

**THE HIGH COURT  
JUDICIAL REVIEW**

[2017 No. 101 J.R.]

**BETWEEN**

**BRIAN GRAHAM**

**APPLICANT**

**AND**

**HORSE RACING IRELAND AND THE PITCH TRIBUNAL**

**RESPONDENTS**

**IRISH NATIONAL PROFESSIONAL BOOKMAKERS ASSOCIATION AND ASSOCIATION OF  
IRISH RACECOURSES**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Murphy delivered on the 29th day of October 2019**

1. The applicant seeks an order of *certiorari*, quashing a decision of the second respondent made the 16th December 2016, in which it upheld Pitch Rules made by the notice parties in March 2016, together with other ancillary reliefs. The first respondent has raised a number of preliminary objections to the application, in its statement of opposition, filed the 25th day of April 2017. The respondents' preliminary objections are as follows: -
  - (i) The naming of HRI as a respondent to the within proceedings is misconceived. HRI is inappropriately joined as a respondent to the within proceedings where no decision of HRI has been challenged by the applicant. HRI's sole function, in the context of the present proceedings is to implement the Racecourse Executives' seniority and Pitch Rules (the Pitch Rules).
  - (ii) The impugned decision derives from contract and so is not amenable to judicial review and in any event the proceedings are moot the Pitch Rules having been properly adopted.
  - (iii) The Applicant does not have the requisite locus standi to bring the within proceedings because he is not a permit holder of an on course betting licence
  - (iv) The first respondent objects that the judicial review proceedings are out of time.
2. This is the court's judgment on the preliminary objections raised.
3. The Pitch Tribunal, the second named respondent, whose decision is impugned, was not legally represented at the hearing. The secretary to the Pitch Tribunal, Francis Hyland, informed the court at the commencement of the hearing that the Pitch Tribunal is a committee set up by agreement between the notice parties to resolve any disputes on the interpretation of the Pitch Rules. To that extent, it is a creation of contract and is a private dispute resolution process. Mr. Barton of McCann Fitzgerald who appeared on behalf of the Association of Irish Racecourses, agreed with the characterisation of the Pitch Tribunal advanced by Mr. Hyland. Mr. Crystal on behalf of the applicant, did not dispute the fact that the Pitch Tribunal is a contractual creation. However, he maintained that since a condition of his on course betting permit issued by Horse Racing Ireland, pursuant to statute, required him to comply with the Pitch Rules agreed between the

bookmakers' association and the racecourse owners' association, that this brought the matter within the public law realm.

### **General Background**

4. The history of the administration of horse racing in this jurisdiction is a long, convoluted and complex one. In the course of the hearing, the applicant exhibited a transcript of evidence from the case of *Francis Hyland v. Dundalk Racing Limited [1999]* which was heard by Hogan J. in November 2013 in which Mr. Hyland set out for Hogan J. the history of horse racing in Ireland and the role of bookmakers within the racing industry. This is the same Mr. Hyland who appeared for the Pitch Tribunal. While the method of adducing this evidence was somewhat unorthodox, the court is satisfied that it is a true transcript of the evidence of Mr. Hyland, and the court found his testimony to be of assistance to it in understanding the context of the case and the roles of each of the parties
5. Apparently, the phenomenon of bookmakers on racecourses dates from the 1850s. In the early days, bookmakers walked around the racecourse with a satchel mingling with the crowds, and when the race started the bookmakers moved to the judges' box by the winning post and gathered there to hear the result. They then formed a circle, and from that circle they paid winnings. That apparently became known as the bookie's ring. According to the evidence of Mr. Hyland, that system continued right through to 1912.
6. In 1912, Clonmel racecourse decided that it would corral the bookmakers into the bookie's ring and the racecourse owners refused to allow them circulate around the racecourse. According to the evidence of Mr. Hyland, bookmakers soon realised that in terms of laying bets, some pitches in the ring or line were more advantageous than others, for example, those that were near the parade ring. To avoid pitch battles, the bookmakers decided among themselves that they would have to have a system for allotting pitches.
7. The system devised by the bookmakers was that the most senior bookmaker got Pitch No. 1, the second most senior Pitch No. 2 and so on down the line. It was the bookmakers who controlled the matter of seniority. Seniority could not be sold but it could be transferred to a son. Seniority could be lost if a bookmaker missed three meetings at a racecourse.
8. Those rules created by bookmakers themselves, lasted until 1945 when the Racing Board was set up. It was set up funded by a levy on the turnover of racecourse bookmakers. It ran the tote which had been introduced in 1929, and it administered the finances of Irish horse racing. Under the Racing Board Act, 1945, the Racing Board took control of the betting arrangements on racecourses. Seniority was adopted by the Racing Board in accordance with the 1912 rules. They allotted pitches to bookmakers in line with the established seniorities. They designed the betting rings in a way to maximise the levy, because the levy was what was now funding racing. The Act provided that bookmakers could only be charged five times the price of admission to the public for their pitches.

9. Over the years the Racing Board noticed that as the senior bookmakers who had the best pitches got older, they became more cautious and less willing to take the bigger wagers, thus affecting the amount of the levy payable to the Racing Board. In order to ensure turnover of the more senior pitches and also to make provision for the families of deceased bookmakers, the Racing Board in 1972, agreed to allow the bookmakers sell seniority. The Racing Board kept a ledger of seniority and on race day allotted the pitches in line with that seniority. The Racing Board controlled the pitches. The system operated on the basis that the Racing Board owned the pitches and the bookmakers owned the seniorities.
10. By allowing the sale of seniority, a young bookmaker in a disadvantageous pitch could purchase the seniority of an older bookmaker and thereby be allotted by the Racing Board a more advantageous pitch. This suited the Racing Board because they wanted the most dynamic bookmakers in the most advantageous pitches because that would increase the levy payable to the Racing Board.
11. In 1976, in the course of a dispute between two bookmakers in respect of seniority, the bookmakers explained to the high court the relationship between seniority and pitches at a racecourse. They explained that the bookmaker owns the seniority while the Racing Board owns the pitches, but that the right to be allocated a specific pitch by the Racing Board depended on seniority. Costello J. remarked: -

*"But surely the racecourses own the pitch?"*

12. According to the evidence of Mr. Hyland, this remark caused a big 'to – do' within racing circles because the Racing Board, which was a semi State body, in administering the Pitch Rules, was potentially claiming entitlement to ownership of private property.
13. Apparently, the Board approached the racecourse owners, suggesting that they take over the Pitch Rules and administer them thence forward. According to the evidence of Mr. Hyland, the racecourse owners were not enthusiastic, as there was very little money in it for them, because the pitch costs were limited by statute to five times the admission price. They were also concerned that they unlike the Racing Board, had no statutory powers to administer the rules.
14. The upshot was that the Racing Board brought the Bookmakers Association and the Association of Irish Racecourses together and got the racecourses to adopt the Racing Board Pitch Rules and regulations which then became the Racecourse Executives' Seniority Pitch Rules and Regulations. The bookmakers signed up to these regulations and then the Racing Board administered them as they had before, but this time as agents for the racecourse. Thus, the racing board continued to collect the pitch fees and the levies from bookmakers as well as other fees created by the Pitch Rules.
15. Thus, since 1977 what are known as the Racecourse Executives' Seniority and Pitch Rules have been determined by collective agreement between the Irish National Bookmakers Association and the Association of Irish Racecourses in consultation with HRI and its

statutory predecessors. The seniority and pitch rule making body, being the two notice parties herein, cannot make rules which would trench in any way on the statutory powers of Horse Racing Ireland to control and licence on course betting permits. In the event that the racecourse owners and bookmakers purported to do so, HRI would in effect have a veto on any such proposed change. No doubt it is for this reason that in agreeing changes to the Pitch Rules the two notice parties must consult with HRI.

### **The Pitch Tribunal**

16. The Pitch Tribunal is an ad hoc body set up by INPBA (the bookmaker's association) and AIR (the association of Irish racecourses) as part of the Racecourse Executives Seniority and Pitch Rules. Its role is to determine disputes as to the interpretation or application of the Rules in any circumstances. It consists of three persons; one nominated by the bookmakers; one nominated by Racecourse owners and a Chairman nominated by both bodies. Prior to 2011, the Chair was nominated by HRI, but the rules were changed that year to provide that the chair would be nominated by the two notice parties.
17. The Pitch Tribunal Rule is admirably succinct. It is set out at Rule 20 of the 2011 Rules and at Rule 21 of the 2016 Rules. They are identical in terms. They provide:
  - “(a) Composition as set out above
  - (b) *The Pitch Tribunal shall have authority to determine any dispute as to the interpretation of these Rules or their application in any circumstances. The determination of the Pitch Tribunal shall be final and binding on all parties concerned. The Pitch Tribunal shall determine its own procedures provided that same shall comply with the principles of natural justice.*
  - (c) *The failure of any party to refer a dispute to the Pitch Tribunal within a reasonable time or the failure of a party to comply with the procedures of the Pitch Tribunal shall not prevent the Pitch Tribunal from making a determination in any such dispute.”*
18. The final two Rules of the Pitch Rules deal with amendment of the rules and the term of the agreement. They appear to the court to be significant in the context of the current dispute. They provide:

**“AMENDMENT**  
*These Rules may only be amended by agreement between the AIR and the INPBA and in consultation with HRI.*

**TERM OF AGREEMENT**  
*These Rules are currently in force and may be reviewed at any time at the request of the AIR, the INPBA or HRI.”*
19. There has been a number of changes to the Racecourse Executives' Seniority and Pitch Rules over the years. New rules were promulgated in 2007, and again in 2011, at a time when it appears, the applicant was chair of the INBA. The changes in recent years have been mainly to extend the areas in which bookmakers can operate. Their areas of

operation have been extended by agreement from the traditional 'ring', to other areas of the racecourse, such as Private Suites, Corporate Areas, and most recently Premium Areas. It appears that on course betting is under pressure from online betting. A punter sitting in a private suite might opt to use his smartphone to place a bet online rather than perhaps, braving the elements to head to the bookies ring. The recent changes in the Rules allow on course bookmakers to go to the punter rather than obliging the punter to come to him.

#### **HORSE RACING IRELAND**

20. Horse Racing Ireland, as successor to the Racing Board and the Irish Horse Racing Authority, is a statutory body which is the national authority for thoroughbred racing in Ireland, with responsibility for the governance, development and promotion of the industry under the Horse and Greyhound Racing Act 2001. One of its functions is the control of the operations of authorised bookmakers. This function is performed through its Betting Division. It has the sole power of granting on course betting permits. The provisions are contained in Part 4 of the Act.
21. Section 47 contains a statutory prohibition on anyone taking on course bets unless they hold a permit from the authority.
22. Section 48 of the 1994 Act as amended by the 2001 Act gives the power to Horse Racing Ireland: -  
  

*“. .to grant to a licenced bookmaker a permit to carry on in person at an authorised racecourse the business of bookmaking in respect of horse races held at an authorised racecourse”.*
23. Section 48(2) provides for representative permits. A permit holder may apply for a representative permit. The representative permit is also the property of the permit holder. It entitles the permit holder to specify a person or persons who can appear at the racecourse in his/her stead.
24. Section 48(6) provides: -  
  

*“The Authority may attach to a permit granted under this section such terms and conditions as it thinks fit and it may also, from time to time, attach further terms or conditions or vary the conditions to such a permit or remove any such terms or conditions”.*
25. One of the conditions attached by HRI to its on course betting permit is that the permit holder is bound by the Racecourse Executive's Seniority and Pitch Rules.
26. Condition 13 states: -

*“I understand that I am bound by the Racecourse Executive's Seniority and Pitch Rules and confirm that I am familiar with its contents. I understand that HRI have*

*been appointed as agents of the AIR and the INBA for the purposes of the application of these rules”.*

27. The application for a representative permit is made by the permit holder to allow named persons referred to as representatives, to act as his/her representative in accordance with the terms of the application. The bookmaker is required to give certain undertakings, to be responsible to Horse Racing Ireland for all liabilities incurred by the representative. There is no reference to the Racecourse Executive's Seniority and Pitch Rules in the application for a representative permit. Presumably this is because the permit holder has already undertaken to be so bound.

#### **Racecourse Executives' Seniority and Pitch Rules**

28. These are the rules agreed collectively between the Irish National Bookmakers Association and the Association of Irish Racecourses in consultation with HRI. The Rules are the conditions upon which individual bookmakers are entitled to carry on the business of bookmaking at a particular pitch on any authorised racecourse. The rules have been altered over time by agreement between the INBA and AIR in consultation with Horse Racing Ireland to reflect changes in betting practices both at racecourses and online.
29. The applicant's primary complaint is that the current Rules, being the 2016 Rules, are not valid because eventhough they have been approved by the membership of his representative body, the INPBA, they were not signed by the Chairman of the INPBA, David Power.

#### **The 2016 Rules**

30. Rule 1 contains definitions. Rule 2 deals with pitches, and at 2(a) provides: -

*“The Executive of any racecourse has control over the area in which bookmakers' pitches are located and has the right to designate any particular area for use as a Betting Ring and to plan, align and allot the pitches of bookmakers. In such matters the Executive will, however, consult with HRI and the INPBA. If these consultations do not result in agreement the matter in dispute shall be decided by the Pitch Tribunal (See Rule 21)”.*

31. Rule 3 deals with the allocation of pitches. Rule 4 deals with changes to the allocation of pitches, Rule 5 makes provision for vacancies occurring on a pitch. Rule 6 deals with the death of a bookmaker, Rule 7 provides for the sale of a seniority, sales are restricted to persons who hold a course betting permit from HRI. Rule 8 deals with registration fees payable on the transfer of any seniority on a racecourse. The fee is payable to the executive of a racecourse and is collected by HRI as their agent. Rule 9 deals with introduction fees. These are payable when a bookmaker wishes to register a new seniority at a racecourse. The fee again is payable to HRI on behalf of the executive of the racecourse. Rule 10 deals with pitch fees, which again are payable to HRI on behalf of the executive of the racecourse. Rule 11 deals with the retirement of a bookmaker. Rule 12 deals with the occupation of pitches. Rule 13 deals with circumstances in which there is a change of pitch. Rule 14 deals with seniority. Rule 15 deals with betting offices. Rule 16 deals with private suites. As already stated, in earlier times bookmaking was confined to

what was described as the betting ring. The introduction of betting facilities to private suites and corporate areas(Rule 17) on certain conditions is to provide easier access for customers to betting facilities. Before designating any location as a private suite or a corporate area in which betting facilities would be provided, the executive of the racecourse has to secure an appropriate authorisation from Horse Racing Ireland.

32. Rule 18, which is the rule in controversy in this application, makes provision for betting facilities in Premium Areas This is a new rule in the 2016 Rules, and it is the manner of the allocation of pitches in these areas that appears to be source of the applicant's complaint. Allocation of pitches in these areas is allocated on the same basis as the corporate areas and may be described as rotational.
33. Rule 19 provides for the setting up of Subsidiary Betting rings where the need arises. The designation of an area as a subsidiary betting ring is again dependent on an appropriate authorisation from HRI. Allocation of pitches in a subsidiary betting ring is on the basis of seniority. The applicant contends that 'Premium Areas' should be treated as Subsidiary Betting rings where pitches are allocated on the basis of seniority. Rule 20 provides for the maintenance of seniority in the event that a racecourse is relocated or redeveloped.
34. Rule 21 deals with the Pitch Tribunal and has already been set out at paragraphs 13 and 14 of this judgment. Prior to 2011, Horse Racing Ireland had the power to nominate the chairman of the Pitch Tribunal. That was changed in the 2011 rules, at a time when the applicant was chairman of the INBA. Subsequent to that change, HRI has no direct involvement in the Pitch Tribunal, but of course any changes of rules still have to be done in consultation with Horse Racing Ireland and in the event that any proposed rule change violated any provision of the statute, it would in effect have a veto over the rule change.
35. Rule 22 provides for amendment of the rules and Rule 23 provides for the term of the agreement.

#### **Status of the Pitch Rules**

36. In the aforementioned case of *Francis Hyland v Dundalk Racing(1999) Ltd* [2014] IEHC 60, Hogan J. had occasion to consider the status and effect of the Pitch Rules. In that case the defendant was the owner of Dundalk racecourse, which had been subject to a €35 million redevelopment. The plaintiff was a bookmaker who, in the mid 1990's, had purchased no.13 in the seniority list for Dundalk racecourse for IRE8,000. The racecourse sought a capital contribution from the plaintiff of €8,000 towards the cost of redevelopment in exchange for a pitch at the redeveloped stadium. The plaintiff maintained that under the 2007 Pitch Rules the defendant was not entitled to ask for a payment from bookmakers. While much of the dispute centred on whether or not the redeveloped Dundalk was a new racecourse, one of the arguments advanced by the defendant was that the Pitch Rules were not enforceable by an individual bookmaker. At paragraphs 38 to 58 of the judgment Hogan J. considered this issue. He adverted to the fact that generally speaking the rules of sporting associations are not intended to be legally justiciable and cited the decision of Laffoy J. in *Jacob v Irish Amateur Rowing Union Ltd* [2008] 4 I.R. 731 that absent mala fides or other exceptional circumstances ,

the courts are reluctant to interfere with matters of purely sporting judgment. He explained the rationale for such a policy as follows:

*"If it were otherwise, the courts would have assumed a strange new jurisdiction which would test the traditional boundaries of justiciability and, indeed, raise questions as to the appropriate judicial role in relation to such matters. Could, for example, the courts be expected to adjudicate on questions such as the handicapping of horses, competitor seedings, team selection or on-field disciplinary or refereeing decisions?"*

37. In the context of the general rule, Hogan J. observed that an exception may have been created by Part III of the Irish Horse Racing Authority Act 1994 in which the Oireachtas entrusted, by statute, the rules of racing to the Turf Club and the Irish National Hunt Steeplechase Committee, thus leaving open the possibility that the decisions of those bodies might be amenable to judicial review.
38. In assessing the legal status of the Pitch Rules the court considered that all depended on the context, wording and intent of the rules. At para 45 of the judgment the court stated:

*"The Pitch Rules stand in contrast to the average set of rules of sporting organisations and clubs, precisely because they are designed to regulate not only the relationship between the individual bookmaker and the individual racecourses, but also aspects of the relationship between bookmakers inter se."*

39. The court cited the introductory preamble to the Pitch Rules as evidence of intent to *"constitute a binding mechanism regulating the conditions of individual bookmakers carrying on business at race meetings and they were also intended to govern the transfer of a sale of a pitch from one bookmaker to another. Indeed, the entire tenor of the Rules is to regulate the conduct of bookmakers inter se with regard to the allocation of pitches."*
40. The court referred to Rule 7 by way of example. That rule restricts a bookmaker from selling his seniority to anyone other than a person who holds a course betting permit from Horse Racing Ireland. The court commented on that rule:

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

41. The court also cited the Pitch Tribunal rule which provides that the determination of the Pitch Tribunal shall be final and binding on all parties concerned, as meaning that individual bookmakers could be bound by all decisions made by the Pitch Tribunal.
42. The court concluded that the Pitch Rules showed the requisite intention to ensure that the Rules had direct contractual effect as between bookmakers. ....*"it might also be said that these rules should have direct contractual effect as between members in order to give them full effect."*



43. Nor was the court persuaded by the defendant's argument that since the Rules are the subject of a collective agreement between the INBA and the AIR, individual bookmakers had no standing to enforce the Pitch Rules against another bookmaker.

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

44. Having cited the decision of Kearns J. in *Collooney Pharmacy Ltd. V North Western Health Board* [2005] 4.I.R.124, Hogan J. concluded as follows:

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

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

45. The decision of Hogan J. was subsequently upheld by the Court of Appeal

Thus, if a party to the Pitch Rules considers that another party thereto, be it a racecourse, a bookmaker, or the collective bargaining parties, has breached the Pitch Rules, causing him/her loss, then, in principle, that party is entitled to sue in contract to restrain that breach and to recoup that loss.

#### **Chronology of events giving rise to this application and findings of fact**

46. In early January 2016, new draft Pitch Rules were circulated. The proposal in effect was to extend betting facilities to premium areas on racecourses, much as previous changes had extended them to private suites and corporate areas. The proposed change at issue in this application is set out in a new Rule 18 which provides: -

*"(a) The racecourse executive may rent a pitch in a premium area to an authorised bookmaker with current seniority on the racecourse provided it has secured the*

*appropriate authorisations from HRI. The daily charge for this pitch shall be five times the charge to the public for admission to that particular area.*

- (b) *Each bookmaker holding a seniority at that racecourse will be offered the opportunity to apply for a position. Applicants will be graded according to seniority initially, subject to a draw if seniorities are equal. Successful applicants will be drawn by pick of place on a random basis. All bookmakers who have used the facility most recently will go to the end of the queue of applications for subsequent draws.*
- (c) *The authorised bookmaker or his representative must be present at the pitch in the premium area at all times when betting services are being made available.*
- (d) *At least one of the pitches in each Premium Area must be linked back to the betting ring. In order for this to be achieved, priority may be given to a ring bookmaker with the facility to work with the two pitches linked".*
47. The manner of allocation of pitches in premium areas is exactly the same as that which had previously been agreed for the allocation of pitches in corporate areas.
48. On the 23rd February 2016, the applicants' mother made her annual application to Horse Racing Ireland for her on course betting permit for the period from the 1st March 2016 to the 28th February 2017 together with applications for representative permits for the applicant and other named persons.
49. On the same day, the 23rd February 2016, there was an EGM of the INBA at the Keadeen Hotel in Newbridge. The first item on the agenda was a merger of the interests of the INBA and the PBA, being the Professional Bookmakers Association, and the proposed merger was carried by a majority vote. The new organisation became known as the Irish National Professional Bookmakers Association.
50. Item 9 of the minutes of the meeting, records that the new version of the seniority and pitch rules was approved. The changes included the new Rule 18 as set out above, in relation to premium areas. Allocation of pitches was partly linked to seniority but was to be rotated among those eligible. The applicant was in attendance at this meeting and was, at that time a committee member of the INPBA.
51. The Association of Irish Racecourses held an AGM on the 30th March to consider the proposed amendments to the rules and it approved the new Rule 18. In addition, it proposed that "premium area" be defined in the definition section as: -
- " . . . an area of the racecourse that is open to the general public, has been designated as a betting area by HRI and where the racecourse executive wishes to provide facilities from which ring bookmakers can operate".*
52. The last underlined part of that sentence was not in the definition of "premium area" agreed by the INPBA.

### **The applicants objections**

53. On the 31st March 2016 at 10 o'clock in the evening, the applicant sent an email to various members of the INPBA noting that the recent update to the Pitch Rules had been agreed with Paddy Walsh of AIR. He stated that he had an issue with regard to the allocation of pitches in new areas to compete with secondary betting shops. He contended that the allocation of pitches in any temporary rings had always been determined on seniority. He considered that the matter needed to be discussed before Punchestown, which was due to be held on the 28th 29th April. The court has no evidence as to what may have caused the applicant's change of attitude between the February EGM, where he approved the new rule 18, and his attitude as revealed in his email of the 31st March in which he objects to the manner of allocation of pitches under that rule.
54. On the 22nd April 2016 the applicant wrote to Paddy Walsh, the chief executive of AIR, by email to express his concerns about the new Rule 18. It reads: -

*"Dear Paddy,*

*I would like to make you aware of my concerns regarding the inclusion of Rule 18(b) to the latest version of the pitch rules and the future implications of such a rule. The rule regards "premium areas" and states the following: -*

*'(b) Each bookmaker holding a seniority at that racecourse will be offered the opportunity to apply for a position. Applicants will be graded according to seniority initially subject to a draw if seniorities are equal. Successful applicants will be drawn by pick of place on a random basis. All bookmakers who have used the facility most recently will go to the end of the queue of applications for subsequent draws'".*

55. He then goes on to cite the definition of premium areas:

*". . . . having read the definition, I cannot see any difference between a 'mayors garden' (Subsidiary Betting Area) which has worked very well in Galway, and a 'premium area'. They are both open to the public, five times admission charge applies, and bookmakers relinquish their seniority in the ring to move to these areas. The only difference is that it is proposed that these areas should be filled on rotation instead of seniority. This is a clear contradiction to the rules which have governed the betting rings since seniority was introduced. In the past all temporary rings have been filled using the seniority list. The mayors garden and the temporary rings at Fairyhouse and Leopardstown during reconstruction was filled on seniority.*

*In an email which I received on the 1st April I was informed that it was AIR that insisted that the pitches were filled on the same basis as the corporate, this is despite the fact that bookmakers are only paying five times the admission to enter.*

*This is a deliberate attempt to destroy any remaining value which is left in my seniorities. I am determined to protect my assets and believe that I have the*

backing of the majority of permit holders who hold 1945 or 1946 seniorities. I would urge the AIR to revisit this clause and remove the ambiguity which currently exists."

56. Mr. Walsh replied two hours later stating: -

*"Having been involved in the detailed discussions leading to the recent revisions to the Pitch Rules, I can advise that the difference between the "premium area" and the "subsidiary betting ring" is primarily one of size. The mayors garden in Galway (a "subsidiary betting ring" within the meaning of the Pitch Rules) is considered to be of sufficient size to ensure that a genuine betting market can be formed therein. The new premium areas were intended to cover situations where much smaller numbers of bookmakers were involved and where there might be a question over their ability to form a genuine betting market. This is why there is a requirement in the rules for at least one of the pitches in a "premium area" to be linked back to the main ring.*

*As you correctly point out, clause 18(b) of the Pitch Rules sets out how these pitches are to be filled. It is not correct to state that AIR insisted on the pitches being filled on the same basis as the corporate area. The reality is that, once principles of reasonableness, equity and natural justice have been met, the AIR do not have any strong feelings one way or the other as to how such pitches are filled, and, in this instance were happy to go along with the suggestions of the bookmaker representatives involved in the discussions relating to draw up revised Pitch Rules.*

*The revised Pitch Rules are, following their approval by both the members of INPBA and those of AIR, currently in force but may be reviewed at any time at the request of AIR, the INPBA or HRI. If you wish to have Rule 18(b) specifically amended you should in the first instance, take the matter up with your association. I trust that the above is helpful in clarifying the position".*

57. The applicant wrote back an hour later maintaining his complaint about the loss of seniority and again despite the earlier denial of Mr. Walsh repeated the allegation that it was Paddy Walsh who proposed that these pitches be filled on the same basis as the corporate areas, in the Pitch Rules. He finishes the email by saying: -

*"I do believe that both the INPBA and the AIR have agreed these rules in principle, but I do know that David Power has not yet signed them off. Therefore, these rules cannot currently be in force".*

58. David Power was at this time, the Chairman of the bookmakers association. Whether or not his signature is required to validate an approval of new rules passed by the membership at an EGM, is entirely dependent on the constitution and rules of the INPBA. The court has no evidence as to the content of the internal rules of the INPBA, but observes that even at this early stage of the dispute, it is clear that the applicant's real dispute is with his own representative body who have approved the 2016 Rules.

59. The foregoing email correspondence appears to have taken place on Friday 22nd April 2016. On the Monday, Paddy Walsh of AIR replied to the applicants' email, stating: -

*"Dear Brian,*

*Thank you for your response to my email of last Friday and I have noted the points that you make therein.*

*Your principal concern appears to be the rotational basis applied to the allocation of pitches in premium areas, but as already advised, this is the method specifically provided for in s. 18(b) of the Pitch Rules that have been formally approved by the members of our respective organisations.*

*If the INPBA now wish to amend this rule, I am more than happy to discuss same as provided for in the Pitch Rules, but, as I am sure you will appreciate, any subsequently agreed amendments would have to go through the normal approval procedures".*

60. The applicant replied to that and copied various other bookmakers on the evening of the 25th April, stating: -

*"Hi Paddy,*

*Many thanks for your email.*

*You are correct that I have concerns about the rotational basis for filling any (temporary) betting rings. I have already made these known to the committee of the INPBA, Paul Finnegan of HRI and my solicitor Kirby Tarrant, of O'Grady Solicitors.*

*I have acquired seniority over the years on the understanding that all seniority rights would apply to those individual assets. There seems to be a deliberate attempt to remove my rights by simply renaming designated betting areas which individual bookmakers enter on the same basis as the mayors' garden.*

*As I stated in my previous email, these rules may have been formally approved, but David Power, chairman of the INPBA has still not signed off on these".*

61. The response and advice of the CEO of AIR seems to the court to be straightforward and appropriate. He rightly identifies that the applicant's issue is with his own representative body and that if that body wishes to change the rules it can do so by invoking the amendment clause in Rule 22 of the Pitch Rules.
62. The applicant has also exhibited a number of emails which he sent on the 26th April to Paul Finnegan of the Betting Division of HRI. The first in the sequence was sent at 10:37 on the 26th April 2016, the subject is headed "premium areas" and it says: -

*"Hi Paul,*

*I am disappointed that you did not reply to my email from last Thursday. As I stated in that email, I have reservations about the attempt to implement rules which will effect (sic) my existing seniority rights and privileges. I have expressed my concerns to the committee of the INPBA, Paddy Walsh, and my solicitor, Kirby Tarrant from O'Grady's. I have informed Paddy Walsh that despite being agreed in principle, these rules have not been signed off by David Power and therefore cannot be implemented".*

63. Mr. Finnegan replied at midday, saying: -

*"Hi Brian,*

*HRI does not wish to interfere with the seniority rights of any bookmaker. If you have a concern about the recent amendments to the pitch rules, I would respectfully suggest that you take up the matter with your association. I have confirmation from the INPBA and AIR that the recent amendments to the Pitch Rules have been approved by both organisations and are effective from the 1st March 2016.*

*While the reserved enclosure at Punchestown was treated as a subsidiary betting ring when bookmakers operated there in 2014, both the INPBA and AIR have confirmed that HRI should now treat it as a 'premium area' for the purpose of allocating pitches at this years' festival.*

*In the absence of an instruction to the contrary, HRI has no alternative to regard the reserved enclosure at this years' festival as a premium area.*

64. The applicant replied at 12:26, saying: -

*"Hi Paul,*

*Thanks for your email. I would respectfully request how HRI and AIR are choosing to ignore the fact that the chairman of the INPBA has not signed off on these rules. If David Power has not signed the rules, they cannot be deemed to be legal and binding.*

*I firmly believe that if Paddy Walsh had not signed off the rules, your position would be entirely different.*

*Contrary to your claims, by allowing rules to be implemented which have not been signed off, you are interfering with individual bookmakers' seniority rights which exist and have for decades, regards, Brian".*

65. Again, the court observes that the applicant is correctly being directed to his representative body for resolution of his complaint. At this point, the emails suggest that he has had the benefit of legal advice, and despite his assertion without any proof, that

the rules are invalid because they have not been signed by the Chairman of INPBA, he takes no steps to protect what he alleges are breaches of his contractual rights.

66. There, the matter appears to have rested and a few days later the Graham Organisation availed of the premium areas facility at Punchestown on the 28th and 29th April 2016 in accordance with the new 2016 Rules for Premium Areas.
67. After that, nothing happened for five months. There was no further challenge by the applicant to the new Pitch Rules, despite the fact that he had referred more than once in his April exchanges to the fact that he was in contact with his solicitor about the matter.
68. On September the 27th 2016, it appears that Horse Racing Ireland notified on course permit holders that betting facilities would be made available in the restaurant area of Gowran Park for an upcoming meeting. This prompted an email from the applicant complaining that as a committee member of the INPBA he had not been consulted regarding this additional betting area. He cited the Pitch Rules as stating: -

*“Prior to deciding the location of the Betting Office or introducing any changes to the location, size or shape of the Betting Office, the Racecourse Executive shall consult with the INPBA and HRI”.*

69. He alleged a breach of the Pitch Rules. Mr. Finnegan on behalf of the HRI replied that Gowran Park were not proposing any change to the location, size or shape of the betting ring. The provision of pitches in the rooftop restaurant area comes under Clause 18 of the Pitch Rules, and he recites the clause. He went on to state that the premium areas rule does not require the racecourse executive to consult with INPBA. Following another email on the 27th September, complaining about the lack of consultation, Mr. Finnegan replied on the 28th September 2016 stating: -

*“Hi Brian,*

*The INPBA was consulted even though this was not required under the Pitch Rules. I informed Francis Hyland (secretary INPBA).*

*Furthermore, I understand from Eddie Scally, manager of Gowran, that Ricky Gernon (vice chairman of INPBA) approached him some time ago and asked if he would allow bookmakers into areas such as the rooftop restaurant”.*

70. There followed a series of emails inquiring as to when HRI had informed Francis Hyland, followed by an email asking for a copy of the latest signed Pitch Rules and pointing out that the website still had the rules from 2011. There was a request from the applicant for a copy of the rules with the signature of David Power the chairman of INPBA on it. HRI responded that they did not have such a copy, but that they assumed that Francis Hyland might have one. This was followed by an email from the applicant stating that a signed copy did not exist because David Power had refused to sign the rules off. The applicant complained that HRI had implemented rules which had not been agreed with INPBA but instead had been agreed with individuals claiming to represent the association. The

applicant referred to the fact that the matter was now in the hands of his solicitor. In response, HRI stated that HRI received confirmation from both INPBA and AIR that their respective associations had approved the revised version of the Pitch Rules effective from the 1st March 2016. HRI would continue to implement the revised version of the rules unless INBPA and/or AIR advise otherwise. This prompted another email from the applicant, again repeating the assertion that the rules had not been signed and therefore were not valid. He alleged bias against bookmakers who hold seniorities and indicated that recourse would be had to law.

71. The foregoing series of emails reveals once again, that any dispute the applicant might have is with his own representative body. He specifically alleges that the 2016 Rules were agreed not with the INPBA, but rather with individuals claiming to represent the association. If that were so, it is difficult to understand why the applicant did not take action against those individuals who in his view had interfered with his contractual right to seniority and in doing so, had failed to adhere to asserted INPBA internal rules that require that new rules be signed off by the Chairman of the association.
72. On the 30th September, the applicants' current solicitor made direct contact with Paul Finnegan of the betting division of Horse Racing Ireland, inter alia seeking undertakings that the 2016 Pitch Rules would not be implemented pending an appeal to the Pitch Tribunal. Mr. Finnegan replied by email on the same date as follows: -

*"Following receipt of your email I contacted Paddy Walsh of AIR and Francis Hyland of the INPBA and they both confirmed that their respective associations have approved the 1st March 2016 revisions to the seniority and Pitch Rules".*

#### **Appeal to the Pitch Tribunal**

73. On the 30th September 2016 the applicants' solicitors sent via email, what they termed as a "pre action" letter for injunctive relief addressed to Mr. Paul Finnegan, Betting Division, Horse Racing Ireland. In summary, the letter advises that the applicant intends to initiate proceedings to quash the decision of Horse Racing Ireland to implement the "Racecourse Executives' Seniority and Pitch Rules (revised version effective from 1st March 2016)" and in particular the implementation of clause 18 of the Rules. No basis for an entitlement to seek judicial review is offered.
74. Attached to the letter was an appeal to the Pitch Tribunal. The letter seeks an undertaking not to implement the new Pitch Rules pending the outcome of the pitch tribunal hearing. This was stated to be without prejudice to any damages which the applicant may seek and any civil action which the applicant may bring against Horse Racing Ireland for breach of contract, financial loss and damage should Clause 18 be implemented to his detriment. The letter erroneously states that the applicant is the holder of an on course betting permit. The applicant appears to be simultaneously asserting an undefined right to a public law remedy and a private law right to a contractual remedy.



75. The applicant's main complaint, as set out in his solicitor's letter, is that the new Rule 18 has the effect of devaluing his equity rights arising from seniority. The letter asserts that the chairman of INBPA has not yet given authority to HRI to adopt Clause 18 of the March 2016 Pitch Rules and that the implementation therefore is invalid. No basis for that assertion is offered. The solicitor quoted the following extract from the decision of Hyland v. Dundalk Racing [1999] No 2., in which Hogan J. concluded at para. 141 (a) as follows:

-

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

76. As seen earlier, the decision of Hogan J. is to the effect that an individual bookmaker has contractual rights arising from the Pitch Rules and is, in an appropriate case, entitled to sue to protect those rights. Nothing in that decision could be construed as holding that the contractual rights of an individual bookmaker are a matter of public law. In any event, the letter had attached to it an appeal to the Pitch Tribunal. The heading prepared by the applicants' solicitor, reads: -

*“An appeal to the Pitch Tribunal, on the application of Brian Graham, against a determination of the Betting Division of Horse Racing Ireland”.*

77. The court notes at this juncture that there had been no 'determination' by the Betting Division of Horse Racing Ireland. There had been an apparent 'determination' by both INPBA and AIR that the Pitch Rules should be changed, and each had independently approved the changes. Having done so, each body notified HRI that the Pitch Rules had been amended. On receipt of the notifications HRI as agent implemented the new rules. It is no part of the function of HRI to look behind the approval notification to see whether the INPBA or AIR had adhered to their own respective internal rules and regulations in approving the new Rules. Any such issues are between each association and its respective members.

78. The notice of appeal sets out the basis of the applicants' entitlement to appeal and notably does not claim that he is a permit holder of an on course betting licence. The thrust of his claim is that the inclusion of Clause 18 to the March 2016 Pitch Rules is unlawful having been adopted in the absence of an agreement to amend under Rule 21 of the January 2011 Pitch Rules. Alternatively, the applicant claimed that he had not been properly notified of the March 2016 Pitch Rules and had not agreed to their terms.

79. The notice of appeal sets out 26 grounds of appeal, mainly alleging that the HRI's actions in the adoption and attempted implementation of the 2016 Pitch Rules were erroneous and in violation of due process. The main defect identified by the applicant in those 26 grounds of appeal is that the INPBA chairman David Power had not yet given authority to the HRI to adopt Clause 18 of the March 2016 Pitch Rules. It is however acknowledged that at the annual general meeting of the INPBA in the first quarter of 2016, an edited excerpt of Clause 18 was read into the record and a motion to adopt was passed.
80. In early October 2016, a series of emails passed between the applicants' solicitor and Paul Finnegan of HRI in relation to hearings before the Pitch Tribunal in which it was confirmed that the Pitch Tribunal had no written procedures, a fact that must have been well known to the applicant as a prior chairman of what was then the INBA. In the course of that email correspondence, Mr. Finnegan again restated that he had been informed by Paddy Walsh, CEO of AIR, and Francis Hyland, secretary of INPBA, that their respective associations had approved the 1st March revision to the seniority and Pitch Rules.
81. A date of the 2nd November 2016 was set for the Pitch Tribunal hearing. By letter dated the 14th October 2016, having been informed that the Pitch Tribunal panel would consist of Jim Kavanagh, chair, Frank Smith (nominated by AIR) and Francis Hyland (nominated by INPBA), the applicant's solicitor, Mr. Murphy wrote and erroneously asserted that the chair, Jim Kavanagh, was a nominee of HRI. In fact, the Pitch Rules of 2011 approved when the applicant was Chair of the INPBA had changed the Pitch Rules, to provide that the chair would thenceforward be nominated by both AIR and INPBA.
82. There was a demand that Mr. Hyland recuse himself on the basis that he was likely to be a witness in the case. The appellants' case was that the rules were invalid because they had not been signed off by the chairman, David Power, and that Mr. Hyland was now in the position of hearing an appeal in which his authority to amend the 2011 Pitch Rules and/or authority to communicate certain matters to the HRI may be challenged.
83. At a meeting of the Committee of INPBA a week later, on Friday the 21st October 2016, attended by the applicant, the minutes exhibited state: -
- "There was a long discussion about the Pitch Rules and the decision of Brian Graham to take his complaint to the Pitch Tribunal. David Power refused to sign the Pitch Rules because there appeared to be an extra sentence written into the definition of premium areas which may not have been in the version presented to the AGM. It was agreed that Brian Graham had every right to bring his case to the pitch tribunal. The committee confirmed by a majority that Francis Hyland would continue to be the INPBA representative on the pitch tribunal. The committee was divided on Clause 18 of the Pitch Rules and Ricky Gernon offered a compromise; that 50% of the premium areas be filled on seniority and the remaining 50% be filled on rotation, this would be considered at the next meeting".*
84. In the meantime, HRI replied to the applicants' solicitors' requests that Mr. Hyland recuse himself on the 17th October by stating: -

*“In relation to the demand that Francis Hyland recuse himself from the pitch tribunal meeting on the 2nd November 2016, I would like to point out that the INPBA nominee to the pitch tribunal is entirely a matter for that organisation and does not concern HRI”.*

#### **Pitch Tribunal Determination**

85. The Pitch Tribunal sat on the 9th December 2016 and heard oral evidence. It reconvened on the 16th December to give its decision. The applicant was represented by solicitor and counsel at the hearing. It appears that the applicant made written submissions dated 2nd December to the Pitch Tribunal. These are referred to in his application for leave to seek judicial review, but are not before the court on this hearing.

86. In its determination, the tribunal dealt seriatim with the applicants' points of appeal and issues. The determination was as follows :-

(i) *the Pitch Tribunal consists of the chairman, nominated thereto by the AIR and the INPBA, and two other members nominated by the AIR and the INPBA respectively. The tribunal has the authority to determine any dispute as to the interpretation of the Pitch Rules or their application in any circumstances. The determination of the tribunal shall be final and binding on all parties concerned.*

(ii) *Composition of pitch tribunal – objection by Mr. Graham to Mr. Hyland's inclusion in the tribunal. Having considered the matter, the members of the tribunal (Mr. Hyland abstaining) decided that as Mr. Hyland had no vested interests in the proceedings, it overruled Mr. Graham's objections. In making this decision the tribunal was conscious of the fact that Mr. Hyland had recently been re-elected as secretary of the INPBA and had been reaffirmed as its representative on the pitch tribunal on the 21st October 2016.*

(iii) *Findings of the pitch tribunal*

a. *Claim that the Pitch Rules should be signed*

*In his submission Mr. Graham contended that HRI's betting division was erroneous and in violation of due process when it adopted the March 2016 Pitch Rules without having received a copy of the said rules duly signed by the chairman of INPBA.*

*The tribunal is satisfied that Mr. Graham's argument has no validity as there is no requirement that the Pitch Rules be signed by either party.*

b. *Claim that the 2016 Pitch Rules were not properly agreed between AIR and INPBA.*

*The procedure for the adoption of any revised Pitch Rules has remained unchanged since they were first introduced in 1976. Any proposed changes are considered by the AIR and the INPBA at their respective general meetings. When adopted the duly authorised officers inform the betting*

*division of HRI to that effect and the HRI is legally obliged to implement the new rules on the agreed date. The tribunal is satisfied that these procedures were implemented in the adoption of the 2016 Pitch Rules.*

- c. *Mr. Graham's claim that he was not made aware of the proposed changes.*

*In Clause 10 of Mr. Graham's appeal he admits that the general body of the INBPA at its general meeting on the 23rd February 2016 at which he was in attendance, was made aware of the proposed changes. Mr. Graham subsequently availed of the facility provided to bookmakers in the new Pitch Rules to consolidate their permits – a facility that was not available in the 2011 Pitch Rules. The tribunal therefore rejects Mr. Graham's statement that he was not made aware of the proposed changes.*

- d. *Annual application for course betting permit*

*The tribunal points out that under the terms of his course betting permit, Mr. Graham is obliged to make himself aware of the Pitch Rules that are at the time being in force, and to adhere to same during the term of his permit. The requirement is clearly set out in no. 20 of Mr. Graham's submission.*

- e. *Definition of premium area. Mr. Graham contends that the absence of the following words "and where the racecourse executive wishes to provide facilities from which ring bookmakers can operate" from the definition of "premium areas" totally changed the meaning of the definition. The tribunal finds that, while there is some dispute over the absence or otherwise of the said words, it is of no consequence as the line merely sets out that, as proprietors of the racecourse, the executive is entitled to manage all activities on the racecourse.*

- f. *The objection to s. 18 of the Pitch Rules.*

*The tribunal is satisfied that the 2016 Pitch Rules were adopted and implemented in compliance with the procedures that have applied for the past 40 years. Accordingly, the tribunal cannot accede to Mr. Graham's request to suspend s. 18.*

- g. *Confidentiality*

*The dissemination of bookmakers' turnover figures is a matter between HRI and the INPBA and is outside the remit of the tribunal.*

- h. *Review of Pitch Rules*

*The tribunal suggests that representatives of the AIR, INPBA and HRI should meet early in 2017 to consider if any section of the new Pitch Rules may have raised issues that the authors of the said Pitch Rules could not have foreseen.*

i. *Notification of changes to rules*

*The tribunal also suggests that a procedure should be introduced that would help to ensure that individual bookmakers and racecourse executives would be advised of any changes to the Pitch Rules and the date of implementation.*

The determination is signed by Jim Kavanagh, chairman of the pitch tribunal.

87. The Pitch Rules provide that the determination of the Pitch Tribunal *shall be final and binding on all parties concerned*. The same rule also provides that the procedures of the Pitch Tribunal *shall comply with the principles of natural justice*. The applicant did not accept the finality of the determination and contended that the hearing had been conducted other than in accordance with the principles of natural justice. The Pitch Tribunal is an ad hoc committee created by INPBA and AIR under the Pitch Rules as a dispute resolution mechanism. It has no separate legal identity. It cannot sue or be sued.
88. As creators of the Pitch Tribunal INPBA and AIR are in principle, answerable for deficiencies in its procedures should those procedures fail to comply with the principles of natural justice. At the conclusion of the Pitch Tribunal the applicant had the option of accepting the determination and requesting his own association to seek a review of the new rule 18 as is provided for in Rule 23 of the 2016 Rules. Alternatively, at least in principle, he could have sued both AIR and INPBA in contract, seeking an order setting aside the determination of the Pitch Tribunal on grounds that there was a want of fair procedures in the manner in which it had arrived at its determination. Such proceedings could have included a claim against the individuals in his own association for their alleged failure to abide by its internal rules when approving the 2016 Rules. In pointing out this option the court is not to be taken as expressing any view on the likely success or failure of such a claim, but is merely indicating the legal avenue open to the applicant (or more accurately, his mother) as a matter of law at that juncture.

**Judicial review proceedings**

89. On the 1st February 2017 the applicants' lawyers lodged an ex parte motion docket seeking leave to apply for judicial review. The relief is sought solely against Horse Racing Ireland and the Pitch Tribunal. The reliefs sought were as follows: -
- (i) An order of certiorari sending forward to this honourable court for the purpose of being quashed the decision of the second named respondent of the 16th December 2016 ("the impugned decision") made under Rule 20 of the Racecourse executive and seniority and Pitch Rules (revised version effective from 1st January 2011) and/or Rule 21 of the Racecourse executive and seniority and Pitch Rules (revised version effective from 1st March 2016) denying the applicants' appeal from a determination of the betting division of the first named respondent, as set out in the applicant's submissions dated the 2nd December 2016;
90. The first thing perhaps to be observed is that this plea is not a model of clarity. The order sought to be quashed is a decision of the Pitch Tribunal denying the applicants' appeal

from a determination of the betting division of the first named respondent as set out in the applicants' submissions dated the 2nd December 2016. As already noted, there was no determination by the betting division of the first named respondent. As the facts show, the first named respondent made no such determination. Rather, it implemented Pitch Rules which it had been informed had been agreed between the INPBA and the AIR. That does not amount to a determination. Secondly, the court has not seen the applicant's submissions of the 2nd December

- (ii) A declaration that the impugned decision is wrong in law and not in accordance with the relevant Racecourse Executive 's Seniority and Pitch Rules;
- (iii) A declaration that the respondents had failed, contrary to the relevant Racecourse executive and seniority and Pitch Rules, to put in place procedures for the proper conduct of an appeal hearing;
- (iv) A declaration that the Racecourse executive and seniority and Pitch Rules (revised version effective from the 1st March 2016) may not be implemented due to the failure of the first named respondent to notify applicants for the bookmakers on – course betting of changes in the relevant Racecourse executive and seniority and Pitch Rules;
- (v) An injunction restraining the respondents, their servants or agents, from taking any further steps in the implementation of the Racecourse executive and seniority and Pitch Rules (revised version effective from 1st March 2016) pending the determination of the within proceedings;

91. The ex parte docket was directed to Horse Racing Ireland, and to the Association of Irish Racecourses. It was not directed to the INPBA who on the facts, is the body which in the applicant's view has acted unlawfully in approving the 2016 Pitch Rules.
92. In his grounding affidavit, the applicant wrongly avers that he is the holder of an on – course betting permit. While the applicant is undoubtedly hugely involved in the family bookmaking business, he is not the holder of an on course betting permit. His mother is the permit holder. She has applied for and been granted, a representative permit which allows the applicant stand in her stead on authorised racecourses. This is a matter which clearly was within the applicant's knowledge when he swore his verifying affidavit. The court concludes that this was a deliberate decision to mislead the court into believing that the applicant was the holder of a statutory permit so as to attempt to convey that his issues were in the public law realm. It is notable that rather than exhibiting a copy of his mother's on course betting permit, or her representative permit, the applicant chose to exhibit a blank application for such a permit.
93. The matter came on for hearing before Noonan J. on Monday 6th February 2017. Leave to apply for judicial review was granted by Noonan J. The grounds upon which the relief were sought were as follows: -

- (i) The respondents have failed, contrary to the relevant Racecourse executive's seniority and Pitch Rules, and contrary to the applicants' right to due process, to put in place procedures for the proper conduct for the appeal hearing.
- (ii) The second named respondent erred in fact and in law by including Mr. Francis Hyland as a member of the Tribunal for the purposes of the appeal hearing;
  - a) The second named respondent erred in fact in its determination that Mr. Hyland had no vested interest in the proceedings;
  - b) In its determination, the second named respondent gave no regard to the fact that Mr. Hyland was called to provide testimony as a witness at the appeal hearing.
  - c) The second named respondent gave no regard to Mr. Hyland's actions and correspondence in relation to the disputed executive seniority and Pitch Rules, which formed the subject matter of the applicant's complaints on appeal.
- (iii) The second named respondents' determination in relation to the validity of the executive and seniority and Pitch Rules (1st March 2016) was in error:
  - a) the second named respondent erred in law and/or fettered its discretion in finding that the Pitch Rules need not be signed by either the INPBA or the AIR;
  - b) the second named respondent erred in fact in finding that the final (published version) of the March 2016 Pitch Rules had been adopted by the AIR and INPBA at their general meetings
  - c) the second named respondent erred in fact in finding that duly authorised officers of AIR and INPBA have so informed the betting division of HRI.
- (iv) The second named respondent erred, acted unreasonably, and/or gave no proper regard to the applicant's complaint that, as permit holder, he had not been properly notified of the adoption of the March 2016 Pitch Rules:
  - a) the second named respondent erred in its determination that the applicants' attendance at the general meeting of the INPBA on the 23rd February 2016, constituted proper notice;
  - b) the finding of the second named respondent that the applicant had "availed of the facility provided to bookmakers in the new Pitch Rules to consolidate their permits" relied on evidence *de hors* the record and on which the applicant had been given no opportunity to address;
  - c) the second named respondent gave no regard, or no proper regard, to the applicant's complaint that the first named respondent was obliged to notify holders of the bookmakers' on-course betting permit of any changes in the Pitch Rules, and to seek agreement for same.
- (v) The second named respondent erred in fact and in law in finding that there was no significance to the addition of the words "and where the racecourse

executive wishes to provide facilities from which the ring bookmakers can operate" to the definition of "premium areas" in the published version of March 2016 Pitch Rules, in contrast to the version of Pitch Rules voted on by the INPBA membership at its EGM.

- (vi) The first named respondent acted unlawfully, and continues to act unlawfully, in implementing Clause 18 of the March 2016 Pitch Rules in circumstances where the first named respondent has been put on notice:
- a) the chairman of the INPBA has not signed off on the March 2016 Pitch Rules;
  - b) the March 2016 Pitch Rules as published do not conform with those adopted by the INPBA at its EGM.
94. What is striking about the grounds is that apart from the last item, they are all directed to unfair procedures in the conduct of the Pitch Tribunal hearing. The complaint made against Horse Racing Ireland is that it is implementing Pitch Rules where they are on notice that they were unsigned by the chairman and that they do not conform verbatim with the amendments agreed by AIR. As we have seen, the applicant was repeatedly and in the court's view, correctly advised, that those issues were issues between the applicant and his own association.
95. The court was persuaded to grant an injunction restraining the respondents their servants or agents from taking any further steps in the implementation of Rule 18 of the Racecourse Executive's and Seniority Pitch Rules pending the determination of the application for judicial review or until further order, or until the stay of proceedings shall have lapsed by reason of the applicants' failure to serve an originating notice of motion within the proper time. Seven days were allowed for service of the notice of motion from the perfection of the order and the motion was made returnable for the 28th March 2017.
96. There were deficiencies in service of the notice of motion on HRI and on the 13th March 2017, application was made on behalf of the applicant to extend the time for service of the notice of motion and to reinstate the injunction, which by virtue of the lapse of time had fallen away. The injunction was reinstated in somewhat different terms, which variation had been agreed by the applicant with AIR.
97. In a letter of 2nd March 2017, William Fry, solicitors for HRI pointed out: -

*"The naming of our client as a respondent to the above mentioned judicial review proceedings is entirely misplaced and we will rely on this correspondence and our clients' previous correspondence to your client in relation to its role with respect to the Racecourse Executive's Seniority and Pitch Rules (revised version effective from 1st March 2016 )and separately the pitch tribunal to fix your client with the costs of the within proceedings.*

*As your client is well aware, (not least as he is a former chairman and committee member of the INPBA), the Racecourse Executives' Seniority and Pitch Rules are adopted by agreement between the Association of Irish Racecourses ("AIR") and*



*the Irish National Professional Bookmakers Association (“INPBA”). Our client is not responsible for drafting or making the Pitch Rules and has only a very limited role with respect to the implementation of them.*

*Further, as your client is well aware, the Pitch Tribunal is an adjudicative body which is provided for under the various versions of the Pitch Rules. Clause 21 of the 2016 Pitch Rules and clause 20 of the 2011 version of the Pitch Rules provide that the Pitch Tribunal shall consist of a chairman “nominated by the AIR and the INBA and two other members nominated by the AIR and the INBA respectively”. Our client does not own, control, operate or have any input into the operation of the Pitch Tribunal or in any decision made by it. Paul Finnegan of our client is not the secretary of the Pitch Tribunal as your email of the 28th February states.*

*Accordingly, there is no basis whatsoever for your client to issue these judicial review proceedings against our client. At the very most our client should have been joined only as a notice party to the proceedings. We call upon your client immediately to strike out the proceedings against our client”.*

98. Having then dealt with the issue of the injunction the letter concludes: -

*“We assume that you will notify the INBPA of any proposed application you intend to make to vary the terms of the injunction, given that it is the party together with the AIR, responsible for the creation and amendment of the Pitch Rules”.*

99. It may have been this correspondence which prompted the applicants’ solicitors to serve the INPBA with the pleadings and orders under cover of a letter dated the 16th March 2017. This was the first formal service of papers on the INPBA, though they were aware of the application and expected that HRI would deal with it. They had had no opportunity to attend court, either on the 6th February 2017 or on the 13th March 2017, to object to the injunction sought by the applicant.

#### **Vacating the injunction**

100. On the 3rd April 2017, PJ O’Driscoll & Sons Solicitors acting for the INPBA, instructed counsel to mention the case before Noonan J. and to seek an opportunity to be heard in relation to the injunction that had been granted by the court. The INPBA were directed to write to the parties giving 48 hours’ notice of its intention to apply to the court for an order vacating the injunction.

101. The application was grounded on the affidavit of Richard Gernon, vice chairman of the Irish National Professional Bookmakers Association. In trenchant terms Mr. Gernon states that the applicant though a member of the INPBA, was acting in a manner contrary to the interests of the Association as a whole and that the elected committee of the Association had taken the decision that it was necessary to highlight the injurious effects on all other members of the Association, of the orders obtained by the applicant. He avers that the Pitch Rules are privately agreed rules agreed principally between two private entities, the INBA and the AIR, albeit that HRI is named in the rules. He avers that it is not clear

therefore that there is any public law element to the Pitch Rules. He highlights what he considers to be a number of factual inaccuracies in the applicants' affidavit and he takes serious issue with the narrative provided by the applicant.

102. At para. 23 he avers: -

*"The Pitch Rules which are and always have been negotiated and agreed on a collective basis, between the INBA of which the applicant is a member (and past chairman) and the AIR on behalf of the racecourse owners. Whilst it is negotiated by the INPBA and AIR individual bookmakers sign up to them when applying for a permit at race meetings".*

103. He avers that the applicant was a member of the INPBA committee during the negotiation, drafting and approval process of the March 2016 edition of the Pitch Rules. He voted in favour of the new Pitch Rules when they were proposed for adoption at the INPBA's AGM on the 23rd February 2016. He avers that the Pitch Rules were approved by both the INPBA members and AIR members. Thus, there was agreement between INPBA and AIR and clause 21 of the 2011 Pitch Rules relating to amendment had been fulfilled.

104. At para. 25 he avers: -

*"All members are bound by changes to the Pitch Rules, and hold their permits subject to such changes. Furthermore, the applicant understood such changes made to the Pitch Rules by taking advantage of them when they came into force. At the Punchestown Festival in late April 2016, the Sean Graham firm exercised his right to bet in the premium area at Punchestown for each of its two pitches"*

105. In his affidavit Mr. Gernon sets out what he avers were the effects of the court's orders of the 6th February and the 13th March and the damaging consequences for on course betting. Mr. Gernon also avers that the INPBA endorsed the findings of the pitch tribunal.

106. In his replying affidavit the applicant is equally trenchant. At para. 7 he contests Mr. Gernon's assertion that the order is prejudicial to the interests of the INPBA and he states: -

*"Most certainly the stay is not prejudicial to those members, like myself, who own seniorities from 1945 or 1946 or who are racecourse bookmakers actually affected by the impugned 2016 rules. Many of the other 120 members are in fact greyhound bookmakers and point to point bookmakers who would never be affected by these rules . . . ."*

107. At para. 7 he states: -

*"Mr. Gernon is well aware that the issue at the heart of this review namely the implementation of premium areas and rotation of seniority in the Pitch Rules has been a matter of continuing controversy within the INPBA, that the membership is*

*split and has been at an impasse on resolution of the issue. See for example INPBA minutes from a meeting dated 21st October 2016 (quoted above at para 82).*

108. The applicant then exhibits extracts from minutes of INPBA Committee meetings of April, September and November 2016. These extracts certainly indicate ongoing disagreement between the bookmakers concerning the operation of the 'Premium Areas'. Various proposals were put forward by individual committee members but no consensus emerged. Interestingly, at the meeting in November 2016, it was agreed '*to let members sort it out at the A.G.M.*' That in the court's view is precisely what should have been done.
109. On the 5th April 2017 INPBA supported by AIR applied to Noonan J for an order discharging the interim relief granted on the 6th February and varied on the 13th March 2017. Both parties had earlier been made Notice Parties to the Judicial Review Application. In the course of his extempore judgment delivered the 6th April 2017 Noonan J. observed:

*"It should be noted that in the within proceedings as originally constituted, no relief was sought by the applicant against the INPBA although it seems clear that his primary dispute is with that body."*

110. Having set out the submissions of both sides and the test for the grant of interlocutory relief in the context of an application for judicial review, as set out in *Okunade v Minister for Justice*, the court stated:

*"Applying these principles to the facts of this case, dealing firstly with the issue of whether the plaintiff (sic) has raised a fair question, it seems to me that there is merit in what the INPBA says regarding the appropriateness of this matter for judicial review at all. However, I do not believe it is at this stage appropriate for me to gauge the strength of the applicant's case in that regard. Although such an exercise can be undertaken sometimes in cases for example involving mandatory injunction, I do not think this is a case where it would be appropriate and, in any event, the applicant has met the threshold for the grant of leave so I propose not to reach any definitive view on the point at this juncture.*

*However, I am satisfied that the applicant's claim, such as it is, is one which is purely predicated on the applicant's alleged proprietary interest in seniority rights and as such, is one that is clearly capable of being remedied in damages. The applicant himself has pointed to the losses that he is likely to suffer if there is no injunction and has given instances of the cost of acquiring those seniority rights which he claims have been infringed. In those circumstances, I have come to the conclusion that damages are an adequate remedy in this case and that this is an entirely appropriate consideration in a claim of this nature, even brought by way of judicial review, as is made clear by the judgment of Clarke J. in *Okunade* to which I have referred. Although it is not necessary having reached that conclusion to consider the balance of convenience, I am also satisfied that the balance of convenience clearly favours the discharge of the stay/injunction. There is clear*

*evidence that a wide range of parties will potentially suffer loss if the injunction is continued whereas it is to my mind less clear that the applicant will suffer loss. Even if he does, it is a loss that is reasonably capable of ascertainment and thus amenable to a claim for damages.*

*For these reasons therefore, I will discharge the interim order previously made herein."*

111. In dealing with the question of costs, which the court awarded against the applicant, the court stated:

*"In this case, I would add that this court was moved by the applicant at the ex parte leave stage for interim relief in the form of an interlocutory injunction. When that application was made, the applicant must have known that the interests of INPBA and AIR would be adversely affected. The court was not advised of this fact and had it been, would have ordered the immediate joinder of those parties and further would not have granted an order of the kind obtained without notice to them."*

112. The circumstances in which the injunction restraining the implementation of the 2016 Pitch Rules was vacated, certainly put the applicant on notice that on a more detailed consideration of the facts, there was an appreciable risk that a court would hold that his complaint lay not against HRI, but against his own representative body, and as such was a private law dispute to be governed by the rules of the association of which he is a member and former chairman.
113. Any doubt that his entitlement to seek Judicial Review was in issue was dispelled by the Statement of Opposition filed on behalf of the first respondent approximately 3 weeks later, on the 25th April 2017.

HRI raised six preliminary objections in its statement of opposition. They are:

- I. No decision of HRI has been challenged in the proceedings;
- II. The impugned decision derives from contract and so is not amenable to judicial review;
- III. The Applicant does not have locus standi to bring these proceedings;
- IV. The judicial review proceedings are out of time;
- V. The Applicant has waived/acquiesced such that he is not entitled to relief;
- VI. The Applicant is estopped by his conduct from claiming relief.

**The Application is Misconceived**

114. The first two preliminary objections of HRI assert that this application is misconceived. First it is misconceived because no decision of HRI has been impugned and second, it is

misconceived because the decision which the applicant seeks to impugn, namely the determination of the Pitch Tribunal, of 16th December 2016, is a determination made in a private law context and as such is not amenable to judicial review.

**Applicant submissions on amenability to Judicial Review**

115. The Respondents' jurisdictional argument that the Pitch Tribunal is not a public body subject to judicial review and that no decision of HRI is being challenged, belies the nature of HRI's statutory functions and the appeals process.
116. As is clear from his Grounds of Appeal, the Applicant had sought to appeal from a decision of the Betting Division of HRI. Indeed, the Applicant was so advised by HRI's legal officer to bring the appeal of this decision to the Pitch Tribunal.
117. HRI is a creature of statute, established under s.5 of the Horse and Greyhound Racing Act, 2001. Pursuant to s. 10(c) of the Irish Horseracing Act 1994 (as amended) (the "1994 Act"), HRI's functions include *"the control of the operations of authorised bookmakers."* These functions incorporate the regulation of bookmakers and betting including the issuance of permits under ss. 47-55 of the 1994 Act. Pursuant to s.53 of the 1994 Act, HRI may by regulation make provision for, *inter alia*, the activities, facilities, and offices of bookmakers. Under s. 53(3) of the 1994 Act, where HRI proposes to make such regulations it *"... may have regard to any agreement between authorised racecourses and authorised bookmakers in relation to any matter referred to in that subsection."*
118. The Applicant's grounds of appeal to the Pitch Tribunal were that HRI's actions in the adoption and implementation of the 2016 Pitch Rules were erroneous and in violation of due process, and that HRI's Betting Division's actions in implementing Clause 18 should be vitiated for illegality. It is submitted that the Pitch Rules, and in particular Clause 18, provide for *"the control of the operations of authorised bookmakers"* and in particular the activities, facilities, and offices of bookmakers, all of which functions are within HRI's regulatory domain.
119. Accordingly, the Applicant's appeal was at all times a challenge to a decision of HRI in exercise of its statutory powers. Whereas HRI has outsourced the appellate review of its decision to the Pitch Tribunal, which is a private body, the Pitch Tribunal was at all times conducting an appeal of a public law decision. In that regard, the Respondents' argument that the "private" nature of the Pitch Tribunal can serve to shield the public decision-making of HRI from judicial scrutiny is entirely unavailing.
120. The Respondents are of course well aware that HRI's decisions are reviewable in light of the dicta of Hogan J. in *Francis Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60:
- "41. In the context of horse racing, sporting questions relating to the application of the rules of racing are entrusted to the Turf Club and the Irish National Hunt Steeplechase Committee who together form the Racing Regulatory Body for the*

*purposes of Part III of the Irish Horse Racing Authority Act 1994. It must, however, also be recalled that given that the Oireachtas has entrusted these functions by statute to those bodies in the public interest, this means that decisions of these bodies are, in principle, at least amenable to judicial review. It is, for present purposes, unnecessary to express any precise view on these questions, save again to say that the more the disputed matters relates purely to questions of sporting judgment, the less likely it will be that there will be any judicial involvement in the resolution of the dispute."*

121. Hogan J further found, at paragraph 44, that the Pitch Rules are regulatory in nature:  
*"The Pitch Rules stand in contrast to the average set of rules of a sporting organisations and clubs, precisely because they are designed to regulate not only the relationship between the individual bookmaker and the individual racecourses, but also aspects of the relationship between bookmakers inter se."* It is submitted that these regulatory provisions come with HRI's statutory functions as set out at s.10(c) of the 1994 Act.
122. The Respondents' jurisdictional challenge is similar to arguments which failed in *O'Connell v The Turf Club* [2017] 2 IR 43, where the Supreme Court found that the Turf Club, as the racing regulatory body, was sufficiently within the field of public law and within the public domain as to have the consequence that its decisions were amenable to judicial review, the Court was required to look at the realities of the power exercised by that body. The respondent in that case was subject to judicial review as a consequence of exercising statutory disciplinary power and adjudicative functions and imposing penalties.
123. Hardiman J. further held that if an adjudication was arguably within the concept of "the administration of justice" then judicial review had to be available in order to prevent such a usurpation of the judicial function, even if, in the end, the specific adjudication was saved by Article 37 of the Constitution, or by being held not to be an administration of justice. The actions of the respondent in adjudicating the relevant complaints in that case might arguably constitute an administration of justice.
124. Similarly, the Pitch Tribunal's adjudication of a challenge to HRI's decision was within the concept of "the administration of justice" for which judicial review should lie.
125. It is also well-established that judicial review is available as a remedy where there is a public aspect to the decision under review, as set out by Finlay CJ in the Supreme Court decision in *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1:

*"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law is confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where the right to make it derives solely from contract or solely from consent or the agreement of the parties affected. Where the duty being carried out by a decision-making authority ... is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be seen as coming within the public domain, that decision can only be excluded from the reach of the*

*jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law."*

126. In *Beirne* the applicant was a trainee Garda whose assignment was terminated by the commissioner because of alleged misconduct. The commissioner denied that there had been any breach of fair procedures, and contended that the right to terminate the applicant's assignment derived from contract, such that his decision was not subject to judicial review. Because there was a public element, the majority of the Supreme Court held that the commissioner's decision was amenable to review. Finlay CJ found this public element in the commissioner's decision was amenable to review. Finlay CJ found this public element in the commissioner's statutory functions in admitting trainees and enrolling persons as members of An Garda Síochána are 'of the most intense interest to the public at large'.
127. In *Browne v Dundalk Urban District Council* [1993] 2 IR 512, [1993] ILRM 328 a dispute arose out of a hall booking from the council by members of Sinn Féin for the party's annual conference. The councillors passed a resolution cancelling the booking, and the town clerk, acting on the resolution, rescinded the contract. On review, Barr J. decided that the issue was *prima facie* a contractual one and outside the scope of review, but acknowledged that there was, in addition, a public element, as the town clerk would not have sought to rescind the contract were it not for the council's resolution, which was clearly in the public domain. For that reason the unlawful termination of the contract was subject to review and, in the circumstances, an order of *certiorari* was granted quashing the purported rescission.
128. In *Eogan v University College Dublin* [1996] 1 IR 390, [1996] 2 ILRM 302, Shanley J identified the following matters which may be taken into account: (a) whether the decision challenged has been made pursuant to a statute; (b) whether the decision maker by his decision is performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain; (c) where the decision affects a contract of employment, whether that employment has any statutory protection so as to afford the employee any "public rights" upon which he may rely; (d) whether the decision is being made by a decision maker whose powers, though not directly based on statute, depend on approval by the legislature or Government for their continued exercise.
129. Shanley J further acknowledged that, in determining whether a decision is reviewable, the issue is not just whether the power derives from a public source, but also whether the power is of a public nature. This jurisprudence is consistent with the UK case of *R v Panel on Takeovers and Mergers ex parte Datafin PLC* [1987] QB 815, where the Court of Appeal held that the Panel was in principle amenable to judicial review, even though it was not created by statute or by any exercise of prerogative or governmental power, but where the Department of Trade and Industry had relied on the Panel's enforcement of the City Code on Takeovers and Mergers.

130. It is submitted that the Honourable Court, when determining whether the decision of the Pitch Tribunal is subject to review, is not confined to a consideration of the source of the Pitch Tribunal's powers and duties, but may look to the nature of those powers and duties. As set out above, the Pitch Tribunal exercised public duties and public law functions in the assessment of an appeal from a decision of a statutory body, namely HRI's Betting Division. HRI's decision to implement the 2011 Pitch Rules, binding on bookmakers, was made under its statutory authority. In this case, the Pitch Tribunal exercised a public law function in the assessment of an appeal from a decision. It is submitted that the Impugned Decision is manifestly subject to judicial review.

### **Respondent's Submissions on Amenability to Judicial Review**

#### **131. Non-amenability of Decisions Derived from Private Law**

The Courts have recognised the principle in a number of cases. Including *Rajah v Royal College of Surgeons in Ireland* [1994] 1 IR 384 and *Geoghegan v Institute of Chartered Accountants* [1995] 3 IR 86 that if a decision derives solely from contract, relief will not be granted on an application for judicial review.

132. In *Beirne v Garda Commissioner* [1993] ILRM 328 Finlay CJ laid down the following test at page 334:

*"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law is confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where the right to make it derives solely from contract or solely from consent or the agreement of the parties affected. Where the duty being carried out by a decision-making authority ... is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be seen as coming within the public domain, that decision can only be excluded from the reach of the jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law."*

133. It is submitted that in accordance with the test as set out in *Beirne*, the Applicant's grounds of complaint are not amenable to judicial review. There is no public dimension involved in the allocation of pitches in a Premium Area.
134. The 2016 Rules were agreed by two private bodies – AIR and the INPBA. Moreover, the decision of Pitch Tribunal is not a product of statutory law – it is solely and exclusively derived from contract made in private law. The 2016 Rules are purely within the realm of private law and thereby, the 2016 Pitch Rules are non-reviewable in line with *Rajah* and *Geoghegan*.
135. The Applicant cites the 1994 Act in support of his contention that HRI should be subject to review in this case. HRI is a statutory body whose functions under section 10(c) of the 1994 Act include "the control of the operations of authorised bookmakers" The decisions of HRI may be subject to judicial review when exercising its public functions relating to bookmakers pursuant to Parts IV-V of the 1994 Act. Parts IV-V of the 1994 Act concern



the licencing of bookmaker permits at authorised racecourses and provides for procedures relating to the Bookmakers Appeal Committee.

136. However, it is clear that HRI was not exercising its powers pursuant to Parts IV-V of the 1994 Act in this case. The Pitch Rules are not provided by statute and the 1994 Act confers no obligations on HRI as to the allocation and location of pitches at authorised racecourses. The allocation and location of the pitches is a matter of private contractual agreement between AIR, the INPBA and individual permit holders over which HRI has no authority. As Hogan J opined in *(Francis Hyland v Dundalk Racing 1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60 at para. 47:

*“It is plain, however, from a consideration of the Pitch Rules that they were intended to constitute a binding mechanism regulating the conditions of individual bookmakers carrying on business at race meetings and they were also intended to govern the transfer of a sale of a pitch from one bookmaker to another. Indeed, the entire tenor of the Rules is to regulate the conduct of bookmakers inter se with regard to the allocation of pitches.”*

137. Moreover, any dispute as to the Pitch Rules is subject to appeal to the Pitch Tribunal – a private body – rather than being subject to statutory appeal to the Bookmakers Appeal Committee pursuant to Part IV of the 1994 Act.

138. The Applicant also cites section 53(3) of the 1994 Act as a basis to HRI within the scope of judicial review in this case. Section 53 of the 1994 Act provides as follows:

*“53.—(1) Subject to this section, the Authority may, by regulations, provide –*

- (a) for fixing the conditions governing and fixing the charges to be made by the executive of an authorised racecourse to an authorised bookmaker for admission to the racecourse (and different charges may be fixed in respect of different authorised racecourses and in respect of different parts of the same racecourse):*

*Provided that in fixing such conditions and charges, the Authority shall not fix for the admission of an authorised bookmaker to any part of that racecourse a charge exceeding 5 times the charge then made to a member of the public for admission to that part,*

- (b) for governing the activities of bookmakers at authorised racecourses, including the range of betting services to be made available,*
- (c) for the provision of facilities for authorised bookmakers by the executive of an authorised racecourse,*
- (d) for the permitting of authorised bookmakers to operate from betting offices,*
- (e) for the regulation of –*

- (i) *the range of betting services to be made available at betting offices,*
  - (ii) *the structure and location of betting offices,*
  - (iii) *the operation and opening hours of betting offices,*
  - (iv) *the persons who may be admitted to, or permitted to place bets at, betting offices,*
  - (v) *good order and conduct at betting offices.*
- (2) *Any regulations made under subsection (1) (e) (iii) in respect of the opening hours of betting offices shall not permit such betting offices to open for business for any time before the racegoing public are permitted admission by the executive of an authorised racecourse to a race-fixture or to remain open later than one hour after the conclusion of the last race of the fixture.*
- (3) *The Authority where it proposes to make regulations under subsection (1) may have regard to any agreement between authorised racecourses and authorised bookmakers in relation to any matter referred to in that subsection.*
- (4) *A person to whom any regulation made under subsection (1) applies shall comply with such regulation."*

139. Section 53 relates to the enactment of regulations by HRI pursuant to section 53(3), wherein it *"may have regard to any agreement between authorised racecourses and authorised bookmakers"*. However, it is important to stress that the Pitch Rules are not regulations of HRI and are not enacted under section 53. In direct contrast to the regulatory framework of section 53, AIR and the INPBA may have regard to the views of HRI when amending the Pitch Rules under Paragraph 21 of the 2011 Pitch Rules and Paragraph 22 of the 2016 Pitch Rules.

140. Further authority to support the submission that the 2016 Pitch Rules are not amenable to review may be found in *Eogan v University College Dublin* [1996] 1 IR 390. In finding that the decision of the Respondent university not to continue the Applicant professor in office was reviewable, Shanley J identified at page 398:

*"the following were among the matters which might be taken into account in considering whether a decision was subject to judicial review:—*

- (a) *whether the decision was made pursuant to a statute;*
- (b) *whether the decision maker, by his decision, was performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain;*

- (c) *where the decision affected a contract of employment, whether that employment had any statutory protection so as to afford the employee any "public rights" upon which he might rely;*
- (d) *whether the decision was being made by a decision maker whose powers, though not directly based on statute, depended on approval by the legislature or the Government for their continued exercise."*

141. In *Eogan v University College Dublin*, Shanley J held the decision not to renew the Applicant's contract was reviewable as the decision was made "*in substance pursuant to the regime flowing from the [Irish Universities] Act of 1908.*"
142. It is evident that applying the factors identified in *Eogan* that the grounds of complaint in this case are not amenable to review because:
- a) the decision of the Pitch Tribunal was not made pursuant to statute;
  - b) the Pitch Tribunal, as to its decision in regard to the allocation of pitches in Premium Areas under the 2016 Pitch Rules, was not "performing a duty relating a matter of particular and immediate public concern";
  - c) the decision does not concern a contract of employment concerning "public rights"; and
  - d) the decision of the Pitch Tribunal whose powers as a private body flow from contract do not depend on approval by the legislature or Government for its continued exercise.
143. In addition, contrary to the submissions of the Applicant, *Francis Hyland v Dundalk Racing (1999) t/a Dundalk Stadium* [2014] IEHC 60 is not authority for the proposition that HRI can be judicially reviewed in relation to the Pitch Rules and/or a decision of the Pitch Tribunal. *Francis Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* did not concern judicial review proceedings; the case related to a contractual dispute as to the application of the Pitch rules to Dundalk racing course. In *Francis Hyland*, Hogan J concluded at para 58:
- "In my view, therefore, bookmakers affected by the operation of the Pitch Rules may, in principle, sue to enforce them in the same manner as any other contract to which they are expressly named as a party."*
144. This finding was upheld on appeal by the Court of Appeal in *Hyland v Dundalk Racing (1999) Ltd* [2017] IECA 172.
145. It is submitted, in light of the judgements in *Francis Hyland*, the Applicant's use of judicial review proceedings against HRI are misconstrued. The Pitch Rules are enforceable as a matter of contract law between individual permit holders, AIR and INPBA – as a matter of private law as distinct from public law.

146. Alternatively, if the Court were to rule the 2016 Rules were amenable to review, HRI could not be party to such proceedings because the Rules are agreed between AIR and INPBA. Pursuant to Paragraph 21 of the 2011 Pitch Rules and Paragraph 22 of the 2016 Pitch Rules, HRI has no role in the agreement of the Rules. HRI's role under the 2016 Pitch Rules relates to the implementation of the 2016 Pitch Rules. Moreover, HRI has no role or function in the appointment, operation or running of the Pitch Tribunal pursuant to Paragraph 20 of the 2011 Pitch Rules and Paragraph 21 of the 2016 Pitch Rules. Therefore, HRI cannot be a party to a review of a decision of Pitch Tribunal.

#### **Public/Private Divide in Judicial Review**

147. The public/private divide in Irish administrative law has not always been clear-cut. The non-reviewability of private decisions was most recently considered in *O'Connell v Turf Club* [2017] 2 IR 43. The Supreme Court held that the disciplinary decisions of the Turf Club were amenable to judicial review in spite of the fact that the source of its powers originally arose from contract law. Writing for the majority of the Court, O'Donnell J stated that it was not necessary to detail "the precise nature of the test" of the public/private divide in judicial review proceedings. However, it is evident from the judgment in *O'Connell v Turf Club* that the 1994 Act was the critical factor in bringing the Turf Club within the scope of judicial review. In recognising the complex features of the 1994 Act, O'Donnell J stated at para 71 that:

*"[T]he 1994 Act undoubtedly seeks to cover the existing bodies with a statutory veneer and to give certain identified statutory powers (of exclusion) and impose certain statutory obligations (of appeal) but the overall effect is not to remove the existing underlying structure, or its legal nature, but rather to add to it. I would accordingly conclude that the formulation contained in the 1994 Act was not intended, and more importantly is not to be understood as, constituting the respondent as henceforth a statutory body exercising solely statutory powers... [T]he unusual terms and structure of the 1994 Act can be more readily understood once they are approached on the basis that an object of the Act was to leave intact the respondent's traditional role in the running and supervision of races."*

148. O'Donnell J concluded at para 80:

*"[I]t is clear that in the aftermath of the 1994 Act, the Turf Club as the Racing Regulatory Body is more clearly in the domain of public law than the Institute of Chartered Accountants was in *Geoghegan v Institute of Chartered Accountants*, and sufficiently within the field of public law and within the public domain, as to have the consequence that judicial review lies."*

149. The circumstances of this case are distinguishable from the facts in *O'Connell v Turf Club*. HRI, unlike the Turf Club, is a statutory body and is subject to judicial review when exercising its public functions under the 1994 Act. However, HRI was not exercising any statutory obligations pursuant to Parts IV-V of the 1994 Act in this case. The role of HRI under the 2016 Pitch Rules is non-statutory in origin and limited to implementation of same. The 1994 Act makes no reference nor imposes any statutory obligations on HRI as

to the regulation of the Pitch Rules. HRI's exercise of its role, albeit limited role, under the 2016 Pitch Rules lies purely within the realm of private law.

150. The Respondent in his submissions makes reference to the judgment of Hardiman J in *O'Connell v Turf Club* in further support of the argument that HRI should be amenable to review in this case, stating:

*"37. Hardiman J further held that if an application was arguably within the concept of "the administration of justice" then judicial review had to be available in order to prevent such a usurpation of the judicial function, even if, in the end, the specific adjudication was saved by Article 37 of the Constitution, or by being held not to be an administration of justice. The actions of the respondent in adjudicating the relevant complaints in that case might arguably constitute an administration of justice.*

*38. Similarly, the Pitch Tribunal's adjudication of a challenge to HRI's decision was within the concept of "the administration of justice" for which judicial review should lie."*

151. *O'Connell v Turf Club* is not authority for the proposition that if an adjudication was arguably within the concept of "the administration of justice", then judicial review must lie – such views were clearly in the minority. O'Donnell J (Denham CJ, Murray and Dunne JJ concurring), writing for the majority in *O'Connell v Turf Club*, expressly disagreed with Hardiman J's proposition, stating at para 94:

*"First, the finding that the respondent's power to impose disciplinary decisions is not dependent on statute weakens, although it does not completely undermine, the applicants' case in this regard. Second, the classic test laid out by Kenny J. in McDonald v. Bord na gCon [1965] I.R. 217, and later adopted by the Supreme Court in that case, seems to suggest that the decisions of the respondent do not constitute the administration of justice. In particular, it does not appear to me that the decisions of the respondent can satisfy the fourth or fifth criteria. Decisions of the respondent imposing penalties for example are not enforceable as a judgment and there is no process for converting such a decision into a judgment. It cannot be enforced of its own right, and instead the respondent must seek to recover any such fine in litigation, in proceedings indeed akin to those in Rogers v. Moore and Others [1931] I.R. 24. Furthermore, the making of such disciplinary orders up to and including the warning of a person from a racecourse, have not only not been characteristic of the courts as a matter of history, they have as a matter of history been the exclusive function of a body such as the respondent."*

152. O'Donnell J held at para 57:

*"The decision-making function of the respondent comes sufficiently within the realm of public law so that it may be supervised by judicial review, but it is a decision-making body subject to judicial review, and not itself a body administering justice."*

153. In light of the majority judgment in *O'Connell v Turf Club*, it is clear that the Courts cannot judicially review a decision of the Pitch Tribunal on grounds that the Pitch Tribunal was administering justice, particularly in circumstances when the Pitch Tribunal, unlike the Turf Club, falls outside the realm of public law.

154. It is further submitted that the exercise of HRI's role in implementing the Pitch Rules constitute the exercise of a private power by a public body. The Courts have recognised that review may be precluded in instances when public bodies are exercising powers under private law. In *Healy v Fingal County Council* [1997] IEHC 197, the Applicant, an elected councillor, sought to judicially review the Council's decision to deduct councillor's expenses by way of set off against debt due to the Council. Barr J, in considering the *Beirne* test, held:

*"In applying that precept to the present case it is evident that the conduct of the respondent of which complaint is made is not "of a nature which might ordinarily be seen as coming within the public domain" as posited by Finlay C.J. I am satisfied that there is no public dimension involved in the set-off made by the Council against expenses due by it to the applicant. The issue as to whether or not the respondent is lawfully entitled to take that course is not a matter which introduces the requisite public element necessary to justify relief by way of judicial review. Accordingly, in the light of the judgment of the Supreme Court in *Beirne -v- Commissioner of An Garda Siochana*, (see also my judgments in *Browne -v- Dundalk Urban District Council*, [1993] 21.R. 512 and *Murphy -v- Turfs Club*, [1989] I.R. 171), I am satisfied that the applicant is not entitled to relief by way of judicial review."*

155. It is submitted, in light of *Healy v Fingal County Council*, that the exercise of HRI's role under the 2016 Pitch Rules is not amenable to review because there is no public dimension involved in the allocation of pitches in a Premium Area.

### **Decision**

156. In its submissions, the applicant's lawyers have misconstrued the import of the decision of Hogan J in *Francis Hyland v Dundalk Racing (1999) t/a Dundalk Stadium* [2014] IEHC 60. The dicta upon which they seek to rely, in respect of the amenability to judicial review of decisions of the Turf Club, came in the context of a discussion of the general rule that sporting judgments are not justiciable. Having set out the rationale for the general rule, the court then observed that Part III of the Irish Horse Racing Authority Act 1994 potentially created an exception to the general rule:

*"In the context of horse racing, sporting questions relating to the rules of racing are entrusted to the Turf Club and the Irish National Hunt Steeplechase Committee who together form the Racing Regulatory Body for the purposes of Part III of the Irish Horse Racing Authority Act 1994. It must however, also be recalled that given that the Oireachtas has entrusted these functions by statute to those bodies in the public interest, this means that decisions of these bodies are, in principle, at least amenable to judicial review. It is, for present purposes, unnecessary to express*

*any precise view on these questions, save again to say that the more the disputed matter relates purely to questions of sporting judgment, the less likely it will be that there will be any judicial involvement in the resolution of the dispute."*

157. Having made that observation, the court then moved on to consider the status of the Pitch Rules and as we have seen, for the reasons set out in the judgment, the court concluded:

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

158. There is nothing in the *Hyland* decision to suggest or support the view, that an alleged breach of the Pitch Rules could give rise to a judicial review. In fact, the import of the decision is to the contrary, that the Pitch Rules create contractual arrangements between bookmakers and racecourses as well as between bookmakers *inter se*.
159. The Court is satisfied that the determination of the Pitch Tribunal was a determination made in a private law setting in which a bookmaker sought to challenge the validity of Rule 18(b) on the basis that the new Rules had not been signed by the Chairman of his Association. The Pitch Tribunal has no statutory dimension or role. It is part of the contractual arrangements agreed between the INPBA and the AIR. As such its determination is not amenable to judicial review.
160. In the course of this application, the applicant deployed a number of strategies in attempting to apply a public law veneer to a private law dispute. He did so in the main by overstating the role of HRI in the process. He characterised his appeal to the Pitch Tribunal as:

*"An appeal to the Pitch Tribunal, on the application of Brian Graham, against a determination of the Betting Division of Horse Racing Ireland".*

161. As held earlier in this judgment, there was no 'determination' by the Betting Division of HRI. It simply implemented a change determined by INPBA and AIR, to amend the 2011 Pitch Rules. A party cannot change the nature of a decision by the label he chooses to put on that decision.
162. The applicant asserted, in the course of the hearing, and in correspondence, that the Chairman of the Pitch Tribunal was nominated by HRI. That is not so, and the applicant well knew that it was untrue, because he was the Chairman of INPBA in 2011 when the Rule was changed to provide that the Chairman would be nominated jointly by INPBA and AIR.
163. It was asserted on behalf of the applicant that the applicant had been directed by HRI to bring his dispute to the Pitch Tribunal. The evidence clearly establishes that such is not the case. The applicant was repeatedly advised that he should raise any issue he had with

the Pitch Rules with his representative body, the INPBA. He was reminded by the CEO of AIR that the Pitch Rules can be reviewed at the request of that body.

164. The most serious untruth advanced during the course of this application, is the averment contained in the applicant's grounding affidavit, that he is a holder of a statutory on course betting permit issued by HRI, when to his knowledge, he is not. The permit holder is his mother. As found earlier in this judgment, the court is of the view that this was a deliberate attempt to mislead the court as to his status in an attempt to convey to the court that the issues raised by him, were in the public law realm.
165. On the facts, as set out in extenso in this judgment, it is clear, that Mr. Graham's real dispute is with his own representative body, the INPBA and not with HRI. At an EGM in the Keedeen Hotel on the 23rd February 2016 the INPBA approved the proposed new Pitch Rules. The applicant was in attendance at that meeting and, according to the uncontradicted evidence of Richard Gernon, Vice Chairman of INPBA, was a member of the INPBA committee during the negotiation, drafting and approval process, of the March 2016 edition of the Rules. He supported the adoption of the new Pitch Rules, including Rule 18(b) which provided for the method of allocation of pitches in Premium Areas. That approval by the members of INPBA has not been withdrawn nor has it been superseded by new Pitch Rules. The Executive of the INPBA notified HRI of its membership's acceptance of the proposed new Pitch Rules. At its AGM on the 30th March 2016, AIR also approved the new Pitch Rules and it too notified HRI of that fact.
166. While the applicant initially supported the proposed changes, he appears to have had a change of heart, for reasons that have not emerged in evidence. On the 31st March 2016, he emailed various Committee Members of INPBA, suggesting that the Premium Areas be treated as Subsidiary betting rings, in which the allocation of pitches would be based on seniority. This suggestion was clearly contrary to what had been agreed at the EGM of the INPBA.
167. The Applicant subsequently wrote to both AIR and HRI complaining about the method of allocation of pitches in the Premium Areas. Both advised him that as the new rules had been formally approved by both INPBA and AIR they were currently in force. The CEO of AIR reminded him that the rule could be reviewed at any time at the request of INPBA and advised him to take the matter up with the INPBA. This he didn't do. Instead, he complained that since the new rules had not been signed by David Power Chairman of INPBA, they were invalid and could not be deemed to be legal and binding. He also complained that the definition of premium area in the AIR version of the Rules differed from that of INPBA.
168. HRI, not unreasonably, in the court's view replied that it had confirmation from the Executive of both AIR and INPBA, that their respective associations had approved the new Rules and in light of that, it would in accordance with the Pitch Rules, apply the agreed Rules. It is no part of the function of HRI to go behind the notifications received from INPBA or AIR to ascertain whether each association complied with its own internal rules in adopting or approving new Pitch Rules.



169. The propriety or otherwise of the manner of adoption of the Pitch Rules by the INPBA is an internal matter for that association. The rules and constitution of the association are not in evidence before the court. The applicant contends that the approval by the EGM is not sufficient and that the proposed rules must be signed by the Chairman. He has adduced no evidence in support of that contention. David Power has been frequently mentioned but he has not sworn an affidavit in these proceedings. An email from him explains why he did not sign the 2016 Rules. It states; *"I have been asked to confirm to you that I have not signed the revised Pitch Rules 2016. I have not signed these because they were altered since they were agreed by the INPBA.* David Power does not assert in his email, that his failure to sign the Rules rendered them invalid.
170. From the various minutes of INPBA meetings exhibited throughout these proceedings it is clear that there is dissatisfaction in some quarters of the INPBA with the operation of the 2016 Pitch Rules, notwithstanding their approval at the February 2016 EGM. That is an issue to be resolved by the INPBA within its own internal rules. If having done so, it wishes to review the Pitch Rules, it can seek such a review pursuant to Rule 23 of the 2016 Rules.

For all of the foregoing reasons, that court is persuaded that this application is misconceived and should be dismissed.