IN THE MATTER OF THE APPEAL OF MR GRAHAM BRADLEY

BEFORE THE APPEAL BOARD OF THE JOCKEY CLUB

Sir Edward Cazalet

Mr Anthony Mildmay-White

Mrs David Whitaker

MR GRAHAM BRADLEY Appellant

and

THE JOCKEY CLUB Respondent

DECISION AND REASONS

ON THE PRELIMINARY POINTS

HANDED DOWN ON THE 21ST MARCH 2003

THIS DECISION AND THE REASONS SET OUT IN THIS DOCUMENT ARE DISTRIBUTED SOLELY TO THE PARTIES AND THEIR LEGAL ADVISORS FOR THEIR CONVENIENCE IN ADVANCE OF THE FURTHER HEARING FIXED FOR THE 31ST MARCH 2003.

THERE IS A FULL **EMBARGO** ON ANY PUBLICATION OF THE DECISION AND REASONS CONTAINED IN THIS DOCUMENT PENDING COMPLETION OF THE FURTHER HEARING OF THE 31st MARCH 2003 WHEN DIRECTIONS AS TO PUBLICATION WILL BE GIVEN.

(1) Introduction

1.1 It is the usual practice of the Appeal Board to give its Reasons in concise form. However, because of the importance of this case and out of deference to the thorough arguments which have been put before us by counsel on a number of complex questions of law, we have thought it appropriate to set out our reasons more fully than is normal.

1.2 This is an appeal by Mr Graham Bradley against (1) findings that he had breached certain of the Rules of Racing ("the Rules") and (2) consequential penalties imposed upon him by the Disciplinary Committee of the Jockey Club, following a three-day hearing which began on 27th November 2002. Pursuant to the Rules, Mr Bradley's appeal comes before us as the Appeal Board of the Jockey Club. This Appeal Board is set up under the Rules, and comprises a Chairman who sits with two members of the Jockey Club drawn from a panel of those nominated under the Rules to sit on the Appeal Board. As is further provided under the Rules the Chairman is not a member of the Jockey Club but is a qualified lawyer.

1.3 Mr Bradley is represented by Mr Robin Leach and Mr Adam Lewis (the latter being instructed on the human rights aspect), and the Jockey Club by Mr Mark Warby QC. Mr Bradley puts his appeal under four separate heads. First, he takes a point challenging, on two grounds, the legality of the disciplinary process through a lack of appearance of independence and impartiality as well as there being objectively a real possibility of bias on behalf of both the Disciplinary Committee and the Appeal Board. Second, he maintains that the proceedings against him by The Jockey Club fail, in any event, to comply with Article 6 (1) of the European Convention on Human Rights. Third, Mr Bradley asks that, if his

challenge is upheld, the Appeal Board should suspend this disciplinary process and should refer all matters appertaining to any breach of the Rules to a body known as The Sports Disputes Resolution Panel ("SDRP"). These three preceding heads comprise what we call "the legality appeal". Fourth, and alternatively, if this Appeal Board is against Mr Bradley on the legality appeal, he maintains that the findings against him were wrongly made, and that further, and in any event, the main penalty imposed, namely that of declaring him to be a disqualified person under the Rules for eight years, was disproportionate and should be quashed ("the liability appeal").

1.4 It has been agreed that the appeal should proceed by way of a split hearing. This first hearing is concerned solely with the legality appeal. If Mr Bradley succeeds on this ground, then the Jockey Club has stated that it will agree to consequential orders being made towards bringing in the SDRP to deal with any breaches of the Rules. Alternatively, if Mr Bradley loses on the legality appeal, his appeal on the merits and against the penalties imposed will then fall to be dealt with by this Appeal Board at a second hearing: the liability appeal.

1.5 This matter has a considerable background. There is a volume of written evidence before us filed on behalf of both Mr Bradley and the Jockey Club. There has also been an application by Mr Bradley asking that he should be permitted, pursuant to the Rules, to admit new evidence relevant to the legality point. This application we have granted. We have before us the evidence raised in these hearings, including the new evidence, as well as the transcript of the evidence given at the three day hearing before the Disciplinary Committee.

Furthermore we have had the benefit of both detailed written and oral submissions made on behalf of Mr Bradley and the Jockey Club.

1.6 At the hearing before the Disciplinary Committee both parties were represented by counsel. In addition to hearing evidence from Mr Bradley the Disciplinary Committee heard and/ or read evidence from many witnesses and also listened to certain tapes and watched a video recording.

1.7 Before we turn to consider the competing arguments, it is helpful to set out in concise form something of the background circumstances surrounding these proceedings, although for the purpose of determining the legality appeal, it is neither necessary nor appropriate to explore at this stage the full detail of much of the factual evidence.

(2) General

2.1 It is not in dispute that the Jockey Club is a private club incorporated under Royal Charter. As has been recognised in a line of legal authorities concerning the role of the Jockey Club, the Club's powers and duties do not derive from any primary or secondary legislation. The Jockey Club's control of racing is maintained, in particular, through the issue of licences and permits by which the Jockey Club's stewards enter into contracts with Racecourse Managers, Owners, Trainers and Jockeys by which the latter are required to submit to a comprehensive regulatory code, namely the Rules, published by the stewards for the conduct of the sport. It is the stewards who have the sole right under the Royal Charter to grant or remove licences necessary for the conduct of horse racing (see generally R v Disciplinary Committee of the Jockey Club ex parte Aga Khan [1993] 1 WLR 909).

(3) Summary

3.1 On 8th January 1982, Mr Bradley, who is now 42 years of age, obtained a full licence under the Rules to ride as a steeplechase jockey. This licence he relinquished on 21st December 1999, since when he has carried on business as a bloodstock agent, having started this business shortly before relinquishing his licence. During his steeple-chasing career, Mr Bradley established himself as a top jockey, riding the winner of a number of the most prestigious steeplechases and hurdle races in Britain. We have before us testimonials from fellow jockeys and others experienced in racing who acknowledge his achievements, as well as the support which he has given to younger and less experienced jockeys when need has arisen.

3.2 In 1984 Mr Bradley met Mr Brian Brendan Wright Snr. (Mr Wright Snr.). Mr Bradley was introduced to Mr Wright Snr. by Mr Barrie Wright (no relation of Mr Wright Snr.). Mr Barrie Wright was both a good friend of Mr Bradley and a fellow jockey having held a Jockey's Licence for some years, though he was well short of attaining the standard and success of Mr Bradley as a jockey. Following their introduction Mr Bradley says that he and Mr Wright Snr. got on straight away and that their friendship started from virtually the first day that they met and has continued over the years. Mr Bradley appreciated that Mr Wright Snr. was a heavy gambler on racehorses. Mr Wright Snr. needed to have confidential information in the racing field, specifically as to particular horses, so that his prospects of betting successfully through his sophisticated betting group known as the Racing Organisation were suitably enhanced. In evidence given in criminal proceedings brought in 2001 against Mr Wright Snr.'s son, Mr Wright Jnr., when the latter was convicted of certain drug-supplying offences, Mr Wright Jnr. spoke of the Racing

Organisation as involving a number of different persons, including himself and his father, and of their both being at the time responsible for collecting information for betting purposes. It is apparent that Mr Wright Snr., whether or not entirely through the Racing Organisation, gambled at times on a very large scale on horse racing.

3.3 Mr Barrie Wright stood trial for certain drug offences in September / October 2001. He was acquitted on these charges. Mr Bradley gave evidence on behalf of Mr Barrie Wright in these proceedings in the Southampton Crown Court. In giving his evidence on 28th September 2001, Mr Bradley made certain statements about his connection with Mr Wright Snr. Major issues have arisen as to whether, in the course of that evidence, Mr Bradley made admissions as to any breaches of the Rules by him. For some months, because reporting restrictions had been imposed by Court Order in regard to evidence given in those and other drug-related proceedings, it appears that there was no, or only limited, media comment. In and after June 2002, following the lifting of reporting restrictions, there was strong adverse media comment both of Mr Bradley, as well as of the Jockey Club in the latter's alleged failure to take suitable disciplinary action against those who had breached its Rules. This culminated in a Panorama programme put out by BBC television on 6th October 2002 which was highly critical of Mr Bradley. Likewise the Jockey Club was attacked for its failure to take the necessary steps to "clean up" racing. Both before and, in particular, after the Panorama programme, the media developed a forceful attack on Mr Bradley and the Jockey Club, including criticising the Jockey Club for failing to take proper action against those who had breached the Rules, asserting that Mr Bradley had admitted to breaching the Rules in his evidence at Mr Barrie Wright's trial.

3.4 In recent times it has been regularly alleged in the media that Mr Wright Snr. has been a major criminal and drugs dealer. He now lives out of the country. Mr Bradley has made clear that, in his association and dealings with Mr Wright Snr. and his betting associates, he knew, at all material times, nothing of the criminal and / or drug-dealing activities as are alleged or have more recently been the subject matter of convictions. The Jockey Club does not challenge this. When more recently, following the media reports, Mr Bradley raised these matters with Mr Wright Snr., he says that the latter firmly denied any such involvement.

3.5 Although it appears that Mr Wright Snr. was never a registered owner under the Rules, he had control of certain horses which raced under the Rules in the name of a third party. There was one horse in particular which Mr Wright Snr. controlled and which has played its part in the charges brought against Mr Bradley. This was Border Tinker which, in the course of its steeplechasing career, ran eleven times between 21st November 1987 and 25th October 1990. Mr Bradley rode the horse in ten of its eleven races. Border Tinker initially ran in the name of Running Horse Ltd., a company in which Mr Wright Snr. held an interest, and then in the name of another third party. The horse won on two occasions, namely on the 21st January 1989 and on 30th January 1989, on both occasions being ridden by Mr Bradley.

3.6 It is not disputed that Mr Bradley received certain cash and benefits in kind from Mr Wright Snr. There is, however, a direct issue as to the circumstances in which such were received by him and the purpose, if any, for which such were provided.

3.7 As we have said Mr Bradley relinquished his licence to ride as a jockey at the end of 1999. Accordingly, when the Jockey Club took these disciplinary proceedings against him, his jockey's licence, which had bound him to comply with the Rules, had lapsed. The more serious of the alleged breaches of the Rules had occurred whilst he had been subject to the Rules as a jockey. Subsequent to the lapse of his jockey's licence and for the purposes of dealing with the alleged breaches, Mr Bradley was invited to accept that he was bound by the Rules for the disposal of all these matters. Having considered, with his solicitors, the alternative courses open both to him and the stewards, Mr Bradley agreed to be bound by the Rules for the disposal of all the alleged breaches. The disciplinary process has proceeded on this basis.

(4) Findings made and penalties imposed by the Jockey Club

4.1 Mr Bradley was held by the Disciplinary Committee, following the three-day enquiry, to have acted in breach of the following Rules:-

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 information for the purposes of general publication.

2. 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.

(Mr Bradley was also charged with a breach of Rule 62 (ii) (b) (2) by receiving on various occasions during the term of his licence part of the proceeds of bets on horseracing. This breach was not found proved and was dismissed.)

3. Rule 220(vii)(b). By providing false information to the Licensing Committee of the Jockey Club on 21st June 1999 by making statements to the effect that he had never been asked by Mr Wright Snr. whether a particular horse would win or not win, and that he had never done anything wrong with Mr Wright Snr.

4. Rule 220(viii). By means of the statements mentioned above, endeavouring, by an overt act, to mislead members of the Licensing Committee.

5. Rule 220 (iii). Having acted in a manner which, in the opinion of the stewards of the Jockey Club, was prejudicial to the integrity, proper conduct and good reputation of horse racing in Great Britain whether or not such conduct should constitute a breach of any of the orders or Rules of Racing.

(This latter finding was made when the Disciplinary Committee declined to find a breach of Rule 201(vi), which had also been brought against Mr Bradley, alleging that he had conspired with Mr Wright Snr. and/or Mr Wright Jnr. and/or Mr Paul Shannon for the commission of a corrupt practice, namely for deliberately bringing about the unwarranted abandonment of the 1987 Cheltenham Gold Cup in the interest of particular bets. However, Mr Bradley admitted that he had been responsible for falsely stating in his autobiography "The Wayward Lad" that he had played a part in seeking to bring about the unwarranted

abandonment of the 1987 Cheltenham Gold Cup. It was on the basis of this latter statement that the breach of Rule 220(iii) was found.)

6. Rule 140. By entering the weighing room without the special leave of the stewards at Cheltenham on 16th November 2001 and at Newbury on 1st December 2001.

4.2 For his breaches of Rules 204(iv), 62(ii)(c), 220(vii)(b) and 220(viii), the Disciplinary Committee declared Mr Bradley to be a disqualified person for eight years from Saturday 7th December 2002. A fine of £2,500 was imposed on him for the breach of Rule 220(iii) and a fine of £400 was imposed for the two breaches of Rule 140.

4.3 Pending the hearing of this appeal a stay has been granted to Mr Bradley in regard to the implementation of all penalties imposed.

4.4 Under the Rules (see paragraph 25 of Appendix J) an appeal to the Appeal Board is not a re-hearing but is by way of review, pursuant to paragraphs 15 – 20 inclusive of Appendix J of the Rules, on the documents only without oral evidence except where the Appeal Board gives leave to present new evidence. On allowing an appeal the Appeal Board has powers, inter alia, to exercise any powers which the Disciplinary Committee could have exercised as well as to refer a matter for rehearing (see para 35 of Appendix J of the Rules).

4.5 We turn now to the questions raised on this appeal.

THE AREAS OF AGREEMENT

(5) Article 6 (1) of the European Convention. Its application to these proceedings.

5.1 Article 6(1) of the Convention states:

"ARTICLE 6

RIGHT TO A FAIR TRIAL

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

5.2 Rule 205 of the Rules prevents a disqualified person from dealing, inter alia, with any horse, and prohibits any such horse being permitted to race until sold on the open market after any such dealing. This means, in effect, that any disqualification prevents Mr Bradley from continuing to work as a bloodstock agent. Accordingly it is accepted by both parties that any interference with Mr Bradley's ability to work brings him within Article 6 (1), and consequently both parties agree that Article 6 (1) applies to these disciplinary proceedings. It is common ground that what the law requires of such a process, where it determines civil rights and obligations, is that the process – including such rights of recourse to the courts as exist – affords the relevant Article 6 guarantees (see Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1 and Stefan v UK 1997 25 EHRR CD 130 as to the applicability of Article 6 (1).)

(6) The Human Rights Act

6.1 As it is accepted that Article 6 (1) applies to the disciplinary process, both parties agree that it is not necessary to establish whether the Jockey Club comes within Section 6 of the Human Rights Act 1998 ("the 1998 Act") as a "public authority". However, both parties reserve their rights as to this, with Mr Bradley reserving the right to raise this assertion at a later stage and the Jockey Club reserving its right then to dispute it.

(7) Challenge to the legality of the process

7.1 Mr Bradley contends, as part of his case, that this Appeal Board, whether under paragraph 16 of Appendix J of the Rules or otherwise, should consider whether there is a sufficient appearance of independence and impartiality for the purposes of Article 6 (1) in regard to both the Disciplinary Committee and the Appeal Board and whether there is at common law a real possibility of bias. Paragraph 16, construed broadly, can be said to require the Appeal Board properly to consider this question in regard to the Disciplinary Committee. However, and in any event, it is agreed that it is proper practice, even if such is not within the specific permitted grounds of appeal under paragraphs 15 to 20, for the Appeal Board to consider such matters in regard to itself when, as here, these points have been raised.

ISSUES

(8) Waiver

8.1 Mr Warby asserts that Mr Bradley has waived his Convention rights by agreeing through his solicitor's letter of 4th September 2002 to be treated as a person bound by the Rules. By this time he had already

alleged bias against the Jockey Club, having made clear in earlier correspondence written by his solicitors that he was aware of his Article 6 rights.

8.2 It is Mr Warby's case that if a person fails to take a point on the qualification of the trial court he will be taken to waive the point unless circumstances show that this was not his intention, or that there was ignorance or misapprehension on his part. He says that, in the present case, Mr Bradley not only caused the letter of 4th September 2002 to be written but then fully submitted to the jurisdiction of the Jockey Club by attending and taking a full part in the November 2002 hearing.

8.3 However in Millar v Procurator Fiscal (2001) UKPC 4 Lord Bingham expressed the view (at paragraph 31) that, in the context of the entitlement to a fair hearing before an independent and impartial tribunal, waiver amounted to no less than a voluntary, informed and unequivocal election by a party not to claim the right or raise the objection.

8.4 We have seen the correspondence leading up to Mr Bradley's agreement to be bound by the Rules. In particular it is to be noted that, before Mr Bradley agreed by his solicitor's letter of 4th September 2002 so to be bound, his solicitors had written, on 3rd September 2002, to the Jockey Club in clear terms, both making reference to the 1998 Act and Article 6 (1), and stating that Mr Bradley was proceeding with the case without prejudice to his contention that the Jockey Club was not in a position to decide the case. We do not think that by his solicitor's letter of 4th September 2002 or by his involvement in the hearing there was an informed or

unequivocal election by him not to assert any Convention or general rights of law in regard to the disciplinary process.

8.5 Accordingly we consider that Mr Bradley did not waive his Article 6 (1) Convention rights, and that Mr Warby's waiver point must fail.

(9) Lack of appearance of independence and impartiality and appearance of bias – The Two Grounds

9.1 Mr Leach and Mr Lewis put Mr Bradley's case on the following two grounds against both the Disciplinary Committee and the Appeal Board (the disciplinary bodies):

(i) At a general level the disciplinary bodies do not have a sufficient appearance of independence and impartiality for the purposes of Article 6 (1) because their members are too closely connected with the Jockey Club. (The General Ground)

(ii) In the particular circumstances of this matter, the disciplinary bodies do not have a sufficient appearance of independence and impartiality for the purposes of Article 6, and at common law there is objectively a real possibility that they might be biased, because of:

(a) statements made by the Jockey Club in the media,

(b) the media coverage of the matter generally,

(c) the pressure on the Jockey Club to find against Mr Bradley,

(d) specific elements of the conduct of the hearing before the Disciplinary Committee, and

(e) statements made by the Jockey Club after the hearing before the Disciplinary Committee.

(f) statement made by the Senior Steward on the 11th February 2003, added following written submissions after the hearing of 14th January 2003. (The Specific Ground)

9.2 On behalf of Mr Bradley it is accepted that there has been neither any actual lack of independence or impartiality, nor any actual existence of bias. His case is put on the basis that there has not been a sufficient appearance of independence and impartiality, and that there has been an apparent existence of bias. Both parties are agreed that the correct test for the resolving these questions is whether a fair-minded and informed observer ("the observer") would conclude that there was a real possibility of (i) a lack of independence or impartiality, and / or (ii) the existence of bias (see In Re Medicaments and Related Classes of Goods (No 2) (2001) 1 WLR 700 and Porter v Magill (2002) 2 WLR 37). In this latter case the House of Lords (see paragraph 102) confirmed the Court of Appeal's test that "the Court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the judge was biased". This further means that a material consideration will be whether there are sufficient guarantees to exclude any legitimate doubt in these respects (see Piersack v Belgium (1982) 5 EHRR 169). At para 30 the European Court of Human Rights stated that:

> "a distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect".

9.3 Some further guidance as to the nature of the information which the observer is expected to be in possession of, is to be found in the recent Court of Appeal decision of Subramanian v General Medical

Council [2002] UKPC 64. This decision has been referred to us in writing by both counsel, with written submissions, since the hearing of the 14th January last.

9.4 The facts, shortly stated, are that during a hearing before the Professional Conduct Committee of the General Medical Council, the press disclosed a previous unrelated finding of misconduct against the doctor in question. The hearing proceeded. Following a finding against the doctor that he had been guilty of misconduct, the doctor appealed to the Court on the ground, inter alia, that, because of the press disclosure of the earlier finding against him, there was apparent bias on the part of the PCC. In dismissing his appeal, the court emphasised that the fair-minded observer was taken to be well and properly informed, knowing the nature and structure of the system in which the tribunal was operating as well as the protections against miscarriages of justice which were built into the system. The fact that the system was a well established one, operated by persons selected and elected to the task and supported by an appeal system are all matters of weight in this context (see para 14). Emphasis was also placed on the importance of the different functions in the organisation being kept separate. Furthermore, statements or acts by other members of the organisation who are not members of the Disciplinary Committee will not be attributed to the Committee members (see paras 19 – 20). It was also provided that if a Committee is a well-established quasi-professional tribunal which is well aware that it must pay no attention to the prejudicial information, there may be no danger at all (see paras 18 and 21). Importance is also to be attached to the direction given by an independent legal chairman.

9.5 Mr Lewis distinguishes that case on the basis that here it is the views of the Jockey Club which are being reported in the press and which

of themselves touch on the very matters before the Appeal Board. Furthermore, he maintains that the Appeal Board, via the members of the Jockey Club, all are very close to it and that the effect of the presumption of Mr Bradley's guilt in the press has to be measured against the background of the immense pressure being put on the Jockey Club to be seen to be "cleaning up" racing. He submits that these factors take this case beyond the particular facts of the one previous conviction disclosed in the press in the Subramanian case.

9.6 We conclude that there is assistance to be gained from the decision in Subramanian. The Jockey Club is a regulatory body, wholly in control of horseracing. Under its well established system it sets up rules for regulating that sport, with clear rules as we have indicated, dividing the different functions, in particular as between the Disciplinary Bodies and the Executive. There is also emphasis on the fact that a statement made by somebody within the organisation but outside the disciplinary body can be expected to be attributed by the observer to the member of the disciplinary body in circumstances where there is a separation maintained between the different functions of the organisation. We bear these factors in mind, and in determining these issues we apply the criteria as stated.

9.7 The general allegation made by Mr Leach is that in the case of both disciplinary bodies, and given that each is made up as they are in whole or in part of Jockey Club members, the observer would conclude, as an objective and general matter, that there were grounds for legitimate doubt that they would act impartially and without prejudgment. These members stand, he says, as judges in their own cause, with the background of all the aims, beliefs and desires of the Jockey Club.

9.8 Mr Bradley's first ground, as its wording demonstrates, is a general ground. His second ground is based on the unusual circumstances, including publicity and other events surrounding this particular case, which he maintains would, of themselves, lead the observer to conclude that the relevant test could not have been met.

(10) The General Ground

10.1 It is not in dispute that independence means "independent of the executive and also of the parties" (see Ringeisen v Austria (No 1) (1971) 1 EHRR 455, para 95). Following a line of authorities (and also see, in particular, Simor and Emmerson "Human Rights" paragraphs 6.119 to 6.122 and Bryan v United Kingdom (1995) 21 EHRR 342, para 37), it is not in dispute that whether a tribunal is independent depends on:

(1) the manner of appointment of the tribunal's members and their term of office,

(2) the existence of guarantees against outside pressures, and

(3) whether the body presents an appearance of independence, such being an objective test.

(11) Challenge to the appearance of independence and impartiality of the Appeal Board

11.1 As to a lack of appearance of independence and impartiality, Mr Bradley's case is that the members of the Appeal Board are too closely connected to the Jockey Club. Mr Leach refers us to paragraphs 1 – 6 of Appendix J and emphasises that only one member of the three-person Board, the Chairman, is external to the Jockey Club, with the two other members being members of the Jockey Club taken from a special panel initially appointed by the Regulatory Stewards. He submits that the Jockey Club represents

prosecutor, judge and jury and that the appearance of independence is lacking. He further submits that, even though the one external member must be in any majority, such is insufficient to dispel the appearance of a lack of independence and/or impartiality.

11.2 In regard to racing and the Jockey Club, he asserts that a Chairman of the Appeal Board sitting, as presently constituted under the Rules, is too closely connected with the Jockey Club even though not a member. In support of this, Mr Leach submits that the method of appointment of the external member of itself lacks the appearance of independence. Following paragraphs 1 – 6 of Appendix J he points out that the external member will be the Chairman of the Board and will be drawn from a panel of persons eligible to serve, initially appointed by the Senior Steward. The Chairman will be a lawyer and in all likelihood independent of the parties. However, submits Mr Leach, because the external member has to be appointed to a panel, is paid for sitting and has to be re-elected to retain the appointment, there is an insufficient guarantee, in terms of appearance, either of his being sufficiently far removed from the Jockey Club, or of his being free from external pressure and thus being independent of the Jockey Club. He refers us to Starrs v Procurator Fiscal, Linlithgow (2000) HRLR 191; Millar v Dickson (2001) UKPC D4; Payne v Heywood, PC July 24 2001. These three cases raised the question of whether temporary sheriffs, whose appointment by the executive was on an annual basis, held a tenure which gave them sufficient independence and impartiality to bring their Sheriffs' courts within Article 6(1). Reference in those decisions is made to the high importance of the tenure of office, and it was held that a temporary appointment for only one year fails to give the necessary appearance of independence and impartiality. Mr Leach goes on to assert that the panel of only three legally qualified

members of the lawyers' Appeal Panel also raises the objective apprehension that each of them might be or become too close to the Jockey Club, in that they will have conducted many cases together with members of the Jockey Club.

11.3 In answer to Mr Leach's points as to the appearance of a lack of independence and impartiality, we consider that the following would demonstrate to the observer an appearance of independence and impartiality as well as sufficient guarantees against bias and outside pressures. First, we consider it important to appreciate how the Appeal Board is appointed; this is set out in paragraphs 1 to 6 of Appendix J. The number of members of the lawyers' Appeal Panel must be between three to five and comprise only members or former members of the judiciary, Queen's Counsel, junior barristers or solicitors of more than ten years standing, who are independent of the Jockey Club. One member only of the lawyers' Appeal Panel always sits as Chairman, with the two members from the Appeal Board Members' Panel being brought in to form the quorum of three which constitutes the Appeal Board itself.

11.4 In response to Mr Leach's submission that more than three legally qualified chairmen should be appointed to the Panel, it is our view that his assertion that the three appointed members of the lawyers' Appeal Panel may be or become, individually or as a group, too close to the Jockey Club, would, on a consideration of the facts, be of no substance to the observer. First the observer would bear in mind that the members of the lawyers' Appeal Panel do not sit together on an individual case, and, second, that as lawyers, they will be fully aware of the importance of maintaining independence.

11.5 As to tenure of office, the members of the lawyers' Appeal Panel are to serve for five years unless they resign earlier or are required to resign at the request of a majority of the members of the Appeal Panel, including the Chairman (see paragraph 5 of Appendix J). As has been pointed out tenure of office is a highly important factor in determining questions of independence and impartiality appertaining to a tribunal. We were referred to authority where three or even four years of tenure of office has been, in particular circumstances, questioned. However in Ringeisen v Austria (No 1) (1971) 1 EHRR 455 the European Court was required to consider whether a Regional Commission whose members were appointed for a term of five years was a tribunal within the meaning of Article 6(1). The Court held that the tenure of five years was sufficient to bring the tribunal within Article 6(1) (see para 95). In our view the tenure of office for five years which applies to those appointed to the lawyers' Appeal Panel suffices to provide the necessary tenure for Article 6(1) compliance. Further, because vacancies on the lawyers' Appeal Panel must be filled at the invitation of its Chairman in consultation with his Deputy Chairman and the Senior Steward, it is the Chairman who is essentially responsible for appointing any new member to the lawyers' Appeal Panel. We regard the tenure of five years and the method of appointment as providing proper guarantees against outside pressure and would satisfy the observer as to the required appearance.

11.6 We also consider that the following further matters would satisfy the observer that the required appearances were in place. First, if the Chairman of an Appeal Board were to take a decision of which the authorities in the Jockey Club disapproved, the Jockey Club has no powers under the Rules to dismiss him. Indeed there is no question of there being an "ad hoc" appointment for a particular case.

Second, the fact that Regulatory Stewards make arrangements for the reasonable remuneration of members of the lawyer's Appeal Panel would not be considered by the observer to compromise the independence of the Panel, and, in our view, would be considered to be immaterial by the observer. Third, a decision must be taken by a majority of two which must include the Chairman. This means that the independent Chairman can negate any joint decision to which the two Jockey Club members are parties. Fourth, neither Regulatory Stewards nor members from whom the Disciplinary Committee are selected, are eligible to sit on the Appeal Board. Fifth, the Appeal Board operates wholly separately from the DPP Steward (that is the Jockey Club's member who decides whether or not to bring a charge involving a breach of the Rules). Sixth, no member of the lawyers' Appeal Panel is permitted to have been a licence or permit holder, whether as rider or trainer, within the previous 5 years nor is any member of The Jockey Club eligible.

11.7 In our view all these matters would demonstrate to the observer that we, as an Appeal Board, have a sufficient appearance of independence and impartiality.

(12) Challenge to the Appearance of Independence and Impartiality of the Disciplinary Committee

12.1 Mr Leach has made a number of points in support of his assertion that the Disciplinary Committee does not have a sufficient appearance of independence and impartiality. In particular, he maintains that:

(1) the Jockey Club is a members' club and that all those concerned, whether at the executive level or on one of the club's panels, are members of that club, and are all part of it.

(2) He emphasises that all members of the Disciplinary Committee are members of the Jockey Club and that they become members of that Committee by invitation of the Jockey Club. He goes on to assert that, on any analysis of the Rules, there are no very clear lines of demarcation between the different areas of responsibility within the organisation. The Jockey Club, he repeats, represents prosecutor, judge and jury.

12.2 Mr Leach submits that it is self evident that members of the Jockey Club do not give the appearance of either independence or impartiality in regard to their role on the Disciplinary Committee.

12.3 Against what is said to be a lack of appearance of impartiality or presence of bias, Mr Warby points out that virtually every disciplinary body in the United Kingdom will have members sitting on it who are involved in their organisation's disciplinary process because they have specialised knowledge and experience in that organisation's field of operation. Indeed, this is one of the important strengths of such organisations. Furthermore, there is clear authority that a disciplinary body which comprises members of the same club or association as the person subjected to the disciplinary process does not by that fact alone give an appearance of a lack of independence. In H v Belgium (1988) 10 EHRR 339, a disbarred avocat under Belgium law sought readmission to his profession. The tribunal consisted of avocats and the court held there was no issue as to its members' independence and impartiality. In Stefan v UK (1997) 25 EHRR CD 130 at page 134 it was held that:

> "there is no indication in the case law of the European Court of Human Rights that the mere fact that disciplinary proceedings against professional persons are determined by members of that

profession amounts to a lack of "independence", even when the professional body concerned regulates a number of functions of the profession".

12.4 Whilst the Jockey Club maintains that there is in reality no improper overlap between the membership of the Disciplinary Committee and the executive functions of the Jockey Club, Mr Warby does accept that, applying the observer test, there is a lack of appearance of independence within the meaning of Article 6. He makes this concession notwithstanding that the "prosecution" is conducted by an independent lawyer; that the Disciplinary Committee plays no part in the taking of the decision to bring charges of a breach of the Rules against a person subject to the Rules; that Appendix S, paragraph B of the Rules expressly provides for any relevant interest of a member to be identified and disclosed before any hearing takes place: that the Secretary will play no part in the Committee's deliberations; and furthermore that a legal assessor who is independent and who has an advisory role on questions, in particular of law and procedure, will sit with the Disciplinary Committee in the more complex cases.

12.5 For the reasons as above stated, in our view, the observer would also not consider that there had been a lack of appearance of impartiality in the Disciplinary Committee. The lack of an appearance of independence has been conceded by the Jockey Club.

(13) Possibility of bias at common law

13.1 In the present case, says Mr Leach, the disciplinary bodies are made up - save for the legal chairman of the Appeal Board - of Jockey Club members, with the result that the observer would conclude as an objective matter that there are grounds for legitimate doubt that those

Jockey Club members sitting on the disciplinary bodies would act impartially and without prejudgment. He maintains that the same factors which indicate the Jockey Club's lack of independence and/or impartiality demonstrate the objective grounds for fearing that they are not impartial. We disagree. We have already stated in detail the steps taken by the Jockey Club under its Rules to separate the functions of the members of the disciplinary bodies from the executive function of the Club. We do not repeat these but, in our view, consider such would satisfy the observer that there is no real possibility of apparent bias or lack of impartiality in either of the disciplinary bodies. Accordingly, we reject Mr Leach's arguments on the general ground.

THE SPECIFIC GROUND

(14) Lack of appearance of independence and impartiality, and possibility of bias in the particular circumstances of this case

14.1 Mr Leach's contention is that, whether or not this Appeal Board finds in his favour on the General Ground, the unusual and particular circumstances of this case would of themselves, whether taken individually or collectively, demonstrate to the observer a lack of appearance of independence and impartiality, and the possibility of bias.

14.2 We turn to Mr Leach's six headings in relation to the specific ground.

(a) Statements made by the Jockey Club in the media

14.3 Mr Leach refers first to a press release dated the 11th June 2002 made by the Jockey Club which includes a statement to the effect that Mr Bradley had committed "breaches of the Rules of Racing", the very charge now made against him. Mr Leach submits that this did not permit the possibility of any decision other than one against Mr Bradley, and that

the Jockey Club could easily have used less specific words, leaving open to the reader the possibility of a different conclusion.

14.4 Mr Leach also relies on the fact that, on 14th June 2002, Mr Spence, the Senior Steward, made statements in a press release which, whilst not naming Mr Bradley, stated that, in sworn testimony given in Court (a reference to the drug trials), "serious malpractice in relation to racing was admitted". Mr Leach says that this statement, when read with that of 11th June 2002, would be taken to refer in particular to Mr Bradley, who, in the 11th June 2002 press release, had been referred to as having admitted certain breaches of the Rules in his testimony at the trial of Mr Wright Jnr. Again, says Mr Leach, that statement left no possibility of any contrary conclusion. Mr Bradley was then later charged with and found in breach of the Rules as already indicated.

14.5 These statements, says Mr Leach, are statements of the Jockey Club's position. He goes on to point out that all members of the Disciplinary Committee and the majority of the members of the Appeal Board are members of the Jockey Club. Consequently, he says, these statements demonstrate an appearance of a lack of impartiality and a real possibility of bias. He further goes on to submit that because Mr Wright Snr. was stated to have been involved in directing corruption in horse racing, drug-supplying and money laundering (as referred to in the earlier press release), it followed, looking at the two press releases as a whole, that the manner in which Mr Bradley was mentioned could be thought to suggest some involvement on his part in such criminal activities.

14.6 We find that the Jockey Club Press Release dated 11th June 2002 and the statement of the Senior Steward of 14th June 2002 did, as to the first, state, and, as to the second, imply that Mr Bradley had committed a breach of the Rules. However, and this must be an important point to

the fair-minded observer, these were not statements made by any of those concerned in the disciplinary hearings. None of those involved in either of these disciplinary hearings has taken any part in the decision to bring disciplinary proceedings against Mr Bradley. That decision would have been taken by the DPP steward. Also, persons, other than Mr Bradley, were implicated in the second statement. A legal assessor sat with the Disciplinary Committee. A legally qualified Chairman sits with the two Jockey Club members on this appeal. That Chairman hereby confirms that, in the course of this Board hearing, he has given to the two other members of the Board, who have seen or who have been in any way required to look at prejudicial or critical material about Mr Bradley in order to determine the observer test, a direction in the clearest possible terms. They have been directed that the Board must decide these preliminary points and the substantive case (if and when the latter comes before it) on such evidence presented by the parties as is admissible and relevant. They have been further directed that the Board must in no way be influenced by any views, whether prejudicial, critical or otherwise, expressed by others, whether through the media, Jockey Club officials or elsewhere, about the alleged nature of Mr Bradley's conduct, his alleged associates or any other matter expressed outside the ambit of these proceedings.

14.7 Mr Warby makes clear that, in those cases relied upon by Mr Lewis in support of his contention that some prejudicial statement made on behalf of a body or association against a person subject to disciplinary proceedings within it will constitute bias (namely Hauschildt v Denmaker (1989), 12 EHRR 266, para 50 and Modahl v BAF (2001) 1 WLR 1192 (CA at para 68), the prejudicial statement in each case was made by a member of the disciplinary tribunal concerned. Mr Lewis does not dispute this. It is not suggested that that any member of either of the disciplinary bodies was a party to the statements of 11th or 14th

June 2002. Bias is not shown by proof that a statement about the merits has been made by some other person within the organisation (see Sports Law, Beloff, Kerr and Denitriou (1999) at 7.65 – 6.6).

14.8 In our view, the observer would regard, as he should, the members of the two disciplinary bodies as competent and responsible individuals of integrity with experience of hearing these cases, and would assess the situation on the basis that the disciplinary bodies concerned would decide the case on the evidence properly put before them, and not on external material, whatsoever its source or content. In the circumstances, he would expect the two disciplinary bodies to ensure that they did not submit to pressure or comment, whether from the media or elsewhere, however critical, prejudicial or extreme. Furthermore it is one thing to make a statement, it is quite another to establish whether the evidence relied upon by the Jockey Club supports that statement.

14.9 In our view, when carefully read, the observer would not regard the two statements, whether read individually or collectively, as being indicative of (i) a lack of an appearance of independence (bearing in mind that the latter is admitted on behalf to the Disciplinary Committee) or impartiality and/or (ii) the possibility of bias by the Committee or the Board. In the case of the Appeal Board, we think that the independence of the Chairman and his power to ensure that no decision is made with which he does not agree are further important bulwarks against the appearance of a real possibility of bias.

(b) Media Coverage

14.10 As is clear from the papers in this case, the members of the Disciplinary Committee had not viewed the Panorama programme and had neither read nor concerned themselves with some of the pre-broadcast or any

post-broadcast media comment about that programme. As to the Appeal Board, all three members saw the programme. During the course of the hearing before us, it was disclosed to the parties that, while the Chairman had read the media publicity both before and after the broadcast as contained in the files in this case, the two Jockey Club members of the Appeal Board had not read them in full. Mr Warby asked that they should not read these further, pending the conclusion of this hearing. However, the Board considered that its two Jockey Club members should read such documents because it was important that the Board had a full over-view of the case, not least in order to consider properly the observer test which has been raised.

14.11 As to the Panorama programme of 6th October 2002, which was not seen by the Disciplinary Committee, Mr Leach makes the point that it was both highly critical of Mr Bradley and the Jockey Club. We agree with this. It is not in dispute that extensive media coverage preceded the programme and, indeed, followed it on television, on radio and in the press, and that the substance of the point made against the Jockey Club was that they should "get off their backsides" and take disciplinary proceedings, against others including Mr Bradley who, they asserted, had already admitted breaches of the Rules.

14.12 Following these events, a letter dated 18th October 2002 was written by Mr Chalk, solicitor to Mr Bradley, to the Jockey Club. This letter sets out in detailed terms the main prejudicial comments and statements made in the Panorama programme about Mr Bradley, in particular relating to his association with Mr Wright Snr. and others connected with him. In his letter, Mr Chalk summarised the bulk of the media coverage as being to the effect that Mr Bradley had knowingly associated with a well-known criminal for many years, that he had improperly passed information to that criminal, that he should have been

warned off years ago for numerous breaches of the Rules of Racing, and the reason why he had not already been warned off was because the Jockey Club had lacked the resolve to deal with him.

14.13 Mr Leach maintains that, in the context of the overall television, radio and newspaper coverage, Mr Bradley was in effect tried and convicted of criminal offences as well as breaches of the Rules. In criminal proceedings, he says, the coverage would have meant that there was a serious risk of substantial prejudice to the fairness of any trial involving the matters dealt with in such coverage. He maintains that whatever the members concerned may have seen or read of this coverage, it must be inevitable that the observer would conclude that those members of the Jockey Club on the disciplinary bodies would have been influenced, either consciously or sub-consciously by it, or by the cut and thrust of exchanges with others so influenced, and would be more inclined to find Mr Bradley guilty of a breach of the Rules.

14.14 Mr Warby points out that the mere existence of prejudicial media comments cannot be enough to give rise to a real possibility of bias requiring a tribunal to recuse itself. If this were so, given the fact that many disciplinary bodies attract press interest and are not protected by the laws of contempt, the more serious cases simply could not proceed without undue risk of being brought to a premature end through adverse publicity. Here it is important again to pay regard to the different functions of the Jockey Club and the Disciplinary Committee. As to the Disciplinary Committee, they did not see the Panorama programme, although, of course, they would have had some limited exposure to some surrounding publicity. Knowing them to be experienced and responsible individuals, the informed observer would, in our view, be expected to see them as fully capable of concentrating on the evidence put before them. Indeed, they would have been reminded by

representations made to them as to the importance of putting out of their minds all matters extraneous to the issues before the Committee and deciding the case on the relevant evidence before them. It is to be noted also that they sat with a legal assessor.

14.15 As to the Appeal Board, like considerations apply, save that all three members of the Board have seen the Panorama programme. The Chairman has given full directions in regard to improper extraneous matter including that given at para 14.6 above.

14.16 We were referred to the case of Montgomery v HM Advocate [2001] 2 WLR 779, a decision of the Privy Council. In that case there had been extensive prejudicial publicity against the defendant in a murder case. The Privy Council held that the decisive question as to whether the defendant would have a fair trial was to be answered by whether the doubts raised about the impartiality of the tribunal were objectively justified; that the proper answer was not confined to the residual effect of the publicity on the minds of each juror, since account had to be taken of the role which the trial judge would play in ensuring that the defendant received a fair trial; and that in most cases the likely effect of any warning or direction given to the jury would be the critical issue. It was also pointed out that the fact of a jury listening to and thinking about the evidence as well as seeing and hearing the witnesses, could be expected to have a far greater impact on their minds than any residual recollection of media reports concerning the case.

14.17 In that case there had been voluminous prejudicial publicity before a murder trial to be heard before a jury which it was assumed had been absorbed by most of the adult population of Scotland. It was held that suitable directions to the jury could exclude any legitimate doubts about its impartiality.

14.18 In the present case it can of course also be said that members of the Jockey Club sitting on each of the professional bodies will be concerned to ensure that the Jockey Club is seen to be doing its job properly, particularly when under criticism. However, because the Montgomery case involved strong racist overtones, it could be argued that much stronger emotions are liable to have been raised by the media against the individual under attack in that case than in the present case. Yet suitable directions even in that case by the judge were considered to be appropriate to exclude legitimate doubts about the impartiality of the jury.

14.19 In the light of the safeguards referred to above, we consider that, in the particular circumstances appertaining to each disciplinary body, the observer would consider that, where necessary, adequate safeguards had been in place; and that in those circumstances there was no appearance of either a lack of independence or impartiality, or a presence of bias arising from such media coverage.

(c) Pressure on the Jockey Club

14.20 Mr Leach contends that, both expressly and by implication, much pressure of a highly critical nature was put upon the Jockey Club through the media as above indicated, to do what it had been perceived to have failed publicly to do for many years, namely to "clean up" racing.

14.21 In the light of all this, says Mr Leach, the observer would consider that there was a real possibility that the members of the Jockey Club disciplinary panel would appear unable to suppress their desire to vindicate the Jockey Club's reputation by being seen to take positive action.

14.22 Against this it can be said that the pressure derives from the same media publicity as has been referred to above and, accordingly, can be met in the way which we have already indicated. There is no evidence of any actual pressure being put on those with the disciplinary bodies. The Disciplinary Committee did not see the Panorama programme and furthermore had a limited exposure to the media coverage. We consider that the duty to focus only on the relevant evidence and to exclude all prejudicial or other critical comment, will eliminate attention to extraneous matters. In the circumstances, we do not consider that the observer would consider there to be a lack of appearance of independence and impartiality or the possibility of bias arising in either of the bodies.

(d) Conduct of Enquiry

14.23 The only complaints made about the actual conduct of the enquiry arise in relation to the period after the findings had been made. At that stage it became necessary for the Disciplinary Committee to determine what penalties should be imposed in respect of the breaches found against Mr Bradley. Issue has now arisen as to whether the Secretary to the Disciplinary Committee supplied to Mr Bradley's advisors full details of "comparable" cases. It has been the practice of the Disciplinary Committee to look only at precedents going back some ten years. However, in this particular case, alleged breaches of Rule 204(iv) by Mr Bradley were found to have gone back to 1988 (when Rule 204 (iv) was introduced in substitute for a similar type rule) and to 1984 under Rule 62(ii)(c). This being so, Mr Leach required details going back to a date earlier than reflected normal practice. Although there was some delay in obtaining the full details of a 1978 case (the Francome case) for an offence under the Rule then comparable to Rule 204(iv), the required details of that case, including, of course, Mr Francome's status as an ex-champion jockey, were ultimately provided to Mr Bradley's advisors so

that Mr Bradley could refer the Disciplinary Committee to those details before the Committee retired to consider what penalties to impose. As to the five other cases referred to and because they had been disposed of in or around 1970, the full records relating to them were not available. In our view, the question of the relevance of these cases should be raised at such adjourned hearing as there may be in relation to the substantive grounds of this appeal under the "disproportionate" powers of paragraph 19. We do not think that there is any substance in this complaint on the question of bias. It should also be noted that the Jockey Club's disciplinary decisions are not secret but are always made available to solicitors acting for a party with an interest in them.

14.24 Complaint has also been made by Mr Leach under two further heads in support of his allegation of bias in regard to the conduct of the enquiry before the Committee between it giving its decision on liability and imposing penalties. Mr Leach complains first, that there should have been an earlier guideline given out by the Committee in regard to the particular type of offence committed by Mr Bradley under Rules 204 (iv) and 62 (ii) (c). This guideline, he says, should have given warnings in clear terms of the very severe penalties that could be imposed in the event of breaches of either of those Rules. Mr Leach puts his case on the basis that looking at other penalties imposed for breaches of the Rules in question, they did not begin to approach the penalty in this case of eight years disqualification. We note this point but, again, in our view, this is a question which does not go to bias, but can be raised at any substantive hearing as and when this occurs.

14.25 Mr Leach also complains that the Disciplinary Committee only retired for 45 minutes after a lengthy and detailed case. It is apparent from the transcript that the Committee had given itself ample time to read the papers well before the conclusion.

14.26 In the circumstances, we do not think that there is any point of substance in any of the specific matters raised by Mr Leach which would have led the observer to consider that there was an appearance of a lack of independence or impartiality or the presence of bias in regard to the time which the Disciplinary Committee took to reach its decision or indeed in regard to any anxiety shown by the Committee to keep the proceedings moving at a reasonable pace.

(e) Statements made by the Jockey Club after the Enquiry

14.27 On 30th November 2002 and 6th December 2002 certain statements appeared in the press which were been made by Mr Spence, the Senior Steward, following the conclusion of the hearing before the Disciplinary Committee. In the first of these statements, Mr Spence is reported as saying that Mr Bradley had made admissions in Court and that clearly he had to face up to the Disciplinary Committee; he went on to refer to Mr Brian Wright Snr. as being a "cancer in racing". In the second article no mention was made specifically of Mr Bradley but reference was made to corruption in racing and to the Panorama programme. Mr Spence went on to assert that the Jockey Club had the resolve to deal with these problems.

14.28 Mr Leach submits that these statements by Mr Spence demonstrate again that the Jockey Club had prejudged the case against Mr Bradley; that it was under pressure to "deal with" Mr Bradley; and that the Jockey Club had itself, and without evidence, linked him to matters beyond the reach of racing.

14.29 We bear in mind that these were statements made only by Mr Spence, and not by any of the members of the Committee or Board. Furthermore, these were statements made after the hearing and findings

made by the Disciplinary Committee. In the circumstances and in so far as they might have any impact on us, we firmly disregard them.

(f) Statement made by the Senior Steward on the 11th February 2003

14.30 Since the hearing on 14th January 2003 a further point has been raised on Mr. Bradley's behalf arising from a recent announcement made by the Jockey Club that it was to hand over its regulatory role to a new body, such to include the establishment and running of the disciplinary process. In announcing this to the press on 11th February 2003, Mr Christopher Spence, the Senior Steward stated, in reference to the regulatory change:

> "This is not some form of fudge, it is a genuine move to give greater accountability, transparency and independence that a lot of people think we should have".

14.31 On Mr. Bradley's behalf it was asserted by letter sent to the Board dated 24th February 2003 that this statement demonstrates an acceptance by the Senior Steward that there is, at the very least, a perception of a lack of independence and impartiality on the part of the Jockey Club in its regulatory role, which includes the disciplinary and appeal process with which this Appeal Board is currently concerned. In further correspondence exchanged between the parties, the Jockey Club has firmly denied that such an appearance arises from the statement, whether in regard to either independence or impartiality. This matter having been drawn to our attention, we consider it appropriate to give a ruling in regard to whether an informed observer would consider that there was a

real possibility of a lack of appearance of independence and / or impartiality arising from the statement.

14.32 We bear in mind that the relevant "appearance" must be to the informed observer. The statement in question was clearly intended for the general public and, indeed, appears to refer to the views of those who would not be as well informed as the observer through being unaware of the full surrounding facts and safeguards.

14.33 In the circumstances, we do not think that the observer would attach significance to this statement given its context and the general public to whom it was addressed. In any event, the concession made as to a lack of independence of the Disciplinary Committee would, in so far as it might be necessary, dispose of the matter. Accordingly, we do not resile from the view we have already expressed.

(15) Conclusion on the Specific Ground

15.1 Despite the unusual circumstances which have arisen surrounding these proceedings, we do not think that the appearance to the observer of a lack of independence or impartiality, or the real possibility of bias is made out, whether taken collectively or individually in respect of all the material before us.

(16) Mr Bradley's Challenge to the Overall Process as not being Article 6 Compliant

16.1 It is agreed between Counsel that the entitlement under Article 6 (1) is to a fair hearing by way of determination of civil rights and obligations, and that there is to be determined by a process which is, as a whole, Article 6 (1) compliant. Mr Leach argues that, in those circumstances and because neither of the disciplinary bodies is Article 6(1) compliant

– there is an issue between the parties as to whether the Appeal Board is Article 6(1) compliant - Mr Bradley will not have had the question of his alleged breaches of the Rules, so vital to his livelihood, determined by an Article 6 (1) compliant process. He submits that, because of its limited supervisory powers of review and inability to hear the facts de novo, the High Court will not be able to "cure" the process of any lack of independence or impartiality and/or presence of bias at a lower stage, and, accordingly, the process as a whole will not have been Article 6 (1) compliant. The burden of Mr Leach's argument is that the deficiencies of the Jockey Club process and the limitations of the court's powers of review are such that despite this overall process Mr Bradley will inevitably have been deprived of his Article 6 (1) rights.

16.2 Mr Leach draws a distinction between a "policy" decision where the decision-making body exercises a discretion as part of the decision-making process, and an "adjudicatory" decision where the decision-making body is essentially concerned with factual matter. He accepts that where the initial decision-making body is not Article 6 (1) compliant (as is conceded by the Jockey Club in respect of the Disciplinary Committee) but is required to exercise a discretion in the decision-making process, then an appellate court with powers of review and which is otherwise Article 6 compliant will, in appropriate circumstances, suffice (see R (Alconbury Developments) v Secretary of State for the Environment [2001] 2 WLR 1389). However, the position here, he says, is different because the disciplinary bodies are manifestly determining "adjudicatory" questions, that is issues of fact. In such a situation, says Mr Leach, the appellate body / court must be itself empowered to hold a full rehearing on the facts.

16.3 We agree with Mr Leach that in this case the disciplinary bodies are, as to the question of liability, concerned with the determination of factual

(that is, adjudicatory) matters. The element of discretion only arises in the determination of the penalty to be imposed.

16.4 Mr Warby disputes Mr Lewis' point that an initial fact-finding decision-making body which is not Article 6 (1) compliant can be cured of this defect only where the appellate court has full power to rehear the facts. Mr Warby asserts that the authorities do not support Mr Lewis' contention.

16.5 It is helpful first to consider the course which the disciplinary process has followed within the governing bodies of well-established professional, sporting and other comparable associations.

16.6 As to this, Mr Warby goes back to Le Compte, Van Leuden and De Meyere v Belgium (1981) EHRR 1, in which at paragraph 51(a) it was held that:

> "Demands of flexibility and efficiency, which are fully compatible with protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, by judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member states of the Councils of Europe may be involved in support of such a system."

16.7 In Stefan v United Kingdom (1997) 25 EHRR CD130 factual issues concerning the appellant's fitness to practise medicine were determined by a medical practitioner. The system did not provide a procedure affording the Article 6 (1) guarantees of independence. However, the right of appeal to the Privy Council, although restricted to points of

law, was nevertheless sufficient to give the Council 'full jurisdiction' for Article 6 (1) purposes. There the Commission observed, at para 1135, that:

> "….it is of the nature of a review of the decision of a disciplinary body that the reviewing authority reviews the preceding proceedings, rather than taking factual decisions".

Mr Warby also referred us to Wickram Singhe v United Kingdom (1998) EHRLR 338, Porter v Magill [2001] UKHL 67 at para 93, citing Alconbury for further support and R v Dorset County Council, ex parte personal representatives of Christopher Beeson and the Secretary of State of Health (interested party), c/2001/2839 and 2002 (EWCA) Civ 1812, 18th December 2002, see para 16(3).

16.8 In Colgan v The Kennel Club (unreported) 26.10.01) at para 40, Cooke J. summarises the requirement as follows:

> "It does not mean that there must be powers to hold a full re-hearing, with all the evidence being adduced once more, merely that such review as is required should take place, in the light of the respect to be accorded to the decisions of the lower body and the nature of the complaints raised."

16.9 These authorities clearly demonstrate some flexibility in the powers of the reviewing body. We turn now to consider the requirements necessary to bring a disciplinary process within Article 6(1) where the initial fact-finding body is not Article 6(1) compliant.

16.10 Since the legality point was argued before us on 14th January last, two further recent decisions have been drawn to our attention and are of assistance. The first is the decision in R v Dorset County Council, ex

parte personal representatives of Christopher Beeson and the Secretary of State for Health (interested party), c/2001/2839 and 2002(EWCA) Civ 1812, 18th December 2002. This was a judgment of the Court of Appeal handed down shortly before we heard argument on the legality point. More recently and since the last hearing before us, the House of Lords has handed down its opinion in the appeal of Begum (FC) v The London Borough of Tower Hamlets [2002] UKHL5, [2003] 2 WLR 388. Counsel concerned for each party was then requested to make, and indeed has made further submissions in writing on these two cases.

16.11 Mr Lewis maintains that both of the cases, each of which concerns the application of a scheme set up under an Act of Parliament, support the distinction which he has drawn between "policy" and "adjudicatory" decisions. He refers us to a passage in Beeson at para 21. The Court of Appeal there determined that the decision-making function, though requiring the exercise of a discretion combined with some fact-finding, was "closer to the function of the administrator than that of the judge". Accordingly the fact that the appellate court had only the power of judicial review did not prevent the overall process from being Article 6(1) compliant.

16.12 In the House of Lords decision in Begum the question was raised as to whether accommodation offered by the local authority to the appellant was reasonable. Again this was a case where there was a significant discretionary element, involving the administrative allocation of accommodation to the homeless. Mr Lewis relies on a passage in the speech of Lord Hoffmann (see paras 41-42) pointing out that where the function, instead of being akin to administrative allocation, is akin to the role played by the court, then judicial review in the appellate court is not sufficient to bring the initial decision-making body within Article 6(1). At the end of paragraph 42, Lord Hoffmann goes on to say that

utilitarian arguments to the effect that it would be cheaper to have such matters decided by administrators (albeit subject to judicial review) would be completely inadmissible.

16.13 Mr Warby answers Mr Lewis' submission by maintaining that no violation of Article 6(1) can be found provided that the decision of the non-compliant fact-finding domestic tribunal is subject to subsequent control by a body or indeed bodies having "full jurisdiction" and meeting the Article 6 (1) requirements of independence and impartiality. In order to determine what "full jurisdiction" may mean in a particular case, Mr Warby refers us to Bryan v United Kingdom (1995) 21 EHRR 342 at head note 2D and paras 40 and 45. At para 45 the European Court said:

> "45. Furthermore in assessing the sufficiency of a review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

16.14 Accordingly, says Mr Warby, regard must be had to the extent to which the initial decision was taken by a fair procedure and the degree of independence and impartiality attributable to that decision-maker (as to this, see further para 46 in Bryan). Likewise in R(Alconbury Developments Ltd & Others) v Secretary of State for the Environment, Transport & The Regions [2001] 2 WLR 1389, HL (cited with approval in Begum, see Lord Millett at para 101) the powers of judicial review over a ministerial planning decision were held sufficient to amount to 'full jurisdiction', since, as is stated in para 87, the term was held to

mean ‘full jurisdiction to deal with the case as the nature of the decision requires’.

Our Decision as to the necessary reviewing powers of the Appeal Tribunal / Court for Article 6(1) Compliance purposes

16.15 In our view, the recent House of Lords decision in Begum throws light on this question, moving directly away from the fact-finding “adjudicatory” approach favoured by the Court of Appeal in Beeson. In disapproving of this approach on the ground that, as a criterion, it tends to undermine legal certainty, Lord Hoffmann, at para 58 of his speech, says:

> “I should however say that I do not agree with the view of Laws L.J. that the test whether it is necessary to have an independent fact finder depends on the extent to which the administrative scheme is likely to involve a resolution on disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain.”

At para 59, he continues:

> “In my opinion the question is whether, consistently with the rule of law and constitutional priority, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact.”

Lord Hoffmann goes on to refer to certain statutes and the provision of facilities arising under them.

16.16 At para 56 of his speech Lord Hoffmann, in dealing with any permitted limitation on the powers of review in the Appellate Court, says:-

> "56. The key phrases in the judgments of the Strasbourg Court which describe the cases in which a limited review of facts is sufficient are 'specialised areas of the law' (Bryan's case at p.361, para 47) and 'classic exercise of administrative discretion' (Kingsley's case, at p.302, para 53). What kind of decisions are these phrases referring to? I think one has to take them together. The notion of a specialised area of law should not be taken too literally…… It seems to me that what the court had in mind was those areas of law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators."

16.17 At para 57 Lord Hoffmann, in what in our view is an important passage, goes on to say:

> "57. National traditions as to which matters are suitable for administrative decision and which require to be decided by the judicial branch of the Government may differ. To that extent, the Strasbourg court will no doubt allow a margin of appreciation to contracting states. The concern of the court, as it has emphasised since Golder's case (1975) (1EHRR 524) is to uphold the rule of law and to insist that decisions, which on generally accepted principles are appropriate only for judicial decisions, should be so decided. In the case of decisions appropriate for administrative decisions, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like Bryan and Kinglsey make it clear

that limitations on practical grounds on the right to a review of the findings of fact will be acceptable."

16.18 We fully appreciate, as has been emphasised to us on behalf of Mr Bradley, that the cases of Bryan, Alconbury, Beeson and Begum all involve decisions taken by administrators under special schemes or other like provisions set up under Act of Parliament. In the instant case the process involves a disciplinary decision being taken by a domestic tribunal, subject to the reviewing power of this Appeal Board as provided for within the Rules, with ultimate recourse thereafter to the High Court. The initial fact-finding body in the instant case is the Disciplinary Committee. This, as we will come to in a moment, has followed a sophisticated legal procedure in making its determination.

16.19 We revert to Lord Hoffmann's statement at para 57 of Begum to the effect that national traditions may differ as to those matters which are suitable for administrative decision and those which must be dealt with by the judicial branch of government. We have regard to the margin of appreciation to which in this context Lord Hoffmann made reference. There is a myriad of domestic and professional bodies in this country which, based on their specialised knowledge and experience in the particular field in which the disciplinary decisions are made, are best placed to make those decisions under their rules and regulations, provided that there are suitable safeguards in place. These bodies range from major sporting organisations to professional associations, school boards and many other comparable entities. Indeed Mr Leach's acknowledgement of the Court's traditional reluctance to intervene in the decision-making process of governing bodies in both racing and sports generally (he has cited a long list of authorities in support of this) is testament to the recognition of the requirement for specialist expertise in

the disciplinary decision-making process within these and other similar bodies. It is important to bear in mind that these bodies have regularly over the years made decisions which may deprive an individual of his or her livelihood for a substantial period of time. These organisations span many fields of endeavour, and the national tradition has been that their disciplinary processes are exercised by 'in-house' members with knowledge of the profession/activity concerned, subject to certain procedural safeguards. Indeed Farquharson LJ (see R v Jockey Club ex parte Aga Khan [1993] 1 WLR 909 at page 924) made reference to the importance of those with experience in running the particular organisation. In his judgment at p930 he said :

> "Nearly all sports are subject to a body of rules to which an entrant must subscribe. These are necessary, as already observed, for the control and integrity of the sport concerned. In such a large industry as racing has become, I would suspect that all those actively engaged in it welcome the control of licensing and discipline exerted by the Jockey Club."

This has long been the practice in this country, with recourse to the court either by way of judicial review or, where judicial review cannot be obtained, then, if available, by a process comparable to it.

16.20 In the instant case judicial review does not run but because Mr Bradley's remedy against the Jockey Club is in contract he is enabled to go to the court to obtain declaratory and / or injunctive relief (see the Aga Khan case). In his judgment Hoffmann LJ, as he then was, in considering the remedies available to the Aga Khan, said at p.33:

> "In the present case, however, the remedies in private law available to the Aga Khan seem to me entirely adequate. He has a contract with the Jockey Club both as a registered owner and by virtue of having entered his horse in the

> Oaks. The club has an implied obligation under the contract to conduct its disciplinary proceedings fairly. If it has not done so, the Aga Khan can obtain a declaration that the decision was ineffective (I avoid the slippery word void) and, if necessary, an injunction to restrain the club from doing anything to implement it. No injustice is therefore likely to be caused in the present case by the denial of the public law remedy."

16.21 We have not heard full argument on the extent of the injunctive relief which, if driven to challenge the decision of the disciplinary bodies, Mr Bradley might be able to obtain. Nevertheless, it seems apparent from the passage in the speech of Lord Hoffmann, to which we have just referred, that an order could be made, if considered appropriate, entitling him, on the basis of a term to be implied into his contract with the Jockey Club, to a rehearing of the relevant factual issues if such were to be required for Article 6 (1) compliance. Given the quasi-judicial and thorough nature of the inquiry before the Disciplinary Committee, we consider that there are adequate remedies in the present case. Accordingly, it is to the nature of the hearing before the Disciplinary Committee we now turn.

16.22 The fact that the hearing before the Disciplinary Committee was conducted in a fair and reasonable manner is, in this context, of material significance to the enquiry relating to Article 6(1). Had, for example, the Committee's failure to comply with Article 6(1) related not solely to a lack of <u>appearance</u> of independence but also to an <u>actual</u> lack of independence, this Board would have had full power to remit this case for a rehearing which, in the light of the Jockey Club's specific concession, could have been to an outside body such as the SDRP. However, this is not a case where any <u>actual</u> lack of independence or <u>actual</u> presence of bias is alleged. Additionally, it is to be noted that this

is an unusual case because the evidence relied upon by the Disciplinary Committee, upon which it made its findings in regard to the most serious offences, namely those of breaches of Rules 204(iv) and 62(ii)(c), takes the form of agreed transcripts of evidence given by Mr Bradley, first on oath to the Crown Court and, second, through his later explanations of that evidence given at the hearing before the Committee. Accordingly a reviewing tribunal / Court, whilst not having had the advantage of hearing or seeing Mr Bradley give his evidence, would nonetheless be able to consider the evidence set out in those two full transcripts, which clearly played a significant part in the decision made by the Disciplinary Committee.

16.23 Mr Warby goes on to point out that, whilst he accepts that the Disciplinary Committee hearing in this case was not Article 6(1) compliant, nevertheless the Committee, with its experienced members, followed a mature legal procedure. This involved a full statement of the Jockey Club's case, disclosure of documents, exchanges of written statements, legal representation "with equality of arms" and rights of cross-examination, as well as the presence of a legal assessor sitting with the Committee. Mr Warby goes on to submit that the Disciplinary Committee acted in accordance with the rules of natural justice. We agree. Furthermore, there is the role of this Appeal Board, exercising its wide powers of review, and the availability of recourse to the High Court, if appropriate.

16.24 As to the powers required of a reviewing court in the present context, we prefer the arguments of Mr Warby. We appreciate that a significant discretionary element in an administrative decision made through the will of Parliament under an enabling statute has been held by the Courts to make it unnecessary for a reviewing Court to be empowered to re-

hear the facts for the purpose of compliance with Article 6 (1). The line of cases to which we have been referred involves administrative decisions. No express reference was made to the role of the domestic tribunal. Nevertheless, following Lord Hoffmann's margin of appreciation in regard to national tradition, we bear in mind that the European Court's decisions in Bryan and the later authorities, bring flexibility to the Court's approach. We record and respect the well-established and important practice which bodies, ranging from professional associations to those governing sport, have maintained in handling their own disciplinary process. Provided that such process can be shown to have adequate safe guards, we consider that it will not always be a requirement for there to be a facility for the High Court itself to rehear the facts afresh.

16.25 In this case the Appeal Board is the first tier of review under paragraphs 15 to 20 inclusive of Appendix J of the Rules. Our powers of review are comparable to those on a judicial review. Under para 17, we are enabled to consider to a significant extent the merits of the decision since it is open to us to find that there was insufficient evidence for the Committee to have made the decision in question. We can admit new evidence subject to certain reasonable criteria, and there is a right of recourse to the High Court. Furthermore, insofar as this Board is not considered to be Article 6 (1) compliant, the existence of a challenge to the High Court is capable of curing the non-compliant process.

16.26 Following Lord Hoffmann in Begum the test goes beyond an "adjudicatory" one by reference to the criteria set out in Bryan (see above). In our view, consideration must be given both to the quality of the hearing before the initial fact-finding tribunal and to the established practice within the particular country. The relevant question is

"whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators": see Begum at paras 58 and 59 per Lord Hoffmann. In our view, the question we must consider is whether the decision at issue is of a kind which, according to national legal tradition and general principle, is regarded as one fit only for judicial decision or as one fit for administrative decision. Following Begum (see para 36 per Lord Hoffmann and paras 103 – 104 per Lord Millett) it is in "specialised areas of law" where a limited judicial review will satisfy Article 6 (1) where decisions are customarily entrusted to administrators and / or call for some specialised knowledge or experience on the part of the decision-maker. It is in this context that the thorough and fair hearing before the Disciplinary Committee, though not fully Article 6 compliant, is of significance, because it was made in an area where such decisions are customarily entrusted to those with specialised knowledge and experience.

16.27 In these circumstances, it is our view that it is not necessary for a reviewing body in this case to be empowered itself to carry out a full re-hearing of the facts. Given the quasi-judicial and fair nature of the enquiry before the Disciplinary Committee, we consider that there are adequate remedies of review in the High Court in this case by way of injunction and / or declaration. We conclude that, for the reasons already given, the overall process in this case complies with Article 6 (1).

16.28 As to whether this Appeal Board is Article 6 (1) compliant, we have regard to the following:

(1) For reasons already given we consider that we are an independent and impartial tribunal.

(2) Article 6(1) requires the disciplinary bodies to sit in public, subject to certain exceptions. This requirement has not been raised before us. Under the Rules, the disciplinary bodies are not empowered to sit in public. We bear in mind that there may be grounds for maintaining that this case comes within one of the exceptions to the requirement for a public hearing as set out in Article 6 (1). It is our intention, subject to hearing submissions on the point, to make public our Reasons. The Appeal Board is empowered so to do under para 39 of Appendix J. However, in so far as the requirement of sitting in public is not met at the hearing before us, any proceedings in the High Court will be heard in public and, in our view, this should remedy any Article 6(1) defect in this regard.

(3) Although we are a reviewing body and cannot ourselves carry out a re-hearing of the facts, we consider, for the reasons already given, that our powers of review are, in the circumstances, sufficient to bring the overall process within Article 6 (1).

(4) Insofar as this Appeal Board is not itself considered to be part of an Article 6(1) compliant process, then, because of the powers of the High Court on a review, the process overall is Article 6 (1) compliant.

16.29 As to the penalty imposed against which appeal is also made, we have powers to review this under the "disproportionate" provisions of paragraph 19 of Appendix J.

16.30 Mr Lewis raised one further point. He maintains that, if a penalty is imposed by one of the disciplinary bodies which is not lifted until it is quashed by the court at a later hearing, Mr Bradley will, in any event,

have suffered prejudice by the adverse initial finding. In our view and, without having heard full argument on this point, any justifiable complaint by Mr Bradley has so far been met, as Mr Leach accepts, by a stay on the effect of any penalty, pending any such later hearing.

(17) Proposal made by the Jockey Club

17.1 We add, for the sake of completeness, that in the course of the hearing, Mr Warby on behalf of the Jockey Club, when seeking to persuade this Appeal Board to make a determination as to the likelihood of whether the review powers of the High Court would enable it to provide an Article 6 (1) compliant hearing, put forward a proposal to Mr Bradley in the following terms:-

> "The following applies if the Board is concerned that the disciplinary process in this case, including any application of the Court which Mr Bradley might make if the substance of his appeal is determined against him, would fail to afford Mr Bradley the rights guaranteed by Article 6 of the Convention because the process affords inadequate review of the Committee's factual findings.
>
> In this event, the Jockey Club consents to the Board conducting this Appeal by way of a re-hearing. That is to say such a re-hearing as would be conducted by the Court of Appeal pursuant to Part 52 of the CPR by reference to the transcripts of the oral evidence below and the documents put before the Committee."

17.2 We record that, Mr Warby having made his proposal, Mr Bradley was not minded to take it up.

(18) Conclusion

18.1 For the reasons above stated, we decide the legality point against Mr Bradley. We do not consider that Mr Bradley has established that the disciplinary process should now be suspended. Accordingly we must proceed to deal with his substantive appeal.