

## ***Bookmakers' Afternoon Greyhound Services Limited v Amalgamated Racing Limited [2008] EWHC 1978 (Ch)***

**Anneliese Blackwood**

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### **Background**

This case involves the intersection of two very British pastimes; horseracing and betting. There are 60 racecourses in Great Britain and since 1986 it had been lawful for live pictures of horseracing to be shown in Licensed Betting Offices (“LBOs”). Racecourses sell the right to show these pictures of horseracing on satellite television (“LBO media rights”) to distributors who in turn sell the pictures, along with other services such as statistical data, to LBOs. Historically there had only been one distributor of LBO media rights, namely Satellite Information Services Limited (“SIS”) which was a company established by the leading bookmakers. The Bookmakers’ Afternoon Greyhound Services Limited (“BAGS”), a bookmakers’ association, would purchase the LBO media rights from individual racecourses and would then sublicense the rights to SIS on conditions which prevented SIS making a profit from distributing the pictures to LBOs. Over the years the racecourses became increasingly dissatisfied with the size of their payments for the LBO media rights and in 2004 30 racecourses set up Racing UK Limited (“RUK”) to exploit their media rights. In 2006 RUK suggested to the racecourses that a new distributor should be launched to compete with SIS. Consequently the RUK racecourses collectively negotiated to sell their LBO media rights to Amalgamated Racing Limited (“AMRAC”) who in turn provided those pictures to LBOs through their satellite channel Turf TV. The RUK racecourses plus Ascot racecourse exclusively sold AMRAC their LBO media rights for a period of 5 years. As AMRAC secured the LBO media rights of the majority of most prestigious racecourses in the UK it became essential for a LBO to have Turf TV. The remaining 29 racecourses exclusively sold SIS their LBO media rights. In 2008 BAGS and number of bookmakers brought an action against the Defendants on the basis that the emergence of the joint venture and its entry into the market was anti-competitive and infringed Article 81 of the Treaty.

### **Restriction by object**

The first allegation made by the Claimants was that there was an agreement between the racecourses which had the object of fixing prices. It was not an issue in this case that the Defendants acted together when negotiating with AMRAC. The real question was whether the object of that collective negotiation was to fix prices. Morgan J took into account two main factors in his deliberation:

- i) the content of the relevant agreement; and
- ii) the particular circumstances in the actual market in which the relevant agreement operated.

In relation to the first consideration the court found that the object of the negotiation was not the "crude and simplistic object of fixing prices". Instead it was held that the objective aim of the cooperation was to sponsor the entry of AMRAC into the market. In relation to the second consideration the court highlighted the fact that the pre-existing market in this case was one of a monopoly purchaser who obtained the LBO media rights. By contrast the market desired by the racecourses was one involving competition for the purchase of those rights and thus the object of the relevant agreement did not have, by its very nature, the potential of restricting competition. Although the collective negotiation would result in an increase in prices paid to the racecourses it was not a consequence of sellers fixing prices but rather the pro-competitive entry into the market of a second purchaser. In light of these findings the court rejected this first head of claim.

### **Restriction by effect: exclusive rights**

The Claimants argued that the consequence of the exclusivity of the AMRAC licenses was that the market was foreclosed to new entrants and BAGS and SIS were precluded from increasing their market share contrary to Article 81 EC. They accepted that if the exclusive licenses granted to AMRAC breached Article 81(1) EC so did the exclusive licenses granted to BAGS and SIS by the other 29 racecourses. The court, however, said the exclusive character of the agreements did not necessarily mean they had an adverse effect on the markets. There would only be such an adverse effect if there was a *real concrete possibility* of a new competitor seeking to enter the markets and the burden of proving that possibility was on the Claimants. On examining the evidence the court concluded that the Claimants failed to establish this possibility. Accordingly, the court held that danger of foreclosure of the market was hypothetical rather than real and the grant of exclusive licenses had not had an adverse effect on competition. The court also said that the Claimants' second argument, namely that there was foreclosure of the market due to the fact that BAGS and SIS were prevented from increasing their market share, stood "arguments as to competition on their head". Before AMRAC entered the market there was a monopoly purchaser of LBO media rights. After AMRAC entered the market there were two purchasers of LBO media rights. This was pro-competitive activity not anti-competitive activity. Furthermore as SIS already had exclusive rights to 26 racecourses by January 2007 it was commercially necessary for AMRAC to take exclusive licenses in order for it to be able to enter the market against SIS. The court found that the market competition was in fact competition to take exclusive licenses and thus the grant of exclusive licenses to AMRAC was not indicative of anti-competitive behaviour but rather participation in the market. As a consequence the court rejected the claim that the grant of exclusive licenses to AMRAC had the effect of restricting competition by foreclosure of the market.

### **Restriction by effect: collective selling**

The Claimants submitted that the RUK racecourses engaged in collective negotiation with AMRAC and that this was an agreement which amounted to collective selling. The Defendants essentially admitted that there had been collective negotiation and so the court proceeded without further discussion on this point. The next issue was whether the RUK racecourses were in competition with each other in relation to their LBO media rights. Applying the reasoning in *Re: The Joint Selling of the Commercial Rights of the UEFA Champions League* [2004] 4 CMLR 9 the court held that although it could be said that the racecourses did not compete with each other in a number of respects, such as for prize money or sponsorship, it was open to them to compete with each other in relation to selling their LBO media rights. Thus the RUK racecourses were in competition with each other in relation to their LBO media rights. The final question which the court had to address was whether the collective selling had an adverse effect on competition. In relation to this matter the court had to deal with two apparently conflicting judgments given by the European Commission in *UEFA Champions League* and the CAT in *Racecourse Association v Office of Fair Trading* [2005] CAT 29. In *UEFA Champions League* the Commission held that a restriction on freedom to negotiate individually was by itself a restriction on competition. By contrast in *Racecourse Association* the CAT went on to ask whether the restriction on individual negotiation had the effect of increasing prices. Morgan J admitted that it was not obvious how these two cases should be reconciled but concluded that the question he should ask himself was whether the collective negotiation in this case was likely to increase the *total* prices paid by AMRAC to the RUK racecourses. He held that on the evidence the Claimants had not established that in the absence of collective negotiation AMRAC would have paid less overall for the LBO media rights. The alternative approach the court adopted to reconcile the cases was to consider whether the effect on competition was appreciable or significant, as required by the test in Article 81(1) EC. As the restriction on individual negotiation in this case did not lead to an increase in the price total paid by AMRAC the court said it could not conclude that the effect of the agreements on competition were significant. For these reasons this head of claim also failed.

### **Restriction by effect: closed selling**

The next allegation raised was that there was closed selling of the LBO media rights by the racecourses to AMRAC. The principle issue that the court had to deal with was whether the closed selling had any adverse effect on competition. The factor that the court considered most important was that the racecourses wanted to provide competition for the purchase of their LBO media rights by creating a joint venture and sponsoring its entry into the market. The suggested alternative would be for the racecourses to sell those rights to the incumbent which would undermine the joint venture and imperil its entry into the market. The court found that it would not be logical to promote the joint venture and then to withhold the rights which it needed to enter the market. Furthermore the court said that it was not right to compare the grant of LBO media rights to BAGS and the grant of LBO media rights to AMRAC. A deal with BAGS would not have resulted in the existence of competition in the market, the successful entry of the joint venture and or in participation in a successful joint venture. If two deals are not alike it is not anti-competitive for an operator to decide which type of deal he prefers to pursue and for him not to deal on the alternative basis. As a result of these conclusions Morgan J held that there was no infringement of Article 81(1) EC on the ground of closed selling.

**Article 81(3) EC**

The court held that as the Claimants had failed to establish any breach of Article 81(1) EC it was not necessary for it to address the parties' submissions in relation to Article 81(3) EC.

**Defendants' counterclaim**

The Defendant maintained two counterclaims at the hearing. The first was that there was an unlawful concerted practice by Coral, Ladbrokes, William Hill and BetFred to refuse to purchase Turf TV and, in effect, to boycott Turf TV. The second counterclaim was that there was an unlawful concerted practice by Coral, Ladbrokes and William Hill (but not BetFred) to withdraw sponsorship from certain racecourses that had licensed their LBO rights to AMRAC. After examining the evidence the court held that the Defendants had not shown that the bookmakers colluded in the manner alleged and that there was insufficient evidence to support the counterclaims.

**Permission for leave to appeal to the Court of Appeal has been granted.**

Peter Roth QC, Paul Harris, Ronit Kreisberger and Ewan West were instructed in this case by  
Wiggan for the Defendants

**For more information on Peter Roth QC, Paul Harris, Ronit Kreisberger and Ewan West, please contact the clerks on 020 7405 7211 or consult the 'Find a Barrister' section at [www.monckton.com](http://www.monckton.com).**