

Update: sports law

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By **Oliver Hunt, Simon Thorp**

Oliver Hunt and Simon Thorp consider breaches of sporting regulations in Formula 1 and rugby, football managers' contracts and the new rules on third party ownership of players

Since the last sports law update (*Solicitors Journal* 153/14, 14 April 2009), Formula 1 has once again come under the legal spotlight. On 21 September 2009, the World Motor Sport Council (WMSC) found that members of the ING Renault F1 team had conspired to cause a deliberate crash at the 2008 Singapore Grand Prix in breach of the International Sporting Code ('the code') and F1 Sporting Regulations. There are a number of legal ramifications of the WMSC's decision:

(a) Immunity from sanctions

Whereas Renault's team principal, Flavio Briatore, was banned for life from motor sport and the team's director of engineering, Pat Symonds, was handed a five-year ban, Nelson Piquet Jnr, the driver who deliberately crashed, was granted immunity even though the WMSC had concluded that the extent of the conspiracy was limited to these three individuals. This was because no investigation would have been possible without Piquet first coming forward and therefore the FIA (the Fédération Internationale de l'Automobile, the governing body for world motor sport) concluded that "the interests of the sport were best served by the truth coming out, even if it meant foregoing the opportunity to take action against one of the perpetrators". Whether this leniency shown towards someone who has admitted to cheating leads to other sporting cheats coming forward remains to be seen.

(b) Mitigation

Renault was found guilty under, inter alia, article 151 (c) of the code which states that "any fraudulent conduct or any act prejudicial to the interests of any competition or to the interests of motor sport generally" would be deemed a breach, while article 123 of the code states that Renault "shall be responsible for all acts or omissions on the part of their driver". However, because of various acts of mitigation (including accepting the charges at the earliest practicable opportunity, cooperating with the investigation and ensuring that Briatore and Symonds had left the team), Renault's sentence of disqualification from F1 was suspended until the end of the 2011 season, with such disqualification to be reactivated if the team is found guilty of a comparable breach during that time.

(c) Termination right for breach of contract

This case has further implications for those drafting commercial contracts where public reputation can be at stake. Just days after the WMSC's verdict, Renault's title sponsor, ING, terminated its agreement with the team with immediate effect. All company branding was subsequently removed from the race car before the following grand prix. Another of the team's sponsors, Mutua Madrilenia, terminated its sponsorship contract with Renault for breach of contract, "for affecting the image, reputation and good name of the team's sponsor".

(d) Right to damages

The Renault decision could lead to a claim being pursued for loss of potential future earnings as a direct result of a fellow competitor's breach of sporting regulations. Ferrari's Brazilian driver, Felipe Massa, was leading the Singapore Grand Prix when Piquet's crash forced Massa into an under-pressure pit stop during which a team error resulted in Massa failing to score any points from a race he was likely to go on and win. Lewis Hamilton finished third in the race, scoring six points and went on to beat Massa to the 2008 F1 world championship by a single point. If he were to successfully challenge the race result and have it annulled, it would be he, and not Hamilton, that should be awarded the 2008 title. Massa and Ferrari could then launch a claim against Renault for damages as a result of Massa and Ferrari not being able to capitalise on the commercial benefits of winning the F1 world championship. Furthermore, Massa may well have championship winning related bonus payment clauses in his employment contract with Ferrari which he would then have a right to claim.

(e) The effect on other sports' regulations

The impact of the Renault decision has been felt in the English football league. Briatore is currently the chairman of Queens Park Rangers FC and investigations are underway to determine whether he now passes the football league's 'fit and proper persons test'. The rules prevent individuals from being a director or holding a majority interest in a club "if they are subject to a ban from a sports governing body relating to the administration of that sport". The league is unsure whether this definition can be legally applied to the WMSC ruling and is still considering its position.

Faked injuries

Cheating also led to disciplinary action in the world of rugby.

Tom Williams and Harlequins Rugby Club were both found guilty of fabricating a cut to Williams' mouth by using a blood capsule during a Heineken Cup quarter-final against Leinster on 12 April in order to allow a substitution that could otherwise not have taken place. The International Rugby Board's regulations enable "a player who leaves the field to have bleeding controlled and/or have an open wound covered, to be temporarily replaced". As a result of Williams' faked injury, fly-half Nick Evans returned to the field with five minutes remaining.

The incident resulted in an inquiry, and a misconduct charge followed. Harlequins denied any allegations of foul play at the initial disciplinary hearing. Williams was found guilty and banned for 12 months by an independent panel, which also fined the club £215,000 – of which 50 per cent was suspended for two years. Dean Richards, the club's director of rugby, had misconduct charges dismissed.

Williams' 12-month ban seemed disproportionate to Justin Harrison's eight-month ban for drug-related offences, and Schalk Burger's eight-week ban for gouging, bringing into question the consistency of how bans are administered.

With the support and encouragement of the Professional Rugby Players' Association, Williams appealed against his suspension in accordance with the regulations. His ban was reduced to four months because he admitted his guilt and cooperated with the authorities investigating the matter.

The evidence that Williams presented at his appeal led to Richards, who resigned from his position as the club's director of rugby, being issued with a three-year ban from coaching anywhere in the world. There was speculation he might still be able to take up a director of rugby role, because the ban refers only to 'coaching'. Harlequins' fine increased, from £215,000 with half suspended for two years, to £259,000 payable in full.

Following the appeal, the incident then passed formally into the RFU's jurisdiction. Under rule 5.12 of its guidelines, the RFU has the power to "discipline any club, official, or player for a breach of its rules with a range of punishments, which include disqualification from any competition; a financial penalty; and exclusion from RFU membership". However, Judge Jeff Blackett, the union's disciplinary officer, decided that the punishments given by the ERC were adequate.

The case illustrates the need for governing body appeal processes to be clear and fair and for any perpetrator to make the most of any second chance.

Constructive dismissal

The actions of Briatore and Richards call into question who controls a team or club. As does the recent Kevin Keegan case.

On 1 October 2009, the Premier League Managers Arbitration Tribunal declared that Kevin Keegan was constructively dismissed by Newcastle United Football Club Ltd (NUFC) for which NUFC must pay Keegan damages of £2m plus interest.

While the tribunal award is based on employment law, it may have ramifications in the football industry with respect to a football manager's power/authority in light of the increasing trend to appoint directors of football. Future manager agreements will need to be drafted carefully in light of the ruling to ascertain who is responsible for a club's transfer activity.

The key principle arising from the award from a sports law perspective is that Keegan was deemed to have (and it would follow Premier League managers generally would be deemed to have), the final say as to transfers of players into the club despite the contract being silent on the point.

Keegan's contract included standard wording found in a manager's contract including clause 3.1.1 which stated: "During the continuance of his employment, Kevin Keegan will ... perform such duties as may be usually associated with the position of a manager of a Premier League football team ..." It also stated that: "Kevin Keegan will be responsible for the training, coaching, selection and motivation of the team."

NUFC did not expressly tell Keegan that he did not have the final say, but it contended that Keegan's awareness that NUFC intended to adopt a 'continental structure' encompassing a director of football meant that it was implicit that Keegan would not have the final say.

On the facts it was held that it was not implicit that Keegan would not have the final say on the basis that a director of football's responsibilities can vary and come in many guises from club to club, and that the tribunal believed that Keegan would not have accepted the job were he not to have the final say. The tribunal concluded that the duties usually associated with the position of a Premier League manager included the right and duty to have the final say as to transfers into the club.

The tribunal found that the club's signing (on loan) of Ignacio Gonzales in August 2009, contrary to Keegan's objections, amounted to a breach of the term in his contract which entitled and required him to have the final say. It was ruled that this was a repudiatory breach that justified Keegan leaving the club.

The award, and the reasons for granting it, will be of interest to clubs and managers going forward. If a club intends or wants to be able to appoint a director of football, it should expressly carve out from a manager's duties the final say as to transfers of players into the club and this may invoke protracted negotiations in the fast-moving world of the football contract.

Third party ownership of players

Following the out-of-court settlement in the Tevez affair ('Update: sports law', *Solicitors Journal* 153/14, 14 April 2009), in the 2009 summer transfer window, Manchester City bought out the rights of Tevez's third party owners, bringing the Tevez saga to an end. The regulatory legacy is summarised as follows.

New regulations have been brought in at every level of the game, albeit not on a uniform or contemporaneous basis. The Premier League (PL) introduced regulation L34 for the 2008/09 season, which, in brief, prevents a third party owning a player (i.e. having control of his registration). However, regulation L35 does permit a club to buy out any rights a third party may have over an overseas player, where such third party arrangements are accepted (e.g. Brazil). The Football Association (FA) broadly followed suit by the beginning of the 2009/10 season (see FA rules A.1, A.2, B.1 and B.2).

The Football League (FL), however, has not to date mirrored the revised regulations of the PL and the FA and instead continues to rely on the regulations preventing a third party having an interest, which includes any form of material influence, in more than one club (see FL regulations 81.1 and 81.2 on dual interests). So, technically, it would be possible for a third party to own a player in the FL, provided the third party did not do so in more than one club. In practice, FL clubs should also comply with FA regulations and so this would prevent a third party from owning a player whether in one or more clubs in the FL. It is also anticipated that FL regulations will be brought more in line with FA and PL regulations for next season.

Notwithstanding this, the FL recognises the need for alternative sources of funding for clubs below the PL. Accordingly, the FL has issued guidance on the ambit of regulations 81.1 and 81.2, allowing FSA regulated third party investors to lend money to one or more FL clubs in return for a right to receive transfer fees in respect of the playing squad of the club. This is several steps removed from third party ownership of players, but does allow FL clubs to access third party funding in return for a third party having a right to receive transfer fees to repay the loan, within permitted guidelines. The PL is understood to be reviewing the possibility of introducing an equivalent guideline.

The governing principle remains, however, that no third party may have material influence over the use or transfer of a player.

Postscript:

Oliver Hunt and Simon Thorp are partners at onside law. They would like to thank Shenal Shah, a trainee solicitor, and Leo Avery, an associate solicitor, for their contributions