Neutral Citation: [2015] IEHC 198

THE HIGH COURT

[2008 No. 3294P]

BETWEEN/

PATRICK O'HARE

PLAINTIFF

AND

DUNDALK RACING (1999) LIMITED TRADING AS DUNDALK STADIUM

DEFENDANT

[2008 No. 3304P]

BETWEEN/

JOHN HUGHES

PLAINTIFF

AND

DUNDALK RACING (1999) LIMITED TRADING AS DUNDALK STADIUM

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 30th January, 2015

PART I - Introduction

1. In these proceedings the plaintiffs claim damages by reason of a breach of contract on the part of the defendant racecourse operator. This matter has already been extensively dealt by me in my judgment in *Hyland v. Dundalk Racing Ltd.* [2014] IEHC 60 *("Hyland No.1")* and *Hyland v. Dundalk Racing Ltd.* (No.2) [2015] IEHC 57 *("Hyland No.2")*. The present claims accordingly represent the second and the third respectively of three test cases dealing with questions of damages and other relief which arise in the wake of my finding as to liability in *Hyland (No.1).* The three cases were heard one after each other (with some overlap in witnesses) in a 14 day hearing which addressed issues of quantum.

2. The following summary of the background facts must accordingly suffice for present purposes. Both plaintiffs held established seniorities to trade from a particular bookmaking pitches at Dundalk Racecourse. That racecourse closed in 2001 and re-opened in August 2007 as an all-weather track following an enormous investment amounting to some €35m. The defendant ("Dundalk") sought a capital contribution of some €8,000 from each bookmaker holding a pitch at the racecourse. The plaintiffs claimed that this demand amounted to a breach of what are known as the Racecourse Executives' Seniority and Pitch Rules ("the Pitch Rules") and, hence, to a breach of contract.

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

4. The present judgment deals solely with questions of mitigation of loss and the quantum of damages arising from the breach of contract findings in *Hyland (No.1).* Mr. O'Hare also claims to be entitled to an order restoring his specific pitch to him.

5. Mr. O'Hare claims the sum of €286,960 for lost profits by reason of an inability to trade at Dundalk in the period from August 2007 onwards. He also claims damages of €221,000 as the capital value of the pitch in the event that the pitch is not restored to him.

6. Mr. Hughes claims the sum of €483,560 for lost profits by reason of an inability to trade at Dundalk in the period from August 2007 onwards. He also claims damages in the sum of €60,000 in respect of the loss of his pitch.

7. This judgment is really in the nature of a supplementary judgment to those earlier judgments and it pre-supposes some familiarity with these decisions. For the sake of consistency and comprehensiveness, some of the analysis contained in *Hyland (No.2)* is reproduced in this judgment as well.

Part II: Mitigation of Loss

8. As the issue of mitigation of loss has been dealt with comprehensively in *Hyland (No.2)* I propose to apply the analysis and the findings contained therein to the present case. I will accordingly allow the plaintiffs to recover 100% of the losses he sustained in the first 12 months from August 2007 to August 2008. So far as subsequent years are concerned, then in line with the reasoning of Henchy J. in *McCord v. ESB* [1980] ILRM 183, I will abate these damages by a factor of 80%, reflecting the extent to which the

failure by the plaintiff to mitigate his loss by taking up a pitch objectively amounted to such fault for the purposes of s. 34(1) of the 1961 Act as would justify the reduction of damages by this amount.

9. In making that assessment, I am endeavouring to reflect the fact that there was continuing fault on both sides. I also take into account the fact by the time of the February 2008 offer from Dundalk to allocate additional pitches on payment of the sum of €863, 14 pitches had already been allocated to the other pitch holders who had applied for them in August 2007 after the breakdown of the negotiations which had been held earlier that month between the Irish National Bookmakers Association, the Association of Irish Racecourses and Dundalk Racecourse.

10. By definition, therefore, any pitch which the plaintiff could then have taken up would have been decidedly inferior to his existing pitch. It followed that his loss could not have been completely mitigated in this manner, even if the February 2008 offer had then been taken up on a without prejudice basis.

11. In addition, however, in the specific case of Mr. Hughes, I will further abate his total damages by a factor of 20%. In my first judgment, I found that Mr. Hughes was one of the persons who had participated in the illegal boycott, although I refrained from actually naming him in that judgment. While it is only fair to say that, following a complaint to HRI, Mr. Hughes apologised profusely for his behaviour, it is nevertheless only appropriate that persons who engaged in illegal activity of this kind should have their damages for breach of contract reduced to reflect to a proportionate extent their degree of objective "fault" within the meaning of s. 34(1) of the Civil Liability Act 1961.

Part III: The Valuation of the Pitches

12. The next issue concerned the actual capital valuation of the pitches which were lost as a result of the re-draw based on seniority of permit holder which was held in August 2007. It is important to state that it was common case that given that there was a new betting ring at Dundalk, the Pitch Rules required that there would, in any event, have had to have been a re-draw. There was, however, a critical difference between the re-draw envisaged in such circumstances under the Pitch Rules and that which actually took place. Both Mr. O'Hare and Mr. Hughes held an October 1945 seniority, which seniority ranked *ex aequo* with ten other pitch holders. In the re-draw envisaged by the Pitch Rules either of them might, for example, have obtained the No. 1 pitch or they might have been relegated to the No. 12 pitch or they might have obtained pitches somewhere in between.

13. The re-draw which actually took place in August 2007 was one which was not sanctioned by the Pitch Rules, chiefly because Dundalk (wrongly) believed that the Pitch Rules did not apply in these circumstances. The re-draw was not based on the 1945 seniorities, but was rather based on the seniority of the permit holders of those bookmakers who (unlike these plaintiffs and the other 31 seniority holders) were prepared to pay the €8,000 capital contribution which Dundalk had asked for.

14. Mr. O'Hare gave evidence that he owned a 1945 seniority, namely, No. 3 on the Parade Ring Side. Two other members of the O'Hare family also owned 1945 seniorities. He stated that under no circumstances would his own pitch have been for sale. He personally valued the pitch at €225,000. Mr. Peelo explained this valuation on the basis that it represented the capital value to *Mr. O'Hare*, as distinct from the market value. In other words, the pitch was intensely valuable to Mr. O'Hare because it gave him the right to annual earnings of €45,000 which when capitalised (using a multiplier of five) came to €225,000. Mr. Peelo accepted, however, that not every bookmaker would be in a position to earn such sums even if this premier pitch were to be allocated to them.

15. Mr. Hughes gave evidence that he held pitch No. 2 on the Racecourse line which he acquired by purchasing it sometime in the 1980s for the sum of approximately IR£30,000. Mr. Hughes personally valued that pitch at somewhere in the region of €60,000.

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

17. At the same time it is only fair to state that Mr. Keegan has not given any formal valuations since he retired in April 2007. Save, perhaps, for one isolated case, nor were any pitches transferred in the period between the closure of the racecourse and its re-opening in August 2007. There have, of course, been huge changes in the intervening years. The racecourse at Dundalk has been transformed and the boycott meant that many pitches were simply not taken up. The advent of technology has continued to place pressure on the on-course betting market at all racecourses. But, perhaps most of all, the enormous economic difficulties which have beset the State since 2008 has resulted in a sharp decline in discretionary spending and this in turn must have depressed the value of capital assets associated with the racing industry.

18. Mr. Keegan enumerated a range of factors which might have affected the general valuation of a pitch. These were, more or less in order of importance, as follows

? date of seniority of the pitch

? location of the pitch in relation to the parade rings, bars and members' enclosures

? position in the bookmaker's line

? the number of bookmakers betting on either side of the pitch

? the number of race meetings held at the venue

? the type of racing at the venue

? facilities at the venue

? the classification of the racecourse (is it, for example, a Category 1 racecourse?)

? is it a HRI racecourse

? is the racecourse convenient to the bookmaker's residence or his business interests?

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

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

21. Mr. Keegan valued Mr. O'Hare's pitch at €38,600 and ascribed a similar value to Mr. Hughes' pitch. He did acknowledge, however, that such premium end pitches rarely came on the market and that this fact gave those pitches a certain cachet in terms of price. Indeed, Mr. Keegan observed in evidence that the €70,000 for the No. 1 pitch was probably too low having regard to its intrinsic value. In valuing these pitches at €38,600, Mr. Keegan took account of the fact that, even under the Pitch Rules, there would have to have been a re-draw for the top twelve seniorities given that there was a new ring and these seniorities ranked equally and that these valuations represented an average of the valuations he would ascribe to the top 12 pitches.

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

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

24. Mr. Jacobs is a partner with Grant Thornton and is a specialist forensic accountant. While his analysis and conclusions were naturally the subject of cross examination and dispute, no one disputed the quite remarkable quality of the comprehensive report on all aspects of this dispute which he prepared for the Court and for which, as I noted in the course of my judgment in *Hyland (No. 2.),* I am personally grateful.

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

Date	Pitch Location	Value Obtained For Transfer
5 September 2010	Parade Ring Line No. 4	€5,000
16 November 2011	Racecourse Line No. 2	€8,000
27 August 2012	Parade Ring Line No. 2	€4,000
18 March 2014	Racecourse Line No. 2	€5,500

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

27. I do not consider, however, that it would be altogether appropriate to measure the value of these particular pitches in this fashion. There are several reasons for this conclusion.

28. First, while I appreciate that Mr. Jacobs had little to go on, I think it clear from the evidence that, generally speaking, each pitch has an individual value. This is especially true of the premium pitches – such as No. 3 on the parade ring side – which have the most advantageous locations. Here small factors such as the proximity to the flow of customers who leave the parade ring following the departure of the horses can be critical. This explains the big difference in value between pitches that may be no more than a few metres apart. Indeed, this rationale lies at the heart of the Pitch Rules, designed as they are to ensure an orderly allocation of a scarce resource, namely, desirable pitches.

29. Second, the effect of the August 2007 re-draw was quite significant because it threw open the pitches to a coterie of new bookmakers who otherwise would have no realistic chance of securing such pitches. It is true that, given that there was a new betting ring at Dundalk, there would have to have been a re-draw under the Pitch Rules even if there had been no dispute. In that situation, given that the first twelve bookmakers held 1945 Dundalk seniorities *ex aequo*, they would have had the claim on the first six pitches on the racecourse line and parade line respectively. There was no guarantee that the plaintiff would have secured No. 3 pitch or better. As has already been noted, Mr. Keegan stated that he factored in this uncertainty in allocating a value for both Mr. O'Hare's pitch and Mr. Hughes' pitch

30. The first twelve bookmakers were all prominent and "strong" bookmakers and the list included three members of the O'Hare family (including the plaintiff), John Hughes and David Power. But for the unusual turn of events which gave rise to this litigation, it is all but inconceivable that the plaintiff or any of these bookmakers would have traded their prominent Dundalk pitches to which they held an established October 1945 seniority. As we have seen, Mr. O'Hare flatly declared in evidence that his prized pitch was not for sale. The

very scarcity of supply would have tended to push up the capital value of these premium pitches including the capital value of these pitches.

31. Third, it is important to stress that the loss which both Mr. O'Hare and Mr. Hughes suffered occurred in August 2007 when the pitches were allocated to the new applicants following a re-draw based on the seniority of permit holders. That loss accordingly occurred before the gathering storm blew away the flood defences of the Irish economy a year later and which subsequently decimated the value of all capital assets.

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

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

33. For all of those reasons, therefore, I think that the valuation of these pitches is much closer to that suggested by Mr. Keegan. I do not think it would be appropriate for me to go behind Mr. Keegan's valuation and have regard, for example, to the value of some €225,000 attributed to his pitch by Mr. O'Hare. In other words, the only loss which the law can realistically measure is to measure it by reference to the market value of the pitch, even if the capital value to Mr. O'Hare is considerably higher.

34. Some deduction from Mr. Keegan's valuation must nevertheless be made to reflect the fact that – as both Mr. Jacobs and Mr. Martin stressed - even six months after the re-draw (and, hence, the loss of the pitch) there was considerable excess and unused capacity. This demonstrates that a more conservative view must be taken of any pre-August 2007 valuation. But the deduction here should be proportionately less than in the case of Mr. Hyland's pitch, because the higher value pitches (such as Mr. O'Hare's and Mr. Hughes') would be less affected by this phenomenon than would have been the case with Mr. Hyland's pitch.

35. I will therefore allow both Mr. O'Hare and Mr. Hughes the figure of €35,000 each in respect of the loss of these particular pitches. In the case of Mr. Hughes, this figure of €35,000 must be reduced by 20% by reason of his participation in the illegal boycott, so that the total figure under this heading will be €28,000.

Part IV: Whether Mr. O'Hare is entitled to an injunction compelling Dundalk to restore him to his original pitch?

36. The claim of Mr. O'Hare has admittedly one novel feature which it does not share with the other related sets of proceedings, namely, the question of whether he is entitled to make an order restoring him to his pitch at Dundalk. Unlike the claim for damages, the order which is sought regarding the restoration of the pitch is a discretionary one and that discretion must be exercised by reference to standard equitable principles. One of those principles is that an equitable claim of this kind may be barred by the doctrine of laches. In other words, the courts will generally refuse specific relief of this kind where it is clear that the plaintiff has acquiesced in a state of affairs such that it would be unfair to grant such relief. The fundamental question is whether this is such a case.

37. In the present case the re-draw for the various pitches occurred in the days leading up to the re-opening of the Racecourse on 26th August 2007. As a result of that re-draw the plaintiff's pitch was – wrongly – allocated to a third party who had tendered for one of these pitches. Although the question of an injunction was apparently mooted, no such application was made to this Court.

38. It is true that these proceedings were commenced in April 2008. Yet no application for an injunction was made at that point either. It must also be noted that these proceedings first only came on for hearing in July 2014, almost seven years since the re-draw took place.

39. In my view, it would be manifestly inappropriate for this Court to make such an order after such a lapse of time. In effect, the plaintiff by his inactivity had allowed the admittedly wrongful transfer of the licence to become an accomplished fact so far as the present pitch holder is concerned. The bookmaker who applied for and obtained the No. 3 pitch on the parade ring side has presumably traded that pitch since August 2007. He or she has doubtless organised their affairs on the basis that the pitch has been allocated to them. The new pitch holder is not even a party to the present proceedings. Were this Court in effect to take away that pitch and restore it to Mr. O'Hare, then, for all that is known, this might have a hugely disruptive effect on that person's business and livelihood.

40. There is a long line of authority to the effect that the courts should not make an order of this nature where the plaintiff has delayed in a manner which would be prejudicial to another party. It is true that some of these cases belong to the sphere of public law rather than private law, but the underlying principle is essentially the same.

41. Any number of examples could be cited for this purpose, but the following may be treated as representative. In *R. (Rainey) v. Belfast Corporation* (1937) 71 ILTR 272 Brown J. refused to grant an order quashing the grant of a new publican's licence even though this had been done in breach of a statutory requirement. The Northern Irish High Court refused to take this step because the applicant had delayed for five months before applying to court and in the meantime the publican had changed his position by expending significant monies on the premises.

42. In *Shaw v. Applegate* [1977] 1 W.L.R. 970 the plaintiff had delayed by some six years from taking action to restrain the defendant's activities in operating an amusement arcade, even though there was a clear covenant to the effect that the lands would not be used for this purpose. The English Court of Appeal held that this was a case where damages were the appropriate remedy rather than injunction. As Buckley L.J. stated ([1977] 1 W.L.R. 970, 978-979):

> "It is almost six years since he first began to operate this property as an amusement arcade and I think that it would be extremely hard after than length of time to retrain him by injunction from continuing to carry on this business, and if we were to grant the injunction sought it would involve his ceasing to use the lean-to for the purposes for which he has been using it, it would involve his dismantling a large number of fairly valuable machines and it is common ground that there is no other space, upon this property at any rate, where the defendant could make use of them…"

43. In *JH v. WJH*, High Court, 21 December 1979, Keane J. stated the test for laches in the following terms:

> "I have no doubt that the interval of time which elapsed before the proceedings were issued in the present case could

> properly be described as substantial. That, however, is not sufficient there must also be circumstances which render it inequitable to enforce the claim after such a lapse of time. I must accordingly consider the circumstances in which the defendant will now find himself if the plaintiff's claim is allowed, as contrasted with the circumstances in which he would have found himself if the plaintiff had successfully prosecuted proceedings in 1973 or earlier."

44. In that case the plaintiff had entered into an agreement in 1969 with the defendant, her son, whereby she waived her legal right share in her husband's estate under the Succession Act 1965 in exchange for periodic payments from the defendant. Although there had been correspondence to the effect that the agreement was invalid, no legal proceedings were initiated until 1977.

45. Keane J. held that he would have used his equitable jurisdiction to set aside the agreement had it not been for the long delay rendering it inequitable to enforce the plaintiff's claim. The defence of laches accordingly succeeded on two grounds. First, the plaintiff had not instituted proceedings until some eight years after learning of her legal rights in relation to the matter. Second, there had been a huge increase in the value of agricultural land in the years leading up to the initiation of proceedings. Accordingly, had the plaintiff acted several years earlier, as she might reasonably have been expected to, the financial burden that the defendant would have faced in satisfying her claim to a legal right share of the estate would have been considerably less. Keane J. held that she should have instituted proceedings either on learning of her rights in 1969 or at the latest by November 1973. As she had delayed for years afterward, equitable relief was refused.

46. In *The State (Cussen) v. Brennan* [1981] I.R. 181 the Supreme Court held that there was no legal basis for an Irish language examination for which applicants for a particular consultant position were subjected. The Court also held, however, that by reason of the four month delay on the part of the losing candidate prior to commencing proceedings to challenge the validity of that appointment, it would be inappropriate to set aside that decision to appoint the successful candidate, this legal irregularity notwithstanding. The successful candidate had left his existing position and moved to Cork with his family for this purpose. As Henchy J. put it ([1981] I.R.181,197) the applicant:

> "…should have instituted proceedings forthwith so that none of the persons or bodies affected by the appointment would make plans or enter into commitments on foot of it. Instead, the [applicant] allowed four months to pass before commencing the present proceedings in the High Court. The delay was excessive and unreasonable. Because of it, the [applicant] became debarred from getting the relief he now seeks."

47. For these reasons and by reason of the general application of equitable principles concerning delay, lapse of time and prejudice to third parties, I would decline to grant the specific relief by way of injunction restoring the plaintiff's original pitch to him. He is, of course, entitled to damages for breach of contract and I have already dealt with this in Part III of this judgment.

Part V: The calculation of damages in respect of Mr. O'Hare's claim

48. Mr. Patrick O'Hare is a bookmaker of long standing based in Newry who operates somewhere in or around 15 or 16 racecourses on the island of Ireland. His business, together with that of his son, Damien, is conducted through the auspices of the Pat O'Hare Bookmakers Ltd., a company which was incorporated in 1999. Both father and son are joint owners and directors of the company. While the three O'Hare pitches at Dundalk are individually owned, they were actually operated by the company.

49. While Mr. O'Hare lives in Northern Ireland, his house is actually just about 15 km. from the racecourse. He regards the racecourse as his own local course. He insisted that many of his customers lived in the vicinity and they were apt to follow him from course of the course.

50. The O'Hare family has a presence at all race meetings where they stand as bookmakers. Where there are overlapping meetings – such as the Christmas Festival at Leopardstown and the corresponding fixtures at Down Royal – one member of the family (or a representative) will cover one meeting and another the other meeting. So far as Northern Ireland was concerned, they stood at both Down Royal and Down Patrick. They also stood at Cheltenham and from time to time at other major meetings such as Doncaster and York. One critical part of their evidence was that the profit margin at the UK courses (including Northern Ireland) was higher than that which prevailed in this State.

51. For the reasons set out at greater length in my judgment in *Hyland (No.2),* there was general agreement between the two respective forensic accountants, Mr. Peelo and Mr. Jacobs, that a comparator racecourse should be identified so that the putative loss of profits suffered by the plaintiff during this period could be identified.

52. So far as Mr. O'Hare was concerned, his evidence was that Down Royal, near Lisburn in Northern Ireland, was the appropriate comparator. Down Royal lies perhaps no more 45km. or so north of Mr. O'Hare's base in Newry, while Dundalk racecourse lies perhaps 30km. or so to the south of Newry. Just as importantly Mr. O'Hare maintained that Down Royal had the strongest profile to Dundalk as it had a strong visual and betting presence. Dundalk serviced his customer base which as both he and his accountant, Mr. Carvill, stressed, was essentially based in Northern Ireland.

53. So far as comparisons with Down Royal were concerned, many witnesses made the point that, in one sense, Dundalk was really a "Northern Irish" racecourse. Seen from that perspective, although the racecourse is located just south of the border in – so to speak - *partibus infidelium*, it nonetheless had a large Northern Irish customer base. In contrast to the position which obtained in most other racecourses in the State, those Northern Irish customers could bet in sterling with Northern Irish bookmakers (such as Mr. O'Hare and Mr. Hughes) and accordingly did not have to carry any foreign exchange risk or inconvenience. It had – and has – a very big meeting on July 12th, even though this day is regarded as just an ordinary day in rest of this State. A large proportion of Mr. O'Hare's business at the "old" Dundalk had been transacted in sterling rather than Irish punts. In all these respects, it was said that Dundalk was a close comparator with Down Royal. It was precisely because Dundalk should properly be regarded as a "Northern Irish" course

54. Mr. Carvill emphasised that for comparison purposes, Down Royal and Dundalk had similar business profiles in terms of turnover – "turnover twins" was the arresting phrase which he used for this purpose - even though he acknowledged that the decline in Dundalk's turnover from 2007 was especially steep. All the witnesses who gave evidence on behalf of the plaintiff – Mr. O'Hare, Ms. O'Hare, Mr. Carvill and Mr. Peelo – made the point that as Dundalk was a really a "Northern Irish" course, the higher profit margin which the O'Hare companies enjoyed in Northern Ireland (and the rest of the UK) should be applied in calculating the loss of profits at Dundalk. The UK figure was calculated by Mr. Jacobs at somewhere around 10.3% and Mr. Carvill thought that it might be as high as 15.3%. This was in contrast to the lower profit margin of 3.5% which applied generally to bookmaking operations which applied in this State.

55. There are admittedly significant differences as well. Down Royal has only one flat race during the year on 12th September, whereas Dundalk is all-weather track designed for flat racing only. There are only twelve race days during the course of the year,

with most of them corresponding with public holidays. There are also festival meetings held at Christmas, mid-summer and the end of October and only four of them are evening meetings. By contrast Dundalk has Friday evening racing under floodlights between October and March (it is the only racecourse on the island of Ireland with this facility), with two special festival days on July 12th and August 15th. In 2014 there were also some occasional meetings in April, May and September.

56. In passing it might be observed that the importance to "new" Dundalk of July 12th and August 15th should not be under-estimated. The betting turnover in 2013 for July 12th was approximately €140,000 and August 15th had a turnover of approximately €120,000. Most other meetings had a betting turnover of somewhere between €20,000 and €40,000, with four or five meetings having a turnover somewhere between €60,000 to €80,000.

57. The average meeting at Down Royal had an attendance almost three times the size of Dundalk, as Down Royal had, for example, the 8th best racecourse attendances in 2013 on the island of Ireland, whereas Dundalk was 26th of 28th. Dundalk's business model was heavily geared towards the generation of media rights, as the all weather track meant that there could be racing during the year at times which was of interest to betting shops and television companies. These types of meetings (known in the trade as "industry days") were a feature of Dundalk. While Down Royal had some "industry days" during off-peak meetings in February and October, the majority of racing at that track was geared towards summer festival meetings and at Christmas.

58. Mr. O'Hare accepted in cross-examination that these differences were such that Down Royal was an entirely different type of racecourse to that of Dundalk.

59. Mr. Martin further suggested that there were some Northern Irish patrons who would not attend Dundalk because it was on the flat and that they would prefer to go to Down Royal for National Hunt or mixed card racing. Mr. Hyland (who gave evidence qua bookmaker on behalf of the plaintiffs in this phase of the evidence) rejected this, saying that while some patrons preferred jump racing to the flat, there was nonetheless a long tradition in Northern Ireland of flat breeding and flat racing. While he accepted that the majority of racing in Northern Ireland was National Hunt, this was because the two racecourses (Down Royal and Down Patrick) were both undulating, making it unsuitable for top-class flat racing. Besides, he thought that the majority of the race going population did not really care whether the racing was on the flat or not. While such patrons were interested in the spectacle of horseracing, they even more interested in the thrill of betting on the race and this is why it was the betting which determined their attendance rather than anything else.

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

61. There are, furthermore, two other factors peculiar to Dundalk which also impact on this assessment. There is first the impact of the illegal boycott on the turnover at Dundalk which, as I ruled in *Hyland (No.1)*, had affected consumer welfare by suppressing competition and leading to higher prices for racing patrons. Ms. Marina O'Hare (the plaintiff's daughter-in-law) said that if patrons perceived that the ring at Dundalk was more competitive then attendances were likely to be higher.

62. Second, there is the question of whether the absence of prominent bookmakers such as Mr. O'Hare and Mr. Hughes has impacted on turnover figures at Dundalk or whether that turnover would have been greater during this period had the "strong" bookmakers been present. Mr. O'Hare described a "strong" bookmaker as a bookmaker who was willing to take a large cash bet and these included bookmakers such as Mr. Graham, Mr. Power and himself and his son. Both Mr. O'Hare and Ms. O'Hare thought that had such "strong" bookmakers been present at Dundalk, they would have drawn with them custom from their own loyal clientele, but they admitted that this was factor difficult to quantify. He did say, however, that he had met his own customers who had stated that they were not prepared to go to Dundalk once he was not there.

63. So far as this point was concerned, Mr. Martin emphasised in response that the "betting was the betting" and that any endeavour to recreate what might have been had these prominent bookmakers taken up their pitches at Dundalk was entirely speculative. Mr. Jacobs did not dissent from the theory of the argument: the casual visitor to the foreign city who wishes to find a suitable restaurant for an evening meal is probably, for example, more likely to seek out the crowded café rather than the one with the empty tables on the intuitive basis that the former must have the better reputation.

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

65. Mr. Jacobs also acknowledged that if there had been evidence from bookmakers or racing experts to the effect that by reason of, for example, the presence of "big name" bookmakers or a more vibrant ring that the betting might otherwise have increased by 10%, then this was a figure which a forensic accountant like himself could have factored into his equation. Mr. Jacob's difficulty was there was no such evidence, so that this rendered such an assessment purely speculative.

66. Mr. Jacobs also stated that given what he considered was the real and significant differences between the "new" Dundalk and Down Royal, that it would be inappropriate to take the latter racecourse as a comparator. He had originally formed the view that, having regard to the absence of detailed information regarding Mr. O'Hare's market share, the most appropriate comparator was to take an average of the racecourse turnover in the State during the years in question and to utilise this as the relevant yardstick.

67. As a result, however, of Mr. Jacob's most diligent researches which came to light towards the end of the quantum hearing, it was ultimately agreed that the market share which Mr. O'Hare enjoyed at "old" Dundalk in the two last years of its operation was approximately 6.2%. The turnover at Dundalk in 2000 was just €2.965m. (seven meetings) and in 2001 it was €2.660m. (six meetings). Turnover had declined significantly with the "new" Dundalk, with these figures declining from €3.153m. in 2007 down to €2.254m. in 2013, even though the number of corresponding fixtures had increased by a factor of five.

68. Mr. Jacobs also stated that given what he considered was the real and significant differences between the "new" Dundalk and Down Royal, that it would be inappropriate to take the latter racecourse as a comparator. In his view, the most appropriate comparator was to take an average of the racecourse turnover in the State during the years in question and to utilise this as the relevant yardstick.

Part VI: Conclusions on the calculation of damages for breach of contract in the case of Mr.O'Hare

69. As I indicated in my judgment in *Hyland (No.2),* the task of the Court in making an assessment of what might have been had there been no breach of contract is especially difficult. This task is, if any anything, more difficult in Mr. O'Hare's case in that his business model was essentially different from that of Mr. Hyland. Mr.O'Hare claims loss of income in the sum of €288,960 (which includes a small payment of €3,610 for media rights) in respect of the 2004 meetings held at Dundalk in the period from August 2007 to December 2013.

70. Mr. O'Hare was a large bookmaker with a loyal following. I think that there is force in the contention that the turnover in Dundalk in the 2007-20013 would have been greater had he been present. His presence and that of other strong bookmakers would have added to the vibrancy of the ring and produced a more competitive betting market which would have attracted extra customers. That extra business would in all likelihood have gone in the main to Mr. O'Hare and other similar "strong" bookmakers.

71. The calculation of what this extra turnover might have been is all but impossible. I will, however, allow a modest uplift for this purpose to the Dundalk betting figures for this period so that they rise from €17,722,844 to €18m.

72. I will next assume that Mr. O'Hare's market share at Dundalk will remain at 6.2% as it was in the period from 1999-2001, this being the figure which Mr. Jacobs unearthed following his own diligent researches. This would give a total "but for" on-course betting figure for Mr. O'Hare of €1,083,600. There then remains the question of whether one should apply the gross profits applicable to Mr. O'Hare's business elsewhere in the State (namely 3.3%) or the higher gross figure which he achieved at UK courses which Mr. Jacobs considered was some 10.3%. (As we have noted, Mr. Carvill thought that the figure might be even higher at some 15%).

73. Just as with his critique in the case of Mr. Hyland of the limitations of the Leopardstown as a comparator, Mr. Jacobs' similar critique of the Down Royal comparator is well taken. Yet just as was the case in respect of Leopardstown in *Hyland (No.2),* Down Royal is the only realistic one available and must, perforce, serve as a working model with all its admitted imperfections.

74. In some respects Down Royal was a better comparator than Leopardstown because of the fact that Dundalk is, in some ways, a "Northern Irish" course attended by a significant Northern Irish clientele which just happens to be located in the Republic. The evidence given on this point by Mr. O'Hare, Ms. O'Hare and Mr. Carvill is, I think, on the whole well taken. Even allowing for this and the fact that many customers travelled from Northern Ireland to bet with Mr. O'Hare (and other bookmakers from Northern Ireland such as Mr. Hughes), this does not mean that the entirety of the higher Northern Irish gross margin of 10.3% could be allowed, if only the available evidence shows that the gross margin for other courses in the Republic was just 3.3%.

75. There is, moreover, one key respect in which Down Royal is not as good a comparator. While Leopardstown did not have quite as many races as Dundalk, its numbers were nonetheless substantial. By contrast, Down Royal holds only 12 meetings a year, with most of them "festival" meetings rather than the "industry days" which - the festival meetings held on July 12th and August 15th aside - are a staple feature of the Dundalk calendar. As Mr. Jacobs was at pains to stress, this makes any wider extrapolation from Mr. O'Hare's performance at either Dundalk during the 1999-2001 period or from Down Royal from 2007 onwards especially difficult and problematic.

76. In these circumstances, I will allow Mr. O'Hare a gross profit of 6%, this giving a gross profit of €65,016. To this must be deducted the "saved costs" which Mr. Jacobs estimated as €25,800, leaving a figure of €39,216. To this must be added the claim of €3,610 for media rights, so that the total figure for gross profits comes to €42,816, *i.e.,* a figure of €6,114 per year. In accordance with the formula I have already indicated, I will allow €6,114 for the first year and (with the 80% abatement), €1,227 per year thereafter for six years with the total figure of €13,376 for those years.

77. I will accordingly allow Mr. O'Hare a figure of €13,376 by way of lost profits. To this must be added the figure of €35,000 in respect of the loss of the pitch. The total award will accordingly be the sum of €48,376.

Part VII: The damages claim of Mr. Hughes

78. Mr. Hughes is a very well known bookmaker. He enjoys a prominent position as a racing commentator in British television and he has No. 1 pitches at Cheltenham and Galway. He also has prominent pitches at Down Royal and Downpatrick, along with a range of other top class pitches at Aintree, Ascot, Chester and Doncaster and other pitches in England. He lives (or lived) close to the border in Northern Ireland and he regards Dundalk as his local course. Although the UK has been the focus of his bookmaking operations since about 2005, he still stands in Galway. Mr. Hughes maintained that but for this dispute he would have continued to stand in Dundalk.

79. As we have noted, Mr. Hughes said that he had acquired the No.2 pitch on the racecourse side at some stage in the 1980s for a sum in the region of IR£30,000. He had betting shops at Newry, Warrenpoint, Tandragee, Portadown, Armagh, Keady and Coalisland, all of which are within easy reach of Dundalk. He believes that with this loyal following he would have been in a position to do very well at Dundalk. Despite the fact that his centre of business is now in the UK, he would have regularly attended all Dundalk meetings, save, perhaps, in the event of a clash with the Cheltenham Festival.

80. Mr. Hughes stated in evidence, however, that by 2012 he had given up nearly all of his Irish pitches with the exception of Galway. In these circumstances he was obliged to make payment in absence payments to HRI amounting to some €75 per race meeting which he missed. Indeed, it seems that at one stage his bookmaking permit for this State had lapsed.

81. Mr. Hughes nevertheless maintained that he would have attended at Dundalk because it was his home course. In those circumstances it would have been worth his while to attend at other Irish courses such as Leopardstown, the Curragh and Punchestown, as he otherwise he would have incurred significant payment in absence fees. In those circumstances he thought that he could have expected to make at least the 6% the gross profits which his turnover figures suggest that he earned at Leopardstown and Down Royal. I think that these are all reasonable assumptions to make.

82. For the reasons which I have already set out, I will proceed on the basis that the Dundalk turnover might have been somewhat higher for this period and, as in the case of Mr. O'Hare, I am allowing a figure of €18m. for this purpose. I will further proceed on the basis that Mr. Hughes would have attained a share of 6% of the Dundalk market during this period, *i.e.,* giving a total figure of €1,080,000 turnover. I will further allow a gross profit margin of 7% in respect of this figure (*i.e.*, higher than the 5.3% which applied to all other racecourses in the State), so that the total gross lost profits during this period come to €75,570. This higher gross margin is intended to reflect the fact that Dundalk was more of a "Northern Irish" racecourse and that Mr. Hughes could take advantage at Dundalk of a loyal customer base from Northern Ireland. It is also slightly higher than that which I am allowing to Mr. O'Hare (6%), but then Mr. Hughes had a higher starting margin for other racecourses in this State (5.3%) as compared with Mr. O'Hare (3.3%).

83. The saved costs of some €25,800 must then be deducted from this figure, so that the lost profits come to €49,770. To this must

be added the figure of €3,616 in respect of media rights, so that the net lost profits came to €53,386. This gives a figure of some €7,912 per year.

84. I will allow the entirety of that figure for the first year and proceed with the 80% abatement for the remaining six years (*i.e.,* €1,582 x 6), so that the figure comes to €9.192. The total figure (€9,192 and €7,912) thus comes to €17,104.

85. As already indicated, however, that figure must be further abated by 20% to reflect the participation in the illegal boycott, so that the figure comes to €13,484. The total award to Mr. Hughes will accordingly be €41,484 (€28,000 and €13,484) by way of damages for breach of contract.