IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MR JUSTICE POPPLEWELL)

QBEN1 96/1040/E

Royal Courts of Justice
Strand
London WC2

Monday 28 July 1997

Before:

THE MASTER OF THE ROLLS
(LORD WOOLF)
LORD JUSTICE MORRITT
LORD JUSTICE PILL

DIANE MODAHL

Plaintiff/Respondent

- v -

THE BRITISH ATHLETIC FEDERATION LIMITED

Defendant/Appellant

(Transcript of the handed-down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

MR D PANNICK and MR P GOULDING (Instructed by Messrs Farrer & Co, London WC2A 3LH) appeared on behalf of the Appellant

MR G POLLOCK QC and MR V NELSON (Instructed by Messrs Mischon de Reya, London WC1B 5HS) appeared on behalf of the Respondent

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JUDGMENT
(As approved by the Court)

JUDGMENT

LORD WOOLF, MR: On the 28th June 1996 Popplewell J dismissed an application by the defendant, The British Athletic Federation, ("BAF") that the writ and amended statement of claim of the Plaintiff, Diane Modahl, should be struck out under Rules of the Supreme Court, Order 18 r19 or under the

inherent jurisdiction of the court on the grounds that they disclose no reasonable cause of action and are frivolous, scandalous and vexatious and an abuse of the process of the court.

Popplewell J, with their agreement, gave both parties leave to appeal.

The appeal raises issues of some general importance but before dealing with them I should shortly set out the background to the appeal.

The Background to the Appeal.

The plaintiff is a well known and successful athlete who has represented this country on many occasions. BAF is the governing athletic federation for the United Kingdom. It is affiliated to the International Amateur Athletic Federation (IAAF). It acts as the representative member for the United Kingdom of the IAAF. BAF has Rules For Competition with which athletes have to comply.

Both organisations are committed to preventing the use of drugs in sport. In the Procedural Guidelines for Doping Control issued by the IAAF in April 1994, the preface commences by stating:

> "It is a sad fact of life that doping has become a deadly threat to sport but thankfully our sport has recognised the problem of doping and is sparing no expense or effort to bring it under control."

On the 18th June 1994 the plaintiff competed at the Santo Antonio athletics meeting at Lisbon University stadium in Lisbon Portugal. She was asked to provide a urine specimen and she did so. Part of the specimen (the "A" sample) was tested by a Portuguese laboratory and on the 22 July 1994 that laboratory reported that the sample contained a testosterone/epitestosterone ratio (T/E ratio) of over 40:1. That is well above what is permissible. The BAF and IAAF were informed on the 24th

August 1994. The same day BAF informed the plaintiff of this at the Commonwealth Games in Victoria, Canada where she was preparing to compete and she was returned to England.

In addition to the A sample which had already been analysed, there was a second sample (the "B" sample) and on the 30th August 1994 the B sample was analysed by the same laboratory and similar results were obtained to those on the analysis of the A sample.

On the 6th September 1994 the plaintiff was suspended from competition by BAF and was informed of her right to a hearing. On the 13th December 1994 a hearing took place before the BAF Disciplinary Committee. On the 14th December that committee unanimously found that an offence of doping had been committed by the plaintiff. On the 24th and 25th July 1995 the Independent Appeal Panel heard evidence and submissions and on 26th July 1995 they unanimously allowed the appeal by the plaintiff. BAF accepts the panel's decision.

On the 14th February 1996 the plaintiff commenced the proceedings which are the subject matter of this appeal. In order to understand the issues on this appeal it is necessary to refer to both the rules of the BAF and the IAAF and the Procedural Guidelines For Doping Control.

The BAF Rules

Rules 24 of BAF contains a code dealing with disciplinary action for doping. Its provisions so far as relevant are as follows:

> "1. Doping in or out of competition is strictly forbidden and is an offence.
>
> 2. [BAF] is responsible for the co-ordination and disciplinary procedures of all doping related matters. It is responsible for the supervision of testing both in and out of competitions. All such testing is operated and co-ordinated by the relevant Sports Council Doping Control Unit, or the IAAF....

3. To be eligible for participation in athletic competitions held under [BAF] and IAAF Rules all athletes must make themselves available for testing when required.

5. The offence of doping takes place when:
(a) a prohibited substance is found to be present within an athlete's body tissue or fluids: or ...
[testosterone is such a substance]

13. Anti-doping tests shall be carried out under the auspices of the relevant Sports Council or the IAAF by Independent Sampling Officers unless otherwise required by the BAF.

Note: See Appendix B for BAF Rules and Procedures relating to testing.

14. The Federation Drug Advisory Committee will deal with any offences under its Doping Procedures (DP). Under these procedures disciplinary proceedings will take place in three stages:

(a) suspension (An athlete shall be suspended from the time that the Drug Advisory Committee considers that there is evidence that a doping offence may have taken place and written notice to that effect has been sent to the athlete concerned):

(b) hearing

(c) decision on eligibility."

There are then provisions providing that where an athlete has committed a doping offence he shall be declared ineligible to take part in athletic events within the United Kingdom or abroad, and the Rule continues:

"22. A departure or departures from the procedures set out in the Rules and Procedure Concerning Doping Control (Appendix B) shall not invalidate the finding that a prohibited substance was present in a sample, or that a prohibited technique had been used, unless the departure(s) was such as to cast real doubt on the reliability of such findings."

Appendix B, Rules and Procedures Concerning Doping Control referred to in Rule 24 states

"(B3) Samples will be analysed by a accredited laboratory.....If the analysis of the "A" sample indicates the presence of a prohibited substance [BAF will inform the athlete that he/she is suspended]

(B4) If requested by the athlete the laboratory will arrange a date within 21 days for the conduct of the test on the "B" sample. The athlete and/or his/her representative are entitled to be present.

(B7) Following suspension for an offence under Rule 24 there will be a disciplinary hearing before The Disciplinary Committee .....

(B8) ...the athlete or BAF will have the right of appeal .. any appeal will be made to an Independent Appeal Panel."

The IAAF Rules contain further provisions for resolving disputes between BAF or the IAAF and an athlete. Rule 21 enables the disputes to be submitted to an Arbitration Panel. Rule 21,4 provides that the decision of the Arbitration Panel "shall be final and binding on all parties" and that a reference shall not be accepted by the Arbitration Panel until all remedies have been exhausted under the Members (i.e. BAF's) constitution.

Rule 55 of the IAAF Rules which deals with the control of drug abuse are in similar terms to the BAF Rules. They include a provision that the procedural and administrative guidelines for the conduct of doping control shall be determined by the Doping Commission and shall be known as the "Procedural Guidelines for Doping Control". There is then a provision that:

> "A departure or departures from the procedures set out in the "Procedural Guidelines for Doping Control" shall not invalidate the finding that a prohibited substance was present in a sample or that a prohibited technique had been used unless this departure, was such as to cast real doubt on the reliability of such a finding."

The Procedural Guidelines for Doping Control state that a "sample will be sent to an accredited laboratory. These are regularly checked to make sure they are of the highest possible standard". The guidelines also provide that:

> "7.2 Only laboratories accredited or approved by the IAAF/IOC may be used to carry out analysis of the samples taken in accordance with doping control."

However it is stated in Guideline 1.2 that:

> "These guidelines must be followed as far as is reasonably practical. However in accordance with IAAF Rules 55 a departure or departures from these guidelines shall not invalidate the finding of a prohibited substance, unless it was such as to cast real doubt on the reliability of the findings."

The contents of amended statement of claim

In her amended statement of claim, the plaintiff alleges that the BAF Rules and the IAAF Rules, insofar as adopted and in force by BAF formed a contract between the plaintiff and the defendant. That this contract includes a term that the tests carried out on the A and B samples would be carried out by an accredited IOC and/or an IAAF accredited laboratory and that "it was a requirement of IOC RAG LP 6.2.2 that continued accreditation was subject to the drug testing laboratory performing all work with its own personnel and with its own premises unless authorised by the IOC Medical Commission." It is then alleged that in breach of this requirement the laboratory prior to or during the time the samples were in their possession moved to premises at the Lisbon City Mortuary without the authorisation of the IOC Medical Commission.

It is also alleged that it was a term of the contract that the plaintiff "would have a fair and impartial hearing at both the BAF Disciplinary hearing and the Independent Appeal Panel." The breach of this term which is alleged is that two members of the disciplinary committee were affected by actual bias or a reasonable likelihood of bias.

As a result of the breaches of the contract it is alleged that the plaintiff was put to the expense in connection with a Disciplinary Hearing and of an appeal to the Independent Appeal Panel and that this resulted in expenses which amounted to £250,000. It is then said that but for

the breaches of contract the plaintiff would have earned the sum of £230,708. In addition interest is claimed.

There are other allegations of breach of contract included in the amended statement of claim. However they are not relied on by the plaintiff for the purpose of this appeal.

The Approach to an Application to Strike Out

The application which Popplewell J had to consider was made both under Order 18 r19 and the inherent jurisdiction of the court. It is desirable to set out the relevant part of Order 18 r19. It is in these terms:

> "Striking out pleadings and indorsements
>
> 19.¾(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that¾
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph
>
> (1)(a)."

Although the parties did not rely on Order 14 A or Order 33 rule 3 and 4 in support of their arguments on this appeal their terms are relevant when considering the correct approach to applications to strike out a pleading. Order 14A so far as relevant provide:

> "Determination of questions of law or construction

1.¾(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that¾

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either¾

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.

(4) The jurisdiction of the Court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, r19 or any other provision of these rules."

Order 33 deals with the place and mode of trial. It gives the court wide powers which are not used as often as might be expected. The relevant provisions of Order 33 are:

"Time, etc of trial of questions or issues

3. The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter , and may give directions as to the manner in which the question or issue shall be stated."

I draw attention to the provisions of Order 14A and Order 33 rules 3 and 4 because, looking at the pleading alone, it recites what is a perfectly respectable cause of action and contains nothing which is vexatious or constitutes an abuse of process. The amended statement of claim sets out the contract upon which the plaintiff relies including the alleged express terms of the contract. It alleges breaches of that contract and the damage which is alleged to have flowed from the breaches.

BAF was only able to suggest that the whole of the action should be struck out by relying upon the additional provisions of the BAF and IAAF rules which are not referred to by the plaintiff (in particular BAF Rule 24(22) and IAAF Rule 11) and by referring to the terms in which the Independent Appeal Tribunal gave its decision. The amended statement of claim has copious references to other rules of the different sporting authorities and therefore it probably does not offend Order 18 r19 (2) to refer the rules as a whole which can be considered to be incorporated into this pleading. However the position is different as to the reasoning of the Independent Appeal Panel. However in relation to the exercise of the court's inherent power which is also relied on by BAF evidence is admissible within limits consistent with the nature of the application and Mr Pollock QC has sensibly not objected to reference to the decision of the Independent Arbitration Panel (although he submits it is of no relevance to the issues on this appeal).

The parties are agreed that the correct approach to Order 18 r19 is to be found from a passage in the judgment of Stuart-Smith LJ in *A.B. and Others v South West Water Services Limited* [1993] QB 507 at p 156 where he said:

> "Before considering the grounds of appeal it is necessary to bear in mind the proper approach of a court in an application to strike out. The pleaded facts must be assumed to be true. It is only in a clear and obvious case, or one that is "doomed to fail," to use the words of Lord Bridge of Harwich in Lonrho Plc. v. Fayed [1992] 1 A.C. 448, 470, that the court should take this draconian step. Moreover in a developing field of law the court may be reluctant to determine a difficult point of law on the scanty facts pleaded in the statement of claim:"

The reference by Stuart-Smith LJ to the appropriateness of the court determining difficult points of law reflects the increased willingness of the courts to determine issues of law prior to a conventional trial of an action where it will result in the earlier resolution of disputes and a saving of costs. This is obviously desirable and, bearing in mind the provisions of Order 14A and Order 33 rules 3 and 4 to which I have referred, is understandable. It is not now

difficult to find examples of extremely difficult points of law being determined on applications to strike out (A good example is provided by *X (Minors) and Bedfordshire County Council and others* [1995] 2 A.C. 633). Furthermore the Court will not always confine a party to his application under Order 18 r19 where he could succeed if there had been an order made under Order 33 r3 (see *Williams and Hernbot Ltd v W & H Trade Marks Ltd* [1986] A.C. 368 at p 435 and *Smith v Croft* [1988] 1 Ch at pp 133/5)

Nonetheless, a word of caution is not inappropriate as to the dangers of allowing Order 18 r19 to be used as a vehicle for determining issues for which it is not really suited. Order 33 rules 3 and 4 have a considerable advantage over Order 18 r19. First, there is the fact that the court has a discretion as to whether to order an issue to be tried. This enables the court to weigh up the advantages and disadvantages of taking this course when exercising its discretion to determine how the action should proceed. It need only order an issue if this will be in the interests of the efficient disposal of the proceedings. The court has no control over an application to strike out. Under Order 18 r19 the court can, unless it is careful, find itself subjected to prolonged argument. It is then difficult for the court to avoid deciding issues which involve extending the courts jurisdiction on a striking out application to the limits so as to avoid all the costs which have been incurred on the application to strike out being wasted. In addition when considering whether to order an issue to be determined, the court can make provision for the evidence needed to determine the issue to be available so that the issue can be determined in the correct factual context. Even under Order 14A, although the procedure is not intended for the resolution of disputes as to fact, both parties can support their case by affidavit evidence. See Supreme Court Practice 1997 14A/1-8.

The Issues

The arguments on the allegation that the laboratory which carried out the testing was not accredited are not the same as those advanced in relation to the allegation that two members of the Disciplinary Committee were affected by bias. However in relation to both allegations, Mr Pannick accepts that the court must assume, for the purposes of the appeal that the respective rules are incorporated into a contract between the plaintiff and BAF. In addition it is to be assumed that the members of the Disciplinary Committee were in fact biased as alleged. The assumptions have to be made notwithstanding that, if the appeal does not succeed, BAF reserves the right to dispute this is the position.

The Accreditation Issue

Mr Pollock's argument on this issue is clear and straightforward. It is that the terms of the contract between the parties was such that BAF were only entitled to suspend the plaintiff and to require the plaintiff to submit herself to their disciplinary process if a prohibited substance had been detected in a sample given by the plaintiff upon analysis by an accredited laboratory. Unless an accredited laboratory had identified the presence of a prohibited substance BAF had no jurisdiction to take any further action and in particular had no jurisdiction to inform the athlete that she was suspended. If Mr Pollock is right in his argument so far, then I would have no difficulty in accepting the remainder of his argument.

If, as Mr Pollock submits, the analysis of a sample by a accredited laboratory goes to jurisdiction, that is to say, it is a condition precedent to BAF being allowed to take the steps which follow, (set out in Appendix B) then, as he also submits, the opinion of the Independent Appeal Panel as to whether the laboratory was accredited is strictly speaking irrelevant for the purpose of determining whether or not BAF was in breach of contract. On this approach the

rules would only give the BAF its powers after there had been an analysis by an accredited laboratory.

As to the issue of accreditation, I also agree with Mr Pollock that at this stage it is not possible to reject his contention that because of the move the laboratory ceased to be accredited. This is very much an issue which has to be determined on its facts having regard to the relevant rules. It would be surprising indeed if the premises where the analysis is to take place cannot affect its continued accreditation. To take Mr Pollock's example, a laboratory which was previously housed in "a gleaming high tech temple to science is unlikely to be regarded as having preserved its identity if, following a fire, some of the staff carry out some work from a potting shed. "

There remains however a critical question as to whether the analysis by an accredited laboratory is a condition precedent to BAF's power to suspend. Here it is convenient to start with the BAF rules. Rule 24 (14) is quite explicit and clear in stating that under paragraph 14 "an athlete shall be suspended from the time that the Drug Advisory Committee considers there is evidence that a doping offence has taken place and written notice to that effect has been sent to the athlete concerned". The Rule says nothing about the use of accredited laboratories. The accredited laboratory is only introduced by the Appendix B.

As to Appendix B, paragraph 22 states that a departure from the procedures set out in the appendix shall not invalidate the finding that a prohibited substance was present in a sample or that a prohibited technique had been used, unless the departure was such as to cast doubt on the reliability of the finding. Appendix B sets out the "Rules and Procedures" as a series of steps, one of which is that "samples will be analysed by an accredited laboratory". That is therefore part of the procedure which is specifically subject to paragraph 22 of Rule 24. The

object of paragraph 22 is clear. It is to avoid technical points being taken which lack any real merit. Even, if, as I assume is the case, changes in the situation since accreditation could affect the continuation of the accreditation, obviously, the non- accreditation need not cast any doubt on the reliability of a finding which has been made as a result of an analysis. In such a situation paragraph 22 should apply.

In this case Mr Pollock does not suggest that the non-accreditation had any effect on the finding which was made by the laboratory. This being so under paragraph any loss of accreditation would not be a departure from the procedures laid down which cast doubt on the reliability of the finding and so would not affect the validity of the plaintiff's suspension. This therefore is not an issue, which on the correct interpretation of the contract, is for the domestic tribunal to decide and not the court(See *Lee v The Showmans Guild of Great Britain* [1952] 2QB 329).

This result under the IAAF rules is even clearer. The very use of the term "Guidelines" does not suggest provisions which go to jurisdiction or are condition precedents to the exercise of a body's jurisdiction. Then Rule 55 and the terms of Guideline 1.2, if they apply to the question of accreditation of the laboratory, are inconsistent with the possible loss of accreditation resulting in a loss of jurisdiction.

The BAF Rules are the rules for implementation in this country of requirements parallel to those contained in the IAAF Rules. If there is any ambiguity as to the interpretation of the BAF Rules then the IAAF can be used to resolve that ambiguity. Reference to the IAAF Rules, therefore, puts this issue beyond doubt.

I would therefore reject the judge's view on this issue, In doing so I would emphasise that the question of the interpretation of the BAF Rules is a question for the courts. In the words of Denning LJ in the *Lee* case, the court "cannot permit a domestic tribunal to deprive a member of his livelihood or to injure him in it, unless the contract, on its true construction gives the tribunal the power to do so. I repeat "on its true construction", that I desire to emphasise that the true construction of a contract is to be decided by the courts and by no one else". (See p 344)

In this case we are not dealing with a situation where the disciplinary body had deliberately chosen to use a non-accredited laboratory. That situation would be different from that which exists here. Here it is said that by changing its location a laboratory which at one time had been perfectly appropriately accredited, ceased to be accredited. I accept that a change of location could affect accreditation. Whether it did so would depend on the effect of the change on the ability of the laboratory to perform the functions for which it is accredited. Here it is not the location which is important but the appropriateness of the site for carrying on the laboratory's functions. Even if it was still on the same site as at the time of the original accreditation a change in the building (eg to the potting shed) could be a matter of significance. Whether it was, would be a matter of opinion or fact and degree which it is appropriate for the tribunal to determine.

Bias

In determining this issue there are three matters which are critical. The first is the nature of the bias alleged. Here the allegations have to be assumed to be true even though were there to be a trial this would need to be established. The second is the term which has to be implied into the contract between the plaintiff and BAF which is alleged to have been

contravened. The third is whether there has been a breach of that implied term. In determining the third matter, it is necessary to deal with a contention of partial waiver. This was a point which Popplewell J determined in BAF's favour. On the bias issue it is not necessary to consider BAF Rule 24,(22), IAAF Rule 55 or Guideline 1.2., since BAF accepts they would provide no defence to an allegation of unfairness.

The allegations of bias relate to members of the Disciplinary Committee. It is not suggested that the decision of the Independent Appeal Panel was affected by the alleged bias of the members of the Disciplinary Committee. It is two of the five members of the Committee, the Chairman Dr Lucking and Mr Guy who it said was affected by bias. No criticism is made of the other three members although the decision was unanimous.

Before the Disciplinary Committee the plaintiff's case was that there had been degradation of the sample and failure to observe good laboratory practices. It was suggested that this created a real doubt as to whether the tests were fair and reliable. The Committee recorded that they considered very carefully the issue of degradation and its possible effects. The Independent Appeal Panel which was presided over by a distinguished QC had "further documents and evidence presented to it." In its reasoned decision the Independent Appeal Panel identified five arguments which were advanced on behalf of the plaintiff, as to accreditation. The Panel, however determined all the issues against the plaintiff apart from the question whether degradation of the sample could have given rise to a false result. On that issue basing their conclusions on the additional evidence which had not been before the Disciplinary Committee, the Panel came to a decision that they were not sure of the plaintiff's guilt and, accordingly, her appeal succeeded.

Dr Lucking is alleged to have been biased because of statements which he had made, the effect of which were, that he presumed that all athletes charged with doping offences were guilty and that the Disciplinary Committee had acted as "a rubber stamp". The principle allegation against Mr Guy is based on his being a senior official and a member of the technical committee of the IAAF. It is alleged that the spokesman of the IAAF had indicated that the plaintiff was guilty of the offence charged prior to the decision of the Committee and therefore it is suggested it is a reasonable inference that Mr Guy held similar views to that of the spokesman.

The plaintiff raised issues of the appropriateness of Mr Guy being a member of the Disciplinary Committee prior to the hearing but did not do so at the hearing. Popplewell J considered that the plaintiff had therefore lost her right to rely on the matters of which she was aware prior to the hearing but not the right to rely on other matters of which she had not been aware. In those circumstances he considered that it would not be appropriate to strike out any part of the statement of claim.

Mr Pannick in this court accepted that if there had not been the further hearing before the Appeal Panel the allegations of bias would require investigation at a trial. He also accepted that if there was a contract there would be an implied term as to the fairness of the disciplinary process. However he disputed the implied term relied on by Mr Pollock. This was "those sitting on the Disciplinary Committee would act in a bona fide manner and would not be biased" This alleged implied term was based on the affidavit of Professor Radford, the Executive Chairman of the defendants who accepted that there was such a term. Mr Pannick does not accept this concession. He submits that the question of what term is to be implied is a question of law for the court. In his submission if there is an implied term, it is to the effect that the disciplinary proceedings are only flawed if the proceedings as a whole are unfair. Here

the fact that there was a perfectly proper de novo hearing which cured any defect in the proceedings before the Disciplinary Committee.

Mr Pollock suggested that Mr Pannick was in error in seeking to rely on what he referred to as an administrative law approach in the different field of contract. There are distinctions between an action which is brought for breach of contract and proceedings for judicial review but Mr Pollock is wrong in suggesting that the approach of the courts in public law on applications for judicial review have 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. 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 p346):

> "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.

Had the plaintiff been in a position to initiate proceedings for judicial review (as could well be the case), it would not have been necessary for BAF to make an application to strike out the plaintiff's claim. If BAF are right in their submissions the plaintiff should not have obtained leave to apply for judicial review. Furthermore even if the plaintiff obtained leave, if she was seeking a remedy in public law, she would not have been entitled to damages. At best she would have succeeded in having the decision of the Disciplinary Commission quashed. She would then have been faced with the predicament that if the decision of the Disciplinary Committee was quashed logically the Appeal Tribunals decision would also have to be quashed since the Appeals Tribunals jurisdiction depends upon there being a decision of the Disciplinary Committee from which there is an appeal.

The fact that the plaintiff would not be entitled to damages in public law also draws attention to what might be thought to be a surprising consequence of her claim for damages. If in the absence of bias or other unfairness, the Disciplinary Committee made a decision which was wrong, she would not be entitled to recover any damages whether by way of wasted costs or otherwise. Nor would she have been entitled to have her suspension stayed. Her sole remedy would be to appeal to the Appeal Tribunal who would have no power to award her costs or damages. However she contends because of the bias she can recover both her costs and the damages to compensate her for loss of her earnings during suspension. The system of appeals is one which is constructed on a model which, presumably, deliberately did not provide a remedy of costs or damages yet she is relying on an implied term which will provide these remedies.

In considering whether there is such an implied term which will provide her with these remedies it is important to note that if there is a contract, it is not a "one off" contract. The implied term either exists or does not exist for all athletes subject to the BAF Rules. This is therefore not a situation where the plaintiff would be able to rely on any particular facts in relation to her own circumstances, which would affect the nature of the implied term. Any material of which evidence would be available or admissible which would effect the interpretation of this contract so far as the implied term is concerned would need to effect the interpretation of all BAF contracts with athletes. This is of some importance as the defendants are seeking to strike out the plaintiff's claim prior to the trial when there has been no opportunity to call or cross examine witnesses and Mr Pollock submits the cross examination of Professor Redford could be critical to his case.

In determining what term it is appropriate to imply, there are two relevant general considerations. First of all the term is to be implied into a disciplinary procedure which has three stages. Each of which can result in the issues being reconsidered de novo. When there is a disciplinary code involving this sort of appeal process, the general inference is that it is the appeal process itself which is intended to remedy defects in an earlier stage or earlier stages of the process. The second feature is that we are dealing here with the implying of a term which will mean that the courts will be drawn into making decisions in relation to the actions of sporting bodies, which is something which the courts only do with reluctance. This is a matter to which Sir Nicholas Browne-Wilkinson, Vice Chancellor drew attention in *Cowley v Heartley and others,* (24th July 1986) The Times Newspaper.

What Sir Nicholas Brown-Wilkinson said was:

"The court would echo the sentiments expressed by Sir Robert Megarry, Vice Chancellor, in *McInnes v Onslow-Fane*
[1978 1WLR] 1520 at 1535, where he said:

> "I think that the courts must be slow to allow any implied obligation to be fair to use as a means to bringing before the court 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 ...."

"The concept of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens ...

"Bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might become degraded and corrupt ought not to be hampered in their work without good cause."

"The court would say with great respect that that made good sense. It was the court's function to control illegality and to make sure that a functioning body did not act outside its terms. But it seems that no good cause would be served by attempting to regulate a domestic body such as the Commonwealth Games".

In the public law field, the usual approach in a situation where there is a right of appeal de novo as here was made clear in the Court of Appeal in *Lloyd and others v McMahon* [1987] 1 A.C. 625. Normally defects will be cured by the appeal and, in the different context of that case, the House of Lords regarded the right of a full appeal as being capable of remedying an earlier defect which could cause unfairness. The same approach was adopted in the earlier case of *Calvin v Carr* [1980] A.C. 575 by the Privy Council. In that case the Privy Council had to consider a situation where the stewards of the Jockey Club had found the plaintiff guilty of a breach of the relevant rules but there was a right to appeal to the Committee of the Australian Jockey Club. It was suggested by conducting a hearing de novo the Committee had cured the defects in the steward's inquiry. Lord Wilberforce when delivering the judgment of the Privy Council, recognised that the decision of the stewards, resulting in disqualification, had serious consequences for the plaintiff and that there could be cases where a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body but he acknowledged this did not apply to all situations. He said:

"In their Lordships' opinion this is too broadly stated. It affirms a principle which may be found correct in a category of cases: these may very well include trade union cases, where movement solidarity and dislike of the rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first - probably branch - level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be

taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.

> In their Lordships' judgment such intermediate cases exist. In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry, for example where it has no material but a transcript of what was before the original body. In such cases it would no doubt be right to quash the original decision. These are all matters (and no doubt there are others) which the court must consider. Whether these intermediate cases are to be regarded as exceptions from a general rule, as stated by Megarry J., or as a parallel category covered by a rule of equal status, is not in their Lordships' judgment necessary to state, or indeed a matter of great importance. What is important is the recognition that such cases exist, and that it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a measure of formal judicialisation. While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency in their Lordships' opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced."

Neither House of Lords or the Privy Council were seeking to lay down any principle of general application. The correct approach must depend upon the consideration, in the case of a public body, what will usually be the terms of a statute and in the case of the private body its rules which have to construed against the relevant background.

In the case of the present rules I am unable to say it is clear beyond doubt that Mr Pannick is correct in submitting that the courts will not imply a term which goes beyond requiring the disciplinary process in which the plaintiff has become involved to be fair as a whole. I recognise that the adoption of any implied term which does not treat the disciplinary process as a whole could be said to be inconsistent with the clear intent of the BAF and IAAF Rules which is to confine the right of appeal

to issues of substance and not to allow procedural defects to interfere with disciplinary proceedings unless they would affect the integrity of the decision. There is also the need to recognise the consequences of requiring each stage of the process to be fair even though there may be no dispute that the procedure as a whole was fair and that the decision was correct. However that this can be the situation was accepted by Lord Wilberforce.

The allegations of bias against Mr Guy in this case illustrate the sort of problems which will arise if athletes are able to come to the courts instead of availing themselves of the intended domestic appeal procedure. Allegations of bias are easy to make and difficult to refute. If more than a process which as a whole is fair is required the courts will have to take care not readily to interfere by injunction as otherwise the whole war against drugs in sport could be undermined.

If it was the process as a whole which had to be looked at, then in my judgment it is self evident that even if there was bias of the sort relied upon by the plaintiff as to a minority of members at one level only this could not contaminate the whole. The appeal procedure would then have achieved what it was intended to achieve mainly the setting aside of the decision of the Disciplinary Committee on the basis of the new evidence which was available to the Appeal Committee but was not available to the Disciplinary Committee. If there is to be any criticism made of the disciplinary process as a whole it is that it does not provide any compensation for athletes who only succeed on an appeal but this is a question for the makers of the rules and not the courts. The same criticism can be made of any appeal process which does not provide the compensation which the plaintiff seeks to obtain in these proceedings. Here it is not unimportant to have in mind that IAAF Rules apply to jurisdictions which do not have in their courts "our cost" shifting traditions and in those jurisdictions it would be no surprise that there is no power on appeal being successful to award costs.

If however, as I accept is arguable each step in the appeal process has to be fair, it is equally clear it can not be said the allegations of bias will fail. It is regrettable there had not been an order for the determination of an issue when the available evidence could have been considered in determining this question.

Having come to this conclusion, it is now necessary for me to deal with the question of waiver. Here I would indicate that I would not for myself prevent the plaintiff relying upon her complaints as to Mr Guy. This is not because I accept Mr Pollock's argument that a waiver could not be established in this situation. If all that was being relied upon was the allegations of which the plaintiff was aware prior to the hearing of the Disciplinary Committee, then I would regard the failure to raise them at that hearing as being fatal to her claim for breach of contract. In such a situation the plaintiff could be met by various defences. First that she had by her silence made a representation that she was no longer relying upon her complaints raised in the correspondence which representation prevented the Disciplinary Committee considering her complaints. In addition it could be argued that you are not being treated in breach of an implied term as to fairness if you know of grounds of complaint but do not rely upon them. Alternatively the cause of any loss you suffer in these circumstances, is your failure to raise your complaint rather than any default on behalf of the tribunal.

However I would not prevent the plaintiff relying on her complaints about Mr Guy because in considering whether there is a breach of the implied term, the plaintiff is entitled to say that while I did not wish to rely upon Mr Guy's alleged bias alone and I am estopped from doing so, I wish now to base my allegations on the combined effect of Dr Luckings and Mr Guy's bias of which I was not aware when I made my previous decision not to rely on information which I did know. This I believe was Popplewell J's approach. He was allowing all the allegations to go forward so that the court could consider the position as a whole. He was right to do so.

Earlier in this judgment I indicated a concern as to whether the issues raised on this appeal were appropriate to be raised on a striking out application. I also pointed out, if this had been a case of judicial review, the question whether the case had any real prospect of success would have been determined on the hearing of the application for leave. It is sometimes said that the leave process is not necessary because if a case is without merit there can be an application to strike out. The discretion under Order 18 r19 is in fact narrower than the discretion of the court on an application for leave to apply for judicial review even if you ignore the differing position as to the party upon whom the onus rests. However where the application is made under the inherent jurisdiction of the court the courts powers are somewhat wider. They are nonetheless still more restricted than when a court is invited to determine an issue under Order 33.

The issues which arise on this appeal are more appropriate to the resolution of the determination of an issue than an application to strike out. Nonetheless in the end the issue as to accreditation involves questions of interpretation, that is law, which I do not consider require any consideration of the facts or the particular position of the plaintiff. The appeal was made to this court with the leave of the judge given at the invitation of both parties. Both parties wanted the issues determined if the court was in a position to do so. I have come to the clear conclusion that if this action were to proceed, the plaintiff would be bound to lose on the accreditation issue. This being so, it is important from the plaintiff's point of view as well as that of the defendants we should stop that issue proceeding further.

I would therefore allow the defendant's appeal in part and strike out the plaintiff's claim as to the accreditation issue.

LORD JUSTICE MORRITT: In the circumstances described by the Master of the Rolls there are two principal issues, namely accreditation and bias. Mrs Modahl contends that each of them, at

least arguably, gives her a cause of action; the Federation submits that it is beyond reasonable argument that they do not so that the statement of claim should be struck out and the action dismissed forthwith.

The claims of Mrs Modahl are based on a contract between her and the Federation constituted by the latter's "Rules for Competition" under which she has competed. For the purposes of this appeal that is not disputed by the Federation. Thus the terms of the contract are to be ascertained from the rules of the Federation and what may be properly implied in them. Whether or not the contract has been broken cannot be finally determined on this appeal; the Court has to assume the truth of what Mrs Modahl asserts in her statement of claim.

In common with most sporting bodies the Federation is concerned to prevent the use of drugs by athletes. Accordingly Rule 24(1) provides that doping in or out of competition is strictly forbidden and an offence. Rule 24(5) provides that the offence occurs when a prohibited substance is found to be present within an athlete's body tissue or fluids. Testosterone is a prohibited substance. Rule 24(8) reminds athletes that it is their duty to ensure that no prohibited substances enter their body and that they are responsible for all and any substance detected in samples given by them. Rule 24(12) requires the athlete to submit to doping control and provides that failure to do so and produce a sample when required is itself a doping offence.

The Rules and Procedures concerning Doping Control are contained in Appendix B. Rule (B2) requires the athlete to provide a urine sample which is divided into a main "A" sample and a reserve "B" sample. Rule (B3) provides that "samples will be analysed by an accredited laboratory". If the "A" sample is positive the Federation and the athlete are informed and, if required by the athlete, the B sample is then analysed at the same laboratory and the result sent to the Federation.

Rule 24(14) provides that

> "The Federation Drug Advisory Committee will deal with any offences under its Doping Procedures. Under these procedures disciplinary proceedings will take place in three stages:
>
> (a) suspension (an athlete shall be suspended from the time that the Drug Advisory Committee considers that there is evidence that a doping offence may have taken place...);
>
> (b) hearing;
>
> (c) decision on eligibility."

Mrs Modahl was suspended by the Federation on 6th September 1994 following the receipt by the Federation of the analyses of the A and B samples provided by Mrs Modahl on 18th June 1994 after competing at the San Antonio Athletics Meeting in Lisbon. The analyses, which purported to show that Mrs Modahl had had an excessive quantity of testosterone, were carried out by Laboratorio de Analises de Doping e Bioquimica of Lisbon.

Rule 24(22) provides

> "A departure or departures from the procedures set out in the Rules and Procedures concerning Doping Control (Appendix B) shall not invalidate the finding that a prohibited substance was present in a sample...unless this departure(s) was such as to cast real doubt on the reliability of such a finding."

The hearing which Rule 24(14)(b) envisages is provided for by Rule (B7). That provides

> "Following suspension for an offence under Rule 24 there will be a disciplinary hearing before the Disciplinary Committee at a date...in the absence of an agreement...not less than 21 days from the notice of the hearing...The Disciplinary Committee will consist of members of the Federation Drug Advisory Committee or its nominees..."

The Disciplinary Committee hearing took place on 13th and 14th December 1994. The Chairman was Dr Lucking and Mr Al Guy was one of its four other members. The Committee considered the

contention of Mrs Modahl that the samples had been degraded so as to be unreliable. The Disciplinary Committee stated that it was satisfied unanimously beyond reasonable doubt that a doping offence had been committed by Mrs Modahl and, under Rule 24(15), declared her to be ineligible to compete for four years from 18th June 1994.

Rule (B8) confers on the athlete or the Federation the right of appeal within 21 days. The appeal is to an independent appeal panel. The hearing of such an appeal took place from 24th to 26th July 1995. The Independent Appeal Panel considered whether the laboratory at which the analysis of the samples had taken place was properly accredited and whether its procedures were acceptable and its staff competent. It concluded those issues in the affirmative. It also considered on the basis of evidence not before the Disciplinary Committee that there was a possibility that

> "the samples had become degraded owing to their being stored in unrefrigerated conditions and that bacteriological action had resulted in an increase in the amount of testosterone in the samples. Mrs Modahl is therefore entitled to succeed in her appeal."

The Federation does not challenge that decision.

Mrs Modahl asserts that the laboratory was not "accredited" within the meaning of Rule (B3). She claims that the Federation had no right to suspend her or to subject her to any further doping control if the laboratory at which the samples were analysed was not "accredited". The Federation counters this argument with the submission that even if the laboratory was not accredited the lack of accreditation was only a departure from the Rules and Procedures concerning Doping Control so that it did not invalidate the finding unless the departure was such as to cast real doubt on the reliability of such a finding. It is not asserted on behalf of Mrs Modahl that the lack of accreditation, which is to be assumed, was of itself such as to cast real doubt on the reliability of the finding. The riposte made on her behalf is that the requirement of Rule (B3) that the laboratory be accredited is mandatory and not a procedure a departure from which comes within Rule 24(22).

Thus the point of contention on which the accreditation point depends at this stage of the proceedings is whether Appendix B can be divided into procedures, departures from which may in accordance with Rule 24(22) be permissible and mandatory requirements or rules which must be strictly observed.

I am unable to accept the arguments advanced on behalf of Mrs Modahl. There is no wording in Appendix B to justify any such distinction. Moreover the Federation's rules are modelled on those of the International Amateur Athletic Association. In those Rules the equivalent of Appendix B is entitled Procedural Guidelines for Doping Control. Rule 1.2 provides that

> "a departure or departures from these guidelines shall not invalidate the finding of prohibited substance unless it was such as to cast real doubt on the reliability of the finding."

Rule 7.2 provides that

> "only laboratories accredited or approved by the IAAF/IOC may be used to carry out analysis on samples taken in accordance with doping control."

To accept the submission for Mrs Modahl would involve giving to the rules of the Federation a different meaning and effect to those of the IAAF which cannot have been intended. Moreover I can see no reason why the parties should have intended that any defect in the accreditation of the laboratory should invalidate the doping control even in cases in which such defect does not cast any doubt on the reliability of the finding.

I accept that it cannot have been the intention of either party to this contract that analyses carried out by organisations with no pretence of being accredited laboratories should be acted on. But in my view such cases are properly catered for by Rule 24(22). Though it was not contended in this case that the defect in accreditation was itself such as to cast real doubt on the reliability of the

finding the point will be available where it is apparent that the requisite analysis may not have been carried out either under proper conditions or, perhaps, at all due to the nature of the organisation from which the report of the analyses has been received.

I would also reject the point made on behalf of Mrs Modahl, which was connected to the accreditation point, to the effect that a report from an unaccredited organisation cannot be evidence for the purpose of Rule 24(14) capable of leading to the suspension of an athlete. It was not suggested that the Drug Advisory Committee could only act on evidence admissible in a court of law. In those circumstances the content of the report from the organisation which carried out the analysis, whether accredited or not, must be capable of being evidence on which the Drug Advisory Committee is entitled to act, subject always to the provisions of Rule 24(22).

Accordingly in my view the Federation is right in its contention that the accreditation issue does not give to Mrs Modahl a reasonably arguable cause of action against the Federation for damages for breach of contract.

In her statement of claim Mrs Modahl claims that there is to be implied into the contract between her and the Federation terms to the effect that those selected to sit as members of the Disciplinary Committee would be free from bias and that she would have a fair and impartial hearing before both the Disciplinary Committee and the Independent Appeal Panel. She alleges that Dr Lucking and Mr Guy, the Chairman and a member of the Disciplinary Committee, were biased. On this application the Court has to assume the truth of these allegations which, if proved at the trial, would constitute a breach of the implied terms for which Mrs Modahl contends.

The Federation argues that such terms are not to be implied but even if they are no damage could have been sustained in consequence of the assumed breach. The implication of terms is a

question of law for the court. But the answer depends, in part, on the surrounding factual circumstances. The circumstances on which the Federation relies are that Rule (B8) provides for an appeal by way of a complete rehearing not confined to the evidence heard by the Disciplinary Committee. It is submitted that in those circumstances there can be no complaint concerning the conduct of the lower tribunal for its decision can be, and in this case was, reversed by the appellate body. Reliance was placed on R v Visitors to the Inns of Court ex p.Calder [1994] QB 1 and Calvin v Carr [1980] AC 574. In the first the Court of Appeal determined that the decision of the Visitors was amenable to judicial review. In that context it was held that the appeal to the Visitors cured any defect in the hearing before the disciplinary tribunal unless it could be said that the evidence before them was restricted by the proceedings before the tribunal. In the second case the plaintiff complained about his disqualification by the Australian Jockey Club. He contended that the hearing before the stewards was defective; but he was entitled to and did appeal to the Jockey Club which heard the case afresh. The Privy Council agreed with the Supreme Court of New South Wales that the appeal to the Jockey Club remedied any defect in the proceedings before the Stewards. That case was based on the contract between the Jockey Club and the plaintiff and not on principles of administrative law. However in both the plaintiff was concerned to set aside the relevant decision for the future rather than to obtain compensation for what had occurred in the past.

The Federation contends that those cases indicate that the term to be implied in the contract is limited to one which requires that the overall process should be fair and precludes a claim based on a defect at a stage earlier than the final decision. Counsel contends that such a conclusion would be consistent with the policy of the courts, exemplified in McInnes v Onslow-Fane [1978] 1 WLR 1520 (boxing), Cowley v Heatley The Times 24th June 1986 (swimming) and Gasser v Stinson Scott J 15th June 1988 unreported (athletics), not to allow the implication of contractual terms to be used as a means of bringing before the courts for review honest decisions of sporting bodies exercising a disciplinary or regulatory function.

Obviously the contentions put forward by the Federation are arguable but I do not find them so compelling as to drive me to the conclusion that the case for Mrs Modahl is not capable of reasonable argument. First, although the question whether or not to imply a term into a contract is one of law for the Court, the answer often depends on the factual circumstances surrounding the making of the contract. Such circumstances would include, in this case, the facts from which Professor Radford drew the conclusion reflected in his statement to which the Master of the Rolls has referred. Second, one of the unusual features of this case is the lack of any power not to suspend the athlete while the rival contentions are being resolved. If there is evidence such as referred to in Rule 24(14)(a) the Drug Advisory Committee have no choice; the suspension is automatic. Under Rule (B7) there cannot be a hearing before the Disciplinary Committee unless the athlete has been suspended and the Independent Appeal Panel's jurisdiction under Rule (B8) is limited to an appeal after the hearing before the Disciplinary Committee. There is no power in the Rules to suspend the suspension required by Rule 24(14)(a) pending the later hearings provided for by Rules (B7) and (B8). Thus the procedure is not adequate to deal at a later stage with all the consequences of defects at an earlier stage. Third, in this case, unlike those on which the Federation relies, Mrs Modahl does not seek to set aside for the future a decision adverse to her; that has been done by the Independent Appeal Panel. She seeks compensation for the consequences of a defect at an intermediate stage which the overall procedure could not have avoided. The fact that damages are not available in judicial review proceedings is not in my view relevant to what term to imply. Damages would not have been recoverable in such proceedings if the overall result had been unfair, yet even on the Federation's case they would be recoverable for breach of contract.

In all these circumstances it is, in my view, well arguable that the term to be implied is that for which Mrs Modahl contends rather than the more limited one which the Federation accepts.

One of the factors which the court at trial will need to bear in mind is the consequence of implying a term such as that for which Mrs Modahl contends. It cannot be in any one's interests that in the course of some sporting event interlocutory applications should be made to the court for injunctive relief in reliance on some alleged breach of contract at an early stage of a disciplinary or regulatory procedure. But it does not follow from that consideration that the solution is to refrain from the implication of the appropriate term rather than the denial of interlocutory relief until the domestic remedies afforded by the rules have been exhausted.

As the claim is in contract damage, if only nominal, is presumed to flow from its breach. Accordingly the contention that even if there is to be implied the duty alleged by Mrs Modahl her claim must still be struck out as she has sustained no damage is wrong. But I do not accept the basis on which the submission is advanced. The contention was that as the Independent Appeal Panel allowed the appeal on evidence not before the Disciplinary Committee and as no complaint was made as to the fairness of the Independent Appeal Panel it must follow that had the Disciplinary Committee consisted wholly of unbiased members it would have reached the same conclusion as the defectively constituted Disciplinary Committee in fact reached. This assumes that evidence comparable to that put before the Independent Appeal Panel could not have been made available to an unbiased Disciplinary Committee. But that is a question of fact to be determined on all the evidence at the trial not a ground for striking out a reasonably arguable cause of action.

Before the judge the Federation also contended that the conduct of Mrs Modahl was such as to preclude her from relying in this action on the allegation of bias on the part of Mr Al Guy. The facts are not in dispute. In September 1994 a press officer for the IAAF made a statement suggesting that Mrs Modahl was guilty of the doping offence with which she was charged. Mr Guy was a member of IAAF. At a meeting on 13th September 1994 there was an off the record

discussion between members of the Federation and representatives of Mrs Modahl as to whether, in the light of the Press Officer's statement, Mr Guy should sit on the Disciplinary Committee. As a result of that discussion on 26th September the Federation's solicitors wrote to those for Mrs Modahl to the effect that having considered the matter further the Federation considered that Mr Guy was to be regarded "as independent of any alleged prejudice that you feel may have been shown at any stage by the IAAF's press officer". On the following day the solicitors for Mrs Modahl wrote a long letter to the solicitors for the Federation noting what they had had to say about Mr Guy. On 29th September the Federation's solicitors replied suggesting that if Mrs Modahl remained concerned on the question of alleged apparent bias or prejudice she should raise it at the directions hearing proposed by the Chairman of the Disciplinary Committee. There was such a hearing. No objection was taken to Mr Guy being a member of the Disciplinary Committee either at that hearing or subsequently when the Disciplinary Committee considered the case against Mrs Modahl. The judge held that in those circumstances Mrs Modahl had waived any right she might otherwise have had to complain about the participation of Mr Guy.

For Mrs Modahl it is contended that the judge was wrong. It is submitted that as the claim is contractual it is necessary for the Federation to establish against Mrs Modahl a case of election, accord and satisfaction or estoppel. It is unnecessary to consider whether there are any material differences between an estoppel and a waiver for it is clear that the conduct of Mrs Modahl was capable of creating an estoppel of the type exemplified in Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 and later described by Lord Denning as a waiver in W.J.Alan & Co v El Nasr Export [1972] 2 QB 189, 213. Assuming that she was entitled to object to the participation of Mr Guy she refrained from doing so when invited. It is suggested that the Federation has not demonstrated that it acted in reliance on the silence of Mrs Modahl. But in my view it is plain that it did for it proceeded with the hearing without considering any further the objections of Mrs Modahl.

But it does not follow that Mrs Modahl's contentions should be struck out at this stage. The question of waiver or estoppel depends, in part, on knowledge. It is not asserted that Mrs Modahl then knew of and waived or is estopped from relying on the matters concerning Dr Lucking of which she now complains or of other matters concerning Mr Guy on which she now wishes to rely. In my view it is arguable that Mrs Modahl is not estopped from relying on the matters concerning Mr Guy of which she did know because of the possible cumulative effect of the other matters of alleged bias of which she did not know. In these circumstances I do not think that it is plain beyond argument to the contrary that Mrs Modahl has waived or is estopped from reliance on the allegations now pleaded in respect of Mr Guy. Accordingly in this respect also I do not agree with the conclusions of the judge but as he did not strike out the allegations concerning Mr Guy there is no need to alter his order in that respect.

For these reasons I agree that the appeal should be allowed in respect of the accreditation issue but dismissed on the bias and waiver issues.

LORD JUSTICE PILL: On the accreditation issue, Mr Pollock QC, for the plaintiff, submits that the issue turns entirely upon the construction of the contract and I approach it on that basis. It is submitted that under the BAF Rules a test by a laboratory which is accredited is necessary as the foundation for the Disciplinary Committee's jurisdiction over the plaintiff. It is also submitted that a distinction should be drawn, when considering "Appendix B, Rules and Procedures concerning doping control", between those provisions which are "rules" and those which are "procedures". Under Rule 24(22) it is only a departure from the "procedures" which will not "invalidate the finding". The provision that samples will be analysed by an accredited laboratory was a rule and not a procedure so that the requirement of accreditation was unaffected by the provisions of Rule

24(22). It is not suggested, upon the facts of this case, that the alleged absence of accreditation in itself "cast real doubt upon the reliability of [relevant] findings" within the meaning of Rule 24(22).

Viewed as a matter of construction, I agree with the conclusion reached by Lord Woolf MR and Morritt LJ. I see no justification for attempting to subdivide the provisions of Appendix B into those which are "rules" and those which are "procedures". No subdivision is attempted in the Appendix itself and the detailed provisions in sixteen paragraphs do not appear to me readily to lend themselves to such sub-division. The distinction between rules and procedures is not made in Rule 24(14). The sentence at paragraph 3 of Appendix B "Samples will be analysed by an accredited laboratory" falls squarely within that part of the appendix dealing with what would ordinarily be regarded as "procedures" relating to drug testing. It is in my judgment covered by the word "procedures" in the opening words of Rule 24(22).

The Rules do not in my judgment lead themselves to a finding that the Drug Advisory Committee has jurisdiction only if the sample is from an accredited laboratory. Rule 24(14)(a) imposes a duty upon the Drugs Advisory Committee and one to be performed in broad circumstances:

> "Disciplinary proceedings will take place in three stages: (a) suspension (An athlete shall be suspended from the time that the Drugs Advisory Committee considers that there is evidence that a doping offence may have taken place and written notice to that effect has been sent to the athlete concerned; (b) hearing; (c) decision on eligibility."

The formulation of that rule does not suggest the existence of a jurisdictional bar arising from procedural requirements such as accreditation. I would strike out that part of the claim which is based on the alleged lack of accreditation.

My conclusion on the second issue, that of bias, depends upon the wording of the BAF rule to which a I have just referred, Rule 24(14). I agree with Lord Woolf MR that the courts will be drawn into making decisions in relation to the actions of sporting bodies only reluctantly. Moreover, in many,

and probably most, situations it will be the fairness of the process as a whole which is the decisive consideration. However, under these Rules, the Drug Advisory Committee has a duty, and not merely a power, to suspend. It has no discretion not to suspend. The effect of suspension may be very serious for the athlete and involve missing important athletic events. The suspension precedes the hearing before the Disciplinary Committee (Appendix B paragraph 7). There can be an appeal to an Independent Appeal Panel only after the disciplinary hearing before the Disciplinary Committee (Appendix B paragraph 8). I understand the need for that sequence of measures in order to guard against the danger of drug taking immediately before a big event. It would be little comfort to other competitors or the public if the defaulter could be punished only after the event had taken place. However, it appears to me arguable that the sequence is such that the athlete is entitled to fairness at each stage of the procedure and that a term should be implied accordingly. It is arguable that a result satisfactory to the athlete before the Independent Panel is an inadequate remedy for the damage which may be caused by lack of fairness before the Disciplinary Committee.

On the question of waiver, the plaintiff's conduct is in my view capable of amounting to a waiver. However, I agree with the conclusion of Lord Woolf MR. I would allow all allegations to go forward so that the court can consider the position as a whole and whether the conduct amounted to a waiver in the particular circumstances.

First, there are allegations against another member of the disciplinary committee based on alleged conduct not known to the plaintiff at the time of the hearing. It may be argued that the plaintiff would not have acted as she did had she known of that conduct. It may also be argued that the combined effect of the allegations should be considered. Second, I should not wish to exclude an argument that, since the hearing was before the Disciplinary Committee of the BAF on whose behalf objection to Mr Guy had already been rejected in correspondence, it was not a waiver to fail to take the point again when the Committee met.

In these circumstances, I would not strike out the pleaded allegations of bias and would dismiss the appeal against the judge's refusal to do so.

Order: Appeal allowed in part. Plaintiff's claim as to the accreditation issue to be struck out. Plaintiff to receive 25% of the costs of appeal. Legal Aid Taxation of Plaintiff's costs. Leave to appeal to House of Lords refused.