Neutral Citation: [2015] IEHC 57

THE HIGH COURT

[2008 No. 907P]

BETWEEN

FRANCES HYLAND

PLAINTIFF

AND

DUNDALK RACING (1999) LIMITED (NO.2)

DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on 9th January 2015

Part I: Introduction

1. In these proceedings the plaintiff, Mr. Hyland, is a licensed bookmaker who at all material times has been chairman of the Irish National Bookmakers' Association ("INBA"), the representative body for bookmakers. Mr. Hyland held an established seniority to trade from a particular bookmaking pitch at Dundalk Racecourse. That racecourse closed in 2001 and re-opened in August 2007 as an all-weather track following an enormous investment. The defendant ("Dundalk") sought a capital contribution of some €8,000 from each bookmaker holding a pitch at the racecourse. The plaintiff claimed that this amounted to a breach of what are known as the Racecourse Executives' Seniority and Pitch Rules ("the Pitch Rules") and, hence, to a breach of contract.

2. In the first judgment in this case which was delivered by me on 19th February 2014 (*Hyland v. Dundalk Racing* (1999) Ltd. [2014] IEHC 60) I held that the Pitch Rules amounted to a legally binding contract and that the defendant had breached these Rules by seeking a payment of this kind. The essence of the decision was that the re-opened Dundalk Stadium did not amount to a new stadium, at least for the purposes of the Pitch Rules, so that a payment of this kind could not be lawfully exacted from bookmakers (such as the plaintiff) holding an established seniority at Dundalk. The nature and purpose of the Pitch Rules and the background to this dispute are all fully set out in that judgment. As I explained in that judgment, the Pitch Rules amounted to a detailed set of rules governing the allocation of pitches at the racecourse betting ring to bookmakers.

3. The present judgment deals solely with questions of mitigation of loss and quantum of damages arising from that first judgment. This judgment is really in the nature of a supplementary judgment to that judgment and it pre-supposes some familiarity with that first judgment.

Part II: Mitigation of Loss

4. The first question which immediately arises from the finding that there was a breach of contract is the question of mitigation of loss. No matter how the egregious the breach of contract on the part of the defendants, the plaintiffs were nonetheless under a clear duty to mitigate their losses. The most obvious method of mitigation would have been for the plaintiffs to have paid the €8,000 capital contribution sought by Dundalk Racing on a without prejudice basis, while simultaneously commencing proceedings by which a declaration was sought to the effect that no such sum was actually due.

5. In assessing whether this would have been reasonable, it is necessary to rehearse again from this perspective the events of July and August 2007. While much of this evidence was given in the liability hearing, this evidence was supplemented in the course of the damages hearing by the testimony of two new witnesses, Ms. Caroline Grey and Mr. Paddy Walsh, the Chief Executive of the Association of Irish Racecourses Ltd. ("AIR"), neither of whom were called to give oral evidence at the first hearing. In view of this additional evidence and the important clarification provided by the Pitch Tribunal at the request of this Court at a relatively late stage of the liability hearing, the reasonableness of the plaintiffs' conduct so far as the mitigation of damages question can be further assessed.

6. The general background to these events is by now well known to the parties. Dundalk Racing had made a large scale investment of some €35m. in the development of a new all-weather track. The course had closed in August 2001 and it was scheduled to re-open in August 2007. Dundalk Racing were anxious to recoup some of its capital contribution by levying a charge of €8,000 on each bookmaker who elected to stand at Dundalk. It was clear that such a payment was not provided for by the Pitch Rules, so that such a payment could only be levied where the racecourse in question was a new racecourse. (Since these events occurred the Pitch Rules have themselves been subsequently amended in order to provide that they now also expressly apply to new racecourses and not simply to existing racecourses). Dundalk Racing maintained that the racecourse was a new racecourse for this purpose, something which the bookmakers steadfastly denied.

7. By the summer of 2007 it was clear that an impasse had been reached between the parties regarding the entitlement of Dundalk Racing to impose such a levy. The racecourse was scheduled to re-open on Sunday August 26th, 2007 and no agreement had yet been reached regarding the allocation of pitches for bookmakers. So far as Dundalk Racing was concerned, it was imperative that an agreement was quickly reached.

8. It was in that vein that Mr. Jim Martin, the Chief Executive Officer of Dundalk Racing, wrote to Mr. Walsh on 9th July 2007 to request him to seek a determination from the Pitch Tribunal as to whether Dundalk was in fact a new racecourse. In his letter Mr. Martin observed:

> "...we believe that the recently signed Pitch Rules do not deal with the creation of new pitches or, as in our case, the creation of pitches a new racecourse. We wish to refer our case to the Pitch Tribunal under Clause 20 of the Pitch Rules so that they may determine whether the existing Pitch Rules apply to our situation in Dundalk."

9. In the end this was not quite the question which was asked of the Pitch Tribunal or, at least, not quite the question which that

Tribunal determined. In the end it was the lack of clarity as to what had been asked of the Tribunal and what that body had actually decided gave rise to much of the misunderstanding between the parties, both at the time and subsequently. Mr. Walsh stated in his letter of 20th July 2007:

> "A dispute has arisen as to the applicability of the Racecourse Executive Seniority and Pitch Rules in a situation where pitches are created at a new racecourse...While this dispute is in the context of the new track at Dundalk, we would request that the Tribunal would make a determination on the applicability of the current rules to the allocation of pitches at any new racecourse."

As Mr. Walsh explained in evidence (Day 10, Qs. 352-354):

> "....The question that we put to the Pitch Tribunal was a simple one: do the Pitch Rules cover the initial allocation of pitches at any new racecourse?..And the Pitch Tribunal ruled that they didn't. In other words, they said that our view on that was correct and the [Irish National Bookmakers' Association's] view was incorrect.
>
> Q. So what was put to the Pitch Tribunal was a theoretical question, but not relating to Dundalk?
>
> A. Absolutely."

10. It would seem from the evidence of Mr. Walsh that the Pitch Tribunal did not send a copy of this correspondence to the INBA, save, of course, that the INBA representative on the Tribunal received a copy of it, albeit in his capacity as a member of the Tribunal.

The Tribunal ultimately ruled by letter of 2nd August 2007:

> "Further to your letter of 20th July, 2007, I confirm that the Pitch Tribunal met as requested at Galway on Monday, 30th July. The Tribunal, consisting of Frank Smith, Ciaran Skelly and myself decided that the racecourse executive seniority and pitch rules do not cover the circumstances where a new racecourse is established. The Pitch Tribunal recommended that Dundalk and the Irish National Bookmakers Association have a face to face discussion to address all outstanding matters."

As I pointed out in the first judgment (at paras. 60-61):

> "60. In the course of the hearing there was some uncertainty as to what precisely the Pitch Tribunal had actually decided. It is also clear that there was a dispute between the parties in the immediate aftermath of the decision as to what the import of this ruling actually was. Dundalk maintained that the Tribunal had impliedly ruled that their new track amounted to a new racecourse, whereas once the terms of the actual ruling was supplied to Mr. Hyland he maintained that the Tribunal had done no such thing.
>
> 61. Since I was concerned that the Court might perforce have to pronounce on the interpretation of the Tribunal's decision in the absence of the Tribunal, I raised the issue of my own motion as to whether the Tribunal might be invited to be heard on that question. As it happens, two of the three members who happened to constitute the Tribunal in question (namely, Brian Kavanagh, Chairman and Frank Smyth, a former Chief Executive of the Association of Irish Racecourses) kindly took up that offer. Their solicitors wrote on 10th January 2014 to state:
>
> "Following due consideration of the Pitch Rules, the three members of the Pitch Tribunal unanimously decided that the Pitch Rules were not applicable to any new racecourse which might be established. As that was the only question that the Tribunal was asked to determine it did not make any determination nor did it even discuss, whether Dundalk was a new racecourse or not. In fact, the letter from AIR seeking a determination by the Pitch Tribunal specifically stated that determination of this issue, in their view, did not fall within the jurisdiction of the Pitch Tribunal."

11. In August 2007 Ms. Grey was manager of the Betting Division of Horse Racing Ireland ("HRI"). She convened a meeting on 8th August 2007 which was held at the offices of HRI at Kill, Co. Kildare in order to see if the impasse could be resolved. The attendance included members of the INBA (including Mr. Hyland), Mr. Martin (representing Dundalk Racecourse) and Mr. Walsh (representing AIR).

12. The meeting lasted from about 10am until 2pm when it ended inconclusively. At one point it seemed that an agreement was within reach and, indeed, Ms. Grey and Mr. Martin maintained that an agreement had in fact been reached during the course of the meeting. The draft agreement appeared to envisage that Dundalk Racecourse would "allocate 30 pitches using the old Dundalk seniority list". Paragraphs 2 and 3 of the draft agreement further recited:

> "2. On 1st August 2008 a fee of €8,000 will be payable by all bookmakers allocated one of the original 30 pitches and wish to retain their pitch. Otherwise this pitch will be declared vacant.
>
> 3. If any of the original pitches are transferred before 1st August 2008, this fee will become immediately due by the bookmakers originally allocated the pitch."

13. The remainder of the draft document appeared to envisage that this agreement would not set a precedent for other racecourses and that the various protagonists would meet to reach an agreement in relation to the applicability of the Pitch Rules to new racecourses. It appears to be common case between the parties that no binding agreement was ever reached. It is nonetheless fair to say – as Ms. Grey pointed out in evidence – that Dundalk (and, by extension, the AIR) had made three concessions. First, 30 pitches would be allocated on the basis of the old Dundalk seniority list. Second, the payment of €8,000 was effectively deferred for one year. Third, it was agreed that any such agreement would be not set a precedent for other courses.

14. There was, however, a surprising degree of disagreement among the witnesses as to what exactly had been discussed during the course of the meeting. Mr. Hyland was emphatic that the ruling of the Pitch Tribunal was centre stage at the meeting and that both Mr. Walsh and Mr. Martin maintained that the Tribunal had effectively ruled in their favour. Mr. Hyland said that at the meeting he had not accepted that the Tribunal had determined that Dundalk was a new racecourse for the purposes of the Pitch Tribunal and, indeed, that he had urged that the Chairman of the Tribunal (Mr. Brian Kavanagh) be contacted so that the point could be clarified. Mr. Hyland additionally stated that he had not been aware until he had been cross-examined to this effect at the liability hearing that the €8,000 payment was to be deferred until after the end of the first year.

15. For her part Ms. Grey was clear that "the Pitch Tribunal decision got no discussion at that meeting whatsoever". She did say,

however, that the parties had discussed the question of whether Dundalk was a new racecourse and it would appear from a perusal of the minutes of the meeting which Ms. Grey prepared that this question was ventilated in one way or another throughout the meeting. Thus, for example, after Ms. Grey thought that agreement had been reached in relation to the heads of agreement, the minutes produced by her record Mr. Hyland as stating that "she had misunderstood their position", as Mr. Martin's demands:

> "were threatening the whole system and that there was nothing to stop the Curragh changing its name and trying to walk away from existing seniorities."

16. Mr. Walsh gave evidence to similar effect. While Mr. Walsh agreed with Ms. Grey that there had been no reference to the decision of the Pitch Tribunal as such, he accepted that there had, in fact, been much discussion at the meeting as to whether Dundalk was, in fact, a new racecourse.

17. I should pause at this point to observe that in evidence Mr. Hyland strongly contested the suggestion that Ms. Grey's minutes were, in fact, agreed minutes and he maintained that they did not properly reflect the INBA's case. Nor had these minutes ever been agreed with the INBA. For her part Ms. Grey observed that she had produced the minutes immediately after the meeting and that the document had been sent to the INBA. She received no response thereto. For my part, I am not sure that anything should turn on the status of this document and that the minutes are probably best regarded as Ms. Grey's contemporaneous note of what occurred at the meeting.

18. On the following day, 9th August 2007, Mr. Hyland sent a letter by e-mail to Mr. Walsh saying that he had consulted with his Chairman and other members of the INBA Committee. He confirmed that the proposals were unacceptable, in large part because "it includes payments that are outside the Racecourse Executive Seniority and Pitch Rules." Mr. Hyland added:

> "We ask again that Dundalk accept that the Racecourse Executive Seniority and Pitch Rules, just like all the other racecourses, and we are prepared to negotiate new clauses to cover the loopholes that Dundalk are trying to exploit. This would include headings such as new transfers and revived racecourse and any payments that become due under the Rules would be paid retrospectively to Dundalk."

19. Mr. Walsh responded in a detailed letter which was sent on the same day. Mr. Walsh expressed disappointment with the outcome of the meeting. He again re-iterated the nature of the concessions which Dundalk had made at that meeting. So far as the substance of Mr. Hyland's objection was concerned:

> "We are also perfectly aware that the proposal in relation to the eventual payment of a capital contribution is outside the Pitch Rules as these rules do not currently cover the allocation of seniorities at a new racecourse. This has been our view since we started discussions with the INBA some months ago and while not initially accepted by yourselves, the Pitch Tribunal – which, I would remind you is binding on all parties – have since ruled in our favour on the matter.
>
> Your request that Dundalk accept the Pitch Rules is mystifying in that at no stage have Dundalk refused to accept same. They have merely pointed out that they do not cover the initial allocation of seniorities at Dundalk……"

20. It appears that at this stage Mr. Walsh and the AIR withdrew the offer which had been made. Mr. Martin then wrote to Mr. Hyland on 10th August 2007:

21. By this stage, any hope of a settlement had more or less broken down. Mr. Martin contacted Ms. Grey with a view to arranging contact with all existing permit holders who were registered with the HRI. This meant in effect that this was an open offer to every registered bookmaker in the State to apply for a pitch at Dundalk based on the seniority *qua permit holder* and not qua seniority based on the Dundalk seniorities (which dated from 1945 onwards) as they existed when the racecourse closed in 2001. This meant that the oldest permit holder who applied got the first pick, the second oldest the second pitch and so on. Some thirteen permit holders applied and the draw based on the permit number was held at the Dundalk racecourse just a few days before it re-opened on 26th August 2007.Ms. Grey and another official from HRI, Noel Cloake, were present and oversaw the entire process. It is important to stress that there was now almost no co-relation between the old Dundalk seniorities and the new allocation of pitches based on the seniority of the permit holder. Indeed, none (or, at least, almost none) of the holders of existing Dundalk seniorities applied to participate in this draw, although it is clear from the evidence that they were aware that this was what was going to happen

22. The Dundalk racecourse re-opened on Sunday August 26th, 2007. The subsequent protests and boycott of the racecourse are chronicled in the first judgment.

23. That, then, is the background against which the question of mitigation of loss falls to be considered. Superficially, of course, one might say that the plaintiff should simply have swallowed his pride, paid the €8,000 on a without prejudice basis (whether upfront or in two tranches – as was proposed in Mr. Martin's letter of 10th August 2007 – or at the end of the first year of trading), took up his pitch and then sued to recover the money. This, indeed, is what was urged on behalf of Dundalk so far as the question of mitigation of loss is concerned.

24. Yet the position of the plaintiff (and his colleagues in the INBA) was more complex than this. They did not want to resort to resort to litigation in respect of an important racecourse and they retained confidence that the matter would ultimately be resolved. The issue also had broader importance for the INBA, because if payments of this kind could lawfully be demanded, then this might set a precedent which other racecourses might well follow. If this were to come to pass, it would have been a development with very significant implications for bookmakers who enjoyed seniorities at other racetracks such as Leopardstown, the Curragh and Galway.

25. The negotiations, moreover, had been conducted on the basis of a fundamental mis-understanding as to what the Pitch Tribunal had actually decided. Ms. Grey and Mr. Walsh may well be correct in their recollection that the decision of the Pitch Tribunal received only a fleeting mention at the meeting which was held on 8th August 2007. It is nevertheless clear that the decision of the Tribunal was a major factor in the thinking of both sides, as the letters of 9th August and 10th August clearly show. Both the AIR and Dundalk were under the impression that the Tribunal had in fact determined in their favour. It only became clear in the course of the first hearing that the Tribunal had merely determined that the Rules (as they then stood) did not apply to a new racecourse and that it had never determined the question as to whether Dundalk was a new racecourse for this purpose.

26. In these circumstances, I do not think that Mr. Hyland can objectively be faulted for failing to take up the offer of 10th August 2007 so far as the question of mitigation of loss is concerned. In this regard, it is clear from the Supreme Court's decision in *McCord v. Electricity Supply Board [1980]* I.L.R.M. 153 that, having regard to the provisions of s. 34(1) of the Civil Liability Act 1961 ("the 1961 Act"), damages for breach of contract may be reduced – or even entirely negatived – where the plaintiff has been guilty of fault

or contributory negligence.

27. In *McCord* inspectors from the ESB had found that the electricity meter in the plaintiff's house had been interfered with, with the result that a considerable quantity of electricity had been had consumed by the household for free for a three year period. Even though, as Henchy J. had put it, "the finger of suspicion" had pointed to the plaintiff, he refused to sign a statement to the effect that the electricity meter in his house had been interfered with, although he denied all knowledge of any wrongful tampering with the meter. As a result of this his electricity supply was disconnected. The Supreme Court agreed that the ESB had no power under the terms of the electricity supply contract to disconnect a customer on this ground.

28. A majority of the Court, applying the principles set out by Kenny J. in *Carroll v. Clare County Council [1975]* I.R. 221, 227 regarding what constituted objective fault for this purpose, held that the plaintiff was thereby guilty of such contributory negligence under s. 34(1) of the 1961 Act to such an extent that he was precluded from recovering any damages whatever for breach of contract. As Henchy J. put it ([1980] I.L.R.M. 153, 163):

> "By taking the reasonable step of putting his signature to a non-incriminating document which would leave him only with a liability to pay, on reasonable and extended terms, for the electricity consumed, he could have prevented the disconnection. Notwithstanding the Board's misconstruction of its powers, the real source of the plaintiff's damages is to be found in his unreasonable refusal to comply with a reasonable request. He was bound to take all reasonable steps to mitigate his damage…Whether the matter be judged in terms of contributory negligence or failure to mitigate the damage, the plaintiff's conduct must be deemed the real and ultimate cause of both the initial disconnection and the continued disconnection for seven months."

29. If one applies the *McCord* principles to the facts of the present case, it cannot be said that the initial failure to take up the offer made by Dundalk amounted to unreasonable conduct in this sense on the part of Mr. Hyland. An impasse had been reached on an important point of principle which had huge implications for the Association and, viewed objectively, Mr. Hyland and his colleagues were entitled to take the stand which they did.

30. Yet there are limits to this approach. The dispute was not, in fact, resolved quickly and it instead led to a bitter and prolonged boycott. Again, viewed objectively, both sides were to blame in failing to have the matter clarified by the Pitch Tribunal: it was remarkable that such clarification only came to hand after I had raised the point of my own motion at the close of the liability hearing. Independently of this, this case – which is, admittedly, in many ways, a very exceptional one – nonetheless illustrates the desirability, where possible, of having complex sporting disputes of this kind resolved either by mediation, or, should such fail, by expert binding adjudication involving the appropriate mix of sporting and legal expertise.

31. In this jurisdiction, the Disputes Resolution Authority of the Gaelic Athletic Association has led the way with an established corpus of published formal decisions on matters such as the construction of rules, player eligibility, player transfers, fair procedures and penalties for disciplinary infringements. These decisions are nearly always accompanied by extensive legal and quasi-legal reasoning, thus providing for an open and objective method of adjudication of these invariably complex problems. All parties to this present dispute might well wish to give consideration to this suggestion and it may be that the Dispute Resolution Authority might yet serve in this regard as a model which might yet guide the Pitch Tribunal for future complex cases of this kind were they ever to arise.

32. Returning, however, to the facts of the present case I am driven to the conclusion that, viewed objectively, it became unreasonable after a certain point for the plaintiff to refuse to take up a pitch offered by Dundalk. This was especially so once it became clear that the protests had been ineffective, that the dispute was not going to be quickly resolved and that this issue would have to be judicially determined. This had become clear at some stage after the early months of 2008, which is precisely the time that the present proceedings were commenced.

33. In saying this I am not at all unmindful of the considerable passions which this dispute has generated or the fact that there was fault and misunderstandings on all sides. I am also conscious of the fact that the non-premium pitches which would then have been available to Mr. Hyland were at a significantly inferior level to that to which he would have been accustomed. This would have been even more true in the case of the major celebrity bookmakers such as Mr. O'Hare and Mr. Hughes who are co-plaintiffs in these proceedings. Had the plaintiffs taken up these pitches they could nonetheless have mitigated their losses, at least to some degree.

Conclusions on the mitigation of loss

34. In the light of all of these factors I will allow the plaintiff to recover 100% of the losses he sustained in the first 12 months from August 2007 to August 2008. So far as subsequent years are concerned, then in line with the reasoning of Henchy J. in *McCord*, I will abate these damages by a factor of 80%, reflecting the extent to which the failure by the plaintiff to mitigate his loss objectively amounted to such fault for the purposes of s. 34(1) of the 1961 Act as would justify the reduction of damages by this amount.

Part III: The valuation of the pitch

35. The next issue concerned the actual capital valuation of Mr. Hyland's pitch which was lost as a result of the re-draw based on seniority of permit holder.

36. Mr. Hyland gave evidence that he purchased his seniority (No. 6 on the Racecourse Line) in April 1999 at a cost of €9,300. He pointed out that this was at a time when the future of the racecourse was shrouded in doubt. He considered that the price should have appreciated in value in the interval having regard to developments such as the re-development of the course and the easier access to the course with the opening of new motorways connecting Dundalk to both Dublin and Belfast. He was confident that his seniority was worth €20,000.

37. The principal expert witness called by the plaintiffs was Mr. Michael Keegan who worked at HRI (formerly known as the Racing Board) between 1973 and 2007. He gave evidence that in 1982 he had been instructed by the then Chief Executive to develop an expertise in the sale and valuation of pitches. Over time he was asked to value individual pitches and was accepted as an independent authority on the point. While there was some dispute as to whether this function was actually part of his official duties at HRI, it appeared to be accepted that he was in fact actively involved in the valuation of over a hundred pitches. Mr. Keegan's expertise in the matter is scarcely in doubt and during his time he was probably the foremost authority on the point in the State.

38. At the same time it is only fair to state that Mr. Keegan has not given any formal valuations since he retired in April 2007. Nor have any Dundalk pitch been transferred since the racecourse closed in 2001 and re-opened in August 2007. There have, of course, been huge changes in the intervening years. The racecourse at Dundalk has been transformed and the boycott mean that many pitches were simply not taken up. The advent of technology has continued to place pressure on the on-course betting. But perhaps

most of all the enormous economic difficulties which have beset the State since 2008 has resulted in a sharp decline in discretionary spending and this in turn must have depressed the value of capital assets associated with the racing industry.

39. Mr. Keegan enumerated a range of factors which might affected the general valuation of a pitch, including the proximity to the parade ring, the status and standing of the racecourse in question and other factors such as the layout of the betting ring itself.

40. There were also some special factors which were peculiar to Dundalk. Mr. Keegan observed that although the "old" Dundalk racecourse was a run-down and drab affair, it still managed to attract large gambling figures in the betting ring. Mr. Keegan also made the point that the racecourse was what he described as a "bookmaker's racecourse", in that its principal customers were drawn from Northern Ireland and the border counties who were more accustomed to on-course betting than using the totaliser. He thought that the average customer for Dundalk was a person who bets with his local bookmaker and bets with the same bookmaker when he attends meetings at Down Royal, Downpatrick or Dundalk. Factors which might be relevant in the choice of bookmakers included value for money, the supply of credit, confidentiality and religious background.

41. Mr. Keegan stressed that the re-development at Dundalk ought to have been extremely positive for those holding seniorities at the course. There were now first-class facilities with all year round racing with a limited number of pitches all within one hour's drive from both Dublin and Belfast. He also thought that as most of the existing pitches were in the hands of established and wealthy bookmaking families, he considered that this would make the cost of acquiring a seniority rather expensive. He valued the principal pitches ranging from the No. 17 on the Racecourse line at €5,000 right up to No. 1 on the Parade Ring at €70,000. He valued Mr. Hyland's pitch (No. 3 on the Racecourse Line) at €20,000.

42. At the same time it must be acknowledged that there were other factors pulling in the opposite direction. The boycott had significantly depressed these values, as did the uncertainty regarding the application of the Pitch Rules. All the experts seemed to agree – or, at least, it was implicit in their evidence - that the pitches would have next to no value unless the holder of the relevant seniority enjoyed the protection given by the Pitch Rules. It followed that the present litigation – and the uncertainties it created – must equally have depressed these valuations. After all, who would be prepared to make a significant capital investment in a premium pitch at Dundalk if there was a real risk that this might be set aside by judicial decision?

43. These countervailing factors were either expressly or tacitly mentioned by both Mr. Martin and by Mr. Paul Jacobs, the expert retained by Dundalk. In his evidence Mr. Martin noted that even to this day only 18 of the 48 pitches are occupied. While one rather suspects that the poor take-up of the remaining pitches was a consequence – at least in part - of the illegal boycott, the fact remains that there was significant excess capacity within months of the stadium re-opening.

44. Mr. Jacobs is a partner with Grant Thornton and is a specialist forensic accountant. While his analysis and conclusions were naturally the subject of cross examination and dispute, no one disputed the quite remarkable quality of the comprehensive report on all aspects of this dispute which he prepared for the Court and for which I am personally indebted.

45. In his report Mr. Jacobs drew attention to the fact that there had been only four instances where pitches had been traded at Dundalk since the re-opening of the course in 2007:

Date Pitch Location Value obtained for transfer

5 September 2010 Parade Ring Line No. 4 €5,000

16 November 2011 Racecourse Line No. 2 €8,000

27 August 2012 Parade Ring Line No. 2 €4,000

18 March 2014 Racecourse Line No. 2 €5,500

43. A further eight pitches were allowed to lapse, so that these pitches essentially had a nil capital value. The average price for all 11 pitch locations which either traded or lapsed during this period (Racecourse Line No. 2 having been traded twice) was €2,045 (i.e., €22,5000 divided by 11).Mr. Jacobs further gave evidence that there are at present 18 occupied bookmaker's pitches and 30 pitches available for purchase. In these circumstances, Mr. Jacobs valued the occupied pitches at approximately €2,000 per pitch, i.e., reflecting the average value of the traded and lapsed pitches between 2008 and 2014.

44. I do not consider, however, that it would be altogether appropriate to measure the value of Mr. Hyland's pitch in this fashion. There are several reasons for this conclusion.

45. First, while I appreciate that Mr. Jacobs had little to go on, I think it clear from the evidence that, generally speaking, each pitch has an individual value. This is especially true of the premium pitches. Here small factors such as the proximity to the flow of customers who leave the parade ring following the departure of the horses can be critical. This explains the big difference in value between pitches who may be no more than a few metres apart. Indeed, this rationale lies at the heart of the Pitch Rules, designed as they are to ensure an orderly allocation of a scarce resource, namely, desirable pitches.

46. Second, the effect of the August 2007 re-draw was quite significant because it threw open the pitches to a coterie of new bookmakers who otherwise would have no realistic chance of securing such pitches . It is true that given that there was a new betting ring at Dundalk there would have to have been a re-draw under the Pitch Rules even if there was no dispute. In that situation, given that the first ten bookmakers held 1945 Dundalk seniorities ex aequo, they would have had the claim on the first five pitches on the racecourse line and parade line respectively. There was then a definite order of seniorities thereafter, with Mr. Hyland entitled to pitch 6 on the racecourse line.

47. The first ten bookmakers were all prominent and "strong" bookmakers and the list included three members of the O'Hare family, John Hughes and David Power. (I will presently deliver supplementary judgments dealing with the damages claims of both Mr. Hughes and Mr. Patrick O'Hare). But for the unusual turn of events which gave rise to this litigation, it is all but inconceivable that any of these bookmakers would have traded their prominent Dundalk pitches. The very scarcity of supply would have tended to push up the capital value of these premium pitches and this would tend to re-enforce the underlying capital value of Mr. Hyland's pitch which lay just outside the top ten pitches.

48. Third, it is important to stress that the loss which Mr. Hyland suffered occurred in August 2007 when the pitches were allocated to the new applicants following a re-draw based on the seniority of permit holders. That loss accordingly occurred before the

gathering storm blew away the flood defences of the Irish economy a year later and which subsequently decimated the value of all capital assets.

49. Fourth, the existence of the boycott and the uncertainties generated by this litigation must all have seriously undermined the value of these pitches after the events of August 2007. As we have already noted, who would be prepared to pay a premium price for a pitch when the effective title to that pitch was under serious challenge? Here it may be noted that a letter which was sent by Dundalk to all registered bookmakers in February 2008 offering to allocate pitches for the sum of €863 expressly contained the warning that in view of the "current stated position of the INBA", the pitches were to be allocated a "temporary basis", so that in the event:

> "of a resolution of the current dispute necessitating the revocation of allocations then there will be no right of any compensation to the bookmakers concerned."

50. For all of those reasons, therefore, I think that the valuation of Mr. Hyland's pitch is much closer to that suggested by Mr. Keegan. But some deduction must also be made to reflect the fact that even six months of the re-draw (and, hence, the loss of the pitch) there was considerable excess and unused capacity. This demonstrates that a more conservative view must be taken of any pre-August 2007 valuation.

51. I will therefore allow Mr. Hyland the figure of €15,000 in respect of the loss of this particular pitch.

Part IV: The claim for loss of profit

52. In his evidence Mr. Hyland rather frankly stated that he was in a modest way of business and he rather disarmingly stated that he could not properly be compared with some of the major and prominent bookmakers such as Mr. Hughes and Mr. O'Hare who are also pursuing claims for the damages against Dundalk. Mr. Hyland maintained his claim for €4,000 loss of profit per year for a seven year period. The entire figure claimed under the heading of loss of profits was some €28,400.

53. The assessment of damages for loss of profit is, of course, particularly difficult in a case of this kind where the court is required to assess what would have happened were it not for the occurrence of particular intervening events. To add to these difficulties, it is necessary to find an appropriate comparator to make an assessment regarding loss of profits during this period. This exercise requires, as the expert witness called by Mr. Hyland, Mr. Peelo put it, an examination of the business interruption model. The expert witness called by Dundalk, Mr. Jacob, largely agreed with this approach, save that he termed it a loss profit contribution, so that the exercise involves "the lost profit which would be a contribution to the fixed overheads." The court is accordingly concerned in this context to ascertain, first, what the lost turnover would have been, second, what the gross profit would have been on that claim and, third, what were the variable costs associated with each particular meeting had he attended it which he would have "saved", since by definition he no longer had to incur such costs.

54. Mr. Hyland gave evidence that during the period from 26th August 2007 (i.e., the date of the re-opening) and 19th February 2014 (the date of the first judgment), Dundalk held 204 meetings, 61 of which clashed with other meetings. Mr. Hyland had alternative work open to him on 39 of these clashes, but given that he did not hold seniority at Clonmel (after June 2009), Downpatrick, Down Royal, Killarney, Thurles and Tipperary (from the end of 2008), he was available for work at Dundalk at the other clashing meetings. His starting point, therefore, was to claim for 162 meetings which were run at Dundalk during this period. With allowances for illnesses and other absences, this brought the claim down to 158 meetings over the seven year period.

55. In order to demonstrate what his losses would have been, Mr. Hyland chose Leopardstown as his comparison course. It was true that his seniority was No. 48 at Leopardstown in comparison with No. 6 on the Racecourse Line (effectively the 12th/13th seniority at Dundalk), but the critical point was that once one compared the profits with earned per meeting at Leopardstown between 1999-2001 and the Dundalk during the same period, they happened to be very similar. During this period his turnover at both racecourses was broadly similar and yielded a gross profit of €463 per meeting (when rounded up) in both cases. Mr. Hyland then went on to note that his gross profit per meeting at Leopardstown during the period from 2007-2013 was €259 per meeting.

56. His Dundalk expenses per meeting would, however, have come to €136. When these so-called "saved" costs – i.e., the costs he would have otherwise incurred but did in fact do so – were deducted, this meant that the profit per meeting would have come to €159. Each bookmaker would also have received a payment from the Satellite Information Services of (in general terms) some €18 per meeting in respect of data payments. On that basis Mr. Hyland claimed the sum of €2,653.

57. In other words, Mr. Hyland sought to extrapolate from the profits which he earned at each Leopardstown meeting to what he would have earned at Dundalk but for what occurred in August 2007. As the expert forensic witness called by the plaintiff, Mr. Peelo, reminded the Court, this was on the basis that a comparator was necessary for this exercise and, as it happens, Mr. Jacobs also agreed that it would be desirable if a suitable comparator could be found. Neither Mr. Hyland or Mr. Peelo claimed that this was a straightforward comparison, but for various reasons which they each advanced in evidence, Leopardstown seemed the best comparison.

58. It is important to state that, as one might expect, there are both similarities and differences between the two racecourses. The profit per meeting figures were broadly similar and the attendance and turnover declines which both experienced since 2008 was not dissimilar. There are also important differences as well.

59. As Mr. Jacobs has helpfully pointed out in his report, Leopardstown is a Category 1 racecourse and its average attendance for the period in question (2007-2013) ranked as the 4th highest of the 26 racecourses currently operating on the island of Ireland. Dundalk is a Category 2 racecourse were ranked as 25th, *i.e.*, it was the second most poorly attended racecourse. (There are 24 racecourses in this State, with two operating in Northern Ireland, namely, Down Royal and Downpatrick.)

60. As Mr. Martin and Mr. Jacobs both pointed out in their testimony, the differences between the business model of the "old" Dundalk and the "new" Dundalk should not be under-estimated. The "old" Dundalk course had simply 6/7 meetings a year during the summer months between May and September. For historical, cultural and religious reasons, the most important days in its fixture calendar were July 12th (given the fact that this day is a public holiday in Northern Ireland) and August 15th (a Church holiday). The racing fixtures themselves were mainly National Hunt (*i.e.*, over jumps) or mixed card (*i.e.*, a combination of National Hunt and flat racing).

61. The business model for the "new" Dundalk is quite different. The new track caters for flat racing only on all weather surface. The number of fixtures has been greatly expanded with 40 meetings in 2012 and 37 in 2013. While the July 12th/August 15th dates have been retained, the majority of the meetings are held during the winter months on Friday evenings under floodlights. Many of the

meetings are in practice what are termed "industry days" where the meetings would not be commercially viable in themselves but for the revenue derived from the sale of media rights. Thus, in other words, Dundalk can exploit its position as the only all weather stadium which can function under floodlights by running winter meetings which are of interest to racing channels and betting shops at a meeting at times of the year when other racecourses are simply not functioning. The media rights derived from this activity are significant and are a vital part of the racecourse's business model.

62. A further important difference which emerged from Mr. Jacob's evidence was that the level of on-course betting was fundamentally different between the two courses. During the period in question, between 2007 to 2013, the level of on-course betting at Dundalk was 14% of that of Leopardstown (€101,836/€733,985). The number of fixtures at Leopardstown (23/24) has remained constant through the years.

63. Yet other factors have to be included in any assessment of this matrix of facts. The severe recession which engulfed the country from 2008 onwards has severely impacted on discretionary spending, including on-course bookmaking. The advent of social media and ease with which customers can bet online has in any event probably eroded the market share of on-course bookmakers.

64. There are, furthermore, two other factors peculiar to Dundalk which also impact on this assessment. There is first the impact of the illegal boycott on the turnover at Dundalk. Second, there is the question of whether the absence of prominent bookmakers such as Mr. O'Hare and Mr. Hughes has impacted on turnover figures at Dundalk.

65. On this latter point, Mr. Martin emphasised that the "betting was the betting" and that any endeavour to recreate what might have been had these prominent bookmakers taken up their pitches at Dundalk was entirely speculative. Mr. Jacobs did not dissent from the theory of the argument: the casual visitor to the foreign city who wishes to find a suitable restaurant for an evening meal is, for example, probably more likely to seek out the crowded café rather than one with empty tables on the intuitive basis that the former must have the better reputation. The average concert goer is more likely to savour the atmosphere of a packed auditorium and there can be few more depressing experiences than to witness the discomfort of the pianist required to perform in the deafening silence of the empty concert hall.

66. By the same token, the average patron of the racecourse is more likely to be attracted by the excitement generated by the melee and the hectic atmosphere of the thronged betting ring than by the desolation and soulless atmosphere of the largely empty ring. It is also seems clear that some patrons were also likely to follow their favourite bookmakers. Such patrons might well be dissuaded from attending a meeting where these bookmakers were absent. Yet, as Mr. Jacobs observed, it was impossible to assess how greater the betting might have been had these larger bookmakers been present following the re-opening of the course without, as he put it, "taking wild guesses as to what the market size would actually be" (Day 12, page 39).

67. All of these imponderables make the task of assessing what the loss of profit would have been exceptionally difficult, if not well nigh impossible. What, then, are the implications of these differences?

68. Mr. Jacobs' basic critique of the Leopardstown comparator was that even accepting that the average profit per meeting in Dundalk between 1999-2001 was directly comparable to that achieved in Leopardstown in the same period, one could then draw direct comparisons between Mr. Hyland's performance at Leopardstown between 2007 and 2013 and how he would have performed at Dundalk during the same six year period. There are essentially two reasons why Mr. Jacobs thought that this could not be done.

69. First, Mr. Jacobs stressed that the product was essentially different: six or seven summer fixtures in "old" Dundalk compared with the present 40 or so meetings during the winter season, National Hunt versus all weather and so forth. Second, it was not inherently likely that a correspondence which existed for a two to three year period would, as he put it (Day 11, page 109) "always exist for the years going after."

Conclusions on the loss of profits

70. As I have already indicated, the swirling eddies of uncertainty which attend all aspects of this claim make an assessment of damages in this case especially difficult. If JK Galbraith thought that the only function of economic forecasting was to make astrologers look respectable, a worse fate probably attends any judicial endeavours to make a fair assessment of the what might have been.

71. I think that Mr. Jacob's critique of the limitations of the Leopardstown comparator are well taken. Yet it is the only realistic one available and must, perforce, serve as a working model with all its imperfections. In addition, one may reasonably assume that Mr. Hyland – who knew his own business best – make a modest profit in the "old" Dundalk and is very likely to have done so had he participated in the "new" Dundalk from 2007 onwards. It must also be recalled that the sums in question in this case are relatively modest. They will, in any event, suffer a significant reduction having regard to my findings in relation to the issue of mitigation.

72. Mr. Hyland claimed a figure of €28,411 for a seven year period, i.e., an average of €4,059 per year. I will allow a full claim of €4,059 for the first year. As already indicated, I will simply allow 20% of the remaining claim of €24,352 (representing the claims from August 2008 to 2013 onwards) giving a figure of €4,870.

73. It follows, therefore, that I will allow Mr. Hyland the sum of €8,929 by way of damages for loss of profits. When the €15,000 damages in respect of the claim for the loss of pitch, the total sum in respect of the damages suffered by Mr. Hyland comes to €23,929.

74. There will accordingly be a decree of €23,929 by way of damages in favour of Mr. Hyland.