Neutral Citation Number: [2014] IEHC 60

THE HIGH COURT

[2008 No. 907 P]

BETWEEN/

FRANCIS HYLAND

PLAINTIFF

AND

DUNDALK RACING (1999) LIMITED TRADING AS

DUNDALK STADIUM

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 19th day of February, 2014

PART I - INTRODUCTION

1. Sunday, 26th August 2007 was an auspicious day in the annals of Irish horseracing, as on that day the first all weather racetrack in Ireland was opened at Dundalk racecourse. This major project had cost €35m. and entailed the construction of a major new stadium along with a new purpose built all weather track. The doyen of Irish racing journalists, the late lamented Colm Murray, was on hand to report on this major event for RTÉ. Yet what ought to have been an occasion for unalloyed joy and celebration was clouded by a bitter dispute between the racecourse (which is owned and operated by Dundalk Racing (1999) Ltd. ("Dundalk")) and the bookmakers who had heretofore frequented the course concerning the operation of what are known as the Pitch Rules.

2. This bitter dispute has abated but little in the intervening seven years. It colours the present proceedings which is but one of perhaps thirty or so similar claims brought by members of the bookmaking fraternity, of which the plaintiff is a prominent member. The plaintiff himself has held a bookmaker's licence since 1975 and he is currently the Honorary Secretary of the Irish National Bookmakers' Association. Sometime in the mid-1990s he purchased the no. 13 in the seniority list at Dundalk Stadium for the sum of IR£8,000. (The seniority concept is central to this case and it is explained in detail later in this judgment.)

3. The outcome of these proceedings also govern another companion case, *John Hughes v. Dundalk Racing (1999) Ltd.*, 2008 No. 3304P. Mr. Hughes lives in Warrenpoint, Co. Down, just about 10 km. or so from Dundalk racecourse. He held the No. 2 seniority on the racecourse line, but in strictness he shared the No. 1 seniority with eleven other bookmakers. This seniority dates from 11th October 1945, which was the date of the first meeting held at Dundalk under the auspices of the Racing Board. He was a prominent supporter of the racecourse, even to the point of sponsoring the last three races held on the course before it closed in September, 2001. Yet both he and Mr. Hyland (along with a majority of the other bookmakers who held seniority at Dundalk) objected strongly to the plans by Dundalk to ask for a capital contribution of €8,000 to the cost of the re-development of Dundalk when the new stadium re-opened in 2007. This is at the heart of the present dispute.

4. The proceedings themselves raise unusual and difficult issues in the fields of contract law, constitutional law and competition law. I will endeavour to summarise these issues at a later stage in this judgment, but it is first necessary to set out the factual background to this litigation, commencing with an outline of the nature and purpose of the Pitch Rules.

The Pitch Rules

5. The latest version of the Pitch Rules – or, to give them their formal title, the Racecourse Executives' Seniority and Pitch Rules – date from 2007. The background to and the evolution of these Rules is, however, a little more complex. In his evidence Mr. Hyland – who, in addition to being a prominent bookmaker, has surely an honoured place as a font of knowledge in all matters relating to the sporting and social history of racing and bookmaking – gave the Court what all acknowledged was a riveting account of the evolution of racing and bookmaking, with the specific reference to the evolution of these Rules. The account of that history which follows is based upon that evidence.

6. Racecourse bookmaking dates from the 1850s. Grandstands, cloak rooms, restaurants and bars were all built to facilitate the public. All of this facilitated bookmakers who had ready access to the racegoers. At that time bookmakers mingled with the crowd with a satchel and took bets as they walked loose around the racecourse. As the race was on they walked to the judges' box by the winning post. The formed a circle and then paid out on the bets.

7. The system of seniority dates from 1912, as it was then that Powerstown Park, Clonmel decided that they would corral bookmakers into a bookmakers' ring and they thereafter not permitted to circulate around the course. The ring was, of course, neutral when it came to paying out customers. The laying of bets was, however, a different matter. It was quickly realised that some pitches in the ring are more advantageous than others as they were more likely to attract custom. There was naturally much jostling and shunting to get these pitches and it was quickly decided that there would have to be a system of allocation of pitches.

8. The advent of the Civil War brought its own difficulties, as the divisions which divided the community also spilled over into the racecourses in the 1920s. Bookmakers took on runners and minders to protect them. These runners then began to get involved in ancillary services such as chalk, sponges, blackboards etc. There was yet some further skirmishing between factions on the racecourse and following a report of Government committee, the Racing Board and Racecourses Act 1945 was enacted by the Oireachtas.

9. The Racing Board – which is the forerunner of the present-day Horse Racing Ireland - then took over the betting arrangements and standardised them. The betting slate or blackboard was required to be a standard size and the Board appointed their own agents to supply the services which the runners had heretofore provided. A new bookmaking levy was introduced to find horse racing prize money and the industry began to go from the strength to strength.

10. The Racing Board also took over the administration of the seniorities, so that the allocations of pitches at different racecourses were fixed by the Board at the first autumn meetings of that year which were held under its auspices. This was known as the seniority system. In some instances the seniorities had pre-dated this event and could be traced back to 1912, but in other cases the pitch allocations were either chosen by lot or determined in some similar fashion. While the number of pitches varies from course to course, within each racecourse the number is fixed. Thus, for example, Galway has 93 pitches with an overflow line of 15.

11. The seniorities were thus administered by the Board and there was a call out of the bookmakers in order of seniority by a Board official in advance of each meeting. By the 1970s, the sale of seniorities become possible (a topic to which I will later return). Up to this point it had been assumed that the Racing Board owned the pitch. It transpired, however, that in the course of litigation in this Court in 1977 Costello J. held that racecourses own the pitch.

12. As a result of that litigation it was apparently decided that the Racing Board's Pitch Rules should be overhauled. A new iteration of the Rules were drawn up in 1977 following discussions between the Association of Irish Racecourses and the Irish Bookmakers' Association and the Racing Board. The Rules were then administered by the Racing Board, but on this occasion as agents for the racecourse. A registration fee was also introduced for the first time in respect of the sale of seniorities. A pitch fee is also payable by each bookmaker in respect of each meeting he or she attends.

13. As we have already noted, the latest version of the Pitch Rules dates from April 2007. This Rule represent an elaborate system defining pitches, the allocation of pitches, vacancies, death, seniority, sale of seniority, registration fees, pitch fees and other related matters. The rules may be amended only by an agreement between the Association of Irish Racecourses Ltd., the Irish National Bookmakers Association and Horse Racing Ireland. Presiding over this is the Pitch Tribunal which has the power to give binding interpretation of the Rules and to determine disputes arising thereunder.

14. It should, however, be noted that the Association of Irish Racecourses Ltd. ("AIR") was originally a co-defendant to the present proceedings. The claims as against that defendant were compromised in July 2009 whereby AIR agreed to promote the following amendment to Clause 19 of the Pitch Rules:

> "In the event of the relocation or redevelopment of a racecourse, then the seniority that applied previously shall continue to apply at any relocated or redeveloped racecourse."

15. Following this amendment, the case against AIR was discontinued. This amendment (which was subsequently adopted) applies only to future relocations or redevelopments and it does not, however, govern the present case.

The background to the present dispute at Dundalk Stadium

16. Horse racing took place at Racecourse Road in Dundalk from the late 19th century until September 2001 when the original track closed. At that point the racing was held on the traditional turf. As the Chairman of the defendant company, Mr. Leo McCauley explained in his evidence, the number of races held at that stage fluctuated between six and twelve meetings per year and they were generally held between May and September. By the late 1990s it was obvious that the racecourse was not doing well and that the facilities left a great deal to be desired. Negotiations then took place between the company which then owned the stadium, Dundalk Race Company plc and Dún Dealgan Greyhound Racing Ltd. ("Dún Dealgan"). This latter company owned and controlled the greyhound stadium at the Ramparts, Dundalk. Both the racecourse company and Dún Dealgan decided to come together to form a new company, Dundalk Racing (1999) Ltd. The new company was incorporated on 18th February, 1999, and it was intended that this would be the vehicle whereby both the racecourse would be re-developed while building a new greyhound stadium at the stadium at the same venue.

17. The application for the re-development of the racecourse (along with the new greyhound track and stadium) entailed a material contravention of the development plan, but planning permission was ultimately granted by Dundalk UDC on 16th October, 2000. Some parties appealed to An Bord Pleanála, but these appeals were ultimately withdrawn on 1st June, 2001.

18. It was obvious that such a major project could not be completed without substantial grant assistance. While Bord na gCon had indicated that it would provide €5m. for the development of the greyhound stadium, Horse Racing Ireland ("HRI")(and its predecessor) were less forthcoming. As Mr. McCauley noted, Dundalk's had advanced applications for funding for an all weather track in the late 1990s, but these applications had been coolly received.

19. On 31st October, 2001, the Dundalk board decided to complete the project in stages, commencing with the greyhound stadium and track. The greyhound stadium opened on 29th November 2003. On 29th June, 2004, some 23 acres were sold for housing re-development and the €6.4m. proceeds were used to reduce borrowings incurred during the construction of the greyhound stadium.

20. In February, 2002 HRI wrote to Dundalk to inform the Board that it was actively considering the development of an all-weather track. There were indeed public policy reasons which would justify the development of an all-weather track. When all-weather race meetings were first held in the United Kingdom – at Wolverhampton and Lingfield – the meetings were generally held for the benefit of television companies. Few highly ranked horses ran at such meetings, in part because of the higher risk of injury.

21. In recent years technological developments led to an improvement in the quality of all weather tracks, thus rendering them suitable for the running of what are termed "Group races", i.e., races involving the best and most highly ranked horses. The last decade or so witnessed the running of Group races at all weather tracks in places such as the United Arab Emirates and the United States. Technological improvements has meant that the modern all weather track – which in evidence Mr. Hyland compared effectively to a fast grass course – is now regarded as being a surface suitable for the best and most valuable horses. It was considered important by Horse Racing Ireland that Ireland should have such an all weather track because Irish horses might well encounter that type of track when racing in major group races abroad.

22. It was nevertheless considered that there was only room for one such course in Ireland. Unlike standard racing where the horses run on the turf, there are, in principle, no limitations on the number of meetings that can be held on all weather tracks through the year. The limitation is instead a purely economic one: there are simply an insufficient number of horses in training to sustain a number of all-weather tracks. There also practical limitations in terms of the number of fixtures available and associated television rights.

23. While HRI were unwilling to provide public funding for the re-development of a (relatively) small course such as Dundalk, the development of an all weather track was a different matter. Two initial applications for funding were refused. By June 2004, however, HRI issued a press release stating that they would consider the development of an all weather racecourse for flat racing only.

24. In August 2004 Dundalk made a further application to HRI seeking to have the all weather track built at Dundalk. HRI thought it

desirable that there should be such a track and, as it happens, they decided in September, 2005 following what amounted to a tender competition between several racecourses that it would part fund Dundalk's bid for such a track. It seems fair to observe that Dundalk was, perhaps, an unlikely candidate for such a venture, since, as we have just noted, it had previously applied unsuccessfully on many occasions for funding from HRI. The redevelopment ultimately cost some €35m., of which €11.6m. came in grant funding from HRI.

25. Completing the funding picture, the directors of Dundalk agreed to sell one third of the company to McGreevy Enterprises Ltd. for €5m. This tranche of money helped greatly in the funding of this massive new development. The construction of the new stable yard, horse race track, floodlighting and the grandstand commenced in September 2006 and was completed by the summer of 2007.

The events of 2007

26. The events of the calendar year 2007 are central to any discussion of the legal issues which arise in these proceedings. On 31st January, 2007, Ms. Caroline Gray, the then manager of the Betting Division of HRI and Mr. Paddy Walsh, the Chief Executive Officer of the Association of Irish Racecourses ("AIR") organised a meeting at Dundalk to discuss the arrangements in respect of the new stadium. Mr. Jim Martin, the Chief Executive Officer of Dundalk informed the meeting that he had been approached by a number of bookmakers who were willing to pay for new pitches at the track when it re-opened. The meeting broke up in disagreement.

27. It seems that both Ms. Grey and Mr. Walsh endeavoured to discuss the situation in Dundalk with the Irish National Bookmakers' Association ("INBA") in a series of ad hoc meetings which took place in the spring of 2007, but the underlying dispute was not resolved. In April 2007, Dundalk agreed to accept the new version of the Pitch Rules. At a further meeting held in June, 2007 Mr. Hyland maintained that Dundalk were violating the Pitch Rules by seeking such a payment from the bookmakers. Mr. Martin replied that in his view the Pitch Rules did not apply to the allocation of pitches at a new racecourse.

28. In early July Mr. Martin was authorised by his Board to seek a ruling from the Pitch Tribunal on this matter. Mr. Martin wrote to Mr. Walsh of the AIR seeking such a ruling. On 20th July, 2007, Mr. Walsh sought such a ruling and on 30th July, 2007, the Tribunal gave a ruling, the implications of which will presently be examined in greater detail.

29. In the wake of the decision of the Pitch Tribunal, Ms. Grey convened a meeting on 8th August, 2007, between Mr. Martin and Mr. Hyland and two other representatives of the Irish Bookmakers Association, Ciarán O'Tierney and Seamus Mulvaney. Mr. Martin made the case that Dundalk was a new racecourse and that by reason of the decision of the Pitch Tribunal that the Pitch Rules did not apply to it. He stated that he was nonetheless prepared to allocate pitches at Dundalk based on traditional seniority if the bookmakers were each prepared to pay a €8,000 capital contribution towards the enormous costs of the redevelopment. He explained that this contribution was payable in two tranches and was repayable after one year if the bookmaker no longer wished to maintain the pitch.

30. For the bookmakers Mr. Hyland riposted by stating that the bookmakers would not accept that Dundalk was a new racecourse. Under the terms of Rule 10(a) of the Pitch Rules bookmakers could be required to pay five times the admission price for a particular pitch and that beyond this were not prepared to go. They flatly refused to countenance making a capital contribution.

31. Here it may be observed that those bookmakers who objected to the capital contribution did so both for reasons of principle and expediency. As far as they were concerned, from the standpoint of principle they had already paid for (or otherwise acquired) their seniority and they considered in that context that the request for the €8,000 contribution from Dundalk amounted to a clear repudiation of the Pitch Rules. Moreover, if Dundalk could lawfully make such a demand, then this might prove to be the beginning of a trend where even bigger courses such as Leopardstown, Fairyhouse or the Curragh would make such demands.

32. These concerns were voiced by the other bookmakers who gave evidence in support of Mr. Hyland, namely, Mr. Graham, Mr. Carty and Mr. Hughes, all of whom also held seniorities at Dundalk. One can therefore fully understand the concerns of these bookmakers along with their sense of deep chagrin that their contractual entitlements were being undermined in this manner.

33. Returning to the meeting, Ms. Grey endeavoured to conduct a form of shuttle diplomacy by separating the various groups. She thought that at one point she had successfully brokered a compromise, but in the end this proved fruitless. On the following day, 9th August 2007, Mr. Hyland wrote to Mr. Walsh of the Association of Irish Bookmakers to say that Dundalk's proposals were not acceptable. He contended that the "financial demands made by Dundalk infringe Clause 10(a) of the [Pitch] Rules as well as the Horse Racing Ireland Act." Mr. Walsh replied later that day to say that the Association were:

> "….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…have since ruled in our favour on this matter."

34. In the wake of these ultimately fruitless negotiations, Dundalk decided that it could wait no longer. The stadium was, after all, due to re-open within a matter of weeks. Mr. Martin then wrote on 10th August 2007 to all registered bookmakers (including the plaintiff) inviting them to apply for pitches at Dundalk. Some fourteen bookmakers took up the offer and their pitches were duly allocated on 21st August, 2007 under the supervision of Ms. Grey of HRI. HRI issued its authorisation on 23rd August, 2007, and the Turf Club likewise granted a licence on the following day. The first meeting on the new track was then held on 26th August, 2007.

35. Further efforts were made to settle the dispute in September, 2007. The first floodlight meeting was due to be held on the 27th September, 2007, yet stories appeared in the media that the trade union SIPTU (which represented bookmakers' assistants) would organise a picket. In the event, this did not materialise. There were, however, protests outside the stadium which in the end petered out. To this day, however, a collective boycott was organised by bookmakers in respect of the stadium and of those bookmakers who entered the stadium. As I shall set out in the course of this judgment, this boycott was plainly unlawful.

36. Before proceeding further, it is necessary to say something now concerning the structure of the plaintiff's claim and the defendant's counter-claim. The plaintiff claims that the Pitch Rules represent a contractually binding document which apply to Dundalk; that Dundalk is contractually bound to honour the bookmakers' seniorities as they existed prior to September 2001 and that the latter's demand for an €8,000 capital contribution from the bookmakers is inconsistent with and contrary to the Pitch Rules. These issues are dealt with in Parts II, Part III and Part IV of the judgment.

37. While Dundalk denies that the plaintiff is entitled to relief in respect of any of these matters, it also pleads by way of counter-claim that independently of this that the plaintiff's protests outside the stadium were unlawful; that the Pitch Rules violate s. 4 of the Competition Act 2002 and that there was, in any event, an illegal trade boycott of Dundalk. The counter-claim issues are dealt with in

Part V, Part VI and Part VII. My overall conclusions are summarised at Part VIII

PART II- THE LEGAL STATUS OF THE PITCH RULES

38. Perhaps the first substantive legal question which arises is whether the Pitch Rules are enforceable and legally justiciable at the behest of an individual bookmaker.

39. There are, of course, many instances where the rules of sporting associations are not intended to be legally justiciable in a court of law or which, alternatively, provide for an alternative dispute resolution system of which the Court for Arbitration in Sport is only the most celebrated. There are admittedly (rare) instances of where the courts have intervened in sporting disputes, but these cases are generally exceptional involving something akin to fraud or manifest irrationality (such as in *Mathews v. Irish Coursing Club Ltd.* [1993] 1 I.R. 346) or where an athlete was denied fair procedures, often in connection with allegations relating to the administration of performance enhancing drugs (*Quirke v. Bord Luthchleas na hÉireann* [1988] I.R. 191). Absent *mala fides* or other exceptional circumstances, the courts will not, however, generally entertain disputes in relation to matters such as team selection: see *Jacob v. Irish Amateur Rowing Union Ltd.* [2008] IEHC 186, [2008] 4 I.R. 731. In that case Laffoy J. refused to grant the plaintiff rower a mandatory injunction compelling the defendant union to select the plaintiff for a competition which was his last chance to qualify for the Beijing Olympics

40. *Jacob* is significant in that the decision of Laffoy J. shows that, absent *mala fides* or other exceptional circumstances, the courts are reluctant to interfere with matters of purely sporting judgment. If it were otherwise, the courts would have assumed a strange new jurisdiction which would test the traditional boundaries of justiciability and, indeed, raise questions as to the appropriate judicial role in relation to such matters. Could, for example, the courts be expected to adjudicate on questions such as the handicapping of horses, competitor seedings, team selection or on-field disciplinary or refereeing decisions? Could it mean that the courts might subsequently be called upon to rule on questions such as whether a penalty ought to have been given or whether a player was properly sent off or even whether a point, goal or try (as the case may be) ought to have been awarded?

41. In the context of horse racing, sporting questions relating to the application of the rules of racing are entrusted to the Turf Club and the Irish National Hunt Steeplechase Committee who together form the Racing Regulatory Body for the purposes of Part III of the Irish Horse Racing Authority Act 1994. It must, however, also be recalled that given that the Oireachtas has entrusted these functions by statute to those bodies in the public interest, this means that decisions of these bodies are, in principle, at least amenable to judicial review. It is, for present purposes, unnecessary to express any precise view on these questions, save again to say that the more the disputed matters relates *purely* to questions of sporting judgment, the less likely it will be that there will be any judicial involvement in the resolution of the dispute.

42. In the context of the contractual enforcement of sporting rules, much will depend on the terms of those rules and the context of the dispute. Counsel for Dundalk, Mr. McDermott, relied heavily on the decision of Jack J. in *Anderton v. Rowland*, The Times, 5th November, 1999, a case concerning the enforceability of the rules of the Showmen's Guild, a British association designed to promote the interests of travelling showmen. In this case the plaintiff alleged that the defendant's bid for a particular fair was in breach of the Guild's rules and claimed damages.

43. Jack J. is quoted as saying that the function of the rules was to regulate the terms of the contracts between the member and the Guild:

> "The primary function was not to set out obligations between individual members, which might give rise to claims for damages if broken.
>
> [The relevant rule] was not to be treated to have direct contractual effect between one member and another and so to give rise to a claim for damages by way of compensation for its breach, unless either there was a sufficiently clear expression of that intention in the rule, or it was necessary that it had direct contractual effect between members in order to give effect to the rule, neither of which applied in the instant case."

44. In essence, *Anderton* is simply an authority for the proposition that the rules of a sporting organisation must evince a clear intention to create contractual relations between *members* for such members to have a cause of action against another *member* in respect of the breach of such a rule. As Jack J. pointed out, such rules are normally designed to regulate the relationship between the individual member and the club or organisation in question. The golfer who joins a golf club well understands that the rules governing his or her relationship with that club and further understands that a serious breach of those rules might lead to the termination of that membership. But he or she would be surprised to learn that a breach of those rules might bring about a situation in which another member could sue him or her in respect of such a breach.

45. Yet all depends on the context, wording and intent of such rules. In my view, the Pitch Rules fall into a completely different category from, say, the average rules of a golf club precisely because the latter set of rules are intended *simply* to regulate the relationship between the individual member and the club in question and are understood as such by all concerned. The Pitch Rules stand in contrast to the average set of rules of a sporting organisations and clubs, precisely because they are designed to regulate not only the relationship between the individual bookmaker and the individual racecourses, but also aspects of the relationship between bookmakers *inter se.*

46. This is clear from the introductory preamble to the Pitch Rules:

> "These Rules represent the conditions *upon which individual bookmakers are entitled to carry on the business of bookmaking at a particular pitch* on any authorised racecourse, excluding point-to-point, together with *details of how such pitches are to be allocated to or transferred between bookmakers.*" (emphasis supplied)

47. It is plain, however, from a consideration of the Pitch Rules that they were intended to constitute a binding mechanism regulating the conditions of individual bookmakers carrying on business at race meetings and they were also intended to govern the transfer of a sale of a pitch from one bookmaker to another. Indeed, the entire tenor of the Rules is to regulate the conduct of bookmakers *inter se* with regard to the allocation of pitches. Many examples of this could be given, but reference to two Rules may suffice for present purposes.

48. Rule 7(a) provides that:

> "A bookmaker may only sell his seniority at any authorised racecourse to a person who holds a course betting permit

from Horse Racing Ireland."

49. If, therefore, a bookmaker endeavoured to sell his seniority to a non-authorised person, it seems perfectly clear that another bookmaker who was affected by the proposed sale could, in principle, at any rate, obtain an injunction to restrain the sale on the ground that it contravened Rule 7(1).

50. This is underscored by the fact that the parties have agreed to establish a Tribunal which would determine disputes. Rule 20(a) provides that the Tribunal is to consist of a representative of the Association of Irish Racecourses and the Irish National Bookmakers' Association, together with a Chairman nominated by Horse Racing Ireland.

51. Rule 20(b) then provides:

> "The Pitch Tribunal shall have the authority to determine any dispute as to the interpretation of these Rules or their application in any circumstances. The determination of the Pitch Tribunal shall be final and binding on all parties concerned. The Pitch Tribunal shall determine its own procedures provided that the same shall comply with the principles of natural justice."

52. It is plain, therefore, that a determination of the Tribunal concerning the interpretation of the Pitch Rules could - in principle, at least - bind individual bookmakers.

53. There is accordingly here the requisite intention envisaged by Jack J. in *Anderton* to ensure that the Rules had direct contractual effect as between bookmakers, because they exist (in part) for the commercial benefit of all authorised bookmakers and to ensure the orderly regulation of on-course bookmaking. Echoing the words of Jack J. in *Anderton*, it might also be said that it is necessary that these Rules should have direct contractual effect as between members in order to give them full effect.

54. It is true that the individual bookmakers are not a party to the Pitch Rules. Indeed, Clause 21 of the Rules provides that the Rules may only be amended by an agreement between the Association of Irish Bookmakers and the Irish National Bookmakers' Association in conjunction with Horse Racing Ireland. Mr. McDermott placed much reliance on these provisions to illustrate his argument that individual bookmakers had no standing to enforce the Pitch Rules against another bookmaker.

55. It might seem unusual that one party should be able to sue to enforce a contract when they have no power of amendment of that contract. It is nevertheless clear, however, that some special arrangements must often be made to accommodate the position of individual members where representative or trade associations contract collectively with another entity. Depending, of course, on the nature, terms and language of the specific rules in question, allowance must nonetheless be made for the fact that it may not be practicable or feasible for individual members of the association to negotiate their own terms.

56. This very point was made by Kearns J. in *Collooney Pharmacy Ltd. v. North Western Health Board* [2005] IESC 44, [2005] 4 I.R. 124 where complaint was made that the fact that a contract was centrally negotiated on behalf of the members of a trade association rendered it more in the nature of an administrative regulation or scheme. However, this proposition was rejected by Kearns J. who observed ([2005] 4 IR 124 at 144):

> "I would be of the view that great value and importance attach to the process of securing uniformity, so far as is possible, in terms and conditions applicable to the supply of drugs and medicines to eligible persons under s.59 of the [Health Act 1970]. It would be both impracticable, and indeed undesirable, to have a process of individual negotiation or to have a situation where different pharmacies were subject to materially different terms and conditions in respect of the provision of the same services. In the circumstances the fact that the health boards were not in a position to negotiate with the appellants in relation to amending the terms of the contract gives rise to no valid complaint on the appellants' part and still less does it provide any basis for impugning the contract or any of its provisions."

57. In the case of the Pitch Rules it simply would not be feasible or practicable for the parties to permit individual bookmakers to negotiate their own terms and conditions with the individual racecourses. It can, accordingly, be no surprise that the Rules confine the power of amendment to the respective associations. Yet the fact that for reasons of practical convenience and efficiency the individual members are not free to negotiate their own terms should not mean, in this instance at least, that the Rules are not directly effective in appropriate cases. This is perhaps especially so given that the individual bookmakers are personally bound by the Rules and, furthermore, that the Rules are intended to operate for the benefit of all interested parties, namely, the bookmakers, the racecourses and, ultimately, the sporting public.

58. In my view, therefore, bookmakers affected by the operation of the Pitch Rules may, in principle, sue to enforce them in the same manner as any other contract to which they are expressly named as a party.

PART III: THE DECISION OF THE PITCH TRIBUNAL

59. The decision of the Pitch Tribunal was originally communicated by Mr. Kavanagh by letter dated 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."

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."

62. Whatever uncertainties might have otherwise attached to the Tribunal's decision have thus been dispelled and, indeed, following receipt of this letter the parties were agreed that this clarification spoke for itself. All, therefore, that the Tribunal ruled was that the Pitch Rules (as they then stood) would not apply to a new racecourse. It did not decide the fundamental question as to whether the redeveloped track at Dundalk constituted a new racecourse. I might add that given that the Tribunal was required by Rule 20(b) of the Pitch Rules to abide by the principles of fair procedures, it could not properly have decided that wider question – insofar as it had a jurisdiction to do so - without some form of hearing in which the interested parties would have been given an opportunity to be heard and, where necessary, lead evidence on that issue.

63. There can, accordingly, now be little doubt but that the Pitch Tribunal's decision has no direct bearing on a question which is central to the plaintiff's claim, namely, is Dundalk a new racecourse for the purposes of the Pitch Rules. Putting matters another way, if the new track is the successor to the old track and is, therefore, in substance the same racecourse, then it is agreed by all parties that the Pitch Rules apply to Dundalk.

PART IV: WHETHER DUNDALK RACECOURSE IS A NEW

RACECOURSE FOR THE PURPOSES OF THE PITCH RULES

64. While racing has taken place at Dundalk since 1890s, it is necessary now to review the evidence to examine the question of whether the racecourse which re-opened in August 2007 it was, in substance, a new racecourse for the purpose of the Pitch Rules. The evidence was that up until August 2001 the racecourse lands themselves were owned by the old racecourse company, Dundalk Race Company plc. Dundalk Race Company had itself merged with Dún Dealgan Greyhound Racing Ltd. in 1999 to form Dundalk Racing (1999) Ltd. and the lands were then transferred to the new company on 10th August, 2001. It is also clear that prior to the closure of the track in September, 2001 that registration fees were paid by bookmakers to Dundalk Racing.

65. Next, it must be observed that the racecourse remains on the original site. It is true that the new all weather track does not exactly follow the line of the original track and, indeed, substantially deviates from it. It is also true that some 23 acres of the original site were sold for housing, albeit that the monies were used to help fund the new development. The planning permission for the new development also required the complete demolition of the existing stadium and all the buildings on it. A small stadium for greyhound racing has also been built.

66. A further consideration is that a combination of the all-weather track and the erection of floodlights has enabled Dundalk to host far more meetings throughout the year than the essentially summer schedule of some seven meetings from May to September which was the norm when racing was held on the turf prior to the 2001 closure. It is, however, clear that Dundalk never abandoned its traditional claim to those summer fixtures and it would seem that these fixtures were transferred by the Fixtures Committee of Horse Racing Ireland to other courses on a purely temporary and provisional basis between 2002 and 2007. It should also be recalled that Dundalk elected to adopt the new Pitch Rules in April, 2007.

67. The fact, moreover, that extensive changes may have taken place in sporting stadia and facilities is generally not taken to detract from the essential historical continuity associated with such venues. Those gallant players from Dublin and Tipperary who took refuge on the narrow embankment which led then from the football field to an athletics track circling the pitch on a bleak Sunday afternoon in November 1920 would probably not recognise the modern day Croke Park. Both the embankment and the athletics track are gone and they would surely look in wonder at the magnificent new towering stands with which the stadium is now adorned. Yet Croke Park enjoys a recognisable historical continuity in over a hundred years of tradition.

68. Many other examples can be found to a greater or lesser extent from other sporting fields. Wimbledon has not changed despite the new retractable roof, even if neither Borg or McEnroe ever played under it. Jones and Sarazen would quite possibly struggle to recognise the modern Augusta. The course has been lengthened, water added and tees, bunkers, greens and in some cases even the layout of holes have been changed. New trees have been planted in order to block access to otherwise inviting fairways, so that the course looks and plays differently from the first Masters championships of the 1930s. For all that, Augusta is still regarded as fundamentally the same golf course as that originally designed by Jones and McKenzie.

69. While acknowledging that this is largely a question of degree, much the same can be said of Dundalk. There is a clear continuity in terms of ownership, location, track and tradition. It is true that the racecourse and its facilities in 2007 were (and are) unrecognisable from that which obtained in 2001. The track is all weather (and not on the turf); the racing is now all on the flat (whereas in the past the racing was over jumps); the course of the track has been significantly altered; the fixtures are held year long (and not just in the summer) and, moreover, the racecourse was closed between 2001 and 2007. For all that, Dundalk is still in substance the same racecourse as it was in 2001, at least in the sense contemplated by the Pitch Rules.

70. "Racecourse" is defined by Rule 1 of the Pitch Rules as meaning a "racecourse (including the precincts thereof) authorised by HRI under s. 59 of the Irish Horseracing Industry Act 1994, but excluding point-to-point courses." Section 59(1) of the 1994 Act provides:

> "The Authority shall, subject to such terms and conditions as it thinks fit, grant an authorisation ("a racecourse authorisation") to a licensed racecourse ("authorised racecourse") where the Authority considers it is able to provide appropriate facilities and services to carry on horseracing at race-meetings and accommodate persons associated with horseracing (including members of the public watching horseracing)."

71. While accepting that there are differences - and, in some respects, significant differences - between the nature of the racecourse as it existed in 2001 as compared with 2007, one must nevertheless conclude that, at least for the purposes of the Pitch Rules, Dundalk remained in substance the same racecourse as it was prior to its closure. The fact that the racecourse remained in the same location is, perhaps, the most important single factor why I find myself arriving at this particular conclusion.

72. It follows, therefore, that in principle at least, Dundalk are bound by the application of the Pitch Rules. Assuming that these Rules do not violate s. 4 of the Competition Act 2002 (a topic which I will presently consider), it follows, therefore, that Dundalk had no

legal right to demand that bookmakers pay €8,000 as a capital contribution to the new development as a condition of the bookmaker taking a pitch, however reasonable that demand might have seemed to some. This demand is plainly inconsistent with Rule 10(a) which provides that all that could be demanded is that each bookmakers pays five times the daily admission fee in respect of each pitch.

PART V: WHETHER THE PROTESTS OUTSIDE THE

STADIUM WERE LAWFUL

73. It is not in dispute but that a number of the bookmakers (including Mr. Hyland) and their supporters protested outside the entrance to the new stadium on a number of occasions after it had first opened. While a few further protests were held in the months thereafter, they seem to have thereafter petered out. Some of the protesters carried placards and beyond some jeering and verbal abuse directed at particular individuals, it does not appear that the protesters took any overt action to dissuade patrons or others from entering the stadium. Although there is no suggestion that the protests were anything other than entirely peaceful in nature, the defendants nonetheless maintain that such protests were in reality a form of illegal picketing which did not enjoy the benefit of the Industrial Relations Act 1990 ("the 1990 Act"). If these protests were a form of picketing, then, of course, they were illegal because it is common case that the 1990 Act does not apply to self-employed persons such as bookmakers.

74. The present case accordingly raises the rather difficult question of where peaceful protest begins and ends and, specifically, at what point is the line crossed from peaceful protest into illegal industrial action. This line is perhaps especially difficult to draw where (as here) the protests relate not to classic political grievances, but rather relate to issues not entirely dissimilar to those which might otherwise arise in an industrial relations context. It must be recalled, of course, that the bookmakers' protests related to matters peculiar to them and to their professional interests, namely, the failure by Dundalk to honour what they considered was their contractual due, namely, the 1945 seniorities recognised by the Pitch Rules.

75. Article 40.6.1.ii of the Constitution guarantees:

> "The right of the citizen to assemble peaceably and without arms. Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas."

76. The protests were carried out on a public road immediately outside the stadium. It is quite clear that persons who assemble peacefully on the public highway for this purpose are *prima facie* entitled to the benefit of the constitutional guarantee: see *The People (Director of Public Prosecutions) v. Kehoe* [1983] I.R. 136, 139 per McCarthy J. No law has been enacted for the purposes of Article 40.6.1 to prevent or control meetings of this kind. It has not been suggested that the protests amounted *in themselves* to a breach of the peace or a danger or nuisance to the general public. Of course, those patrons attending the race-meeting might have regarded the protesters as something of a nuisance in the colloquial sense of that term, but that is not the sense in which the Constitution uses this concept. "Nuisance" in this sense refers to activities which make it difficult or impossible for the general public to use their own amenities, by, e.g., blocking access to a private dwelling or by holding late night protests in a purely residential area.

77. The context and nature of the protest is also, of course, of some importance.

78. In the first place the protestors had a strong interest in communicating their message, especially to the sporting public. They believed – with deep conviction – that they had been wrongly deprived of their contractual rights and that they had been most unjustly treated by Dundalk as a result and that the sporting public would support them if they – the bookmakers – could only inform and educate them in relation to the background facts. These accordingly were views the expression of which were fully was protected by the parallel free speech guarantee contained in Article 40.6.1.i. It followed thus that the protestors had the right to seek to persuade public opinion of the justness of their cause in the sense envisaged by Article 40.6.1 itself: see, by analogy, my own comments to this effect in *Cornec v. Morrice* [2012] IEHC 376, [2012] 1 I.R. 804 at 818-825.

79. Second, it is true that the protests were outside a racecourse stadium. While admittedly sporting and entertainment venues are not forums normally associated with public protest, neither is this unknown. Just to take a well known historical example, it could not have been said, for instance, that the protests which took place in January 1970 outside the Lansdowne Road stadium by reason of the fact that Ireland were playing (in the then apartheid era) South Africa in a rugby test match were not the manifestations of constitutionally protected rights of free speech and peaceable assembly.

80. It must also be recalled that substantial amounts of public money were used to fund the stadium project, so that the stadium cannot be realistically regarded as a purely private venture. The present case is accordingly very different from a case involving the picketing of a private dwelling with menaces, where the constitutional rights of the occupier or owner of a private home to the protection of the inviolability of that dwelling as guaranteed by Article 40.5 would otherwise be engaged: see *Sullivan v. Boylan (No.2)* [2013] IEHC 104.

81. Third, the most important feature of all is that the protestors sought only to persuade and to rest their case on an appeal to the sporting public to acknowledge the justness of their cause while remaining within the law. As we have already noted, there was no overt act or even implied threat against those who ignored the protest. The protestors merely sought for the most part to convey information regarding the background to the dispute. Given that the free exchange of ideas, arguments and views is central to the operation of the democratic State envisaged by Article 5 and is at the heart of the protections of free speech and peaceable assembly contained in Article 40.6.1, the public expression and manifestation of different and dissenting views must - in general, at least - be tolerantly accepted by all.

82. At the same time any effort to dissuade an individual (by, e.g., verbal abuse directed at such an individual) from exercising their lawful right to attend the race meeting would have been plainly unlawful, as would any attempt to interfere with the running of the meeting have been. It would have been likewise unlawful had the protesters committed any acts of trespass or obstructed the entrance to the premises. Here the evidence was that the protesters remained in a public place and it has not been suggested that they committed any acts of trespass on Dundalk's property (or that of other parties) or that they attempted to obstruct any public thoroughfare.

83. In this respect this protest was different from industrial action in an important but subtle respect. Industrial action involving picketing is premised on the express or implied threat of collective action on the part of the trade union concerned and its individual

members to dissuade others from exercising certain legal and contractual rights, most notably to attend at a workplace. This is why even the solitary picketer can have such a devastating impact and again this is why this activity is strictly regulated by the 1990 Act. Here, however, there was no evidence of any such express or implied threat and nor was it so regarded by the sporting public who seem to have largely ignored the protest.

84. In this respect, Mr. Hyland stoutly rejected the suggestion which was put to him in cross-examination that the object of the protest was to discourage patrons attending the meeting. He instanced the case of a racing correspondent who sought an assurance from the protesters that there was no actual picket, lest he might inadvertently cross a picket line. The unchallenged evidence was that the protesters assured the journalist that this was not the case and that he should enter the stadium to do his work in the ordinary way. No evidence was led of intimidation or any endeavour by overt acts to stop any person entering the stadium.

85. The protestors appealed merely to the public to recognise the justness of their cause through the power of persuasion. If in this respect they appear to have been largely unsuccessful – and Mr. Hyland candidly acknowledged in evidence that the sporting public "had just laughed at them" - this cannot take from the fact that they were exercising core constitutional rights which are at the heart of the free and democratic society guaranteed by Article 5 of the Constitution.

86. I am, however, satisfied from the evidence of Mr. McCartan that insulting language was used by some protesters to describe as he, his sons and some employees drove into Dundalk racecourse on the day of the re-opening and in this respect they were verbally abused. This conduct was quite unlawful and – depending on the exact language used – might have potentially constituted a breach of the peace.

87. Provided that the protestors otherwise refrained from any overt actions against individuals and the protest remained peaceable and without any acts of trespass and otherwise remained within the law, then if Dundalk had applied for an injunction at the time it would not have been entitled to any such relief, since the core of the protestors' activity was fully protected by the guarantees contained in Article 40.6.1.i (free speech) and Article 40.6.1.ii (peaceable assembly) of the Constitution.

88. Dundalk would, however, have been entitled to have obtained an injunction restraining the use of jeering, insulting language and verbal abuse which was *personally directed* – and I emphasise these words - at those bookmakers (such as Mr. McCartan) and others who entered the stadium. This does not mean *in and of itself* that the protest thereby became unlawful. The right of free speech and free assembly are critical constitutional rights and they are vital to the functioning of the free and democratic society posited by Article 5 of the Constitution. The principle of proportionality comes into play here and the right of protest is not to be lost *merely* because of the regrettable lapses on the part of an undisciplined minority.

89. This general conclusion furthermore accords with the distinction itself drawn by s. 9 of the Non-Fatal Offences against the Person Act 1997. Section 9(1) provides that:

> "A person who, with a view to compel another to abstain from doing or to do any act which that other has a lawful right to do or to abstain from doing, wrongfully and without lawful authority—
>
> …
>
> (d) watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place, or
>
> (2) For the purpose of this section attending at or near the premises or place where a person resides, works, carries on business or happens to be, or the approach to such premises or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of subsection (1)(d)."

90. In my view, the protesters merely attended "at or near" Dundalk Stadium, while not actually trespassing thereon. They further attended simply for the purposes of communicating information, so that in these circumstances this conduct did not amount to the act of "watching or besetting" within the meaning of s. (2) of the 1997 Act.

91. For all of these reasons, I am satisfied that the protesters had engaged in the constitutionally protected activities of free speech and free assembly without engaging in any overt acts to dissuade others or to commit acts of trespass or other illegal acts. It follows, therefore, that, subject to the important qualification in respect of the jeering and verbal abuse of individuals – which was unlawful - the protests outside the stadium were otherwise perfectly lawful.

PART VI: WHETHER THE PITCH RULES ARE ANTI-COMPETITIVE

AND VIOLATE THE COMPETITION ACT 2002

92. The defendant has also counter-claimed that the Pitch Rules are anti-competitive and violate s. 4(1) of the Competition Act 2002 and, further, that there had been a collective boycott of Dundalk and the bookmakers who had elected to take up their pitches at the new stadium. For this part of the hearing I derived great benefit from listening to the evidence of two very distinguished economists, Mr. Jim Power (called by the plaintiff) and Mr. Moore McDowell (called by the defendant). While the plaintiff contended that the €8,000 capital contribution requested by Dundalk was an ant-competitive barrier to entry, in the end in view of the conclusions I am about to reach, it is not necessary for me to express any views on this question.

93. The two competition issues which I am required to determine can rather be summarised thus: (a) are the Pitch Rules in themselves anti-competitive and contrary to s. 4(1) of the Competition Act 2002 and (b) whether there was an illegal trade boycott. I propose now to address the first of these issues.

94. Section 4(1) of the Competition Act 2002 ("the 2002 Act") provides:

> "(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
>
> (b) limit or control production, markets, technical development or investment,

(c) share markets or sources of supply,

(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."

95. At its heart, the fundamental question is whether the Pitch Rules are anti-competitive in their intent or in their effect. Here it is no answer to say that the Rules contain clauses which, taken literally, restrict competition in the sense that every contract restrains trade in one sense or another. This not at all what the Oireachtas had in mind when enacting the 2002 Act. The question is rather whether these Rules tend to promote the operation of an orderly and transparent market or rather whether the Rules are anti-competitive in their object and effect.

96. This was the very point made by Brandeis J. in his classic judgment in *Chicago Board of Trade v. United States* 246 US 231 (1918) when he stated (246 US at 238-239):

> "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences."

97. In *Chicago Board of Trade* the US Supreme Court rejected the contention that the "call" rules operated by a commodities exchange violated s. 1 of the Sherman Act 1890 (the core section of US antitrust rules which both Article 101 TFEU and s. 4 of the 2002 Act in varying degrees parallel). The call rule forbade the member of the exchange from trading in grain "to arrive" at any other price other than the closing price at the "call" (which was generally in the early afternoon) until the opening of the market in the following day. In his judgment for the Court Brandeis J. stressed that the call rule facilitated the proper functioning of the exchange market by avoiding purely private markets and by promoting the open exchange of information and bids.

98. This is the approach which must be adopted when examining the Pitch Rules by reference to s. 4(1) of the 2002 Act. The starting point of the Rules is that they exist to promote the orderly dispatch of bookmaking business in the ring. Without such Rules, no bookmaker could conveniently plan his or her business arrangements for a particular meeting and much energy would be needlessly wasted in an indecorous and unseemly scramble for the best pitches at a particular ring. Indeed, judged by Mr. Hyland's compelling account of bookmaking history prior to the coming into force of the first version of the Pitch Rules in 1945, the potential for disorder at such meetings could not be excluded.

99. In that respect, therefore, the Rules fall into the classic Brandeisian formulation of regulating and even promoting competition. They promote competition in the sense that they facilitate the prior allocation of pitch spaces in an orderly and foreseeable fashion. The Rules further avoid the risk of a false market arising in on-course betting because without the order and consistency of the Pitch Rules, there is the risk that the unworldly patron might be lulled into betting with poor odds with the first bookmaker he or she happened to encounter in a crowded racecourse. There is here a direct analogy with the call rule in *Chicago Board of Trade*, because as Brandeis J. pointed out, without the support of that rule, country dealers and farmers arriving in the late afternoon would otherwise have been obliged to deal "without adequate knowledge of actual market conditions."

100. The Pitch Rules accordingly underpin the system of the betting ring. The existence of a betting ring in turn creates a public market for on-course betting because the patron can conveniently inspect the range of odds by a short tour of the lines of bookmakers' pitches in the ring. It was with good reason, therefore, that this was described by Mr. Power as "the ultimate transparent marketplace." The ring system further promotes competition in on-course betting services because it brings all patrons and all bookmakers into direct contact, thereby facilitating what Brandeis J. described in *Chicago Board of Trade* as "the free and open interchange of bids and offers." The ring system thus avoids the asymmetries of information which are characteristic of purely private markets and which so often work to the disadvantage of the private consumer. This is particularly true of markets such as a betting market where the ever nature changing of bids and odds means that public exchange of instant information is perhaps especially important and, in this respect at least, a betting ring can fairly be compared with a commodities exchange.

101. These are all important considerations from the standpoint of competition law because in these respects the Rules generally help to create and to improve market conditions for on-course betting by having a consistent pitch allocation system. The pre-1945 experience showed the empirical necessity for a pitch allocation system of some kind. One might equally say that as the betting ring system promotes open competition in on-course betting services, the Pitch Rules are a necessary ancillary feature of that system in order to have the orderly operation of the betting ring. It must accordingly be adjudged that the Pitch Rules are, *generally speaking*, pro-competitive in their object and effect.

102. Yet even if the Pitch Rules are not *per se* contrary to s. 4 of the 2002 Act, that is not to say that there may not be individual features of those Rules which are exclusionary and anti-competitive in terms of either their object or effect. Two past examples may be given. Mr. Hyland gave evidence that seniorities could not be sold or traded prior to the 1970s. Other witnesses such as Mr. McCartan complained that even after that change was first made a novice bookmaker had to wait seven years before a pitch could be purchased. Both rules have subsequently been changed.

103. If the Pitch Rules did not allow – at least in principle - for the trade in seniorities to authorised bookmakers, this would clearly be manifestly anti-competitive and contrary to s. 4(1) of 2002 Act. There are clearly supply side constraints in that the number of desirable pitches at any given racecourse is restricted. It is those very supply side constraints which serve to give the more desirable pitches an economic value. This was graphically explained by Mr. Hyland in evidence when he described what happened when he purchased number 13 on the seniority list at Dundalk for IR£8,000 in the mid-1990s:

> "It was like moving from Siberia to the Bahamas...I [had been originally] allocated a pitch on the end line which is

> the furthest line away from the parade ring and [following the seniority purchase] I moved up to number 6 on the racecourse line, right at the heart of the meeting."

104. If, however, such seniorities could not be traded or if a new entrant had to wait a very long time before he or she was eligible to effect such a purchase, this would deter new entrants who could use the pitches most efficiently and profitably, to the disadvantage of consumers. Neither the economist nor the competition lawyer would be surprised to learn that this was precisely what happened in the 1970s prior to the changes in the Pitch Rules which for the first time then permitted the sale of seniorities.

105. As Mr. Hyland explained in evidence, many of those bookmakers who then owned the 1945 seniorities were at that stage then in their 70s. This was shown to be to the disadvantage of the betting ring because:

> "…age is the enemy of the bookmakers because you need to be very mentally alert. The older you get you loose this alertness which means you become cautious, you take smaller bets, you make a smaller book. [This] therefore… was not in the interest of the Racing Board who are anxious to get the bookmakers into the most advantageous pitches for doing business to do the maximum amount of business in those pitches. So you got rid of the old, tired bookmaker and in came some of the big names of the betting ring that you all know, and they came into the betting pitches and the betting ring which [from about 1975 was] absolutely transformed as [by that stage the sale of seniorities had become possible]."

106. Accordingly, subject to one important caveat, one could not at all disagree with the analysis offered by Mr. McDowell when he stated:

> "In a competitive market, the number and conformation of pitches and their allocation to users would be determined by the opportunity cost of space, ancillary provision costs and the willingness to pay to stand by bookmakers. Pitches of varying quality would command different prices. Other things being equal, the better pitches would be bought by the bookmakers who could use them most profitably *and the racecourse would appropriate the revenue*." (emphasis supplied)

107. One may agree that this is the result which orthodox economic theory would predict. Yet, for whatever reason, racecourses (with, of course, the exception of Dundalk in August, 2007) have traditionally refrained from seeking to exploit what amounts to an essential facility for on-course betting (namely, pitch allocation at a betting ring) for their own commercial advantage. The economist and competition lawyer alike might both wonder why, for instance, the racecourses did not seek to auction off the most desirable pitches to the highest bidder and to capture this revenue for themselves rather than to remain a purely passive party to a system which involved the sale of seniorities and the appropriation of these capital sums by bookmakers who effected the sale.

108. While no direct evidence was given on this point, one may assume that the racecourses had their own reasons for not taking this step and, as Mr. McDowell in any event accepted in evidence, their failure to do so could not be regarded as anti-competitive in itself. The racecourses may have concluded, for example, that the imposition of capital costs on bookmakers would dull the vibrancy of the betting ring by deterring bookmakers offering cheaper odds to the sporting patrons and that the racecourses would be better off in the long run with higher attendances from the public. They might also have thought that a vibrant betting-ring thronged with patrons added to the excitement and interest of the race meeting and that this might well be jeopardized if the public realised that on-course betting was relatively expensive by reason of the capital costs associated with an auction for pitch allocation. Or they may have concluded that maintaining the general goodwill of bookmakers was more important to them than extracting every possible revenue source from their own facilities and assets.

109. At all events, none of this greatly matters so far as the sweep of the prohibition contained in s. 4(1) of the 2002 Act, provided that effective competition is maintained so far as on-course betting market is concerned. Here it is the contestability of that market which is critical. This means in turn that the Pitch Rules must facilitate ease of entry onto the market by new entrants and they must further ensure that no artificial quantitative restrictions (i.e., over and above acceptable and natural capacity constraints) on the number of pitches are imposed.

110. The Pitch Rules say nothing about quantitative restrictions. It is true that they do place some restraint on entry by a system of the prior allocation of the best pitches to bookmakers of long standing. Yet this has to be balanced against the fact that these rules are, on the whole, market making In this respect, I agree with the approach taken by Mr. Power, who argued that the Pitch Rules really operated only as a method of allocating spaces on a racecourse which in turn facilitated competition in the on-course betting market. Critically, it is always open to the new entrant to enter by purchasing seniorities and, as we have already noted, *absent this possibility* then the exclusionary aspects of the Rules would outweigh their pro-competitive aspects. But as the modern version of the Rules *do* afford this possibility, this issue does not now arise.

111. The Pitch Rules do not therefore materially affect the constestability of the on-course betting market. They moreover help to promote effective competition in that market in the manner which I have indicated. It is true that, as we have already noted, one might have expected that the racecourses would have sought to extract the capital values associated with these pitches for themselves, but their failure to do so does not *in itself* suggest that they have succumbed to an anti-competitive agreement regarding the Pitch Rules.

112. As things stand, therefore, it cannot be said that the Pitch Rules violate the prohibition contained in s. 4(1) of the 2002 Act.

PART VII: WHETHER THERE WAS

A COLLECTIVE TRADE BOYCOTT

113. The final question is whether there was a collective trade boycott of Dundalk and of the bookmakers who elected to stand there. Before examining the evidence on this point, a few diverse general observations may be in order.

114. First, the law has always sharply differentiated between individual and collective actions in the sphere of trade and commerce. Subject to the specific exceptions contained in the Equal Status Act 1998 (as amended) and the special case of the firm or individual occupying a dominant position in the relevant market for the purposes of either s. 5 of the 2002 Act or Article 102 TFEU, the private individual is, generally speaking, entitled to do his or her business as he or she pleases. Even in cases of dominance the courts are generally loath to compel the dominant firm to engage in trade with a particular customer. This point was well made by Advocate General Jacobs in Case C-9/97 *Oscar Bronner GmbH* [1998] ECR I-7791 when he observed that:

> "…..it is apparent that the right to choose one's own trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States…Incursions on those rights require careful justification."

115. The US Supreme Court has likewise held that the antitrust laws do not generally "restrict the long recognised right of [a] trader or manufacturer engaged in an entirely private business, free to exercise his own independent discretion as to parties with whom he will deal": *United States v. Colgate & Co.* 250 US 300, 307 (1919), per McReynolds J.

116. Collective action has, however, have always been viewed in a different light from the actions of an individual trader. That, after all, is the difference between *Allen v. Flood* [1898] A.C. 1 and the subsequent decision of *Quinn v. Leathem* [1901] A.C. 495. In *Allen,* the House of Lords held that a statement by a single trade union official that he would persuade employees to terminate their contracts of employment unless the defendant was sacked was held not to give any actionable civil wrong. Yet three years later the House of Lords held in *Quinn* that if two persons combined to make such a statement in an industrial relations context it might – subject to specific exceptions – amount to the tort of conspiracy.

117. Shades of this thinking in the competition law sphere can be seen in the judgment of Carroll J. in *A & N. Pharmacy Ltd. v. United Drug plc* [1996] 2 I.L.R.M. 42. Here all three pharmaceutical wholesalers in a particular locality had refused to supply the plaintiff pharmacy, even though it was prepared, if necessary, to pay cash on delivery. Carroll J. accepted that the refusal to supply might well amount to an abuse of a dominant position contrary to s. 5 of the Competition Act 1991 (the statutory predecessor to the 2002 Act) and she accordingly granted a mandatory interlocutory order requiring the making of supply on payment of cash. Questions of dominance aside, the right of the individual trader to choose his or her customers should not generally be at issue. But it does become an issue when - as in *A & N Pharmacy* - all local suppliers refuse to supply, for no particular good reason. At that point the refusal to supply takes on the character of a trade boycott.

118. Thus, even in a major antitrust decision which re-asserted the *general right* of the single dominant firm to refuse to supply if to do so was perceived as conduct which might assist potential rivals – *Verizon Communications Inc. v. Trinko LLP* 540 US 398 (2004) – the US Supreme Court acknowledged that concerted action involving joint action by competitors was very different. As Scalia J. observed:

> "*concerted* action… presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted non-discriminatory admission to the club."

119. Second, collective boycotts inevitably harm consumer welfare by stifling the normal operation of market forces, specifically the efficiencies associated with price competition and the price allocation process. Such conduct classically amounts to "concerted action" which has as its object or effect the "prevention, distortion or elimination" of competition within the meaning of s. 4(1) of the 2002 Act.

120. Third, this may be especially so in the context of a market such as that for on-course betting services because the ability to lay off bets with other bookmakers is an integral part of that business. As Mr. McDowell explained in evidence, laying-off is really a form of re-insurance in the bookmaking business. Risk has a cost and because the laying-off mechanism helps to reduce that cost, this ultimately promotes consumer welfare by leading to better odds for the sporting patron.

121. Was there, then, a collective boycott of those bookmakers who paid the €8,000 requested by Dundalk and who then took pitches following the re-opening of the track? The evidence unfortunately coerces me to the view that there was such a boycott and that it continues to this day, even if it has abated somewhat.

122. There can also be little doubt but that the boycott has – as one might expect – damaged consumer welfare. In the first place, there are only twelve or so bookmakers who stand at Dundalk, thus making it the smallest betting ring in the country. The Chief Executive Officer of Dundalk, Mr. Martin, referred in evidence to an article written in *The Racing Post* by the distinguished sports journalist, Jonathan Mullin, which was published on 3rd October 2013 in which the latter observed:

> "But it is not just the racecourse paying for this mess, punters are getting it in the neck too. Taking every Friday night meeting at Dundalk from October until Christmas 2012 – that is 95 races over 12 meetings – it is clear a lack of competition in the ring had a seriously negative impact on starting prices. In 67 races, the average betting percentage (over round) per runner was 2.5% or higher, and as many as 15 of the races, it was more than 3% per runner, including a disgraceful 152% for a 14 runner handicap last October.
>
> Bookmakers are, of course, entitled to their margin, but if a proportionate amount is wagered on every horse – admittedly a rare occurrence - a race with an over round of 115% means that for every €100 bet with them, they pocket €15. It is never as simple as that, but the corollary of that means that a race with an over round of 152% implies punters have no chance, the 52% of money bet by punters on that race will be lost.
>
> This winter our office will once again field dozens of calls from punters rightly complaining about high over rounds at Dundalk. Friday night after Friday night, favourites are collapsing on the show at Dundalk, 3-1 turning into 5-2 when you consider you get 7-2 on the exchanges."

123. In the wake of that article, Mr. Martin contacted Mr. Mullin and asked him for his calculations, in respect of which Mr. Mullin duly obliged. Mr. Martin satisfied himself that the calculations and conclusions were correct. To this end Mr. Martin compared the betting odds available on the early evening Friday night meetings under lights at Dundalk and those available at an exactly comparable meeting at the all weather track at Wolverhampton. Having done this, Mr. Martin was satisfied that:

> "…the betting percentage that was occurring in Dundalk was considerably higher than the betting percentage at Wolverhampton….I would suspect that more bookmakers would…improve the competition and maybe more access to lay off bets would accrue and improve the competition, and, therefore, would lower the bookmaker's margin and improve the margin that the punters could operate at."

124. The plaintiff's expert economist, Mr. Power, accepted in evidence that there was reason to "believe that something happened that damaged competition in Dundalk", although he thought that the imposition of the €8,000 charge had acted as a barrier to entry and that this might be responsible. The evidence subsequently led by the defendants after Mr. Power gave his evidence, however, unquestionably demonstrated the existence of a collective boycott and I think it absolutely clear that it was this above all which has

damaged competition at Dundalk.

125. It is sufficient for this purpose to look to the evidence of Mr. McCartan, Mr. Grimley and Mr. O'Hare.

126. Mr.McCartan gave evidence that he had seniorities at Dundalk, Galway, Leopardstown, Laytown, Sligo and Roscommon and at the Maze and Downpatrick in Northern Ireland. While he wanted to take up Mr. Martin's offer in August 2007, he did not immediately stand at Dundalk for the better part of a year. He had initially refrained from taking up his pitch at Dundalk (even though he had paid for it) because he was aware of the on-going dispute which he had hoped might have been amicably resolved. During the period from 2007-2008 it was made clear to him by named other bookmakers at various racecourses that he was not to deal with Dundalk bookmakers.

127. Mr. McCartan felt that he could not refuse to deal with these bookmakers as they were friends of his. It was then made clear to him that he would be boycotted in turn. He had hoped that the dispute would be resolved by arbitration, but this did not prove possible. He then took up his pitch at Dundalk in July 2008. He and other Dundalk bookmakers made a complaint to HRI regarding the boycott, but it would seem that little came of this.

128. In his witness statement Mr. McCartan recounted several incidents at racecourses such as Galway, Navan, Roscommon, Sligo and Cheltenham. A common theme was that other bookmakers would either not lay off bets with him or were intimidated or pressurised in not doing so. Mr. McCartan accepted, however, that the boycotting had eased somewhat in recent years. He further stated that while Mr. Hyland did not engage in any of these activities personally, he maintained that he (Mr. Hyland) had turned a blind eye to such conduct. He did, however, observe that Mr. Hyland did not lay-off bets with him (or vice versa), although he accepted that Mr. Hyland had done so with his son (who is also a bookmaker).

129. Mr. Brian Grimley stated that he was a bookmaker in the years between 1996 and 2009. He decided to take up the August 2007 offer from Dundalk to take a pitch on payment of €8,0000. Shortly before the Dundalk was due to open on Sunday August 27th, he received a telephone call from a named person to the effect that if he took up his pitch at Dundalk none of his sons would work in Irish racing again.

130. The day after Dundalk re-opened – i.e., Monday, 27th August, 2007 - happened to be a public holiday in Northern Ireland and it was the busiest meeting of the year at Downpatrick. Mr.Grimley described how he had encountered a very unpleasant atmosphere at the betting ring and he was subjected to jeering and insults from other named bookmakers.

131. A few days later Mr. Grimley entered the racecourse at Laytown whereupon a prominent member of the Irish National Bookmakers' Association told him twice that he was a disgrace. A few days later again at Leopardstown Mr.Grimley was approached by another named colleague who told him that "it was not too late to give up Dundalk" and that if he did he would see to it that he (Mr. Grimley) would get back into the bookmakers' fold. On other occasions - including both Downpatrick and Fairyhouse - insulting expletives were uttered concerning him in his presence by other bookmakers.

132. Mr. Grimley had a particularly unpleasant experience on Easter Monday, 5th April, 2010, when he was standing at Fairyhouse. This was the day of the Irish Grand National. Mr. Grimley was asked by a named bookmaker whether he was still working in Dundalk. Mr. Grimley applied in the affirmative. The other bookmaker then used an insulting expletive to describe Mr. Grimley, whose 15 year old son was present and who also witnessed this singularly unpleasant event. Other members of staff and racing patrons also heard these comments. Not surprisingly, both Mr. Grimley and his son were very upset. These deeply unpleasant events meant that what for him was an important day in the racing calendar was ruined.

133. Mr. Grimley duly reported to this incident to HRI and his solicitor wrote to HRI on 15th April, 2010, to give particulars of the complaint. It is only appropriate to record that the individual in question later apologised in writing through his solicitor in respect of this incident.

134. The boycott nevertheless continued. Not only did the boycott lead to a reduction in Mr. Grimley's turnover, but it caused him much personal anguish. Other bookmakers simply refused to lay off bets with him. It is not at all an exaggeration to state that the boycott prompted Mr. Grimley's decision to surrender his bookmaker's licence in 2009.

135. Mr. O'Hare gave evidence in a similar vein. While Mr. O'Hare had seven betting shops in the town of Dundalk, he never had a pitch at Dundalk racecourse prior to 2007. He nevertheless paid the racecourse for a pitch in August, 2007 and he stood at every meeting since that date. Once, however, he took up a stand at Dundalk he was boycotted immediately and other bookmakers refused to place bets with him. This, of course, damaged his business because he was left with a riskier book than he would otherwise have maintained. He also found that it was impossible to trade or sell any of his pitches.

136. Mr. O'Hare arranged for his solicitor in February 2008 to write to the INBA complaining that this boycott was a breach of s. 4 of the 2002 Act. The INBA's solicitors replied by denying that there was any such boycott organised by the Association, saying that if any of the individual members "have chosen to use alternative bookmakers for the purposes of trade betting", this was entirely a matter for them.

137. None of this evidence regarding the existence of a boycott was seriously challenged. The evidence, therefore, clearly demonstrates that there was concerted action on the part of certain bookmakers to enforce a collective trade boycott in respect of those Dundalk bookmakers who paid for and took up a pitch at Dundalk. There is absolutely no doubt but that this was seriously anti-competitive conduct which is prohibited by s. 4(1) of the 2002 Act.

138. In the specific case of bookmaking, the refusal to lay off bets damages the ability of the individual bookmaker to remain in the market by undermining the capacity to manage risk. The laying off of bets is a standard industry practice. The present case is accordingly no different in principle from that of *British Midland/Aer Lingus* [1992] OJ l96/34, [1993] 4 CMLR 596. In that case, following British Midland's announcement of a new service on the London Heathrow/Dublin route, Aer Lingus announced that it would refuse to interline with British Midland. This is a standard industry practice which enables a passenger to use a ticket issued by one airline for a return journey on another. The European Commission held that Aer Lingus's conduct was manifestly anti-competitive in the circumstances, since it was exclusionary and selective in its operation and raised a competitor's costs without objective justification.

139. In the present case, the effects of the refusal to deal by means of the boycott were even more pervasive given that it involves collective action and not merely the individual actions of an (admittedly) dominant firm. The boycott not only seriously damaged the structure of competition at Dundalk racecourse, but they also gravely harmed the economic interests (and, for that matter, the social

interests) of the boycotted bookmakers. There is absolutely no doubt but that many of the boycotted bookmakers suffered intensely as a result

140. In the circumstances, it perhaps suffices for the moment to grant a declaration that the boycott is unlawful and to hold that it is contrary to s. 4(1) of the 2002 Act. It should, however, be fully understood that the boycott must immediately end. Failure to heed this court declaration might well expose those who engage in this manifestly anti-competitive practice to other civil and, for that matter, criminal consequences. If required, however, I would in principle be prepared - should this prove necessary - to grant an injunction directed at named individuals compelling them to end the boycott.

PART VIII – CONCLUSIONS

141. It remains only to summarise my principal conclusions:

(a) It is clear from the context, wording and intent of the Pitch Rules that they are designed to regulate not only the relationship between the individual bookmaker and individual racecourses but also aspects of the relationship of bookmakers *inter se.* As the individual bookmakers are personally bound by the Pitch Rules and, furthermore as these Rules are intended to operate for the benefit of all interested persons (including bookmakers, racecourse and, ultimately the sporting public) bookmakers affected by the operation of the Pitch Rules may, in principle, sue to enforce them in the same manner as any other contract to which they are expressly named as a party.

(b) The decision of the Pitch Tribunal on 30th July, 2007, was merely to the effect that the Pitch Rules (as they then stood) would not apply to a new racecourse. As the Tribunal subsequently made clear to this court, it did not decide the fundamental question as to whether the redeveloped track at Dundalk constituted a new racecourse.

(c) While it is true that the racecourse and its facilities in 2007 were and are unrecognisable from that which obtained when the racecourse closed in September 2001, there is nonetheless clear continuity in terms of ownership, location, track and tradition. In my judgment, therefore, while acknowledging these substantial changes, Dundalk still remains in substance the same racecourse as it was in 2001, at least in the sense contemplated by the Pitch Rules. It follows, therefore, that in principle, Dundalk are bound by the application of the Pitch Rules. Subject to the separate question as to whether these Rules violate s. 4(1) of the Competition Act 2002, Dundalk had no entitlement to demand that bookmakers pay €8,000 as a capital contribution to the new development as a condition of the bookmaker taking a pitch at the stadium.

(d) The question whether the protests outside the stadium were lawful raises the difficult question as to when peaceful protest begins and ends and, specifically at what point the line is crossed from peaceful protest into illegal industrial action.

(e) In as much as the protesters refrained from any overt actions against individuals so that the protest remained peaceable and without any acts of trespass and otherwise remained within the law, then if Dundalk had applied for an injunction in September or October 2007 it would not have been entitled to any such relief, since the core of the protesters' activity was fully protected by the guarantee contained in Article 40.6.1.i (free speech) and Article 40.6.1.ii (peaceable assembly) of the Constitution. Dundalk, would, however, have been entitled to obtain an injunction restraining the use of jeering, insulting language and verbal abuse which was *personally directed* at those bookmakers and others who entered the stadium.

(f) The Pitch Rules generally help to create and to improve market conditions for on-course betting by having a consistent pitch allocation system. As the betting ring system promotes open competition in on-course betting services, the Pitch Rules are a necessary ancillary feature of that system by facilitating the orderly operation of the betting ring. The Pitch Rules are thus, *generally speaking*, pro-competitive in their objective and effect and the essential contestability of the on-course betting market is thereby maintained because of the options for the sale and trade in seniorities. It cannot, therefore, be said that, generally speaking, the Pitch Rules violate s. 4(1) of the Competition Act 2002.

(g) It is nevertheless clear from the largely unchallenged evidence of Mr. McCartan, Mr. Grimley and Mr. O'Hare that there was a collective boycott of those bookmakers who took up pitches at Dundalk. This was seriously anti-competitive behaviour in that this amounted to concerted action within the meaning of s. 4(1) of the 2002 Act which had as its object or effect "the prevention, restriction or distortion" of competition in on-course betting services in a part of the State. I accept the evidence of Mr. Martin that this boycott seriously damaged competition at Dundalk and ultimately affected adversely consumer welfare in that patrons were obliged to pay higher prices for on-course betting.

(h) It is sufficient for present purposes to grant a declaration that this boycott was and is unlawful, but, if necessary, I would be prepared in principle to grant an injunction directed at named persons preventing the continuation of the boycott.