury, his evidence about Barrie Wright’s collation or collection of information, and that if one looked at it sensibly it was not really confidential, sensitive, privileged information; and that the only information he had passed to Mr Wright Snr, and for which he had received money and other benefits, was information about a horse named “Border Tinker” which Mr Wright Snr had owned and the claimant had ridden. The claimant had in fact ridden Border Tinker nine times in the late 1980s and once in 1990. Asked about his Southampton evidence that he had given Mr Wright Snr “lots” of information in the 1990s, his explanation was that he had made a mistake about dates and had meant to refer to lots of information about Border Tinker in the 1980s.

12. The Disciplinary Committee's decision was dated 4 December 2002. The Committee found the claimant to be in breach of Rules 204(iv) and 62(ii)(c), in that "(a) since 1988, (when Rule 204(iv) was introduced) he had been giving privileged information about horses to Brian Brendan Wright in return for monetary consideration; and (b) throughout the period 1984 to 1999 he had been receiving presents from Brian Brendan Wright, particularly in the form of nights out at expensive nightclubs and hotels, for privileged information about horses including horses he was riding in races". The claimant's explanation about Border Tinker and his reference to the 1990s when he meant the 1980s was said to have been "wholly unconvincing".

13. The Disciplinary Committee also found the claimant to be in breach of Rules 220(vii)(b) and 220(viii), on the basis that his statement to the Licensing Committee in June 1999 that he had not done anything wrong with Brian Wright constituted the provision of inaccurate information and that he had been endeavouring to mislead the Licensing Committee.

14. For those various breaches taken together, the Disciplinary Committee imposed a penalty of disqualification for eight years. The power to impose a penalty of disqualification for breach of the Rules of Racing is conferred by Rule 2(i).

15. Although the Disciplinary Committee's decision also dealt with other matters, they are not material to the present proceedings.

16. The claimant appealed, in accordance with Appendix J to the Rules of Racing, to an Appeal Board. The grounds of appeal available under paragraphs 15-20 of Appendix J are that the reasons given by the Disciplinary Committee are insufficient to support the decision; that the hearing before the Disciplinary Committee was conducted in a way which was substantially unfair and prejudicial to the appellant; that there was insufficient material on the basis of which a reasonable Committee could have made the decision in question; that the Committee misconstrued or failed to apply or wrongly applied the Rules of Racing, or Instructions or Jockey Club General Instructions or Regulations relevant to the decision; that the penalty or sanction imposed is disproportionate; or that there is evidence available for the appeal which, had it been available at the enquiry would have caused the Committee to reach a materially different conclusion. For the purposes of the present proceedings the key ground of appeal was "that the penalty or sanction imposed is disproportionate" (paragraph 19).

17. For the claimant's appeal, the Appeal Board consisted of Sir Edward Cazalet (a former High Court Judge who was drawn from a panel of independent chairmen) and two members of the Jockey Club drawn from a members' panel. The claimant was again represented by counsel, led by Mr Robin Leach. The appeal was dealt with in stages.

18. First, in a reasoned decision handed down on 21 March 2003, the Appeal Board rejected the claimant's arguments that the disciplinary process, including the Disciplinary Committee and the Appeal Board themselves, lacked an appearance of

independence and impartiality and was in breach of article 6 of the European Convention on Human Rights. That ruling is not challenged.

19. The Appeal Board then went on to deal with the substantive appeal on liability. In accordance with paragraph 25 of Appendix J, the appeal was treated not as a rehearing but as a review of the Disciplinary Committee's decision, though (as was permitted under the Rules) the Appeal Board also received a substantial amount of new evidence. In a reasoned decision dated 31 March 2003 the Appeal Board dismissed the appeal. In relation to the issue arising out of the claimant's Southampton evidence, it made detailed findings and concluded that "the reasonable committee would consider that there was sufficient material to infer that, in breach of Rule 204(iv) and Rule 62(ii)(c), Mr Bradley was passing confidential information for benefits or monetary reward outside Border Tinker to Mr Wright Snr over a period of some 10 years. We consider it appropriate to substitute the period 1989 to 1999 for the findings of the Disciplinary Committee …". The decision itself is not challenged, but the claimant does take issue with certain of the findings in so far as they touch on penalty.

20. Finally the Appeal Board considered the issue of penalties, handing down a reasoned decision on 1 April 2003. Since that decision is the target of the present challenge, I need to refer to it in some detail.

The Appeal Board's decision on penalty

21. The Appeal Board turned first to consider the four most serious findings against the claimant, for breaches of Rules 62(ii)(c), 204(iv), 220(vii)(b) and 220(viii), for the collective breach of which he had been disqualified for eight years. It was noted that the disqualification would have "the most serious impact" upon him and would "in reality, debar him from dealing as a bloodstock agent" (para 1.4).

22. After recording the relevant part of the Disciplinary Committee's reasons, the Appeal Board made the following general observations:

> "THE IMPORTANCE TO RACING OF MAINTAINING ITS INTEGRITY
>
> 1.6 The seriousness of the breach of these Rules stems additionally from the impact that such may be expected to have on the reputation of racing in general. The well-being of racing is founded on its integrity, actual and perceived. If that perception is compromised, then various undesirable consequences will flow. Owners will not invest in the industry if they believe that it is corrupt, and it is the owners who provide the runners, the life-blood of racing, without which the sport cannot survive. Furthermore, the public will not bet on horse racing if they believe that they are not betting in a fair market. It should be remembered that it has been, to a large degree, the taxed income from betting, the "Betting Levy"

which has funded the sport/industry. The new media rights charges are equally sensitive to integrity, as there would be a sharp fall in those who would be prepared to pay such charges within a corrupt sport. The standard of racing in this country is universally regarded as high, many of the best thoroughbreds in the world are bred in the British Isles and race here. If this position is to be retained, then it is essential that the integrity of the sport is fully protected.

THE IMPORTANCE OF THE FOUR RULES

1.7 These particular Rules are an essential part of the Jockey Club's process in maintaining its integrity.

1.8 The Disciplinary Committee clearly regarded the breaches of Rules 62(ii)(c), 204(iv), 220(vii)(b) and 220(viii) as being serious. We point to the first two reasons in reference to the penalty imposed, namely seriousness and the length of time over which the offence was committed. Mr. Bradley was found to have been passing confidential information in consideration for cash and presents over a period as long as fifteen years. Moreover, Mr. Bradley was passing this confidential information regularly to a major betting Organisation which was, according to Mr Bradley's evidence, placing bets in sums quite frequently of £10,000 to £20,000, at times even £50,000 and on one occasion, in the sum of £100,000.

1.9 Offences under Rules 220(vii)(b) and 220(viii) are also potentially serious matters. This is because the Licensing Committee is solely responsible for deciding to whom, in particular, licences and permits to train and ride are granted, as well as the making of decisions about those who should hold official roles in the administration and regulation of racing.

1.10 We consider that the very fact that the cash and benefits continued to be supplied by Mr. Wright Snr. to Mr. Bradley throughout a period of ten years (which we have substituted for the fifteen year period found by the Disciplinary Committee) justifies the conclusion that this information yielded a significant profit. Indeed, the length of time over and regularity with which this information was supplied is a major factor in distinguishing this case from other alleged comparable cases which have been cited to us.

DETERRENCE

2.1 The third ground advanced by the Disciplinary Committee for imposing the eight year disqualification was that the penalty should act as a deterrent to other jockeys.

2.2 In imposing a penalty under the Rules, it is our view that an element of the penalty imposed can properly reflect, subject to the requirement of proportionality, an increase so as

> to deter others from like conduct. However, whilst the level of that increase must not be out of proportion to the size of penalty which would otherwise fall to be imposed, the Jockey Club must be vigilant in regulating a sport which is open to improper practices."

23. There followed a section on the Appeal Board's overall approach, referring *inter alia* to the range of penalties provided by the Rules, from disqualification or exclusion for an unlimited period to fines, and explaining that the decision was based on the evidence alone.

24. The decision dealt next with "comparables", distinguishing the claimant's case from other Jockey Club cases relied on as having given rise to much lower penalties. I shall return to the detail of this when considering the submissions made on behalf of the claimant before me.

25. The next matter considered was that of mitigation. Since it is very important for the overall assessment of proportionality, it is right to set out in full what the Appeal Board said about it:

> "Mitigation
>
> 5.1 We turn now to Mr Bradley's personal situation. Mr Bradley is aged 42 years, he lives with his wife and daughter aged nearly 12 months. His wife does not work, he is the family breadwinner. In our earlier reasons of 31st March 2003 we set out in detail the remarkable career that Mr Bradley had as a National Hunt jockey, being regarded as one of the most stylish jockeys of his era. As is well known, he has ridden the winner of most of the top, prestigious National Hunt races. All his working life has been with horses. He held a full licence to ride as a National Hunt jockey from 8th January 1982 until 21st December 1999 since when he has carried on business as a bloodstock agent, having started the business shortly before relinquishing his licence.
>
> 5.2 We have before us numerous glowing testimonials from all sectors of the racing world, including top trainers and owners for whom he has ridden. They all speak highly of his achievements, and those for whom he has worked also speak highly of his loyalty and reliability.
>
> 5.3 From the early days of his racing career, Mr Bradley has gone to considerable lengths to involve himself in charitable work, in particular raising money for those jockeys who have been seriously injured. Also, it is apparent that he was most popular in the Weighing Room and is someone who would regularly help the younger and less experienced jockeys, as well as those in need.

> 5.4 On the family side he has more recently had the worry of members of his close family suffering from serious ill health and a bereavement.
>
> 5.5 Mr Bradley's bloodstock business was started in 1999. We have seen a letter from his accountant. The business is in its early days, but clearly as we have seen from more recent figures and correspondence, he has an increasing clientele. He is, undoubtedly, a fine judge of a racehorse. In order to keep his business intact, it is essential that he is able to attend racecourses and training yards regularly. If this cannot be continued then his ability to promote and find new clients will be severely curtailed.
>
> 5.6 The bloodstock business supports the family. His house is subject to £120,000 mortgage and he has no reserves of capital on which to rely. We were told that if a disqualification continues for any length of time, the business will not survive. We bear in mind that his business needs him now rather than in a few years time when he may be less active. He has put a lot of hard work into his business and of course he is deeply concerned that this should not be destroyed. Mr Leach has also made the point that Mr Bradley lacks educational qualifications and his choice of alternative occupation is therefore limited.
>
> 5.7 Mr Bradley has more recently been victimised by the Press. We accept that he has personally suffered both as a result of that and in the delay in finality being reached with regard to these proceedings and his future."

26. The Appeal Board then considered the penalties imposed in respect of each of the various breaches found by the Disciplinary Committee. In relation to the breach of Rules 220(vii)(b) and 220(viii) (provision of false information, etc.), which the Disciplinary Committee had included with the breach of Rules 62(ii)(c) and 204(iv) when imposing the eight year disqualification, the Board referred to the existence of mitigating circumstances. It considered that the claimant should have been required to have legal representation before the Licensing Committee. Had he had such representation, the breaches would not have occurred. Accordingly the Board did not consider that these two offences merited any form of disqualification. It dealt with them as self-standing and substituted a total fine of £500.

27. After upholding the penalties in respect of other, minor breaches, the Appeal Board turned to the central question of breach of Rules 62(ii)(c) and 204(iv):

> "6.4 Counsel are agreed that the test of proportionality which we must apply in this case is the definition stated by Lord Clyde in *de Freitas v Permanent Secretary* [1999] 1 AC 69 at page 80, in the following terms:-
>
> 'Whether:

1) The legislative objective is sufficiently important to justify limiting a fundamental right;
2) The measures designed to meet the legislative objective are rationally connected to it;
3) The means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

In *Colgan v Kennel Club,* Cooke J at paragraph 42 stated that:

> 'in order to apply the proportionality test here, it is necessary to replace the words 'the legislative objective' with 'the objective or objectives of the disciplinary procedures.''

6.5 In applying this test it is appropriate that we consider whether the objective of the Disciplinary procedure is sufficiently important to justify limiting the fundamental right of Mr Bradley to work in his business. Put in more specific terms, this means that we have to consider the importance of protecting the integrity of racing against the impact on Mr Bradley of disqualifying him for such a period as puts his bloodstock business either in serious jeopardy or at an end. In determining what penalty to impose against these objectives, we look to a penalty that reflects three main elements namely punishment, deterrence and prevention. We then have regard to sub-paragraphs 2 and 3 of the proportionality test set out above.

6.6 We have substituted a finding that Mr Bradley supplied confidential information for reward to Mr Wright Snr. for a period of some ten years, and not the fifteen years found by the Disciplinary Committee enquiry. Furthermore, we have detached from the collective sentence of eight years the disqualification the offences under Rules 220(vii)(b) and 220(viii). Accordingly, we now consider whether the penalty of eight years disqualification, which now stands alone for Rules 204(iv) and 62(ii)(c), is disproportionate.

6.7 Mr Leach raised the question of using the penalty of exclusion as opposed to disqualification. He accepted that if we were minded to impose a disqualification in respect of the breaches of these Rules, it would not be possible for Mr Bradley, by reason of the provisions of Rule 205(vi) to deal in any capacity with a racehorse, thus prohibiting him from acting as a bloodstock agent. However, said Mr Leach, if we took the route by way of imposing an exclusion order, the exclusion Rule 2(v), permits there to be tailoring of the terms of the order made to accommodate continuation of Mr Bradley's bloodstock business in, at least, a limited form. We bear this in mind.

6.8 As to how we approach Mr Bradley's character, we have held, as we have already pointed out, that for a ten year

period Mr Bradley was regularly in breach of Rules 204(iv) and 62(ii)(c). This is something which we will take into account when considering whether the penalty imposed by the Disciplinary Committee was disproportionate. Save for this, we approach this case on the basis that Mr Bradley is someone of otherwise good character.

6.9 We have set out above our view as to why we think Mr Bradley's breach of this Rule was a serious one. As we have already said, the preservation of the integrity of racing is essential. If the betting market in particular races is shown to be unfair with what is in effect insider information being used to distort that market, the status of the sport will be severely diminished with possible damaging consequences to those employed in or otherwise promoting the industry. We have already stated how we find the comparability between Mr Bradley's case and the others cited by Mr Leach as being no more than superficial. We do not repeat our views as to this. However, it follows from our assessment of the comparables that there appears to be no decision in being which can be said to be adequately comparable to this one. Mr Bradley's regular dealings over a period of ten years receiving presents and monetary reward must be seen as self standing. We have set out above how vital it is for integrity to be maintained if the continued well being of racing is to be preserved. We have indicated our concern at the extent of privileged information that was being passed to the Racing Organisation. The extent of the privileged information used to distort the betting market indicates to us that an element of deterrence is justified in the penalty even though Mr Leach has pointed out there has only been one other established breach of these Rules since 1978.

6.10 We have set out above the serious impact that disqualification of a substantial period will have on Mr Bradley's livelihood. As part of the proportionality test we must weigh this against the need to maintain the integrity of racing.

6.11 Mr Lewis has urged upon us that as Mr Bradley is no longer licensed by the Jockey Club, he is a spent force in the context of passing confidential information. We are aware, however, that Mr Bradley's occupation as a bloodstock agent brings him into intimate contact with all sections of the racing world. Thereby continues the opportunity to profit from the passing of confidential information.

6.12 Finally, for the reasons given above, we think that disqualification is the appropriate penalty. It follows that we do not think it appropriate to take up the alternative course of a qualified extension. Having regard to all these factors we have considered the criteria of proportionality. Having carried out

> that exercise we substitute five years disqualification for the eight years imposed by the Disciplinary Committee."

28. The penalty of disqualification has been suspended pending the outcome of the present proceedings. For the time being, therefore, the claimant has been able to carry on his bloodstock business, but the disqualification will bite if and when his challenge to the Appeal Board's decision is dismissed.

Issues

29. The claim is pleaded first in contract, contending that by the imposition of the period of disqualification the Jockey Club was in breach of various implied terms, including in particular an implied term that it would only impose a sanction that was proportionate. The contractual claim raises issues as to whether there was a relevant contractual relationship between the parties at all and what were the implied terms of any such contract. A particular question is what, if any, contractual liability was assumed by the Jockey Club in respect of decisions of the Appeal Board. A linked question is whether, to the extent that the Appeal Board's decision can be challenged by the contractual route, the role of the court is to determine for itself the proportionality of the penalty or to review, on a supervisory basis, the decision made by the Appeal Board in that regard.

30. There is an alternative, non-contractual basis of claim, namely that the imposition of the disqualification would operate in unreasonable restraint of trade. In this area there is a degree of common ground that the court has a supervisory jurisdiction over the decision of the Appeal Board, but there is again an issue about the precise nature of the court's role and the intensity of review. When I come to consider the issues below, I have found it convenient to deal first with the non-contractual claim.

31. The pleaded case includes a further basis of claim, under Article 1 of the First Protocol of the European Convention of Human Rights. In the course of the hearing before me, however, Mr Higginson accepted that Article 1 of the First Protocol did not add materially to the argument and he did not pursue it as a separate head of claim.

32. The contention that the period of disqualification was disproportionate calls for consideration of a number of matters: an assessment of the claimant's conduct, looking in particular at the evidence given by him at Southampton Crown Court and before the Disciplinary Committee; new evidence given by witnesses before me about practices within the industry (which I heard *de bene esse* and the status of which has to be resolved); so-called "comparables", i.e. penalties imposed by the Jockey Club in other cases; and an overall examination of the lawfulness of the Appeal Board's decision.

The non-contractual claim

33. Both parties accept as a premise to their arguments that the decision of the Appeal Board is not subject to judicial review: see *R v. Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909. Much of the debate before me would have evaporated if judicial review applied.

34. It is nevertheless common ground that, even in the absence of any contractual relationship, the decision of the Appeal Board is subject to the supervisory jurisdiction of the court in accordance with the principles stated in *Nagle v. Feilden* [1966] 2 QB 633. For all the doubts expressed about the jurisprudential basis of *Nagle v. Feilden*, it has become an accepted part of the law and has perhaps assumed an even greater importance since the courts came to adopt a restrictive approach towards the application of judicial review to the decisions of sporting bodies. In *Modahl v. British Athletic Federation Ltd* [2002] 1 WLR 1192 ("*Modahl (No.2)*"), Latham LJ referred to a number of the earlier authorities on the court's power to grant remedies against domestic tribunals, and continued (at 1207, paras 44-47):

> "However this particular debate has been resolved, certainly in this court, in *Nagle v. Feilden* …, in which the court unanimously held that, where a man's right to work was in issue, a decision of a domestic body which affected that right could be the subject of a claim for a declaration and an injunction even where no contractual relationship could be established. The case concerned the rejection of an application by the plaintiff for a trainer's licence from the Jockey Club. The claim was based fairly and squarely on an allegation that the Jockey Club's policy was to refuse to grant any women such a licence. Her statement of claim had been struck out. Her appeal to the Court of Appeal was unanimously allowed. Lord Denning MR … said [1966] 2 QB 633,646:
>
> > 'We live in days when many trading or professional associations operated 'closed shops'. No person can work at his trade or profession except by their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or a tort. But he may get a declaration and injunction.'
>
> …
>
> Despite the comment by Hoffmann LJ in *R v. Disciplinary Committee of the Jockey Club, ex p. Aga Khan* … to the effect that there was an 'improvisatory air about this solution' and his doubts as to whether the possibility of obtaining an injunction

> had survived *Siskina (Owners of cargo lately on board) v. Distos Cia Naviera SA* [1979] AC 210, this court was clearly of the view in *Stevenage Borough Football Club Ltd v. Football League* 9 Admin LR 109 that the court retained a supervisory jurisdiction over such tribunals in the absence of such contracts, at least for the purposes of granting declarations. And in *Newport Association Football Club Ltd v. Football Association of Wales Ltd* [1995] 2 All ER 87 Jacob J held that the jurisdiction to grant an injunction in such cases where the allegation was there had been an unreasonable restraint of trade had survived the *Siskina* case."
>
> (See also per Jonathan Parker LJ at 1216 para 81 and Mance LJ at 1224 para 109.)

35. The submissions of counsel touched on the question whether *Nagle v. Feilden* is itself a restraint of trade case (I note that the present claimant's case was pleaded on the basis of restraint of trade) or whether the restraint of trade doctrine provides a jurisprudentially distinct basis for supervision by the court in a non-contractual context. Of the further authorities on restraint of trade to which I was referred, the most interesting was the detailed exposition by Carnwath J at first instance in the *Stevenage Borough Football Club* case (unreported judgment of 23 July 1996). What he said was dealt with only briefly by the Court of Appeal on appeal in the same case (9 Admin LR 109, referred to by Latham LJ in the passage from *Modahl (No.2)* quoted above). For present purposes, however, I think it unnecessary to get caught up in the subtleties of Carnwath J's analysis. It is sufficient that even in the absence of contract the court has a settled jurisdiction to grant declarations and injunctions in respect of decisions of domestic tribunals that affect a person's right to work. That applies both to "application" cases such as *Nagle v. Feilden* itself and to "expulsion" or "forfeiture" cases in which a person is deprived of a status previously enjoyed, though in the latter category of case it is likely in practice that a contractual relationship will also have been established. Moreover no challenge is made in the present case to the Rules themselves, only to the Appeal Board's decision reached in the application of those Rules, so I do not need to consider whether it is for the Jockey Club to justify the Rules or for a challenger to show that the Rules are unreasonable (an issue on which Carnwath J's conclusions are of particular interest).

36. That the decision of the Appeal Board in this case is subject to the supervision of the court was recognised by the Appeal Board itself and played some part in its reasoning on the compatibility of the procedures with article 6 of the European Convention on Human Rights. Further, paragraph 34 of Appendix J to the Rules of Racing provides that, although the decision of the Appeal Board shall be final and binding, this is not intended to fetter an applicant's right "to pursue further action in relation to the subject matter of any appeal to a judicial hearing". The Jockey Club accepts that that includes proceedings in the High Court and also accepts that, despite its reliance elsewhere on a submission that the Appeal Board is an independent body, the Jockey Club is an appropriate defendant to a claim seeking a declaration that the Appeal Board acted unlawfully and an injunction restraining the Jockey Club from implementing the Appeal Board's decision. That is an obviously sensible position to adopt, since it is only through the Jockey Club's implementation of the Appeal Board's decision that an

adverse effect on the claimant's livelihood arises, thus triggering the application of *Nagle v. Feilden* and/or restraint of trade principles. The Jockey Club contends, however, that the proper issue in such a claim is the lawfulness of the Appeal Board's decision and that any wider claim against the Jockey Club itself is misconceived.

37. That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth.

38. The supervisory nature of the court's role runs through the case-law. In *Nagle v. Feilden* Lord Denning MR referred to the concept of abuse of power and said that if those having the governance of a trade or profession "make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad" (pages 644-645). In *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch 591, 606, he referred to the rules of a body like the Football Association as being "nothing more nor less than a legislative code - a set of regulations" which were invalid if "they are in unreasonable restraint" or "they unreasonably shut out a man from his right of work" or "they lay down a procedure which is contrary to the principles of natural justice". In *McInnes v. Onslow-Fane* [1978] 1 WLR 1520, 1529-1530, Megarry V-C referred to the various requirements of natural justice or fairness that have to be observed according to whether a case is a forfeiture case or an application case. He endorsed counsel's concession that in an application case the relevant board was "under a duty to reach an honest conclusion without bias and not in pursuance of any capricious policy" (1533E). He also expressed the view that "the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts …" (1535F). In the *Stevenage Borough Football Club* case, Millett LJ stated that those observations had won subsequent approval and suggested that the role of the court was essentially supervisory.

39. Although it was a contractual case, I think it helpful to refer also to *Wilander v. Tobin* [1997] 2 Ll Rep 293, which arose out of disciplinary proceedings by the International Tennis Federation against a leading tennis player under a rule relating to drugs testing (rule 53). An allegation that the rule was void as being in unreasonable restraint of trade was struck out. One of the issues before the Court of Appeal was whether leave to amend should be given to contend that the rule failed to confer a right of appeal in accordance with the requirements of the 1989 Anti-Doping Convention. The Court of Appeal held that the internal Appeal Committee was in fact exercising an appellate power, but that in any event the combination of the Appeals Committee and the

review provided by the High Court met the requirement of the Convention. Lord Woolf stated (at 299-300):

> "It is important to note that the art.7 requirement of the Convention arises under the provision that the general procedures should apply 'agreed international principles of natural justice and ensuring respect for fundamental rights of suspected sportsmen and sportswomen.' This is exactly the function which the High Court performs in relation to domestic tribunals such as the Appellate Committee. Assuming, but not deciding, that the Appeals Committee is not subject to judicial review because it is not a public body, this does not mean that it escapes the supervision of the High Court. The proceedings out of which this appeal arises are part of that supervision. The Appeals Committee's jurisdiction over the plaintiff arises out of a contract. That contract has an implied requirement that the procedure provided for in r.53 is to be conducted fairly …. *If the Appeals Committee does not act fairly or if it misdirects itself in law and fails to take into account relevant considerations or takes into account irrelevant considerations, the High Court can intervene. It can also intervene if there is no evidential basis for its decision*" (emphasis added).

40. Those observations were made in what was assumed to be a contractual context, and I shall return to them later when I consider the contractual claim in the present case. In my view, however, they have just as much bearing on the non-contractual claim. The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim. In *Wilander* Lord Woolf was using the language of judicial review; and it seems to me that those concepts are just as applicable here.

41. In *Modahl v. British AthleticFederation Ltd. ("Modahl (No.1)")*, an unreported interlocutory judgment of the Court of Appeal, dated 28 July 1997, on an application to strike out the claim in the proceedings which led ultimately to *Modahl (No.2)*, Lord Woolf MR again emphasised the similarity of the applicable principles. There was an issue about the term to be implied in relation to the fairness of the disciplinary proceedings. Lord Woolf stated (pages 17-18):

> "… Mr Pollock is wrong in suggesting that the approach of the courts in public law on applications for judicial review has no relevance in domestic disciplinary proceedings of this sort. The question of whether a complaint about the conduct of a disciplinary committee gives rise to a remedy in public law or private law is often difficult to determine. However, the complaint in both cases would be based on an allegation of unfairness. While in some situations public and private law principles can differ, I can see no reason why there should be any difference as to what constitutes unfairness or why the standard of fairness required by an implied term should differ from that required of the same tribunal under public law.

> That they have in fact similarities was made clear by Denning LJ in the *Lee* case [*Lee v. Showmen's Guild* [1952] 2 QB 329]. Having pointed out, that in the case of disciplinary bodies governed by contract, the question of what are the terms of the contract is a matter for the courts, Denning LJ referred to various cases concerning statutory tribunals. Having done so, he added (at p.346):
>
> > 'I see no reason why the powers of the court to intervene should be any less in the case of domestic tribunals. In each case it is a question of interpretation. In one of a statute, in the other of the rules, to see whether the Tribunal has observed the law. In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction. The remedy by certiorari does not lie to a domestic tribunal but the remedy by declaration and injunction does lie; and it can be as effective as, if not more effective than certiorari. It is, indeed, more effective, because it is not subject to the limitation that the error must appear on the face of the record.'
>
> The last sentence has been overtaken by the developments of administrative law but the remainder of the statement is still true today. Indeed in areas such as this, the approach of the court should be to assimilate the applicable principles. There would however remain the procedural differences and differences as to the remedies which are available."

42. Again the observations were made in the context of contract but seem to me to be just as relevant in the context of the non-contractual claim, where there is an equal, if not greater, reason for assimilating the applicable principles.

43. Of course, the issue in the present case is not one of procedural fairness but concerns the proportionality of the penalty imposed. To my mind, however, that underlines the importance of recognising that the court's role is supervisory rather than that of a primary decision-maker. The test of proportionality requires the striking of a balance between competing considerations. The application of the test in the context of penalty will not necessarily produce just one right answer: there is no single "correct" decision. Different decision-makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests. The same essential approach must apply in a non-ECHR context such as the present. It is for the primary decision-maker to strike the balance in determining whether the penalty is proportionate. The court's role, in the exercise of its supervisory jurisdiction, is to

determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is *not* the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be.

44. To illustrate the point made in the preceding paragraph, I can refer by way of analogy to the decision of the Court of Appeal in *Edore v. Secretary of State for the Home Department* [2003] EWCA Civ 716, in which it was held that the task of an immigration adjudicator, on a human rights appeal from a decision of the Secretary of State involving a judgment on proportionality, is to determine whether the decision under appeal "was properly one within the decision-maker's discretion, i.e. was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play", and that if it was "he cannot substitute his own preference for the decision in fact taken" (para 20). (I should make clear that *Edore* was not cited in the course of argument before me, but in view of the purely illustrative use to which I have put it I did not think it necessary to invite the parties' comments on it.)

45. Mr Higginson cited *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 in support of his submissions on the correct approach of the court towards the issue of proportionality. I see nothing in *Daly* that is inconsistent with the views I have expressed above.

46. The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are knowledgeable about the racing industry and are better placed than the court to decide on the importance of the rules in question and the precise weight to be attached to breaches of those rules. (I treat the Appeal Board as the primary decision-maker since, although its function under Appendix J to the Rules of Racing was largely a review function, it found that the penalty imposed by the Disciplinary Committee was disproportionate and, as it was empowered to do, it substituted a penalty of its own as a proportionate penalty.)

47. Accordingly, if the claimant is to succeed in the non-contractual claim in this case, he must in my view show that the Appeal Board's decision to impose a five year disqualification fell outside the Board's discretionary area of judgment.

The contractual claim

48. I turn to consider the contractual claim, which is the primary basis on which the claimant's case is put. It is submitted that he was in a contractual relationship with the Jockey Club, based either (a) on his holding of a licence as a jockey up to 1999, with continuing obligations on the Jockey Club with regard to its disciplinary functions in respect of breaches of the Rules of Racing during the period his licence, or (b) on the exchange of correspondence in 2002 whereby he consented to be treated as if at all material times he was bound by the Rules of Racing.

49. There are said to have been implied terms of the contract that in carrying out its disciplinary functions, the Jockey Club (by way of its Disciplinary Committee and the Appeal Board) would (i) act in accordance with the Rules of Racing, properly instructing itself as to the meaning of those Rules, and in accordance with the general law; (ii) act reasonably, taking into account relevant considerations, not taking into account irrelevant considerations, and not treating like situations differently or unlike situations the same; (iii) act fairly in its procedure and in accordance with the principles of natural justice and legal certainty; and (iv) only impose a sanction that was proportionate in the light of the facts proven or admitted. Mr Higginson referred to a degree of overlap between these implied terms, stressing that the general duty was to act fairly and that an aspect of fairness was a fair and proportionate penalty. As regards specific implied terms, he placed particular emphasis on (iv), the essence of his case being that the sanction imposed in this case was disproportionate and therefore in breach of contract.

50. The Jockey Club does not accept that there was any contractual relationship between the parties, but submits that even if there was such a relationship it cannot avail the claimant in these proceedings. In particular, a distinction is drawn between the Jockey Club and the Appeal Board, and stress is placed on the separate role of the Appeal Board in the disciplinary process. It is submitted that, so far as is material, any implied obligation on the Jockey Club cannot have extended beyond ensuring that the appeal procedures were made available to the claimant, an obligation with which it plainly complied. There is no basis for implying a term the effect of which would be to hold the Jockey Club responsible, and potentially liable in damages, for any errors by the Appeal Board. The Appeal Board's decisions are subject to the supervision of the court by the non-contractual route considered above.

51. I can deal shortly with the first basis on which the contractual relationship is put, arising out of the claimant's licence as a jockey. There are strong observations in *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 as to the existence of a contractual relationship between the Jockey Club and those agreeing to be bound by the Rules of Racing: see, in particular, per Sir Thomas Bingham MR at 915D and 924A-C and Hoffmann LJ at 933F. The case concerned an owner, but the observations apply with equal force to the position of a licensed jockey. In the circumstances I am prepared to assume the existence of a contract during the period of the claimant's licence, whilst noting that I have not been taken through any documentation relating to the licence in order to see precisely how matters were expressed.

52. The fact is, however, that the Jockey Club did not purport to act in pursuance of any such contract in proceeding against the claimant. It took the view that the Rules of Racing in force at the time when the claimant held his licence did not entitle it to take action pursuant to Rule 2(i) so as to fine or disqualify him after he had ceased to be a licensed jockey. The material part of the rule at the time when he held his licence provided:

> "When any person subject to the Rules of Racing has, in the opinion of the Stewards of the Jockey Club,
>
> - committed any breach thereof …

> the Stewards of the Jockey Club have power at their discretion to impose upon such person any one or more of the following penalties, namely:
>
> …
>
> (a) The may impose a fine …
> (b) They may declare him a disqualified person."

It was only later that the following words were added to the rule in order to deal with the situation after someone had ceased to be a licensed person:

> "For the avoidance of doubt the preceding power applies to any person who has ceased to be subject to the Rules of Racing provided that the commission of the breach or offence by such person took place whilst he was subject to the Rules of Racing."

53. I do not need to decide the point, but I am inclined to think that the Jockey Club was right to take the cautious approach that it did. The court would in my view be slow to find a power to fine or disqualify in the absence of clear words. At best the version of the Rules of Racing prior to the "for the avoidance of doubt" amendment was unclear as to whether disciplinary proceedings could be brought after the expiry of a licence in respect of the period when the licence was in force; and in this situation one would expect the Rules to be construed against the Jockey Club, as the body responsible for promulgating them: see Chitty on Contracts, 29th edition, paras 12-083 ff. on the rule of "construction against grantor" (the *contra proferentem* rule).

54. In any event it was not just the Jockey Club but also the claimant who proceeded on the basis that his former status as a licensed jockey did not give rise to any continuing contractual relationship. That was the reason for the exchange of correspondence in 2002.

55. That brings me to the effect of that exchange of correspondence. On the face of it, it gave rise to a clear agreement between the parties that (i) the claimant would be treated as if bound at all material times by the Rules of Racing, and (ii) the Jockey Club would apply the Rules accordingly and in particular would conduct an inquiry into whether he had acted in breach of the Rules and would make available to him a right of appeal in accordance with the Rules. Mr Warby submitted that there was no intention to create legal relations by that correspondence, but I reject the submission. These were considered, formal letters; and given the importance of the subject-matter and the potential seriousness of the sanctions, it would be very surprising if the parties intended anything other than to create legal relations. Mr Warby also submitted that there was no consideration, in that the agreement benefited only the claimant by giving him the possibility of an appeal: the sanctions available to the Jockey Club in consequence of the agreement were no different in practical effect from the sanction of exclusion that would have been available without the agreement. This argument depended on a detailed examination of a number of rules, in particular Rule 2(v) (the power to exclude), Rule 205 (which relates to the effect of disqualification) and Rule

220(iv) (which prohibits association, in connection with horseracing, with any person known to be disqualified or otherwise excluded under Rule 2(v)). I found it unpersuasive. There was in my view a clear benefit not only to the claimant but also to the Jockey Club in having wider and more flexible powers with regard to the imposition of penalties, including a power to fine as well as to disqualify. I conclude that there was ample consideration to create a binding contract.

56. In my judgment, therefore, the exchange of correspondence did give rise to a contractual relationship between the parties. It is necessary to consider next what were the relevant terms of the contract. I have referred already to the implied terms for which the claimant contends. The thrust of Mr Higginson's submissions was that the Jockey Club impliedly undertook that any penalty imposed upon the claimant would be proportionate and that it is for the court to determine the question of proportionality, so that the Jockey Club will be in breach of contract if the court, making its own assessment of proportionality, considers that a lesser penalty should have been imposed. Thus it was that Mr Higginson submitted that the court should step into the shoes of the Appeal Board in determining the proportionality of the penalty and, although unable formally to substitute its decision as to penalty, should declare what a proportionate penalty would be.

57. The structure of the Rules militates strongly against the approach for which Mr Higginson contended. First, if the *Disciplinary Committee* imposes a penalty which is considered to be excessive, the Rules confer an express right of appeal to the Appeal Board on the ground that "the penalty or sanction imposed is disproportionate" (Appendix J, paragraph 19). It was to obtain that right of appeal that the claimant agreed to be treated as if bound by the Rules in the first place. In those circumstances I can see no basis for implying a term whereby the Jockey Club enters into a contractual undertaking to the effect that the Disciplinary Committee will impose only a proportionate penalty. There cannot be said to be an unexpressed intention to that effect: the evident intention is that any complaint about the proportionality of the penalty is to be pursued by way of appeal. Nor is such a term necessary for the efficacy of the contract: an appeal provides an effective remedy.

58. Secondly, there are at least as strong reasons against implying such a term in relation to the *Appeal Board's* decision on the appeal. The Appeal Board is independent of the Jockey Club and reaches its own independent decisions. Those decisions are subject in any event to review by the court by the non-contractual route considered above. In those circumstances it cannot sensibly be said to represent the unexpressed intention of the parties or to be necessary for the efficacy of the contract to imply a term whereby the Jockey Club undertakes that any penalty decided on by the Appeal Board (whether by dismissal of an appeal or by exercising its powers to substitute a penalty) will be proportionate.

59. There was a dispute before me as to whether the Appeal Board can properly be regarded as independent of the Jockey Club. Before the Board itself, in the context of the case under article 6 of the European Convention on Human Rights, counsel then representing the claimant conceded that there was no *actual* lack of independence or impartiality on the part of the Board: the case was put on the basis of an *apparent* lack of independence or impartiality. That case was rejected by the Board, in a

decision that is not challenged in these proceedings. In my view it is not now open to the claimant to go behind the decision and to argue that the Board nonetheless lacks independence from the Jockey Club. In any event I would hold if necessary that the Board can properly be regarded as independent for the purposes of the present issue. The chairman is drawn from a panel for which the only persons eligible are "members or former members of the judiciary, Queen's Counsel, junior barristers or solicitors of more than 10 years post call or admission" (paragraph 2 of Appendix J). In this particular instance the chairman was a former High Court Judge; and although he acted for the Jockey Club in his days as a barrister, I have no hesitation in rejecting Mr Higginson's suggestion that that impaired his independence as a chairman. It is true that the other two members of the Board are drawn from a panel of members of the Jockey Club (paragraph 7). But decisions of the Board, save for interlocutory decisions which are made by the chairman alone, are to be determined by a majority which must include the chairman (paragraph 33). It follows that no decision can be made without the concurrence of the chairman. Moreover the Jockey Club itself has no control over the Board's decisions. It provides administrative support through the appointment of a secretary to the Board, and it is represented as one of the parties in proceedings before the Board, but it has no involvement in the Board's decision-making processes. That ensures a sufficient degree of independence and separation from the Board for present purposes.

60. A further point relied on by Mr Warby against the approach for which the claimant contended is that Rule 231A provides that, save for liability for death or personal injury resulting from negligence, "neither the Jockey Club nor its officers, employees or agents shall be liable to any person for any act done or omission made in the bona fide discharge or purported discharge of any duties on the part of any such officer, employee or agent under or pursuant to these Rules". I accept that it would be surprising if the Jockey Club, having expressly excluded liability for the acts or omissions of its officers, employees or agents, had nevertheless accepted liability for the decisions of the Appeal Board by impliedly undertaking that the Appeal Board would impose only a proportionate penalty.

61. All those considerations tell against the implication of any term that would make the Jockey Club contractually responsible for the decisions of the Appeal Board. A further reason why I reject Mr Higginson's approach is that it seeks to attribute to the court a primary decision-making role which I consider to be inappropriate and contrary to the scheme of the Rules of Racing. Under the Rules it is for the Disciplinary Committee and, on appeal, the Appeal Board to decide what is a proportionate penalty. The court's role must be limited to determining whether the decision reached by the Appeal Board was within the Board's discretionary area of judgment, i.e. whether it was a *lawful* decision rather than whether it is the decision that the court would have made if it had been standing in the shoes of the Appeal Board. I have dealt with this point when considering the non-contractual basis of claim. The point has equal force in the present context.

62. The Jockey Club plainly undertook to make the appeal procedures available to the claimant in accordance with the Rules: for that purpose one does not need to look beyond the express terms of the contract constituted by the correspondence in 2002. It may be necessary to imply a term that the Jockey Club would give effect to the

Appeal Board's decision, or would not implement any penalty or sanction beyond that decided on by the Appeal Board. In my judgment, however, there is no basis for implying any material obligation on the Jockey Club going beyond that. The non-contractual route provides a satisfactory basis for any challenge to the lawfulness of the Appeal Board's decision. Alternatively, if reliance on the non-contractual route is considered unsatisfactory, the contractual analysis could be extended so as to imply a term that the Jockey Club would give effect to the *lawful* decision of the Appeal Board, or would not implement any penalty or sanction beyond that *lawfully* decided on by the Appeal Board. That would provide the basis for a contractual claim against the Jockey Club, but one under which the Appeal Board's decision would be assessed by the court in the same way as I have held to be appropriate in the non-contractual context. In either event the court is limited to the supervisory function of reviewing the lawfulness of the Appeal Board's decision and it is not for the court to substitute its own judgment or decision for that of the Appeal Board.

63. I have dealt with the matter largely as a matter of principle, but in my view the authorities, to which I now turn, support the conclusion I have reached.

64. In *Singer v. The Jockey Club* (Scott J, 28 June 1990, unreported) a licensed owner claimed damages against the Jockey Club for breach of contract, alleging that the disciplinary committee had misconstrued Rule 180 and that, if the rule had been applied according to its true construction, the winner of a particular race would have been disqualified and the owner's horse would have been declared the winner. Scott J found that, although there had been a failure to consider part of the rule, it had caused no damage. He went on to make additional observations on the contractual position. Assuming, without deciding, that there was a contract, he held (tr.18E-19A):

> "The terms would, I think, in relation to Rule 180, require no more than that the Jockey Club would hold a fair and proper inquiry and would take reasonable steps to ensure that the Rules of Racing, so far as relevant to the inquiry, would be applied. The terms would not, in my judgment, place the Jockey Club under a contractual obligation to ensure that the Rules were correctly applied according to this fine construction. No judge would ever guarantee that he had reached the right result and I do not see why it should be implied that the Jockey Club had contractually bound itself that its disciplinary committee would do so."

65. Mr Higginson sought to distinguish *Singer* on the ground that it was concerned with the review of a substantive decision rather than penalty. I accept, of course, that the subject matter of the case was different, but in my view that does not provide a valid basis for distinguishing the observations made by Scott J with regard to implied terms. What was said in *Singer* supports the position taken by the Jockey Club in the present case too.

66. Chronologically, the next two cases of particular relevance are *Wilander v. Tobin* and *Modahl (No.1)*, with both of which I have already dealt in some detail in the context of the non-contractual claim. As indicated there, they strongly both support the view

that the role of the court even in a contractual context is supervisory and that the approach of the court should be similar to that adopted when considering the lawfulness of a like decision of a public body in proceedings for judicial review.

67. I have also referred already to *Modahl (No.2)* (*Modahl v. British Athletic Federation Ltd.* [2002] 1 WLR 1192), but I have not yet dealt with the detail of that case. The claimant, a well known athlete, had been accused of taking a banned drug and had been suspended in accordance with the rules of the defendant ("the BAF") and the International Amateur Athletics Federation. A disciplinary committee appointed by the BAF concluded that she had committed an offence and banned her for four years. Subsequently, however, an independent appeal panel, on the basis of evidence that had not been available to the committee, allowed her appeal and lifted the ban. She claimed damages for expenses and loss of income during the period of her disqualification, contending that the hearing before the disciplinary committee had been tainted by bias. The majority of the Court of Appeal found that there was an implied contract between the claimant and the BAF, but that the parties should be taken to have agreed to accept what in the end was a fair result; and that, although there was an issue of apparent bias in relation to the hearing before the disciplinary committee, the appellate process was wholly untainted and there had been no breach of the obligation on the BAF to provide a fair hearing overall. Latham LJ stated (at paragraph 61):

> "It seems to me that in cases such as this, where an apparently sensible appeal structure has been put in place, the court is entitled to approach the matter on the basis that the parties should have been taken to have agreed to accept what in the end is a fair decision. … The test which is appropriate is to ask whether, having regard to the course of the proceedings, there has been a fair result."

68. Jonathan Parker LJ was not persuaded that there was a contract at all. On the assumption that there was, however, he went on (at paragraphs 85-88):

> "In the first place, the notion of the body which has the obligation to set up a disciplinary tribunal being in some way contractually responsible for the manner in which that tribunal, once set up, conducts the proceedings seems to me to be something of a contradiction in terms, since it is inherent in the process itself that the tribunal should so far as practicable be free from influence by the body which sets it up.
>
> In the second place, it seems to me in any event that it is reasonable to assume that no such body, properly advised, would voluntarily assume contractual responsibility for matters outside its control.
>
> In those circumstances, it seems to me that any implied contractual obligation on the part of the BAF relating the disciplinary process should be limited to the setting up of the disciplinary committee, and should not extend to the exercise

> by the disciplinary committee of its functions once it had been set up ….
>
> Finally, it seems to me highly significant that the disciplinary process itself allows for an appeal. I take that as a strong indication that if there is a contractual obligation of fairness, it is, as the judge concluded, an obligation of fairness in the operation of the disciplinary process as a whole, that is to say, including any appeal ….”

69. Mance LJ endorsed the view that the parties were implicitly agreeing to be bound by the ultimate outcome of the disciplinary process, taken as a whole and therefore including the independent appeal panel's determination (paragraph 115). He stated later in his judgment (at paragraphs 120-122):

> “I note, in relation to any independent appeal panel, that the rules provide that one of the three members should not even be appointed by the defendant and that one, although nominated by the defendant, should be a barrister or solicitor. Whilst the fair conduct of appeal proceedings by the independent appeal panel was no doubt a condition of both parties' willingness to be bound by their outcome, I would see little attraction, and some incongruity, in holding the defendant contractually responsible in damages for failure by properly appointed members of an expressly 'independent' appeal panel to behave fairly. Such a failure might abort the proceedings and be potentially unfortunate for whichever side had lost below, but I do not see why, without more, the defendant should be treated as having contracted that it would not occur.
>
> Whilst the disciplinary committee is under the rules more closely linked in composition to the defendant, it is inherent in the claimant's own case, as well as in the defendant's, that the disciplinary committee was intended under the rules to fulfil an independent adjudicatory role. On that basis, which I accept, I again see no reason for treating the defendant as answerable for all aspects of a disciplinary committee's behaviour, as if its members were acting as employees or agents.
>
> In these circumstances, I would regard any implied obligation on the part of the defendant under its rules as extending, at most, to an obligation to act in good faith and take due care to appoint persons who so far as it knew or (probably) had reason to believe were appropriate persons to sit on the relevant disciplinary committee."

70. As in relation to *Singer*, so in relation to *Modahl (No.2)* Mr Higginson sought to distinguish the case on the ground that it was concerned with a substantive decision rather than a challenge to the penalty imposed, as well as on other grounds. Again it is true that the precise subject-matter of the case was different, but the approach of the

court in *Modahl (No.2)* is nonetheless very relevant to the present case and tells strongly against the claimant's contentions on the issue of implied terms.

71. I turn finally to *Colgan v. Kennel Club* (Cooke J, unreported judgment of 26 October 2001). Mr Higginson placed great weight on this decision, contending that on the question of penalty it represents the correct and modern approach to review of domestic tribunals. The claimant in *Colgan*, an experienced breeder of dogs, had been convicted of offences under the Protection of Animals Act 1911 in respect of a journey in a van during which ten dogs had died because they became overheated. The magistrates court gave her an absolute discharge, finding that she had failed to exercise reasonable foresight in choosing the van but they were confident that nothing like this would happen again. The General Committee of the Kennel Club, however, imposed a five year ban on her. The claimant brought proceedings to challenge the ban. It was common ground that the disciplinary rules were part of a contractual relationship between the parties, but there was a dispute about the terms of the contract. Cooke J, after reviewing a number of authorities, including *Singer* and *Modahl (No.2)*, held (at paragraph 36):

> "I conclude therefore that the contractual obligations on the Kennel Club in exercising their functions were at most to act fairly and to take reasonable steps to apply the Rules of the club and act in accordance with the law. They were not contractually obliged to reach a correct decision and damages could not flow from any wrongful decision on their part, unless there was unfairness or negligence …. In the light of *Modahl*, the contractual obligations may indeed be even more limited than this."

72. Cooke J, having found that there had been no procedural unfairness, went on to consider the proportionality of the penalty imposed. He cited the test set out in *de Freitas v. Permanent Secretary* [1999] 1 AC 69 - the test applied by the Appeal Board in the present case. He stated that there had been a debate about the intensity of the review process that the court should adopt in considering the penalties imposed. He referred to *Ghosh v. General Medical Council* [2001] 1 WLR 1915, citing a passage which set out the principles upon which the Privy Council acted in reviewing, on appeal, sentences imposed by the Professional Conduct Committee of the GMC. He referred to the acute disparity between the magistrates' absolute discharge of the claimant and the imposition of a five year ban. After considering the submissions, he held (paragraph 48):

> "In my judgment the penalties imposed were manifestly excessive and disproportionate to the objectives to be achieved, given the limited culpability of Mrs Colgan, the inherent unlikelihood of any repetition of the offence by her, the huge publicity already given to the dangers of dogs in transporting or leaving them in vehicles exposed to the sun and the financial loss and trauma already suffered by her in the loss of valuable pedigree dogs to whose welfare she was devoted."

73. He considered that "a three year ban on registration and a two year ban in respect of each of the other elements of the ruling would have represented a proportionate and appropriate penalty" (paragraph 49), and he granted a declaration accordingly.

74. On the facts, the judge's conclusion that the penalty was disproportionate was unsurprising, whatever the precise test he was applying. It is not entirely clear, however, what that test was. If he was purporting to apply the principles in *Ghosh*, then I accept Mr Warby's submission that this was not strictly the correct approach. Unlike the Privy Council in *Ghosh*, the court in *Colgan* was not exercising an appellate jurisdiction (albeit that the Kennel Club seems to have argued that the proceedings operated as an appeal against sentence: see paragraph 29). It seems to me to follow from the judge's findings on the extent of the implied terms of the contract between the parties that the court's role in relation to the imposition of penalties by the General Committee was in substance supervisory; and that is the approach which in my view the judge should be taken to have been following. In any event I do not read *Colgan* as laying down any principled basis upon which I should step into the shoes of the Appeal Board and determine for myself what a proportionate penalty would be.

75. In the light of the above I conclude that the contractual and non-contractual claims call for the adoption of the same approach by the court towards the issue of penalty. In each case the role of the court is supervisory and the question for the court is whether the Appeal Board reached a lawful decision, in particular whether the Board's decision on penalty fell within the limits of its discretionary area of judgment. With that in mind I turn to consider the way in which the Appeal Board dealt with the matter. I shall look first at its assessment of the claimant's conduct.

Assessment of the claimant's conduct

76. Whilst not challenging the conclusion of the Appeal Board in respect of liability, Mr Higginson sought to present the evidence against the claimant in a more favourable light than that in which it was viewed by the Board. He submitted in particular that the Board was mistaken in its inferences as to the frequency with which the claimant had supplied information over the ten year period and as to the amount of information supplied; as to the gains he had received in return; as to the similarities between the claimant's conduct and that of Barrie Wright; and as to the number of people within Mr Wright Snr's betting organisation to whom the claimant was passing information. Mr Higginson took me through the claimant's testimony at Southampton Crown Court in some detail. He stressed that the claimant, although admitting to giving tips, disavowed anything to do with "stopping" horses. What was admitted by way of the giving of tips was non-specific and unattributed. There was no evidence of any specific incident or of any specific sum of money being paid. Moreover the claimant made plain that what occurred was in the context of his doing what all other jockeys were doing.

77. I have set out earlier in this judgment the Appeal Board's own summary of the evidence given by the claimant at Southampton Crown Court, including its citation of a passage from the claimant's cross-examination. I omitted the Board's summary of

the evidence subsequently given by the claimant to the Disciplinary Committee, where he sought unsuccessfully to go back on or explain away parts of his evidence at the Crown Court. That detail is not needed, not least because Mr Higginson did not seek to go behind the Disciplinary Committee's rejection, as upheld by the Appeal Board, of the explanations given by the claimant. Nor do I think it necessary to set out all the passages of the Appeal Board's decisions that are relevant to this part of Mr Higginson's submissions. It is, however, worth setting out the overall conclusion reached by the Appeal Board in its decision on liability:

> "5.24 In our view, there was more than ample evidence to enable a reasonable committee to find that Mr Bradley was saying, in clear terms, that he was, for both money and other presents, disclosing confidential information to Mr Wright Snr., wholly outside the confines of Border Tinker and far beyond the three year racing life of that horse whilst in ownership of Mr Wright Snr. Mr Bradley's evidence at Southampton, in our view, points firmly to this conclusion.
>
> 5.25 We look at the totality of the evidence. We have in mind what we regard as the clarity of the evidence given by Mr Bradley, when on oath, at Southampton Crown Court. We note that there was corroboration of Mr Bradley's evidence, as to expensive evenings out paid for by Mr Wright Snr., given by other jockeys called on his behalf. There is also general corroboration of Mr Bradley's account of the sums in which Mr Wright Snr. used to bet from Mr Wright Jnr.'s evidence at Woolwich Crown Court in the course of his trial there …. We, of course, allow for the fact that neither of these two latter witnesses gave evidence to the Disciplinary Committee. The Disciplinary Committee, in hearing and seeing the explanatory evidence of Mr Bradley about his evidence at Southampton, found it to be 'wholly unconvincing'. Having ourselves considered the transcripts of Mr Bradley's evidence at Southampton and to the Disciplinary Committee, we consider that there was more than sufficient material, indeed we would say ample material, to have enabled a reasonable committee to have reached the same decision as the Disciplinary Committee, to the effect that Mr Bradley had acted in breach of Rule 62(ii)(c) and Rule 204(iv). We consider that Mr Bradley admitted to this in his evidence to the Southampton Crown Court, such admission being inconsistent with his evidence to the Disciplinary Committee. Even allowing for his evidence at Southampton going, as he said, 'over the top', the admission was, in our view, clear and unambiguous."

78. The Appeal Board did, however, go on to find that the period over which the conduct had been shown to take place was the period 1989 to 1999 rather than the longer period found by the Disciplinary Committee.

79. One sees from the quoted passage that the Appeal Board's entire assessment was based, as was plainly the correct approach, on "the totality of the evidence". On that point Mr Warby reminded me of other important features of the evidence as a whole. For example, the claimant gave evidence at Southampton about the conduct of Barrie Wright while they were living together, the substance of the evidence being that Barrie Wright was passing privileged information on a daily basis. In cross-examination the claimant accepted that he was providing the same sort of information. He also gave evidence that Mr Wright Snr was a professional gambler conducting a very sophisticated operation and on a massive scale, and that his relationship with Mr Wright Snr was a very close one. It was apparent from the claimant's cross-examination that there was regular and frequent passing of information. As regards the value of that information, it must be borne in mind that the claimant was a top jockey whereas Barrie Wright was near the bottom. Moreover, as mentioned by the Appeal Board in the passage quoted above, there was evidence about the amounts of money bet. There was also further evidence that Mr Wright Snr. was a generous man: following one betting coup in respect of Border Tinker, in relation to which the claimant's role was accepted to be legitimate, he gave the claimant a present of £10,000.

80. Mr Warby submitted that the Appeal Board's approach of looking at the totality of the evidence was impeccable and that, on that evidence, there is no basis for interfering with the Appeal Board's findings. I agree. Mr Higginson failed to persuade me that any of the findings made by the Board went beyond those reasonably open to it on the evidence. More generally, in so far as it was sought to present the evidence in a more favourable light than that in which it was viewed by the Appeal Board for the purposes of penalty, there is in my judgment no basis for departing from or watering down the view taken by the Appeal Board as to the seriousness of the claimant's conduct. The Appeal Board was fully entitled to take the view it did.

81. I should deal specifically with the question whether a large number of other people were engaging in similar conduct. Although the claimant said in the course of his evidence at Southampton Crown Court that every jockey was "probably" doing the same as he was, he did not give any specifics beyond his evidence about Barrie Wright. In the proceedings before the Disciplinary Committee he produced a list of jockeys and trainers who were to his knowledge friends of Mr Brian Wright, but did not give evidence that others on the list were doing what he was doing. Nor did the jockeys who were called to give evidence on his behalf before the Disciplinary Committee say that they were doing the same thing. Mr Richard Dunwoody, one of those on the list, specifically denied having been asked to give inside information about racing by various people whose names were put to him. Mr Anthony McCoy, another of those on the list, denied ever having reason to believe, while staying with the claimant in 1998 or 1999, that the claimant was supplying information to people in return for money: "If I had have thought so I wouldn't have put myself in the position to have stayed there, especially riding for the people that I ride for." Accordingly, as matters stood at the time of the proceedings before the Appeal Board, there was no evidence that what the claimant was found to have done was a widespread practice within the sport or that the Jockey Club was singling out the claimant unfairly for punishment.

82. Before me, however, Mr Higginson sought to adduce what he described as "supplementing" evidence as to the culture which operated in this area, which it was said would shed light on how the Jockey Club should have viewed the claimant's conduct. I turn to consider that new evidence.

New evidence

83. The possibility of adducing new evidence was raised late in the proceedings. Mr Warby opposed it but indicated that he would wish to call witnesses of his own if I acceded to the claimant's application. In the circumstances I agreed to hear the evidence for both sides *de bene esse*, reserving to this judgment a decision as to the admissibility of the evidence as well as its value if admitted. The evidence fell within a relatively narrow compass.

84. In the light of the conclusions I have now reached about the supervisory role of the court in reviewing decisions of the Appeal Board, I take the view that the further evidence is irrelevant and should not be admitted. The underlying premise to Mr Higginson's attempt to adduce such evidence was that it is for the court to form its own view, on the basis of all the evidence available at the time of trial, about the seriousness of the claimant's conduct. In my judgment that premise is mistaken. The court's concern must be whether the Appeal Board reached a lawful decision on the material before it, including the question whether the Board's assessment of the seriousness of the claimant's conduct was properly open to it. For that purpose the court should confine its attention to the evidence that was placed before the Board. I accept that there may be exceptional circumstances in which further evidence can properly be admitted, but the present case does not fall within that category.

85. If I am wrong about that, I take the view in any event that the further evidence did not advance the claimant's case.

86. The claimant called two witnesses: Mr Charles Brooks, who was a trainer until 1998 and is now involved in horse racing as a trader, breeder and writer; and Mr Declan Murphy, a former jockey (and one of those on the list of friends of Mr Brian Wright which was produced by the claimant before the Disciplinary Committee). Their witness statements stood as their evidence in chief. Both were cross-examined by Mr Warby.

87. In his witness statement Mr Brooks said that "it was widely known to everyone in racing circles that the vast majority of jockeys had their own 'punter', by which I mean a person to whom that jockey would give tips in return for reward" and that he found it inconceivable that members of the Jockey Club did not know of the practice. In the course of cross-examination he added that it was also probably quite common practice among stable lads. From the cross-examination, however, I formed the view that what Mr Brooks had to say on the subject of the supply of inside information was speculative and lacking in any firm evidential foundation. It was apparent that he did not have actual evidence of breaches of the rules and was not saying that the Jockey Club had received such evidence or had failed to take action against people in respect

of whom they had received evidence. In terms of substance, there was nothing in Mr Brooks's evidence to show that the conduct that gave rise to the claimant's disqualification was commonplace or that the claimant had been unfairly singled out for punishment.

88. Mr Murphy said in his witness statement that "it is common practice for most people who have information relating to a horse's form to share it with others. Those dispensing the information frequently include jockeys and those receiving the information may well be punters, some of whom may place large bets and, therefore, stand to make significant financial gain from the information they receive". Later in his statement he said that "on a day-to-day basis, people involved in the horseracing industry will relay what information they have, on whatever scale, to somebody" and that the Jockey Club was fully aware of this practice. He gave examples of the release of information to the media and of information available through tipping hotlines.

89. In the course of the cross-examination of Mr Murphy a distinction was drawn between (i) the general dissemination of information to the media and others (in relation to which Mr Murphy said that jockeys will speak to people at a racecourse in the same way as they will speak to a member of the press) and (ii) the giving of information by a jockey to an individual or small group of persons on an exclusive basis, i.e. when it is not available to the world at large and it could be used to cheat the rest of the betting public. Mr Murphy did not believe that cases in the latter category occurred, and he appeared to accept that it would be right for the Jockey Club to take a serious view about such behaviour. The following exchanges are particularly instructive:

> "Q. … You cannot say from your own knowledge that anyone has engaged in the practice of providing inside information exclusively to a gambler or a bookmaker?
>
> A. I think there is a very different situation. The only situation that I am aware of where a jockey passed information to a bookmaker is in the history books, where the jockey got banned for I think five weeks.
>
> …
>
> Q. … You cannot say, can you, that there is any instance of a jockey giving inside information exclusively to either a gambler or a bookmaker of which the Jockey Club has had evidence and has not acted on it?
>
> A. Like I said earlier, I don't think any person will give exclusive information to a punter in order to benefit from the information they are giving. They will disseminate the same information as they will do to anybody that would come up and ask them."

90. Thus the tenor of Mr Murphy's evidence was to deny the existence of conduct of the kind that was found proved against the claimant.

91. The Jockey Club called two witnesses in response to the claimant's witnesses: Mr Christopher Foster, Executive Director of the Jockey Club; and Mr Nigel McFarlane, Secretary to the Disciplinary Panel of the Jockey Club. Again their witness statements stood as their evidence in chief. They were cross-examined by Mr Higginson.

92. Mr Foster dealt in his witness statement with the examples given by Mr Murphy as regards the release of information into the public domain through the press, which he said was permitted by Appendix N to the Rules, and the provision of tipping hotlines, which he said was unobjectionable provided that the opinion was not based on inside information. Subject to those examples, he denied that the Jockey Club was aware of the widespread selling or passing on of information such as that for which the claimant was disciplined, and he stated that the Jockey Club would act on evidence of persons acting in breach of the relevant rule.

93. Mr Foster was cross-examined at some length about tipping hotlines, but he knew very little about them and I did not find this line of inquiry fruitful. He was also cross-examined about the rules relating to the supply of information to the media. In the course of that cross-examination a potential problem was identified about the applicability of the Rules to a situation in which inside information (or "privileged" information) is given e.g. to a newspaper tipster but, instead of being published, is retained by that person for use by himself or his friends. No doubt the point raised is something to which the Jockey Club will give consideration. In my view, however, the point does not have any significant bearing upon the seriousness of the claimant's breach of the Rules. Towards the end of his cross-examination Mr Foster was asked more generally about sources of information within the racing industry. He said that "the industry feeds on information" and that everyone on the racecourse engages in gossip or conversation and that the passing of inside information is something that happens. But he drew a sharp distinction between, on the one hand, the general willingness of everyone to talk about horses and, on the other hand, the provision of inside information for reward, such as gives rise to an offence under the Rules. In my judgment that was a valid distinction and nothing said by Mr Foster could lead to a materially different assessment of the claimant's conduct from that made by the Appeal Board.

94. Mr McFarlane's witness statement dealt with a number of matters which it is unnecessary for me to touch on here. Although his cross-examination seemed to be directed towards showing that the Jockey Club had singled out the claimant for disciplinary action, not having taken such action against other jockeys, the point got nowhere. Nothing said by Mr McFarlane gave support to the suggestion that the Jockey Club had failed to take action in any case where it had evidence that a jockey had given inside information for reward.

Comparables

95. In support of his argument on proportionality, Mr Higginson relied on a substantial amount of material relating to penalties imposed in other Jockey Club cases. He described the material as falling into two categories: (i) cases involving the same allegations as, or similar allegations to, those made against the claimant, and (ii) cases that were factually different but were said to be indicative of the Jockey Club's general approach. As explained below, Mr Higginson's stance in relying on some of that material differed from the stance adopted on the claimant's behalf before the Appeal Board and/or from the claimant's pleaded case.

96. As regards category (i), it is accepted that the number of comparables is small. In the cases of Lynch, Jennings and others in 1970, short periods of disqualification were imposed on jockeys for tipping horses for reward on a number of occasions. The longest period of disqualification was about 3 months, for tipping horses on 8 or 10 occasions and receiving a total of £120 or £130. In the case of Francome, a former champion jockey, in 1978 his licence was suspended for 35 days (during which there were 24 days of racing) and he was fined £750 for supplying confidential information to a bookmaker during much of a season, in return for which he received £500: he had desisted and confessed only when caught. Mr Higginson and, in turn, Mr Warby took me through the facts of these cases, to the extent to which they can be extracted from the material now available. Reference was also made to the case of Day in 1983, where a 3 month disqualification was imposed in circumstances that are very unclear, and to the case of Browne in 1992, where a total disqualification of 10 years was imposed for a variety of offences: it was agreed before the Appeal Board that the total period of disqualification could not be attributed between the various individual offences and that the case was of no real value.

97. Some of the cases in category (ii) related to the "stopping" of horses, i.e. where a horse is not run on its merits, so as to enable it to be backed subsequently at favourable odds. In each of the cases identified a fine was imposed.

98. The cases in category (i) and the cases in category (ii) on the stopping of horses were relied on before the Appeal Board. The submission before the Board was that the Disciplinary Committee had failed to pay regard to comparable cases and that those cases supported the view that the penalty of disqualification imposed by the Disciplinary Committee was manifestly disproportionate. Essentially the same submission was advanced by Mr Higginson before me in relation to the penalty of disqualification substituted by the Appeal Board. He submitted that the Appeal Board paid only lip service to the comparables and that, as compared with other cases, the penalty imposed by the Board "sticks out like a sore thumb".

99. At paragraphs 4.1-4.7 of its decision on penalty, the Appeal Board examined the submissions made with regard to comparables. Its conclusions were expressed as follows:

> "4.8 We do not consider that the comparability with Mr Bradley's case, for which Mr Leach strives in regard to these cases, is sustainable. In our view, the essential distinctions between Mr Bradley's case and the others referred to are as follows:

1) The length of time over which the confidential information was passed. Ten years is a period which so far exceeds in time those of the cases to which Mr Leach referred is such as to render any comparison of no more than superficial value.

2) The confidential information in question was passed by Mr Bradley to the members of Mr Wright Snr.'s Organisation regularly during the National Hunt season over the ten year period. Mr Leach emphasised that the likelihood was that Francome, in the short period in which he was passing information, gave a greater volume than Mr Bradley did over the ten years. In our view this simply does not accord with the evidence. To gain some appreciation of the regular contact by Mr Bradley with Mr Wright Snr.'s Organisation it must be appreciated that there were four members of the Organisation who were recipients. Furthermore, the picture painted of Mr Barr[ie] Wright's contact with the Organisation when he and Mr Bradley were supplying like information is that of, at times, daily contact.

3) Mr Leach emphasised that Mr Francome's case was more serious than that of Mr Bradley because Mr Francome was passing information, not only about winners but also about horses unlikely to win. We consider this to be misconceived because it is evident from the transcript of the evidence of the Disciplinary Committee enquiry, that Mr Bradley was giving similar evidence to Mr Francome by passing on information that a horse had missed a piece of work, not eaten up and so forth.

4) Mr Leach asserts that there should no deterrent element in any penalty imposed for a breach of these Rules on the ground that similar cases have been extremely infrequent over a period of some twenty years. However, whilst we note this, we are concerned by the extent to which the passing of information has been revealed in this particular enquiry. This demonstrates to us the need both for greater vigilance and for an element of deterrent.

5) Mr Leach further contends that by reason of the decisions to which he has referred coupled with the absence of any clear guideline from the Jockey Club, it is contrary to the concept of legal certainty that such an extended period of disqualification should have been imposed on Mr Bradley for a breach of the two Rules in question when previously such breaches have only been dealt with by short periods of weeks of disqualification. We do not think that there is substance in this point. As we have indicated, Rule 2(v) of the Rules makes clear that the powers of the Jockey Club are unlimited with regard to disqualification. Furthermore it must have been apparent to Mr Bradley that his conduct stepped so significantly outside the sort of cases upon which

> Mr Leach had been seeking to rely that he should have appreciated that a very serious penalty might well be imposed. We repeat both the duration and the nature of his arrangement with Mr Wright Snr., and his professionally run, high-betting Organisation, obtaining from time to time sensitive information not in the public domain about a particular runner. When the big bet was placed, this would distort the market. We are, however, mindful that it is not suggested against Mr Bradley that he has been involved in any race fixing."

100. In my judgment the Appeal Board plainly had proper regard to the material relied on before it by way of comparables and gave valid reasons for distinguishing it. In reaching that conclusion I have taken full account of counsel's detailed analysis of the material, which I do not need to set out here. It is clear that essentially the same exercise was carried out before the Appeal Board and that the Board, far from paying mere lip service to the material relied on, examined it with care.

101. Mr Higginson sought in addition to rely on various cases in category (ii) that were not relied on in this connection before the Board. The cases relate to misleading statements, omission of material information, forged or inaccurate records, and like matters, for which fines of various amounts were imposed. It was submitted that each of those offences also eats at the heart of the integrity of racing, yet attracted financial penalties, and that again the period of disqualification can be seen to be manifestly excessive in comparison with such cases. There are several difficulties about that submission.

102. First, it was contended on the claimant's behalf before the Appeal Board that in assessing the appropriate penalty for the breaches now in issue (as distinct from the separate offence of misleading the Jockey Club), it was irrelevant to consider penalties imposed for offences other than those in category (i) or the cases in category (ii) that related to the stopping of horses. This led to the Jockey Club agreeing that the Appeal Board should not consider details that it had collated of other substantial disqualifications or warnings off imposed over the years for serious breaches of the Rules. It is not open to the claimant now to rely on material that was successfully contended on his behalf before the Appeal Board to be irrelevant.

103. Secondly, the claimant's pleaded case on comparables does not rely on material going beyond category (i) and the cases in category (ii) on the stopping of horses.

104. Thirdly, Mr Warby placed before this court the additional material upon which the Jockey Club would have relied before the Appeal Board but for the agreement arising out of the claimant's contention that only a limited body of material was relevant. Mr Warby also prepared a helpful schedule summarising the effect of that additional material. It shows that over the period 1975 to 1998 bans ranging from 2 years to 30 years were imposed for offences of various kinds. It is of course not suggested that these cases are directly comparable with the claimant's case, but the material does serve to demonstrate a willingness on the part of the Jockey Club to impose very

lengthy periods of disqualification or warning off in cases considered to be sufficiently serious to merit them. That tends to counter any suggestion made on behalf of the claimant, which in any event does not seem to me to be supported by the other evidence, of a general culture of leniency or laxity on the part of the Jockey Club with regard to activities which threaten the integrity of racing.

105. I conclude that the Appeal Board dealt properly with the material on comparables that was before it and that the additional material placed before this court is not strictly relevant but does not in any event assist the claimant's case.

Proportionality: examination of the Appeal Board's decision

106. I turn to consider the lawfulness of the Appeal Board's decision on penalty, pulling together the various strands considered above.

107. First, it is clear that the Appeal Board had careful regard to the principle of proportionality. Having concluded that the offences under Rules 220(vii)(b) and 220(viii) called for a separate and lesser penalty, the Board found that the period of eight years' disqualification for the remaining offences under Rules 62(ii)(c) and 204(iv) was disproportionate. It nevertheless considered disqualification to be appropriate and it substituted a five year disqualification after considering the criteria of proportionality.

108. It is not in dispute that the Board applied the correct legal test of proportionality. With the agreement of counsel it directed itself by reference to the test set out in *de Freitas v. Permanent Secretary*, as modified in *Colgan*. Mr Higginson relied on the same test before me.

109. As to the objectives of the disciplinary procedures and the importance of those objectives, the Board was clearly entitled to view the relevant Rules as being essential to the maintenance of the integrity of racing and to attach corresponding importance to the enforcement of those Rules. It had full regard to the range and nature of the penalties available for breach of the Rules. It was entitled to look to a penalty that reflected, as it said, the elements of punishment, deterrence and prevention. In relation to deterrence it bore properly in mind that the level of increase so as to deter others from like conduct must not be out of proportion to the size of penalty which would otherwise fall to be imposed, and it made the reasonable observation that the extent to which the passing of information had been revealed in the particular inquiry demonstrated the need for an element of deterrence. In relation to prevention it formed a reasonable view of, and took into account, the opportunities that the claimant would continue to have to profit from the passing of confidential information in the absence of disqualification.

110. I have already set out why I consider the Board to have engaged in a correct assessment of the claimant's conduct and why it was entitled to take the serious view that it did of that conduct. As I have explained, the new evidence before this court,

even if relevant and admissible, does not in my judgment undermine the Boards' view of the matter.

111. I have also described the Board's careful consideration of other cases relied on as comparables and the Board's reasons for concluding that there was no decision adequately comparable with the claimant's case. The Board was entitled to reach that view. Again, the additional material placed before me does not undermine the Board's view of the matter. The imposition of a lengthy period of disqualification for a serious breach of rules which are essential to the integrity of racing cannot be said to be a radical departure from previous practice. Very long periods of disqualification have been imposed in sufficiently serious cases in the past.

112. The Board approached the matter on the basis that, apart from the breaches of the relevant Rules over the lengthy period that it was considering, the claimant was otherwise of good character. Moreover it took careful account of the various matters put forward in mitigation, including the claimant's personal situation, the large number of positive testimonials in his support (to which Mr Higginson directed my specific attention), his family circumstances and, most importantly, the nature of his business and the importance of it to the claimant and his family. A central feature of the Board's assessment of proportionality was its awareness of the serious impact that a substantial period of disqualification would have on the claimant's livelihood. Mr Higginson provided the court with some updated material about the claimant's business talent and success, but even if admissible it did not add materially to the information that was before the Board.

113. Having directed itself correctly and given proper consideration to all relevant matters, the Board then carried out, as it was required to do, a careful balancing exercise, looking on the one hand at the important purpose served by the Rules and the seriousness of the breaches of those Rules, and, on the other hand, at the mitigation and at the impact of disqualification upon the claimant and his family.

114. I do not think that there is now any dispute about its conclusion that disqualification was the appropriate penalty. The question of exclusion rather than disqualification was canvassed before the Board but was rejected by it. Mr Higginson has not argued that the Board was wrong to adopt that course (and I would have had no hesitation in rejecting any such argument). His submissions focused on the period of disqualification rather than on the principle of disqualification.

115. In my judgment the Board was fully entitled to conclude, as the final result of its balancing exercise, that a period of five years' disqualification was a proportionate penalty. Such a conclusion was within the limits of the discretionary area of judgment open to the Board in the application of the test of proportionality; it was within the range of reasonable responses to the question of where a fair balance lies between the conflicting interests. In my judgment there is no basis for the court, in the exercise of its supervisory jurisdiction, to hold that the Board acted unlawfully in imposing that penalty.

116. In reaching that view I have found it of very limited value to refer to penalties imposed in other sporting or professional contexts. I shall therefore refrain from citing cases on penalties in other contexts to which Mr Warby drew my attention. I should, however, mention *Colgan v. Kennel Club* once more since Mr Higginson placed a lot of weight upon it. It is sufficient for me to say that it was factually a very different case but that, in so far as any guidance is to be gained from the court's view on the appropriate penalty in the circumstances of that case (a three year ban on registration), it does nothing to cast doubt on the appropriateness of the five year disqualification imposed by the Appeal Board in the circumstances of the present case.

117. Lest I am wrong about the nature of the court's function in reviewing the Appeal Board's decision, I have endeavoured to form a judgment about the period of disqualification that I would have thought appropriate had I been carrying out my own separate balancing exercise in the application of the principle of proportionality. It is not an easy or satisfactory task, since I do not have the same experience of the industry as did members of the Appeal Board and it is very difficult to put altogether out of mind the judgment reached by the Board itself on the issue. Doing the best I can, however, I do not think that I would have decided on any lesser period of disqualification as the proportionate penalty had I been standing in the shoes of the Board.

Conclusion

118. For the reasons I have given, I reject the challenge to the Appeal Board's decision and to the implementation of that decision by the Jockey Club. Although my analysis has taken the detailed route, it will be apparent that at the end of the day I accept the Jockey Club's fundamental submission that in the circumstances of the case a five year period of disqualification was on any view a proportionate and lawful penalty.

119. The claim will therefore be dismissed.