THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 172

[2015 No. 579]

Finlay Geoghegan J.
Peart J.
Irvine J.

BETWEEN

FRANCIS HYLAND

PLAINTIFF/

RESPONDENT

AND

DUNDALK RACING (1999) LIMITED T/A DUNDALK STADIUM

DEFENDANT/

APPELLANT

AND

[2015 No. 578]

BETWEEN

JOHN HUGHES

PLAINTIFF/

RESPONDENT

AND

DUNDALK RACING (1999) LIMITED T/A DUNDALK STADIUM

DEFENDANT/

APPELLANT

AND

[2015 No. 580]

BETWEEN

PATRICK O'HARE

PLAINTIFF/

RESPONDENT

AND

DUNDALK RACING (1999) LIMITED T/A DUNDALK STADIUM

DEFENDANT/

APPELLANT

JUDGMENT of the Court delivered jointly by Ms. Justice Finlay Geoghegan and Ms. Justice Irvine on the 1st day of June 2017

1. These three appeals concern a bitter dispute between members of the Irish National Bookmakers' Association ("INBA") and Dundalk Racing (1999) Limited ("Dundalk") which is the owner and operator of the racecourse at Dundalk. The appeals by Dundalk and cross appeals by each of the plaintiffs (to whom we will refer as "the bookmakers" or Mr. Hyland, Mr. Hughes and Mr. O'Hare respectively) are from three orders of the High Court dated 13th July 2015, one in each proceeding. The orders were made pursuant to three judgments of the High Court (Hogan J.):

> 1. A judgment delivered on 19th February 2014 in Mr. Hyland's proceedings (2008 No. 907 P.) [2014] IEHC 60 which, pursuant to an order of the High Court of 20th October, 2008 (Murphy J.), was heard with Mr. Hughes' proceedings (2008 No. 3304 P.) and in respect of which the plaintiffs in approximately 30 other proceedings recorded in the schedule to the order of 20th October, 2008, all against Dundalk, agreed to be bound. Those plaintiffs included Mr. O'Hare. We will refer to that judgment as the "liability judgment".
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> 2. A judgment delivered on 9th January 2015 in Mr. Hyland's proceedings [2015] IEHC 57 to which we will refer as the

"Hyland assessment judgment".

3. A judgment delivered on 30th January 2015 in Mr. O'Hare and Mr. Hughes' proceedings [2015] IEHC 198 to which we will refer as the "O'Hare/Hughes assessment judgment".

Background to Dispute

2. The background to the dispute is fully set out in the liability judgment of the trial judge. As ever, he elegantly encapsulated the moment at which the dispute crystallised in the opening paragraph of his judgment:

> "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."

3. The primary facts for the most part are not in dispute. We only propose summarising same and reference should be made to the judgment of the trial judge for a more detailed account and explanation of the origins and evolution of the Pitch Rules which are central to the dispute.

4. Horseracing has taken place at Racecourse Road in Dundalk from the late nineteenth century. Until 1999, at least, the racecourse was owned and operated by Dundalk Race Company plc ("Dundalk Race Company"). At that point racing was not doing well in Dundalk and Dundalk Race Company and Dún Dealgan Greyhound Racing Limited ("Dún Dealgan") decided to form a new company, Dundalk Racing (1999) Limited. It was incorporated on 18th February 1999 and intended as a vehicle whereby the racecourse would be redeveloped and a new greyhound stadium built at the same venue.

5. Certain dates prior to 2001 are relevant to the issues on appeal. The submissions refer to evidence given by Mr. Martin, the Chief Executive Officer of Dundalk, and Mr. McAuley, who was Chairman of both Dundalk Race Company and Dundalk, to the effect that there was, in 1999, an agreement to transfer the ownership of the racecourse from Dundalk Race Company to Dundalk in return, it would appear, for shares in the latter. Dún Dealgan was also allotted shares in Dundalk Racing. A planning application for the development of the racecourse site was lodged by Dundalk and planning permission granted on 16th October 2000. Following the lodging of appeals, there were further negotiations and an agreement was reached with An Taisce in early 2001, which ultimately resulted in the withdrawal of the appeals which had been lodged by third parties to An Bord Pleanála.

6. Horseracing ceased at the racecourse in September 2001 for the purposes of redevelopment. There was a dispute in the High Court as to whether Dundalk operated racing at the racecourse prior to its closure in September 2001. The trial judge, at para. 64, records the transfer of the lands to Dundalk on 10th August 2001, and also held that it was "clear that prior to the closure of the track in September 2001 that registration fees were paid by bookmakers to Dundalk Racing". The submissions on behalf of the bookmakers refer to evidence given to support this latter finding. Elsewhere, there is reference to the transfer of the ownership of the racecourse lands to Dundalk as occurring in October 2001. Nothing turns on the actual date of transfer. There had been an agreement to transfer the lands in 1999 with Dundalk then lodging the planning application.

7. The development progressed in stages. With a grant from Bord na gCon, a new greyhound track and ancillary facilities were first developed. The greyhound stadium opened on 29th November 2003. In 2004, 23 acres were sold for housing redevelopment and the proceeds used to reduce borrowings incurred by Dundalk in connection with the greyhound stadium development.

8. In 2004, Dundalk made applications to Horse Racing Ireland ("HRI") seeking to have an all-weather track then under consideration by HRI built at Dundalk. Following a process in 2005 HRI decided it would part fund Dundalk's bid for an all-weather track. The directors of Dundalk then agreed to sell one third of the company to McGreevy Enterprises Limited for €5m to assist in the funding of the new development. The construction of the new all-weather horse track, a new stable yard, flood lighting, grandstand and other ancillary facilities commenced in September, 2006 and was completed by the summer of 2007.

The Pitch Rules

9. Prior to summarising the events of 2007, which led to these proceedings, it is necessary to describe briefly the Pitch Rules and the roles of those involved. The Pitch Rules, whose formal title is the "Racecourse Executives' Seniority and Pitch Rules", were an agreement between the Association of Irish Racecourses ("AIR") and the INBA. The AIR is essentially the association of racecourse owners. In respect of each racecourse, the "Executive" is defined as meaning the person "who owns or exercises control over that racecourse". The preamble to the Pitch Rules states:

> "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-points, together with details of how such pitches are to be allocated to or transferred between bookmakers."

10. The pitch is the specific area within the betting ring allotted to a particular bookmaker by a racecourse executive. Pitches are allocated according to a seniority held by the bookmaker. Seniority is also fully defined in the Pitch Rules. In essence, it is a right of priority that a bookmaker acquires at a racecourse which is represented by a date, evidenced in the records of Horse Racing Ireland ("HRI"), which determines relative priority between bookmakers in relation, *inter alia*, to the right to occupy a particular pitch and the order of allocation of pitches in the event of a re-draw. The date is the day upon which the bookmaker first operates in the betting ring at the racecourse in question, and where bookmakers have a similar seniority, their respective seniority for the purposes of the Pitch Rules is determined by lot. Seniority may be transferred between bookmakers.

11. For the reasons more fully explained in the judgment of the trial judge, following the enactment of the Racing Board and Racecourses Act 1945, the Racing Board (the forerunner of HRI) took over the administration of seniorities, and at Dundalk certain of the bookmakers hold seniority from 1945.

12. The Pitch Rules may be amended from time to time by agreement between the AIR and the INBA. They had been amended in 2003 and again in April, 2007 prior to these proceedings. The 2007 Rules are applicable to this dispute. The Pitch Rules provide for a betting ring at each racecourse; the allocation of pitches and changes to same; the maintenance by the executive of a pitch list; sales of

seniority between bookmakers; when a pitch is to be considered as vacant, and reallocation of pitches on a change of pitch. They also provide for a payment of three types of fees: registration fees, introduction fees and pitch fees. All fees are paid to HRI on behalf of the relevant racecourse executive. The registration fees for 2007 were set out in the appendix to the 2007 Pitch Rules and included those payable in respect of pitches at Dundalk.

13. The Pitch Rules provide for a Pitch Tribunal that has authority to determine any dispute on the interpretation or application of the Rules and its determination is expressly stated to be "final and binding on all parties concerned". The Pitch Tribunal comprises a chairman nominated by HRI and two other members, nominated one each by the AIR and the INBA.

Events of 2007

14. It appears that from January 2007, there were discussions between Ms. Grey, the then manager of the betting division of HRI, Mr. Walsh, the Chief Executive of the AIR, and representatives of the INBA concerning arrangements in relation to the new stadium in Dundalk. Mr. Martin, the CEO of Dundalk, attended some such meetings. In the course of these meetings, it became apparent that Dundalk was seeking a capital contribution for the allocation of pitches at what it considered to be a new racecourse. Dundalk maintained that the Pitch Rules did not apply to the creation and allocation of pitches at a new racecourse and as such did not apply to the allocation of pitches at Dundalk Racecourse in 2007. The INBA disputed this and maintained that the Pitch Rules did apply and did not provide for or permit the payment of a capital contribution on the reallocation of pitches upon a change of pitch at a racecourse.

15. By letter of 9th July 2007, Mr. Martin requested Mr. Walsh to make a reference of the dispute to the Pitch Tribunal under Clause 20 of the Pitch Rules. This was done, albeit not, unfortunately, in the terms requested by Mr. Martin and to which more detailed reference is made below. The Pitch Tribunal met and its decision was that the Pitch Rules "do not cover the circumstances where a new racecourse is established". The Pitch Tribunal also recommended that Dundalk and the INBA "have face to face discussion to address all outstanding matters".

16. Dundalk then maintained that this decision meant that the Pitch Rules did not apply to the proposed allocation at Dundalk as it was a new racecourse. The INBA did not accept that Dundalk was a new racecourse or that the Pitch Tribunal had so decided.

17. Ms. Grey of HRI then convened a meeting on 8th August, 2007 between Mr. Martin and Mr. Hyland and two other members of the INBA. She endeavoured to broker an agreement but failed to do so. The proposal and its rejection, together with correspondence on the following days are referred to in more detail below.

18. Dundalk then decided to invite applications for pitches at Dundalk by a letter of 10th August 2007. It required the payment of a capital contribution of €8,000, payable in two tranches, and proposed allocating pitches in accordance with permit numbers as distinct from seniority held at Dundalk Racecourse under the Pitch Rules. The pitches were allocated on 21st August, 2007 under the supervision of Ms. Grey of HRI. HRI issued its authorisation for the Dundalk Racecourse on 23rd August 2007; the Turf Club granted a license on the following day. The first meeting on the new track was then held on 26th August 2007. There were certain further attempts to reach agreement between the INBA and Dundalk that failed, and ultimately these proceedings and other similar proceedings commenced in 2008.

19. Subsequent to the commencement of racing on the all-weather racetrack in August 2007, there were initially protests outside the Dundalk stadium and it is also contended that a collective boycott was organised by some bookmakers in respect of both Dundalk Racecourse and those bookmakers who took up pitches at the racecourse.

The Claim, Counterclaim and Liability Judgment

20. The next part of the judgment concerns the appeal from the decisions in the liability judgment. The appeal and cross- appeals from the assessment decisions are later considered.

21. The primary claim of the bookmakers was that the Pitch Rules are the terms of a contractually binding agreement between Dundalk, and each bookmaker which obliged Dundalk on the re-allocation of pitches in 2007 to respect or honour the bookmakers' seniorities as they existed at Dundalk prior to September 2001, and precluded it demanding an €8,000 capital contribution from the bookmakers.

22. Dundalk disputed the enforceability of the Pitch Rules by an individual bookmaker against it as a racecourse owner. It also disputed that the Pitch Rules applied to the allocation of pitches at Dundalk in August 2007 primarily upon the basis that it was a new racecourse. It also maintained that the Pitch Rules did not apply to the allocation in August 2007 in reliance upon Rule 19 as the new racetrack was an all-weather racetrack. Dundalk also counterclaimed that the Pitch Rules violated s. 4 of the Competition Act, 2002 and that there was an illegal trade boycott of Dundalk Racing.

23. The trial judge in the liability judgment concluded in summary:

> 1. The Pitch Rules are enforceable by the individual bookmakers against the individual racecourse owners and the bookmakers may sue to enforce them in the same manner as any other contract to which they are expressly named as a party.
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> 2. 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. It did not decide the fundamental question as to whether the redeveloped track at Dundalk constituted a new racecourse.
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> 3. Dundalk racecourse in 2007 remained in substance the same racecourse it was in 2001, at least in the sense contemplated by the Pitch Rules. Dundalk, in its allocation of pitches in 2007, was bound by the Pitch Rules and had no entitlement to require the bookmakers pay €8,000 as a capital contribution.
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> 4. The Pitch Rules do not violate s. 4(1) of the Competition Act, 2002.
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> 5. There was a collective boycott by "certain bookmakers" of those bookmakers who took up pitches at Dundalk which amounted to concerted action within the meaning of s. 4(1) of the 2002 Act and unlawful. The protests outside Dundalk racecourse in which Mr. Hyland was identified as participating were lawful.

Appeal
24. The grounds of appeal and submissions made in relation thereto against the decisions in the liability judgment may be summarised as follows:

> 1. The Pitch Rules do not constitute the terms of a contract enforceable by an individual bookmaker against Dundalk Racing. In particular, there is no intention to create a legally enforceable contract between an individual bookmaker and an individual racecourse owner such that its breach gives rise to a claim in damages.
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> 2. Even if there is an enforceable contract between an individual bookmaker and Dundalk whose terms are the Pitch Rules such contract did not apply to the allocation of pitches at the racecourse by Dundalk prior to the opening of the new all-weather racetrack in August 2007. There are essentially three separate grounds upon which that submission was pursued:
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> > (i.) Dundalk is a new legal person distinct from the owner of the racecourse at which the individual bookmakers held seniority prior to September 2001;
> >
> > (ii.) The racecourse that opened in August 2007 is a new racecourse and by implication not one at which the individual bookmakers held seniority such that what was occurring was a re-allocation of pitches under Rule 13. Rather, it was a new allocation of pitches at a new racecourse in relation to which there was no relevant rule in the Pitch Rules.
> >
> > (iii.) As the new racetrack was an all-weather racetrack and there had been no meeting and agreement between the AIR and the INBA in relation to the application of the Pitch Rules to the all-weather racetrack at Dundalk, it followed that in accordance with Clause 19 the Pitch Rules did not apply.

25. A limited submission is made against the decision that the Pitch Rules were not in breach of s. 4 of the Competition Act 2002. Dundalk submits that if the trial judge was correct that the true interpretation of the Pitch Rules constrained Dundalk in the allocation of pitches in 2007, then to that extent only the Pitch Rules are invalid and unenforceable upon the basis that they prevent, restrict or distort competition and are in breach of s. 4 of the Competition Act 2002.

26. There is a cross- appeal by the bookmakers in relation to the conclusion and declaration of an unlawful boycott.

Enforceability of the Pitch Rules
27. Dundalk submits that the Pitch Rules comprise an agreement between the AIR and the INBA. It does not dispute, as a matter of principle, that an agreement negotiated by representative bodies may constitute a binding agreement between individual members. It relies upon the judgment of the Supreme Court per Charleton J. in *Reid & Anor. v. Health Service Executive* [2016] IESC 8. It submits that in accordance with that judgment the question as to whether the agreement in question is binding upon individual members of the bodies or associations between which it was negotiated depends upon the construction of the agreement and the relevant facts and circumstances. It primarily disputes that the Pitch Rules evidence an intention to create binding contractual rights and obligations between individual bookmakers and individual racecourse owners, and in particular not such as to give rise to a claim for damages for any alleged breach of obligations thereunder.

28. The Court has concluded that the trial judge was correct in construing the Pitch Rules as indicating an intention to bind individual bookmakers and individual racecourse owners and create legally enforceable rights and obligations, both between bookmakers and between an individual bookmaker and an individual racecourse owner. The principal reasons for this conclusion are the following.

29. The introductory preamble to the Pitch Rules is important. It provides:

> "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-points, together with details of how such pitches are to be allocated to or transferred between bookmakers."

30. The wording used in the preamble indicates an intention that the Pitch Rules set out a binding mechanism according to which individual bookmakers are entitled to carry on business at a racecourse; how a pitch on an authorised racecourse is to be allocated, and how the pitches may be transferred between bookmakers.

31. As held by the trial judge, the terms of Rules 7(a) and 20(b) indicate a clear intention to bind individual bookmakers and racecourse owners. This latter rule provides that a determination of the Pitch Tribunal "shall be final and binding on all parties concerned". Given that the Pitch Tribunal, pursuant to that rule, has authority to determine "any dispute as to the interpretation of these Rules or their application in any circumstances", Rule 20 clearly intends that the Pitch Tribunal should have jurisdiction, for example, to determine a dispute in relation to the allocation of a pitch to an individual bookmaker on an authorised racecourse purportedly in accordance with the Rules, and further, that its decision should bind the parties. Dundalk relied in the High Court, and again on appeal, by analogy on the decision in *Anderton v. Rowland*, The Times (5th November 1999) concerning the enforceability of the Rules of the Showman's Guild, a British association designed to promote the interests of travelling showmen. On appeal, it submits that the trial judge correctly held that "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". Nevertheless it submits that he did not correctly apply that test to the Pitch Rules in particular by reason of his failure to have regard to Rule 19. We refer to Rule 19 below. Insofar as the principle stated in *Anderton* applies by analogy to the Pitch Rules for the reasons stated by the trial judge and referred to above, the Pitch Rules do evince a clear intention to create contractual relations between the individual members of the AIR and the INBA, which are the parties to the rules, and also between individual bookmakers. However, it also appears that there is not a full analogy with *Anderton* as the Pitch Rules are not purporting to regulate a sporting activity as such, but rather businesses associated with a sporting activity. The Pitch Rules are in the nature of a commercial agreement which, although negotiated and agreed to collectively, is intended to and does bind the individual members of each association in relation to the matters which it covers with the intent that the rights and obligations conferred thereunder are enforceable in law.

32. The question as to whether a breach of any individual rule potentially gives rise to a claim in damages depends upon the particular rule, the alleged breach and the loss claimed in accordance with the principles applicable to damages for breach of contract. The Pitch Rules do not evidence any intention to exclude the normal remedy in damages for breach thereof.

Applicability of Pitch Rules to Allocation of Pitches in 2007

33. The fact that the appellant, Dundalk, is a distinct corporate entity from the one which operated the racecourse at Dundalk prior to its closure in 2001, does not appear of itself to justify a conclusion that the Pitch Rules did not apply to the allocation of pitches at the reopening of the racecourse in August 2007. The evidence was that the Pitch Rules, when amended in 2003 and again in 2007, were accepted by Dundalk. Dundalk was, it would appear, a member of the AIR prior to 2007. Mr. Martin, CEO of Dundalk, by a letter dated 9th July 2007 to Mr. Walsh, Chief Executive of the AIR, sought a reference to the Pitch Tribunal under Clause 20 of the Pitch Rules in order that "they may determine whether the existing Pitch Rules apply to our situation in Dundalk". Such a reference could only be made by a person to whom the Pitch Rules applied as a member either of the AIR or the INBA. In the case of Dundalk it was as the owner and operator of a racecourse which was a member of the AIR.

34. The Pitch Rules applied to Dundalk and the Dundalk racecourse in August, 2007. Nothing in the Pitch Rules excluded their continued application on a change of ownership of a racecourse. The definition of seniority is of a right of priority acquired "at an authorised racecourse". It does not relate to or depend upon the owner of the racecourse. Rather, the issue is whether the Pitch Rules applied to the allocation of pitches in the new betting ring at the Dundalk racecourse in August 2007.

35. The next issue for consideration is the appeal against the determination of the trial judge that the Dundalk racecourse in 2007 was not a new racecourse for the purpose of the Pitch Rules. It is necessary to set out certain relevant exchanges in 2007.

36. The contention of Dundalk as set out in the letter 9th July 2007 was:

> "We believe the recently signed Pitch Rules do not deal with the creation of new pitches or as in our case the creation of pitches at a new racecourse."

37. The dispute referred by Mr. Walsh as Chief Executive of the AIR to the Pitch Tribunal was in slightly different terms. On 20th July 2007 he wrote to each of the three members of the Pitch Tribunal with the substance of the dispute being referred explained in identical terms as follows:

> "A dispute has arisen as to the applicability of the Racecourse Executives' Seniority and Pitch Rules in a situation where pitches are created at a new racecourse. While this dispute arose in the context of the new track at Dundalk we would request that the Tribunal would make a determination on the applicability of the current rules to the allocation of pitches at any new racecourse.
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> It is the view of both Dundalk and of the AIR that the existing rules do not address a situation where pitches are to be allocated at a totally new racecourse. Unfortunately, the INBA do not accept that view and, hence, the dispute.
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> For the sake of clarity, I should also point out that we are also in dispute with the INBA as to whether or not Dundalk is a new racecourse – our strongly held view is that it is. However, it is also our view that the determination of this latter dispute does not fall with in the jurisdiction of the Pitch Tribunal."

38. As appears, there were essentially two disputes identified: (1) whether the Pitch Rules applied where pitches were to be allocated at a new racecourse and (2) whether Dundalk, in 2007, was a new racecourse. However, the first dispute only was referred to the Pitch Tribunal.

39. The decision of the Pitch Tribunal on the single dispute referred was communicated by Mr. Kavanagh, the Chief Executive of HRI, who was its member on the Pitch Tribunal, by letter of 2nd August 2007:

> "Further to your letter of July 20th, I confirm that the Pitch Tribunal met as requested at Galway on Monday July 30th. The Tribunal, consisting of Frank Smyth, Ciaran Skelly and myself decided that the Racecourse Executives Seniority and Pitch Rules do not cover the circumstance where a new racecourse is established. The Pitch Tribunal recommended that Dundalk and the INBA have a face to face discussion to address all outstanding matters."

40. In the course of the hearing before the trial judge, there was uncertainty as to what the Pitch Tribunal had decided. Dundalk maintained that the Tribunal had impliedly ruled that its new track amounted to a new racecourse but Mr. Hyland was of the opposite view. The trial judge raised the issue and asked if the Tribunal might be invited to be heard on the question. Two members of the Tribunal, Mr. Kavanagh, the Chairman, and Mr. Smyth of the AIR, through their solicitors, stated by letter of 10th January 2014:

> "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 that 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."

41. The trial judge then identified the question central to the plaintiff's claim as being whether Dundalk, in 2007, was a new racecourse or was, in substance, the same racecourse as prior to its closure in 2001. The trial judge, at paras. 64 to 70 of his judgment, considered that issue in some detail by reference to evidence of the change in ownership, retention of location with changes made to track and stadium, changes in numbers of proposed race meetings, and retention of traditional summer fixtures (identified on appeal being in particular those of 12th July and 15th August). He also considered changes to Croke Park between 1920 and present; to Wimbledon and Augusta during similar periods such that the earlier relevant stadium or course would not now be recognisable, but nevertheless, each continue to be considered as fundamentally the same stadium or course, and concluded at paras. 69 and 71:

> "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.
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> . . .
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> 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."

42. The conclusion reached by the trial judge was dependant on findings of fact made and inferences drawn. *The Hay v O'Grady* [1992] 1IR 210 principles apply. The Court considers that there was evidence before the trial judge to support the findings made, the inferences he drew and conclusion reached that Dundalk remained in substance the same racecourse as it was prior to its closure in 2001 and was not a new racecourse for the purpose of the Pitch Rules and the allocation of pitches in 2007. Whilst he referred to a continuity of ownership in para. 69, he had, in para. 64, referred to the ownership prior to August 2001 by Dundalk Race Company plc and the incorporation by it of Dundalk with Dun Dealgan Greyhound Racing Ltd. in 1999. Even if the actual transfer of the lands did not occur until October 2001 rather than August 2001(as stated by the trial judge), that does not justify an interference with the conclusions reached. The agreement to transfer was in 1999, long before closure, and formed part of the arrangements made by Dundalk Race Company for the incorporation of Dundalk in which it remains a significant shareholder.

43. That being so, the next submission of Dundalk relates to the non-applicability of the Pitch Rules to the allocation of pitches in 2007 in reliance on Rule 19.

Rule 19

44. Counsel submitted that the trial judge failed to consider the submission made by Dundalk in the High Court in reliance upon Rule 19 of the Pitch Rules and the fact that Dundalk Racecourse, when it reopened, was an all-weather track as distinct from a turf track prior to its closure in 2001. Rule 19 in the 2007 Pitch Rules provided:

> "In the event of all-weather racing being introduced at any racecourse the AIR and INBA shall meet to agree how the provisions of these Rules shall apply to same."

45. It is not in dispute between the parties that Dundalk, in the High Court, made submissions against the application of the Pitch Rules to the allocation of pitches at the Dundalk racecourse immediately prior to its reopening in August, 2007 in reliance on Rule 19. However, it must be noted that Rule 19 was not relied upon by Dundalk either at the time of the reference of the dispute to the Pitch Tribunal in July 2007 or at the time of the final attempts to resolve the dispute between 7th and 10th August 2007. Rule 19 was first referred to by the solicitors for the INBA in a letter of 27th August 2007 to Mr. Walsh of the AIR.

46. The submission on appeal is that irrespective of whether Dundalk racecourse is a new racecourse or in substance the same racecourse as operated prior to 2001, it was a racecourse at which all-weather racing was being introduced for the first time in 2007. Hence, in accordance with Rule 19, the AIR and the INBA were obliged to meet to agree "how the provisions of these Rules shall apply to same" and in the absence of any such meeting and agreement (as was the position), the Pitch Rules did not apply to the Dundalk racecourse in 2007.

47. Counsel for the bookmakers does not dispute that Rule 19, upon the introduction of all-weather racing at any racecourse, requires that the AIR and INBA meet "to agree how the provisions of these Rules shall apply to same". However, in addition to reliance upon the well-recognised difficulties about the enforceability of an "agreement to agree" he submits that the default position is that in the absence of such meeting and agreement the current Pitch Rules continue to apply to the racecourse in question.

48. Counsel for Dundalk does not dispute that this is one possible construction of Rule 19, but submit that the meaning consistent with the remaining provisions of the Pitch Rules which should be given is that the Rules would only apply to a new all-weather track insofar as the AIR and the INBA agreed. They submit that it follows that if, (as was the case here) the AIR and the INBA failed to agree then none of the Pitch Rules apply.

49. Determining the proper interpretation of Rule 19 is not without difficulty. The applicable principles are not in dispute. They are the oft-cited principles set out in the judgment of Geoghegan J. in *Analog Devices BV v. Zurich Insurance Co.* [2002] 1 I.R. 272. These require the Court to consider the words used by the parties to the agreement in the context, first of the entire agreement and of any relevant background facts. The meaning of the words used is the meaning that they would convey to a reasonable person having knowledge of all the relevant background facts available to the parties.

50. The Pitch Rules applicable in August 2007 at the time of this dispute were the Pitch Rules agreed in April 2007. There was no amendment to Rule 19 in April 2007. It is agreed that Rule 19 was introduced in prior amendments made in 2003 at the same time as an amendment to Rule 10(a) which provided that the annual pitch fee payable by a bookmaker to a racecourse owner include days termed "absentee days" *i.e.* days upon which the bookmaker did not attend a race meeting. Whilst the Court has noted that fact as a permissible and relevant background fact, it does not appear to be of direct relevance to the dispute between the parties on the interpretation of Rule 19.

51. The Pitch Rules were last amended and agreed to by AIR and the INBA on behalf of their members in April 2007. At that time it was well known that Dundalk was due to reopen shortly for racing with an all-weather track *i.e.* it would be introducing all-weather racing for the first time at any stadium in Ireland. The Rules agreed between the AIR and the INBA in 2007 did not amend any rule to apply it in a different way to Dundalk as an all-weather track. On the contrary, the preamble continues to refer to the business of bookmaking at a pitch "on any authorised racecourse". Further, the definition of "[r]acecourse" expressly excludes "point-to- point courses" but does not contain any exclusion of courses with an all-weather track. Also, the registration fees payable in accordance with Rule 8 on the transfer of any seniority at a racecourse were fixed as from 1st March 2007 and set out in an appendix based on a fixture list for 2007. This list includes fees due for Dundalk based on 25 meetings.

52. Hence, the Pitch Rules, as amended in 2007 when it was known that all-weather racing was to commence shortly at Dundalk, are expressly stated to apply to "any authorised racecourse" and include express reference to Dundalk. The 2007 Pitch Rules include Rule 19.

53. Rule 19 requires the AIR and INBA to meet to agree on "how the provisions of these rules" [emphasis added] shall apply to all-weather racing. That Rule must be interpreted in a manner consistent with the remaining rules, including those already referred to, and Rules 21 and 22 which respectively provide:

> "21. These Rules may only be amended by agreement between the AIR and the INBA and in consultation with HRI.
>
> 22. These Rules are currently in force and may be reviewed at any time at the request of the AIR, the INBA or HRI."

54. Dundalk does not dispute that as the owner of the racecourse at Dundalk and a member of the AIR they agreed to the Pitch Rules as amended in April 2007. Rule 19 envisages a situation where all-weather racing is introduced at any racecourse *i.e.* including an existing racecourse. While it requires the AIR and INBA to meet to agree how the provisions of the Rules are to apply to all-weather racing, if, following such a meeting, it is agreed that one or more of the Rules should be different for all-weather racing, and hence the Rule in question requires amendment, then such amendment must be made in accordance with Rule 21. Rule 22, when construed in accordance with the preamble, makes clear that, subject to review, the Rules currently in force apply to all bookmakers and all racecourses.

55. The Court has concluded that Rule 19 in the 2007 Rules, having regard to the words used, when interpreted in the context of the remaining Pitch Rules agreed in April, 2007 and the then well-known fact of the proximate start of racing on an all-weather track in Dundalk, means that in the absence of a meeting and agreement between the AIR and INBA as to how the Rules are to apply to the all-weather racing, then the Pitch Rules currently in force remain applicable to the all-weather racing at the racecourse in question.

56. Accordingly, the Court has concluded that the trial judge was correct in deciding that the 2007 Pitch Rules did apply to the allocation of pitches in Dundalk in 2007. It was never contended, if they did apply, that Dundalk was entitled to seek a capital contribution or that the pitches could be allocated other than in accordance with the seniority held at Dundalk in 2001, as provided in Rule 13. In fact, the latter form of allocation was offered albeit subject to the capital payment in the course of the August, 2007 negotiations considered below.

Competition Law

57. Dundalk, in the High Court, maintained that the Pitch Rules were anticompetitive and violated s. 4(1) of the Competition Act 2002. It called Mr. Moore McDowell, to give evidence on its behalf, and the plaintiffs called Mr. Jim Power, both distinguished economists. The trial judge, at paras. 92 – 110 of the liability judgment, analysed in some detail the contention that the Pitch Rules fell foul of s. 4 of the 2002 Act with particular reference to the analysis of Mr. McDowell. Ultimately he stated that he agreed with the approach of 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". The trial judge concluded:

> "111. The Pitch Rules do not therefore materially affect the contestability 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."

58. Dundalk made a limited and focused submission on appeal. It submitted that if the true interpretation of the Pitch Rules is that pitches cannot be reallocated afresh in circumstances such as occurred in the present case then, **to that extent only**, the said rules are invalid and unenforceable on the basis that they breach competition law.

59. The plaintiffs in response submitted, correctly, in the Court's view, that the trial judge did consider the fact that in accordance with the Pitch Rules the racecourse owners had traditionally refrained from seeking capital contributions from the bookmakers. At paras. 106 to109, he stated:

> "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."

60. It does not appear that there is any basis for contending that the analysis and conclusion of the trial judge is flawed by reason of any failure to expressly consider in isolation the fact that the Pitch Rules, properly construed, do not permit a new legal entity which acquires an existing racecourse, and develops same at significant cost to seek a capital contribution on allocation or re-allocation of

pitches at the redeveloped racecourse. This forms part of the general consideration addressed by the trial judge in relation to the restraint by racecourses in seeking capital contributions in the context of the maintenance of effective competition in the on-course betting market that led to his conclusion that the Pitch Rules do not violate the prohibition in s. 4(1) of the 2002 Act. Hence, this ground of appeal also fails.

Cross-Appeal on Boycott

61. All three plaintiffs cross-appeal against the declarations made on the counterclaim in each proceeding that there was an unlawful trade boycott, contrary to s. 4(1) of the 2002 Act, of those bookmakers who took up pitches in Dundalk, as found in the judgment delivered on 19th February 2014 . Only in Mr Hughes's order was he identified as having participated in the boycott.

62. The principal grounds upon which the bookmakers appeal against the finding of a collective trade boycott, which amounted to a concerted action contrary to s. 4 of the 2002 Act, is the reliance by the trial judge on undisputed evidence of incidents by or with individual bookmakers (unidentified with one exception) in making a finding of a collective or concerted action. Further, that with the exception of the one incident relating to Mr Hughes the evidence does not relate to the plaintiffs.

63. The liability judgment was given in the proceedings brought by Mr. Hyland. By the consent of the High Court order made on 20th October 2008 (Murphy J.), they were heard along with the similar proceedings brought by Mr. Hughes. However, no other bookmaker was then before the court as a party to proceedings.

64. The trial judge, at paras. 113 to 120 of the liability judgment, distinguishes carefully between the right of an individual trader to refuse to deal or supply and a collective trade boycott which may amount to a "concerted action" which has as its object the "prevention, distortion or elimination" of competition within the meaning of s. 4(1) of the 2002 Act. The boycott identified by the trial judge related to a refusal to deal with bookmakers who stood at Dundalk, principally in relation to laying off bets - an intrinsic part of the bookmaking business.

65. The trial judge, at para. 121, having identified the question as being "whether there was a collective boycott of those bookmakers who paid the €8,000 requested by Dundalk" concluded that: "[t]he 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".

66. The evidence of fact upon which he relied to reach that conclusion was evidence from three bookmakers who took up pitches in Dundalk in 2007 and 2008, Mr. Grimley, Mr. Barney O'Hare and Mr. McCartan. The relevant evidence is set out at paras. 126-136. The judge then concluded at para. 137:

> "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."

67. The undisputed evidence referred to is evidence by the three bookmakers named above of other bookmakers, for the most part unidentified, refusing to lay off bets or making comments or statements aimed at pressurising them not to stand at Dundalk.

68. The only express reference to Mr. Hyland is in para 128:

> "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)."

69. Subsequently, at the assessment hearings, it was accepted that there was not evidence or a finding that Mr. Hyland participated in the boycott. Mr. Patrick O'Hare was not before the Court as a party at the liability hearing, and similarly, there is no finding of his participation in the boycott. Accordingly, the declarations granted on the counterclaims in the proceedings against Mr. Hyland and Mr. O'Hare do not relate to a boycott in which the High Court found them to have participated. The declarations in the orders do not relate to any act or omission of those plaintiffs.

70. There is no reference in the recording of the evidence or the boycott findings in the liability judgment to Mr. Hughes by name. However, it is accepted that the evidence of Mr. Grimley relating to an incident in Fairyhouse on Easter Monday 2010, when a "named bookmaker" described him by an "insulting expletive" in front of his 15-year old son when he said he was still standing in Dundalk was to Mr. Hughes. In the judgment of 30th January 2015, the trial judge stated that he found "Mr. Hughes was one of the persons who had participated in the illegal boycott" although he refrained from naming him in the judgment, and that Mr. Hughes had apologised for his behaviour as indeed he had recorded in the liability judgment in relation to the Fairyhouse incident. However, the only participation by Mr. Hughes found by the trial judge is the Fairyhouse incident.

71. The Court has concluded that the submission made on behalf of Mr. Hughes that the individual incident in 2010 relating to his use of an expletive is not sufficient to sustain a finding that he had participated in the collective boycott of the bookmakers who stood at Dundalk as found by the trial judge (*i.e.* refusing to deal with them in relation to the laying off of bets or otherwise) which amounted to a concerted action and which had, as its object or effect, the "prevention, distortion or elimination" of competition within the meaning of s. 4(1) of the 2002 Act, in accordance with the principles set out by the trial judge. Accordingly, the Court will allow Mr. Hughes's cross-appeal against the declaration granted that he participated in the unlawful collective trade boycott as found by the trial judge.

72. Accordingly, as this Court is satisfied that, even if there was evidence before the trial judge in relation to activities of named bookmakers who were not parties to these three proceedings to support the finding of the unlawful collective trade boycott by those named bookmakers (not identified in the liability judgment), the plaintiffs are entitled to have the declarations made in their respective proceedings vacated as there is no subsisting finding that they participated in such boycott. The inclusion of the declaration on the counterclaim in a proceeding in which each is the only plaintiff indicates that Dundalk is entitled, as against each plaintiff, to such a declaration, and in the Court's view, wrongly implies participation by such plaintiff in the boycott.

73. In those circumstances, it is unnecessary for the Court to consider further the cross-appeal in relation to the trial judge's

conclusion in relation to the boycott by bookmakers named in evidence, but not identified in the liability judgment who are not parties to the proceedings and against whom the findings could not be considered as *res judicata.*

Damages

74. The remaining issues are those raised by Dundalk's appeal and the bookmakers' cross-appeals against:

> (i) The judgment of the trial judge delivered on 9th January 2015 in Mr. Hyland's proceedings [2015] IEHC 57, and order made pursuant to it on 13th July 2015, inter alia, awarding Mr. Hyland €23,929 against Dundalk as damages for breach of contract;
>
> (ii) the judgment of the trial judge of 30th January 2015 in Mr. Hughes's and Mr. O'Hare's proceedings [2015] IEHC 198, and orders made pursuant to it on 13th July 2015, inter alia, awarding Mr. Hughes €41,484 and Mr. O'Hare €49,070 against Dundalk as damages for breach of contract and refusing to direct Dundalk to reinstate Mr. O'Hare to a pitch at Dundalk commensurate with his seniority and
>
> (iii) the failure of the trial judge to award Dundalk damages against Mr Hughes in relation to the unlawful boycott.

Mitigation of Loss

75. Common to Dundalk's appeal in respect of each of the aforementioned judgments is its submission that the trial judge erred in fact and in law in awarding any damages to the bookmakers because of their failure to mitigate their loss. The bookmakers in turn, cross-appeal the judgment on the basis that his decision to reduce by 80% their respective claims in respect of net loss of profits for the six years commencing in August 2008 was excessive, having regard to the evidence. They submit that it was reasonable for them not to seek to stand at Dundalk on any of the terms on offer pending the outcome of the proceedings.

76. In order to consider these competing claims, it is necessary to refer in turn, firstly, to the legal principles applicable to the obligation of a party to mitigate their loss in the face of a breach of contract, and secondly, the facts relied upon by the trial judge to support his conclusions.

77. The principle is that a plaintiff cannot recover loss that could have been avoided had they acted reasonably in the prevailing circumstances: (See *Waterford Harbour Commissioners v. British Rail* [1979] 1 ILRM 296). Their duty is to take all reasonable steps to minimise their loss and what is to be considered reasonable in any case is a question of fact. As Bankes L.J. stated in *Payzu v. Saunders* [1919] 2 KB 581 at 588-589:

> "It is plain that the question what is reasonable for a person to do in mitigation in his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as a matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in the presence of others of being a thief, and if after his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal."

78. While a plaintiff is bound to mitigate his or her loss "the standard by which they are to be judged is not an unduly harsh one" because, as was stated by Jackson J. in *Shepherd Holmes v. Encia Remediation Ltd*. [2007] EWHC 1710 (TCC), it is the defendant, as wrongdoer, who has put the claimant into that difficult position. Oftentimes, the courts will adopt a pragmatic approach to t*he issue as was noted by Lord Macmillan in* Banco de Portugal v. Waterlow and Sons Limited [1932] AC 452, where at p.506 of his judgment he stated:-

> "A pragmatic approach is often evident in the case law and the measures that the plaintiff should have taken to mitigate will not be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty".

79. Further, if an innocent party has two ways of mitigating their loss, both of which are reasonable, they cannot be stated to have acted unreasonably if it should later transpire that the loss would have been less had they adopted the better option. However, their obligation to mitigate their loss may require them to enter into a contract with the party who they maintain was in breach of an earlier agreement. That was the position in Payzu, one of the foremost authorities on the issue of mitigation. That decision is of particular relevance in this case because of the offers made by Dundalk to enter into a new arrangement with the bookmakers in the wake of their assertion that it had acted in breach of contract in seeking to impose conditions on their trading relationship beyond those provided for in the Pitch Rules.

80. In *Payzu*, the defendant had agreed to supply silk to the plaintiff on monthly credit terms. Because of some delays in payment, the defendant later demanded payment on delivery, a demand which constituted a repudiatory breach of the contract which the plaintiff then accepted. The plaintiff was held not to be entitled to damages because it had refused to trade on this basis in circumstances where the market had risen considerably and no alterative source of supply was available. Thus, the Court held that the plaintiff should have accepted the defendant's offer to supply the silk on cash terms.

81. The Court's approach to the issue of mitigation in general, as well as the role of an appellate court when asked to address the issue of mitigation, was recently considered by this Court in *Rosbeg Partners Ltd v. LK Shields (a firm)* [2016] IECA 161. The following is what was stated concerning the issue by McMenamin J. (sitting as a member of this court):

> "51. Turning then to the question of mitigation, it is true to say that the quantum of recoverable damages may be reduced, if a plaintiff fails to take reasonable steps to mitigate its loss. The duty is *"to take all reasonable steps"*, having regard to the circumstances of the case (see the judgment of Hamilton C.J., and Denham J. in *Kelly v. Hennessy* [1995] 3 I.R. 253).
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> 52. Here, again, the trial judge's assessment of the reasonableness of efforts to mitigate is highly relevant. The second principle in *Hay v. O'Grady* is engaged. Where a plaintiff has provided an explanation for a failure to take certain steps to mitigate loss, and the trial judge has accepted that explanation, an appellate court should be slow to overturn that assessment, unless there was no credible evidence to support it. (See judgments of Hamilton C.J. and Denham J. in *Kelly v. Hennessy*). In that authority, the Supreme Court declined to engage in any substantive assessment of the reasonableness of mitigation. The trial judge's findings were based on an acceptance of the plaintiff's evidence, which

was sufficient to dispose of that ground of the appeal. It has not been suggested that Kelly was erroneously decided, or can be distinguished on the facts.

53. It is well established that the reasonableness of a plaintiff's effort to mitigate is a question of fact, not a question of law (*Payuz v. Saunders* [1919] 2 KB 581; *The Soholt* [1983] 1 Lloyds Rep 605) and McCord v. Electricity Supply Board [1980] ILRM p.153. In general, courts, both here and elsewhere, rarely find it appropriate to interfere with conclusions of a trial judge either based on evidence, or the lack of satisfactory evidence. The onus lies on a defendant (here the appellant) to establish, on the basis of satisfactory evidence, that there was a failure to mitigate which was unreasonable in all of the circumstances."

82. Apart from the aforementioned common law principles, s. 34(1) of the Civil Liability Act 1961 is also of relevance. That section provides that where an action is brought in respect of a wrong (which includes a breach of contract), and where it is proved that the damage suffered to the plaintiff was caused partly by the want of care of the plaintiff and partly by the wrong of the defendant, the damages recoverable in respect of that wrong shall be reduced by such amount as the court thinks just and equitable. Under s. 34(2)(b), negligent or careless failure to mitigate damage shall be deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred. It is important to note that the wording of s. 34(1) provides that the damages recoverable in respect of the wrong **shall** be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and the defendant. The test under this section is to be assessed on the basis of blameworthiness by reference to what a reasonable man or woman would have done in the circumstances.

Findings of the Trial Judge

83. As a matter of law, the trial judge concluded that the bookmakers were under a clear duty to mitigate their loss. He stated that the most obvious approach would have been for them to have paid the €8,000 capital contribution sought by Dundalk on a without prejudice basis whilst simultaneously commencing proceedings seeking a declaration that the demand for that payment was in breach of contract. However, in light of the circumstances which he considered to be relevant to the issue of mitigation, he concluded that it was reasonable for the bookmakers not to have taken action to mitigate their loss until at least the spring of 2008. Thus, it was that he allowed each of them, inter alia, the full sum which he determined they had lost in respect of net loss of profits for the year between August 2007 to August 2008.

84. The following is a brief résumé of those facts found by the trial judge which appear to have informed his decision on the mitigation issue. Some of these are set out in more detail earlier in this judgment, but are summarised here once again for convenience.

85. By the summer of 2007, an impasse had been reached between the parties regarding the entitlement of Dundalk to impose the €8,000 levy on bookmakers wishing to stand at the racecourse when it reopened for business on 26th August 2007. Negotiations had proved unsuccessful, with the result that in late July 2007, Mr. Walsh of the AIR had sought a ruling from the Pitch Tribunal as to whether the Pitch Rules applied to the allocation of pitches at any new racecourse. The Pitch Tribunal, by letter dated 2nd August 2007, had ruled that they did not apply and had recommended that Dundalk and the INBA have face-to-face discussions to address "all outstanding matters". The trial judge noted, however, that it was only in the course of the trial itself that the Pitch Tribunal, at his instigation, had clarified that in making its aforementioned decision it had never considered the issue as to whether the racecourse at Dundalk in 2007 was in fact a "new" racecourse.

86. The meeting recommended by the Pitch Tribunal took place on 8th August 2007. Mr. Hyland and two others represented the INBA bookmakers, Mr. Martin represented Dundalk and Mr. Walsh represented the AIR. The trial judge then reflected upon the evidence offered on behalf of the appellant as to its efforts to resolve the dispute at that meeting on the terms set out in a document entitled: 'Heads of Agreement re: Dundalk Stadium'. The terms of the offer included, *inter alia*, the following:-

(i) That Dundalk would allocate 30 pitches using the old seniority list;

(ii) that any bookmaker offered such a pitch would pay a fee of €8,000 on 1st August 2008 in default of which their pitch would be declared vacant;

(iii) that the AIR would confirm that the arrangement would be without prejudice to any future negotiations at any other racecourse and

(iv) that the AIR, INBA and HRI would agree to meet for meaningful negotiations regarding new Pitch Rules to address new racecourses.

87. The trial judge, for whatever reason, did not resolve a factual dispute between the parties which arose from the evidence of Mr. Hyland. Mr. Hyland had stated that he understood that the offer proposed by Dundalk, referred to in the last preceding paragraph, required the payment of the €8,000 to be "up front", as opposed to at the end of the first 12 months of trading on 1st August 2008, as provided for in the Heads of Agreement. Mr. Hyland, in evidence, had suggested that the date for the payment referred to in the Heads of Agreement was likely a typographical error; evidence that was inconsistent not only with what was specifically provided for in that document but also inconsistent with the terms of the offer referred to in the letter of Mr. Walsh of 9th August 2008, which expressed his disappointment at its rejection. However, there was no dispute that the document containing the Heads of Agreement was handed to Mr. Hyland at the meeting and taken away by him to enable him consult with his Chairman and Executive.

88. The trial judge next referred to the letter dated 10th of August 2007 sent by Dundalk to all bookmakers for the purpose of inviting them to apply for a pitch at Dundalk based upon their seniority *qua* permit holder. The terms of that offer, *inter alia*, required those wishing to stand at Dundalk to pay a sum of €8,000 in two instalments; €4,000 accompanying their application and €4,000 by 1st January 2008.

89. For the purpose of considering the reasonableness of the bookmakers' conduct in terms of their obligation to mitigate their loss, the trial judge noted that their position and that of their colleagues in the INBA was complex for the following reasons:

(i) They retained the confidence that the ongoing dispute would ultimately be resolved;

(ii) the issue as to the payment of a levy had broader importance for the INBA because if capital payments could lawfully be demanded of bookmakers at Dundalk, this might set a precedent which other racecourses might follow; and

(iii) the negotiations had been conducted based on a fundamental misunderstanding as to what the Pitch Tribunal had actually decided, with the AIR and Dundalk being under the impression that the Pitch Tribunal had determined that the

pitch rules did not apply to the all weather facility at Dundalk.

90. Having referred to the respondent's obligations under s. 34 (1) of the Civil Liability Act 1961, and the decision in *McCord v. Electricity Supply Board* [1980] ILRM153, the trial judge went on to hold that it could not be said that the bookmakers' initial failure to take up the offer made by Dundalk amounted to unreasonable conduct. An impasse had been reached on an important point of principle, which had huge implications for the association, and viewed objectively Mr. Hyland and his colleagues were entitled to take the stand that they did. He was satisfied that both sides were to blame for failing to have the matter clarified by the Pitch Tribunal. However, when it became clear that their protests had been ineffective, *i.e.* by early 2008, the trial judge was satisfied that it was unreasonable for the bookmakers not to seek to stand at Dundalk on whatever terms were available, even if by then only non premium pitches would have been available.

Decision

91. Having considered the submissions of the parties, the Court is firstly satisfied that in reaching his decision as to whether the bookmakers acted reasonably in terms of their obligation to mitigate their loss, the trial judge attached significant weight to a factor to which he ought not have had regard, namely, the bookmakers' concern that any payment made to Dundalk might have adverse consequences for them should they find themselves in dispute with the owners of such other racecourses as might later be redeveloped. That wider consideration was extraneous to the bookmakers' obligation to mitigate the damage they alleged would result from the breach by Dundalk of the contracts for which they had contended.

92. It is important in this regard to emphasise that each of the bookmakers claimed damages for breach of the individual contracts, which they maintained, and this Court has upheld they had with Dundalk. Central to those claims was the contention that they, as individual bookmakers, were contractually bound to Dundalk under the terms of the Pitch Rules and that the breach by Dundalk of those agreements, the terms of which were the Pitch Rules, had caused them significant financial loss. Mr. Hyland, for example, did not advance his claim in his capacity as Secretary of the INBA or on behalf of its members. It was the terms upon which he, as an individual, and the other bookmakers individually traded with Dundalk (the Pitch Rules) that were at issue. Thus, they each had a personal obligation to mitigate any loss they might suffer arising from the breach of contract alleged.

93. While the bookmakers were clearly collectively concerned to try to protect what they perceived to be much wider concerns, namely, what might happen at other redeveloped racecourses owned and operated by different persons , albeit members of the AIR, should they make any payment to Dundalk, they were not entitled to eschew their obligations to mitigate the damage that was claimed to flow from Dundalk's breach of contract based on such concerns. Dundalk was entitled to have the trial judge assess the reasonableness of each plaintiff bookmaker's conduct by reference solely to the damage that might be avoided as a result of the breach of contract he alleged. He was not entitled to make that assessment based on his consideration as to the possible effect that accepting any offer made by Dundalk might have on the contractual relationship between the bookmakers or other members of the INBA and other racecourse owners. In factoring such a consideration into his assessment of the reasonableness of each bookmaker's obligation to mitigate his loss, he visited upon Dundalk the financial consequences of those concerns, matters that were extraneous to the damage claimed to result from Dundalk's breach of contract and outside of its control.

94. Whilst of little or possibly no significance having regard to the conclusion last expressed, it is perhaps, nonetheless, relevant to note in the context of the bookmakers' concern as to the potential consequences of accepting the offer of 8th August on the terms as they were understood by Mr. Hyland concerning the payment "up front" of the €8,000, that the trial judge also appears to have overlooked the fact that it was a term of that offer that Dundalk would procure from the AIR confirmation that the arrangement proposed would be without prejudice to any future negotiations concerning any other racecourse.

95. The second reason why the trial judge concluded that it was reasonable for the bookmakers not to accept any offers or proposals made by Dundalk in August 2007, was his finding that they retained confidence that the dispute would ultimately be resolved. That being so, it is important in the context of the limitation placed on the jurisdiction of an appellate Court to consider whether that finding is one which can be shown to be supported by credible evidence.

96. The dispute between the bookmakers and Dundalk had broken out as early as April 2007, with the bookmakers refusing to countenance the €8,000 capital contribution demanded. Racing was due to recommence on 26th August 2007. Negotiations had been ongoing between the AIR, HRI, and the INBA which, as of July 2007, had proved unsuccessful. At that point, the bookmakers remained adamant that they would not make the capital contribution and Dundalk remained convinced of its entitlement to raise such a levy. By late July, matters were still not resolved with the result that a ruling was sought from the Pitch Tribunal on 30th July, albeit that it was asked the wrong question. The result of the ruling of the Pitch Tribunal was that Dundalk felt fortified in its view that it was entitled to impose the proposed levy while the bookmakers remained adamant that they could not be required to make such a contribution. It was against this backdrop that the meeting of 8th August 2007 took place, in the course of which Dundalk made the offer the terms of which are referred to above.

97. It is difficult to see how the bookmakers, when turning down that offer, could reasonably have been of the opinion, as the trial judge found, that matters would "ultimately" be resolved. Racing was, after all, scheduled to recommence on 26th August 2007. It must have been clear to the bookmakers that if they rejected the offer of 8th August 2007, that Dundalk would have no option but to offer the pitches to other bookmakers willing to stand at the venue later that month, albeit on different terms.

98. While the trial judge relied upon the fact that both the AIR and Dundalk were under the impression that the Pitch Tribunal had determined the issue under the Pitch Rules in their favour, it is difficult to see how that is a relevant factor which could be weighed in the bookmakers' favour when it came to assessing the reasonableness of their conduct. At the time the bookmakers rejected the offer of 8th August 2007, they knew that the AIR and Dundalk believed, wrongly, as it now transpires, that the issue of whether the Pitch Rules applied to the allocation of pitches in 2007 at the racecourse at Dundalk had been resolved in their favour. Mr. Hyland, on the other hand, remained convinced that the Pitch Rules did apply because it was not a new racetrack. Thus, the ruling of the Pitch Tribunal would appear to have polarised the position of the respective parties and the negotiations which followed proved unsuccessful. Meanwhile, Mr. Hyland was concerned about the ramifications for bookmakers at other racecourses having regard to the demands made by Dundalk, and felt he was being railroaded into accepting something that he considered the Pitch Tribunal may not have decided, with the result that a stalemate position was reached.

99. In such circumstances it is difficult to see what evidence there was to support the trial judge's conclusion that it was reasonable for the bookmakers to fail to mitigate their loss by accepting the offer made on 8th August 2007, based upon a belief that matters would be resolved.

100. For the aforementioned reasons, the Court considers that the matters which the trial judge relied upon to support his conclusion that the bookmakers acted reasonably in refusing to agree to stand at Dundalk on the terms available in August 2007 , were either

not supported by the evidence or were matters to which he ought not to have had regard. In those circumstances, it is necessary for the Court to consider the issue of mitigation de novo, while remaining mindful of the facts found by the trial judge.

How and when might the Bookmakers have Mitigated their Losses arising from Dundalk's Breach of Contract?
101. The options available to the bookmakers to mitigate their loss in 2007 were as follows:-

> (i) To have accepted the original demand made by Dundalk and paid the €8,000 under protest, after which they could have issued proceedings seeking a declaration as to their contractual entitlements and the return of the money so paid;
>
> (ii) to have accepted the offer made by Dundalk on 8th August 2007, as recorded in the document 'Heads of Agreement' subject to the requirement that the sum of €8,000 therein referred to be paid up front. It is necessary to consider the offer in such terms given that the trial judge did not resolve the dispute that arose from Mr. Hyland's evidence to the effect that it was not his understanding of the offer that the payment of the €8,000 was to be deferred until August 2008, at therein stated. That payment would have entitled the bookmakers to stand at Dundalk on a pitch allocated on the basis of their prior seniority as *per* Rule 13 of the Pitch Rules, and to obtain a written undertaking from the AIR that the payment would be without prejudice to anything that might later arise at any other racecourse allied to which they could have issued proceedings of the nature advised at (i) above and
>
> (iii) to have accepted the invitation made to all bookmakers by letter of 11th August which, *inter alia*, provided for staggered payments of €4,000 on application and €4,000 on 1st January 2008, with the pitches to be allocated in accordance with permit number. Any bookmaker accepting this offer was to be entitled to relinquish their pitch before 1st August 2008, in which case the aforementioned payments would be refunded. As with options (i) and (ii) above, the bookmakers could have issued proceedings of the nature advised at (i) above.

102. Having considered the submissions of the parties, the relevant circumstances and the findings of fact made by the trial judge, this Court is satisfied that the bookmakers acted unreasonably, notwithstanding their genuine belief that Dundalk was in breach of its contractual obligations in failing to mitigate their loss by accepting the offer made by Dundalk on 8th August 2007, even if it was on the terms as they were understood by Mr. Hyland *i.e.* requiring a payment of €8,000 up front, as opposed to the terms as recorded in the Heads of Agreement and Mr. Walsh's letter of 9th August 2007 *i.e.* a deferral of the payment.

103. In coming to this conclusion, the first matter of relevance is that the bookmakers, unlike the position of many claimants, had the ability to fully and entirely mitigate the capital loss destined to flow from Dundalk's breach of contract by accepting the offer made on 8th August 2007. Instead, they elected to decline it, and in doing so, divested themselves with immediate and permanent effect of the future capital value of the pitches with the seniority they claimed that would otherwise have been allocated to them.

104. A similar situation pertains in respect of the bookmakers' anticipated claims in respect of loss of earnings. Had they paid the €8,000, they would not have sustained any loss of earnings and could have immediately instituted whatever proceedings they considered necessary to establish their contractual rights vis-a-vis Dundalk in the context of the redevelopment of the racecourse, and if necessary, seek an order for the repayment of the aforementioned sum. Further, the bookmakers had no prospect of mitigating such losses by replacing them with earnings from other venues on the dates of the Dundalk meets. They were not, for example, in the same position as a vendor of goods who, when faced with a breach of contract on the part of their purchaser, might accept repudiation of the contract, confident of the fact that they would likely be in a position to mitigate their loss by selling the goods concerned to a third party.

105. As is apparent from the decision in *Payzu*, a claimant's obligation to mitigate loss may require him to enter into contractual obligations with those who have earlier been in breach of their contractual terms, even if those terms are less favourable than those previously enjoyed. This is particularly relevant in a case such as this where there was no other avenue available to the bookmakers to mitigate their potential losses. It was only by entering into a new agreement with Dundalk that they could hope to mitigate those losses which were otherwise bound to increase and accumulate until the dispute was resolved by way of litigation.

106. Another relevant factor is that the terms on offer from Dundalk, even if, as per Mr. Hyland's understanding of those terms, could hardly have been more favourable. Other than the payment of the €8,000 that was to be refundable at the end of the first year, if the bookmakers did not wish to remain trading at Dundalk, no other onerous terms were to be imposed. The bookmakers were to enjoy the seniority which they had enjoyed when the old racecourse closed in 2001 as *per* Rule 13 of the Pitch Rules, and the payment was to be without prejudice to anything that might happen at any other racecourse in the future should the same be redeveloped. Indeed, what was on offer to the bookmakers could hardly be described as prejudicial or substantially different to the contract which they maintained had been breached by Dundalk. They were getting all that they were entitled to under the Pitch Rules, save for the requirement that they make the €8,000 payment. The offer of 8th August 2007 is to be contrasted with the type of offer made in cases such as *Lennon v. Talbot Ireland Limited* (Unreported, High Court, 20th December 1985), wherein it was established to the satisfaction of Keane C.J. that the arrangements which the plaintiffs had been asked to accept were "significantly different from the existing arrangements in a way which could only be detrimental to the plaintiffs" such that it was reasonable for them to have rejected the defendant's proposal.

107. Yet another factor of importance is that given that racing was due to recommence on 26th August 2007, it must have been obvious to the bookmakers that if they did not agree to the terms available on 8th August 2007, the pitches which Dundalk had agreed to allocate to them on the basis of the old seniority would be offered to other bookmakers with the result that they would never be in a position to again trade at Dundalk other than from a pitch significantly inferior to that which was then on offer.

108. Perhaps one of the most significant factors material to the consideration as to the reasonableness of the bookmakers' conduct in terms of their obligation to mitigate their loss is the fact that the sum to be paid to mitigate all potential loss was so modest *i.e.* €8,000. There was no evidence that any of the bookmakers were not in a position to pay that sum. Little more was required of them than that which was described by the trial judge as "swallowing their pride". Instead of paying €8,000 and commencing proceedings, possibly in the Circuit Court, to have the contractual situation clarified, the bookmakers opened themselves, and consequently, Dundalk, to very substantial claims in terms of financial loss which could have been fully avoided.

109. Insofar as it might be stated that the window within which the offer of 8th August 2007 remained open was short, to the point that the bookmakers' failure to accept it before it was withdrawn was reasonable, it is important to note that the offer was considered and rejected in writing in the clearest of terms the following day. Further, no case was made by the bookmakers that the fact that the offer was withdrawn immediately following upon Mr. Hyland's letter of 9th August had anything to do with their failure to accept it. It was clear from their evidence, and in particular that of Mr. Hyland, that they had set their face against paying any capital sum to Dundalk, as is perhaps also evident from their failure to consider any later alternative proposals which involved making

a capital payment, regardless of the loss they might sustain as a result of rejecting the offer. Their focus in rejecting the offer had little to do with Dundalk and everything to do with the effect that any such payment might have on their future dealings with the owners of other racecourses, matters outside Dundalk's control.

110. In coming to its conclusions on the issue the bookmakers' obligation to mitigate their loss, the Court has been mindful of the public policy considerations core to the concept of mitigation. That being so, it is relevant to note that the offer made by Dundalk on 8th August 2007 did not require the bookmakers to give up any of their rights or abandon any of their principles. They could have paid the €8,000, taken up the pitches on offer, and brought their dispute to the courts for resolution. Had they done so, they could have avoided all of the loss they must have known would follow from Dundalk's breach of contract.

111. Having determined that the bookmakers acted unreasonably in failing to agree to stand at Dundalk on the terms offered on 8th August 2007, it is not necessary to consider the subsequent opportunities that the bookmakers might have taken to mitigate their loss.

112. In the foregoing circumstances, the Court rejects the submission made on the part of the bookmakers that their conduct was reasonable up to the date of judgment. The fear or the apprehension that acceptance of Dundalk's conduct under protest would imperil their position and that of their colleagues at any other racecourse was not one which justified their rejection of Dundalk's proposals. As already stated, it was for the bookmakers to address the broader concerns of members of the INBA by further negotiation with the AIR.

113. Having regard to its conclusions on this issue, the Court is satisfied that the trial judge should have declined to make any award of damages in favour of the bookmakers notwithstanding his finding of breach of contract on the part of Dundalk. For this reason, the Court is satisfied that the damages awarded to each of the bookmakers must be set aside. Further, it is not necessary to consider the bookmakers' cross-appeals against the reductions made.

The Trial Judge's Failure to Grant an Injunction Directing Dundalk to Allocate to Mr. O'Hare the Pitch to which he would have been Entitled in 2007 in Accordance with the Pitch Rules

114. Mr. O'Hare has sought to cross-appeal the trial judge's refusal of an order directing Dundalk to allocate to him the pitch to which he would have been entitled in 2007 in accordance with the Pitch Rules. In his plenary summons, he had sought an order in such terms.

115. In his judgment delivered on 30th January 2015, the trial judge, at paras. 36 to 47, explained his reason for refusing the order sought. He did so by reference to the equitable principles which apply to a claim for discretionary relief of this nature.

116. The trial judge relied upon the fact that Mr. O'Hare well knew that in the lead up to the reopening of the racecourse on 26th August 2007, the pitch to which he would have been entitled by way of seniority under the Pitch Rules, was to be allocated to a third party, yet no application was made for an injunction to restrain that allocation. Neither was such an application made when the proceedings were commenced in April 2008. Further, by the time the action was heard in July 2014, almost seven years had elapsed during which another bookmaker had traded from the pitch which Mr. O'Hare sought to have allocated to him and had organised his affairs on that premise. Mr. O'Hare's delay in seeking equitable relief had undoubtedly prejudiced another party.

117. Having considered the submissions of the parties, this Court is satisfied that the trial judge cannot be faulted for declining the injunction sought. In doing so, he had regard to all of the relevant circumstances and the legal principles material to a consideration of the type of order sought, namely, delay, laches and prejudice to third parties.

118. It is also worth stating that it is difficult to see how the High Court judge could lawfully have granted an injunction in the terms in which it was sought, given that Mr. O'Hare did not seek to join as a party to his proceedings, or otherwise put on notice of his application for such relief the bookmaker allocated or now entitled to stand at the pitch which he sought to have allocated to him as per the terms of the injunction sought.

119. For the aforementioned reasons, the Court rejects Mr. O'Hare's cross-appeal in respect of the failure of the High Court judge to grant the injunction sought.

Dundalk's Appeal against the Failure of the High Court Judge to Award Damages against Mr. Hughes in Respect of the Illegal Boycott

120. By reason of the conclusion earlier reached in this judgment to set aside the finding that Mr. Hughes participated in the unlawful boycott, it is not strictly necessary to consider Dundalk's appeal against the failure of the trial judge to award damages against Mr. Hughes. The Court would simply add the following.

121. Dundalk claimed damages in respect of the financial loss outlined by Mr. Jim Martin in the course of his evidence. According to the parties, his evidence was in accordance with his statement dated 10th June 2014, a copy of which this Court has considered. In that statement, Mr. Martin maintained that the bookmakers involved in the boycott had damaged the Dundalk brand and had, by their conduct, on his estimation, reduced by approximately 100 the number of customers attending at each fixture. Between the loss of income at the turnstiles and the loss of gross margin on food and beverages, he estimated that Dundalk was at a gross loss of €408,000 up to February 2014. He was satisfied that, but for what he described as the illegal boycott, greater numbers of bookmakers would have stood at each meeting of Dundalk, and consequently the boycott gave rise to a loss on pitch fees of €260,100 over the same period.

122. The trial judge, in the course of his judgment, expressed himself satisfied that such picketing or protests as occurred outside Dundalk Stadium after it reopened in August 2007 amounted to no more than constitutionally protected activities of free speech and assembly. The protesters were doing no more than carrying placards and trying to explain to the public the wrong that had been perpetrated against them. There had been no overt act or even implied threat to patrons who ignored the protest. There was no evidence that bookmakers had tried to stop anybody entering the stadium or that anybody had actually not entered the stadium by reason of the protests. Thus, even if the protests had resulted in a reduced number of patrons attending the meetings, as Mr. Martin had maintained was the situation, any loss as a result of the constitutionally protected activities of the bookmakers could not have resulted in an award of damages.

123. In relation to the boycott alleged by Dundalk, it is important to carefully scrutinise the findings of the trial judge. At para. 137 of his judgment, he found that there was "concerted action on the part of certain bookmakers to enforce a collective trade boycott" and that this was "seriously anti-competitive conduct which is prohibited by s. 4(1) of the 2002 Act". He went on to hold that such conduct damaged the structure of competition at the racecourse and the economic interests of the bookmakers. He referred to the

fact that this boycott damaged on-course betting and had affected consumer welfare in that there was a lack of competition in the ring and this had had a serious negative impact on starting prices.

124. Bookmakers were adversely affected insofar as they were not in a position to lay off bets with other bookmakers and were therefore left with riskier books than they might otherwise have been in a position to maintain. He did not find that the illegal boycott had caused any bookmakers who would otherwise have stood at Dundalk, not to do so. Further, he made no finding in the liability judgment of an unlawful boycott of Dundalk racecourse as distinct from the bookmakers standing there.

125. The damage identified by the trial judge flowing from the boycott was confined to those bookmakers who actually took up the offer to stand in Dundalk in 2007 and 2008 and to the members of the public. He did not find that Dundalk, as owner or operator of the racecourse, had suffered any loss or damage as a result of the boycott.

126. In these circumstances, the Court is also satisfied that based on the evidence and the findings made by the trial judge in relation to the nature of the boycott , no financial loss by Dundalk was established to have been caused by the illegal collective trade boycott which the trial judge found had taken place. For these reasons, the Court would also, if it remained an issue in the appeals, have dismissed Dundalk's appeal against the failure of the High Court judge to award damages against Mr. Hughes in respect of participation in the unlawful trade boycott as found by the trial judge.

Summary of Conclusions

127. The Court has concluded that the trial judge was correct in deciding:

> 1. The Pitch Rules are enforceable by the individual bookmakers against Dundalk as a racecourse owner and the bookmakers may sue to enforce them in the same manner as any other contract in which they are expressly named as a party.
>
> 2. 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. It did not decide the fundamental question as to whether the redeveloped track at Dundalk constituted a new racecourse.
>
> 3. Dundalk racecourse in 2007 remained in substance the same racecourse it was in 2001, at least in the sense contemplated by the Pitch Rules.
>
> 4. Dundalk, when allocating pitches in 2007, was bound by the Pitch Rules and had no entitlement to require the bookmakers pay €8,000 as a capital contribution. Dundalk was in breach of contract in so doing.
>
> 5. The Pitch Rules do not violate s. 4(1) of the Competition Act, 2002.

128. The Court accordingly dismisses the appeal of Dundalk against the above findings and the relevant declarations in the orders made in each proceeding on 13th July 2015.

129. The Court has concluded that Rule 19 in the 2007 Pitch Rules meant that in the absence of a meeting and agreement between the AIR and the INBA as to how the Rules were to apply to all-weather racing, the Pitch Rules then currently in force remained applicable to all weather racing in Dundalk.

130. The Court has concluded there was not evidence to substantiate the finding of the trial judge that Mr. Hughes participated in the unlawful collective trade boycott of bookmakers who stood at Dundalk in 2007 and 2008. That finding is set aside. The Court also dismisses the appeal of Dundalk in respect of the failure of the High Court Judge to award damages against Mr. Hughes. Further, the declaration in relation to the unlawful trade boycott made on the counterclaim in each proceeding in the orders of 13th July 2015 will be vacated as there is no subsisting finding that any of the three plaintiffs participated in such boycott.

131. The Court has decided that the matters which the trial judge relied upon to support his conclusion that the bookmakers acted reasonably in refusing to agree to stand at Dundalk on the terms available in August 2007, were either not supported by the evidence or were matters to which he ought not to have had regard. In those circumstances, the Court considered the issue of mitigation de novo, while remaining mindful of the facts found by the trial judge

132. The conclusion of the Court, having done so, is that the bookmakers failed in their lawful obligations to mitigate their loss when they rejected the offer made by Dundalk on 8th August 2007 of terms on which they might stand at the redeveloped Dundalk racecourse. Had that offer been accepted the bookmakers would have been allocated pitches at Dundalk in accordance with the old seniority list and would have suffered no loss by reason of the breach of the Pitch Rules by Dundalk, save for the payment of €8,000, which could have been recovered in whatever proceedings they deemed appropriate. Accordingly, it follows that the appeals of Dundalk against the awards of damages are allowed and each of the awards of damages made in favour of the plaintiffs must be set aside.

133. Finally, the Court dismisses the appeal by Mr. O'Hare concerning the failure of the trial judge to grant an injunction directing Dundalk to allocate to him the pitch to which he would have been entitled in 2007 in accordance with the seniority provided for in the Pitch Rules.

134. When the parties have had the opportunity of considering the judgment the Court will hear counsel in relation to the orders to be made including variations to the High Court orders under appeal in accordance with the judgment.