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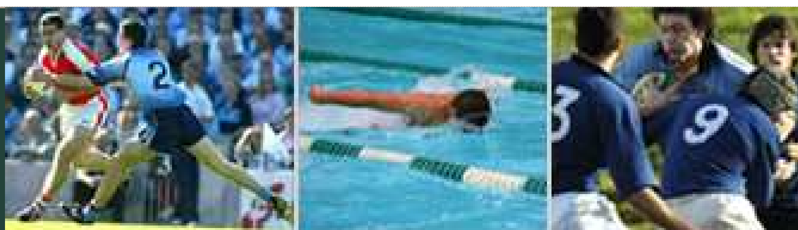

Sport Update

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Injunctivitis

Despite the high profile nature of the Dwain Chambers case, it is important to note that the recent decision of the English High Court is not a ruling on the validity of the British Olympic Association (BOA) bye-law which bans athletes who have been given doping bans from competing at any future Olympic Games, but is only a decision that Chambers cannot use the legal system to obtain a place in the 2008 Beijing Olympic Games.

Chambers had argued that the lifetime ban was unfair, an excessive punishment and an unfair restraint of trade, but the BOA, which is one of only a few international Olympic bodies to take such a hard line against drug offenders, argued that Chambers could not show that the bye-law was an unlawful restraint of trade as it only concerns eligibility for an amateur event which takes place once every four years and for which there is no prize money (apparently the fact that lucrative commercial contracts tend to arise just after an athlete wins Olympic gold is a coincidence of timing).

Mr. Justice McKay rejected the athlete's arguments saying that allowing the challenge would upset the "harmony and management of the British team and undermine its orderly demonstration". He was also frustrated by the last minute nature of the proceedings claiming he would probably have refused the injunction alone by reason of the effect the delay would have on the BOA and the other athletes. Mr. Justice McKay also took the view that if Chambers had succeeded at least one other athlete and possibly two would have been left out, adding that if these other athletes were represented at the hearing they would likely have had much to say in this regard. Mr. Justice McKay was also concerned about setting a precedent which would open the floodgates for other athletes who have served doping bans to launch last minute court actions.

It has been stated in the press that the judge did not see good enough reason to overturn the ban, but that is incorrect. In an injunction hearing, a judge does not delve too deeply into the merits of a case but considers what is called the "balance of convenience". The applicant must show good reason why the injunction should be granted and this Chambers failed to do. The merits of the ban itself were never going to be addressed at the injunction hearing but would be addressed at the full hearing of the matter which is now unlikely to be heard. That said, even if the application was successful, it is unlikely that the full hearing would have proceeded, as by that stage Chambers would have competed in the Olympics and at 30 years of age he may see little point in proceeding with the hearing in an attempt to make himself available for the 2012 Olympics in London.

Injunctions have long been used by sports people in order to effectively set aside a disciplinary ban or penalty and thus allow themselves to compete in a certain event. Inevitably, the full hearing of the matter never proceeds, as after the athlete or player has competed in the event, the merits of the case itself are moot. This is what makes injunction applications so attractive to athletes and so repugnant to sport governing bodies. In making an application, athletes have nothing to lose other than their legal costs. Rarely are legal costs awarded in favour of the governing body and against an athlete, and costs are usually reserved until the trial which, as noted above, usually doesn't take place. The governing body normally has to pay its own costs even if it is successful in resisting the injunction application. The athlete is ostensibly in a "win/win" situation while the governing body is in a "lose/lose" situation.

So, what can a governing body do? It should ensure the sanction being imposed is within the range of sanctions provided for in its rules and is fair and proportionate. The rules themselves must be well-drafted and provide for a range of sanctions that are commensurate with the offence. A governing body should also provide a forum for an appeal within the organisation (or an appeal to an independent body) which appeal should ideally comprise a hearing to ensure that an athlete can have his or her "day in court", thereby hopefully avoiding a day in Court.

Play your cards right

Two recent Canadian cases focused on carding schemes. Athletes who are "carded" receive funding from their government to facilitate their training and competing. In the first case, a track and field athlete who had been carded for five years running challenged the decision of Athletics Canada, his national governing body, to deny him a card. Athletics Canada nominates its athletes based on a variety of factors, some of which are objective and some of which are subjective, and a certain number of points are awarded for comparison purposes. The athlete in this case did not attain the minimum points required. The arbitrator in the case stated that the onus was on the athlete to demonstrate that the decision of Athletics Canada was unreasonable and that the athlete failed to do so. The arbitrator determined that Athletics Canada had followed proper procedures and that there had been no bias or lack of neutrality in its nomination of athletes. He also pointed out there must be specific grounds for bringing an appeal and mere disagreement with a particular outcome is not sufficient.

In the second Canadian case, Taekwondo Canada was challenged after revising its carding criteria to be more objective just two months prior to the beginning of the 2008 carding cycle. An athlete who was denied a card claimed that the new criteria included results from competitions that had already taken place and therefore were not reasonable as the modification to the criteria did not allow sufficient time for athletes to meet the new criteria. He claimed the new carding criteria was not published with enough advance notice and that if he had known that the Pan Am Games would be among the only carding selection criteria for the 2008 carding cycle he would have tried harder. The arbitrator decided that the timing of publication of the modified criteria does not affect their reasonableness and that the claimant as well as any other athlete who had been previously carded could easily have predicted that their performances at the World Championships and Pan Am Games would be major factors in their nominations. The timing of the publication of the criteria for the 2008 carding scheme was the same for all previously carded athletes therefore there was no unfairness specific to the claimant in that respect.

Generally arbitrators will only interfere with decisions reached reasonably by sports authorities when it is shown to the satisfaction of the arbitrator that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand. A governing body should ensure that the criteria it uses to select which athletes it is putting forward for carding is more objective than subjective in so far as is practicable, and, therefore, more specific, transparent and verifiable.

Amateur v Professional: This time it's personal

FIFA is speaking out about the refusal of certain clubs to release players to play for their international teams in the 2008 Olympic Games in Beijing. The issue first arose when it was confirmed that some German clubs were not releasing their players for the Olympics due to the fact that the Bundesliga, Germany's premier soccer league, begins during the Olympics. Now Spanish club Barcelona are claiming they are not obliged to release 21-year-old Lionel Messi to the Argentinean national team, but the player wants to play. FIFA and the IOC warned clubs that they had to release under-23 players for the Beijing Games unless the player did not want to play at the Games. FIFA notified the clubs that if a club did not release a player, the player could be suspended for the whole period of the Games under the FIFA laws. However, some clubs refused to change their position and last week the sole Judge of the Players' Status Committee, the whimsically named Slim Aloulou, confirmed that it is mandatory for players to be released for Olympic duty. Two German clubs and Barcelona have filed appeals with the Court of Arbitration for Sport which is expected to rule on all three matters simultaneously within the next day or so.

It is an interesting struggle between the international community and the national and local communities. Should the international community be able to force a club to release a professional player for an amateur competition when all the possible ramifications are considered? Certainly losing a player who is of the calibre to play at the Olympic level will hurt a club in terms of performance and, possibly, attendance. There is also the possibility of the player getting injured during the Olympics, and the related financial implications for the club. With other team sports in contention to be added to the Olympic line-up, governing bodies need to have their rules regarding player release in order.

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Be sure they get their due process

So you think someone has brought your sport into disrepute and you want to do something about it? Just make sure you follow the proper procedures as Motorcycling New Zealand (MNZ) learned recently after a New Zealand sports tribunal recently re-heard a case due to extreme flaws in the process, lowered the suspension period imposed, removed the fine imposed, and awarded minor costs to the athlete.

Mr. Noel Curr, member of MNZ was suspended for three years and fined $500 (NZ$) for sending derogatory emails about an executive in the organisation. In the emails he alleged a number of instances of inappropriate conduct for which, unfortunately for Mr. Curr, there was no foundation. MNZ decided to take action against Mr. Curr in light of the personal and derogatory nature of the emails sent and the adverse affect such actions could have on the reputation of MNZ. Mr. Curr was first made aware of the issue at the AGM of the MNZ on the 13th May 2007 when it was brought up in front of the entire meeting. After a very public and very confrontational humiliation of Mr. Curr, the Board of the MNZ adjourned for fifteen minutes then returned and decided to suspend him for 28 days during which time he could take advice and prepare a full response to the Board before a decision was made about his future in the organisation. He was then asked to leave the AGM immediately. A hearing on the matter was held on the 17th August 2007 and on the 18th September 2007 the member was notified of his suspension and fine.

The "hearing" at the AGM provided Mr. Curr with no notice or proper opportunity to consider his position. Furthermore, the combination AGM/Board process was inappropriate. The Tribunal was concerned that much the same Board had considered substantially the same issues in the August hearing and acted in a cavalier fashion previously. The Tribunal noted that in other cases it may set aside a decision and not exercise its right of re-hearing but to bring an end to this issue it would exercise its right of re-hearing in this case. Without a specific rule contractually accepted by its members, allowing two processes for the same offence with an interim suspension pending a fuller process seems fundamentally unfair. On one view the Board could not get a second process having spent its jurisdiction on the first process. However, here the Tribunal determined that the AGM was intended as an interim measure pending a fuller, proper process. The second process was of a wider scope and addressed a "course of conduct".

In considering whether to set aside the decision entirely, the Tribunal noted that it is important that sports recognise that very serious breaches of process may see a decision set aside. It is important for governing bodies to ensure that whenever a disciplinary matter arises in any regard involving one of its members or participants, its disciplinary process must be well-structured, fair and followed exactly. It is also important that the issues at stake not be predetermined by the hearing panel and that the hearing panel be independent of all the parties to the matter.

Fat Pats

25 year-old midfielder Michael Keane has been sacked by his club, St Patrick's Athletic, for being too fat (or too overweight if you want to be politically correct). The club claimed that he was in breach of a clause in his contract regarding his physical fitness and that a letter was sent to him earlier this year regarding his physical condition, telling him to lose weight, failing which he would be dismissed. Keane argued that he has not missed a training session during his time with the club and is said to take home a weekly wage of in excess of €3,000.

He appealed the club's decision to the Eircom League Disputes Resolution Committee (DRC) and it found in his favour. The three-man panel decided that the club has terminated the player's contract "without just cause". Article 14 of the FIFA Regulations for the Status and Transfer of Players ("FIFA Regulations") states that " a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause". The FAI Rulebook allows cases where "just cause" is an issue to be reviewed. The FIFA Regulations do not provide any guidance on what is meant by "just cause", but there have been a number of cases before FIFA's Disputes Resolution Chamber which have dealt "just cause". Keane introduced medical evidence to demonstrate that his fitness and agility levels were similar to that of other Eircom League players and having accepted this evidence there was little alternative for the DRC than to rule in Keane's favour. No ruling was made on damages and the parties are to come back before the panel in that regard. It is thought that they may reach a settlement which would obviate the need for any hearing on the sanction.

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USOC Bud

No it is not one Dubliner insulting another, the US Olympic Committee has received a boost after Anheuser-Busch (brewers of Budweiser) extended its sponsorship deal with the US Olympic team until 2012. There had been fears that Anheuser-Busch would cut back its significant presence in the sport sponsorship market, as it has recently been taken over by Belgian-based brewer InBev. Readers will be aware that such a deal will not now be possible in Ireland, as drink companies can no longer sponsor events or teams where the adult audience profile of the team will be less than 75% on account of the new Code of Practice introduced in relation to alcohol sponsorship and advertising.

In more booze related news, the German Council for Alcohol and Addiction ("the Council") has recommended to the German Government a ban on alcohol sponsorship in sport and a ban on alcohol advertising on television. It remains to be seen whether the German government will follow the advice of the Council, but, of the eighteen teams in German soccer's Bundesliga, sixteen have sponsors of one level or another that are breweries or beer brands. The German clubs are probably downing a few glasses of Weißbier to wash away their worries until the German government makes it's decision.

It's safer if the bike moves… at least in NYC

A New York City jury recently acquitted a gym go-er of assault charges arising out of an schmozzle at his local gym. Mr. Carter was taking a spinning class (that's sort of like extreme bicycling but the bikes are stationary) and a fellow spinner was yelling encouragement to himself (and possibly others) saying things such as "you go girl" and "good burn". Mr Carter, having received a rude gesture after asking the yeller to quiet down did what we all imagine doing – walked over to the yeller and, with the man still on the bike, lifted the bike and crashed it into a wall. The jurors of NYC didn't see the problem.

Gary Rice
Head of Sport
Beauchamps Solicitors Riverside Two, Sir John Rogerson's Quay, Dublin 2
t: +353 (0)1 4180600 f: +353 (0)1 4180699
e: securemail@beauchamps.ie w: www.beauchamps.ie

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