Case No: A2/2001/0134

Neutral Citation Number: [2001] EWCA Civ 1447

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(DOUGLAS BROWN J)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 12th October 2001

B e f o r e :

LORD JUSTICE MANCE
LORD JUSTICE LATHAM
and
LORD JUSTICE JONATHAN PARKER

- -

DIANE MODAHL	Appellant
- and -	
BRITISH ATHLETIC FEDERATION	Respondent

- -
- -

Mr A Julius (of **Mishcon de Reya** for the Appellant)
Charles Flint QC & Andrew Green (instructed by **Hamond Suddards Edge** for the Respondent)

- -

Judgment

Lord Justice Latham:

1. The appellant is a well known athlete who has represented Great Britain in the Olympic Games, World Championships and European Championships. She has won many titles at national and international level as an 800 metre runner. The respondent was at the relevant time the governing body for athletics in the United Kingdom, and was affiliated to the International Amateur Athletics Federations (IAAF) and acted as its representative for the United Kingdom.

2. On the 18th June 1994, the appellant took part in an athletics meeting under the auspices of the European Athletics Association (EAA) and the IAAF Rules at Lisbon University Stadium in Lisbon Portugal. She was asked to provide a urine specimen under the IAAF doping control procedures. Part of the specimen known as the "A" sample was tested by a laboratory in Lisbon. On the 22nd July 1994, the laboratory reported that the sample contained testosterone well above any permissible level. The respondent was informed on the 24th August 1994, and in turn informed the appellant. She was at the time preparing to compete in the Commonwealth Games in Canada, but was asked to return. On the 30th August 1994, the other part of the specimen known as the "B" sample was analysed by the same laboratory and the results were very similar to those found on the analysis of the "A" sample.

3. In accordance with the rules of the IAAF and the respondent, the appellant was suspended from taking part in competitions by the respondent on the 6th September 1994 and informed of her right to a hearing before a Disciplinary Committee the members of which were chosen by the independent Drugs Advisory Committee. That hearing took place on the 13th December 1994 before a five member Disciplinary Committee at which she was legally represented. On the 14th December 1994, the Committee unanimously found that she had committed a doping offence and was declared ineligible, in accordance with the rules, to compete in the United Kingdom and abroad for four years from the 18th June 1994. She exercised her right to appeal to an Independent Appeal Panel. This panel of three members presided over by Mr Robert Reid QC, heard argument and evidence over two days, on the 24th and 25th July 1995, and unanimously allowed her appeal. Although in the first instance the IAAF announced its intention to refer the matter to the IAAF Arbitration Panel, as was its right under the IAAF rules, it announced on the 25th March 1996 that it had decided not to proceed with the arbitration.

4. By writ dated 14th February 1996, the appellant claimed damages for breach of contract and negligence, although by the statement of claim served on the 29th February 1996, she restricted her claim to a claim for damages for breach of contract. The basis of her claim was that implied into a contract between her and the respondent were conditions that the respondent's Drugs Advisory Committee would take all reasonable steps to ensure that those who sat as members of the Disciplinary Committee were free from bias, and that the appellant would have a fair and impartial hearing before the Disciplinary Committee. The basis of the claim was that Sir Arthur Gold, chairman of the Drugs Advisory Committee, was biased against the appellant in that he regarded or presumed her to be guilty, and that this bias was exemplified by his choice of members for the Disciplinary Committee which included Dr Martyn Lucking, who was alleged to have been similarly biased, and a Mr Albert Guy, a senior official or member of the Technical Committee of the IAAF, which was similarly biased. At trial, the judge, Douglas Brown J, held that there was no contract

between the appellant and the respondent, that there was no actual or apparent bias on the part of Sir Arthur Gold, Dr Lucking, or Mr Guy, that even if there was a contract, the only implied condition was that the disciplinary procedures would as a whole be fair, and that the hearing before the Independent Appeal Panel was fair, and cured any unfairness that there might otherwise have been. He further held that in any event even if there had been bias on the part of those named, the decision of the Disciplinary Committee was not affected by that bias, so that no damage was thereby caused.

5. To understand the issues it is necessary to set out the facts in more detail. The structure of the sport in Great Britain is based on clubs of whom individual athletes become members. Clubs are in turn affiliated to a regional or national association to which they pay an affiliation fee. They were also affiliated at the time to the respondent which had taken over responsibility for athletics in Great Britain from the British Amateur Athletics Board (BAAB) in 1991. The respondent was in turn a member of the IAAF. No athlete was eligible to compete in any event sanctioned by the respondent or its affiliated associations if he or she was not a member of an affiliated club. Further, no athlete was eligible to compete in any competition sanctioned by the IAAF if he or she was not eligible to compete in a competition sanctioned by the respondent.

6. The relevant rules in relation to doping were set out in the IAAF Handbook for 1994 – 1995 (the IAAF Rules) and in the respondent's Rules for Competition 1994 – 1995 (the BAF Rules).

7. The IAAF Rules provide as follows:

> "Rule 55
>
> Doping.
>
> 1. Doping is strictly forbidden and is an offence under IAAF Rules.
>
> 2. The offence of doping take place when either
>
> (i) A prohibited substance is found to be present within an athletes body tissue or fluids ….
>
> 4. It is an athletes duty to ensure that no substance enters his body tissues or fluids which is prohibited under these rules. Athletes are warned that they are responsible for all or any substance detected in samples given by them…..
>
> Rule 59
>
> Disciplinary Procedures for Doping Offences
>
> 1. Where a doping offence has taken place, disciplinary proceedings will take place in three stages:
>
> (i) Suspension.

(ii) Hearing.

(iii) Ineligibility.

2. An athlete shall be suspended from the time the Doping Commission in the case of the IAAF, or its equivalent body in the case of a member reports that there is evidence that a doping offence has taken place.

3. Every athlete will have the right to a hearing before the relevant tribunal of his National Federation, before any decision on eligibility is reached ……

4. If an athlete is found to have committed a doping offence, and this is confirmed after a hearing …. He shall be declared ineligible …. His ineligibility shall begin from the date on which the sample was provided.

5. Where a hearing takes place the IAAF or the member (as the case may be) shall have the burden of proving, beyond reasonable doubt, that a doping offence has been committed.

Rule 60

Sanctions

1. For the purpose of these rules the following shall be regarded as "doping offences" see also Rule 55.(2)

(i) The finding in an athletes body tissues or fluids of prohibited substance …..

2. If an athlete commits a doping offence, he will be ineligible for the following periods:

(a) An offence under Rule 61(i)…..

(i) First offence a minimum of four years from the date of the provision of the sample …."

8. The BAF rules essentially mirrored the rules of the IAAF. The procedures for dealing with alleged breaches of the rules were set out in Appendix B. The relevant provisions were:

"(B7) Following suspension for an offence under Rule 24 there will be a disciplinary hearing before the Disciplinary Committee at a date to be determined by the Chairman of the Drug Advisory Committee, after consultation with the parties, and in the absence of an agreement, being a date not less than 21 days from the Notice of the hearing being given to the athlete. The Disciplinary Committee shall

consist of members of Federation Drug Advisory Committee or its nominees. At the hearing the athlete be entitled to be represented and will have the opportunity to present his/her case. The Disciplinary Committee may exercise all the disciplinary powers given by Rule 24.

(B8) After the disciplinary hearing before the Disciplinary Committee and any declaration of ineligibility, the athlete or the IAAF will have the right of appeal within 21 days. Any appeal will be made to an Independent Appeal Panel consisting of one representative of the athletes Member Association, one representative from the Federation and one person nominated by the Federation who may be a Barrister or Solicitor."

9. Further, it is a condition of membership of the IAAF that a national body includes within its constitution provisions entitling the IAAF to conduct out of competition testing on athletes. No athlete is entitled to enter his or her national championships, nor is he or she permitted to take part in International events unless he or she agrees to be subject to out of competition testing. The BAF Rules contain the necessary provisions to give effect to this stipulation. The mechanism by which the respondent controlled entry into international meetings was by Rule 6 (4)(a) which precluded any member of a club under the jurisdiction of the respondent from competing outside the United Kingdom without the permission of the respondent.

10. In 1977 the appellant became a member of Sale Harriers, Manchester which was affiliated to BAAB and which became affiliated to the respondent when the respondent succeeded the BAAB in 1991. I have already set out in paragraph 2 the circumstances which gave rise to the disciplinary proceedings. At that time, Sir Arthur Gold was the Chairman of the respondent's Drug Advisory Committee. He chaired the meeting of that Committee on 4th September 1994 at which the members of the Disciplinary Committee were chosen. It was decided to appoint five members because of the high profile nature of the proceedings, and in order to provide a spread of expertise. They were Dr Martyn Lucking, Mrs Joslyn Hoyte-Smith, Mr Christopher Carter, Mr Walter Nicholls and Mr Al Guy. All had been former athletes and three had competed at the highest level. Dr Lucking was appointed because of his medical knowledge; and Mr Nicholls, a solicitor, for his legal knowledge. Mr Guy, who was a member of the Irish Athletic Federation and was on the Technical Committee of the IAAF, was appointed because he had no connections with the respondent.

11. The hearing of the Disciplinary Committee took a full day on the 13th September 1994 and the Committee gave its decision, as I have already indicated, the next day. The issues canvassed at the hearing related first to the status of the laboratory in Lisbon, and the procedures which it adopted, and secondly the possibility of contamination or degradation. The Committee concluded unanimously that it was satisfied beyond reasonable doubt that there had been no defect in the procedures or degradation or other event which could have rendered the test result unreliable, and that accordingly the appellant was guilty of a doping offence. She was declared ineligible for four years in accordance with the rules.

12. The Independent Appeal Panel, having heard evidence on the 25th and 26th July 1995, gave a reasoned decision on the 26th July 1995. It considered that there were five issues. First, was it satisfied as to the chain of custody relating to the sample from the time it was given by the appellant to its final analysis? Second, was the laboratory at which the analysis took place

properly accredited, and were its procedures and its staff competent? Third, were the A and B samples analysed (or tested) the same as the sample given by the appellant, and if so, should they have been analysed? Four, were the tests carried out in accordance with the relevant guidelines and what ratio of testosterone to epitestosterone (T/E ratio) did they reveal? Five, could the degradation of the sample have given rise to a false result?

13. As to the first, although it noted that there were unsatisfactory features relating to the evidence as to the chain of custody, it was satisfied that nothing had occurred to cast any real doubt on the reliability of the findings. As to the second, it concluded that there was no justification for the argument that the laboratory had not been properly accredited, but that there had been some departures from best practice in relation to the analysis in particular of sample A, as to which the pH value had not been noted. Nonetheless it concluded that these did not cast any real doubt on the reliability of the findings. As to the third, it was satisfied that the samples were the appellant's. The problem which was identified, however, was that the pH value of the B sample was such as to show bacterial degradation of the sample to an extent which caused some of the experts called to give evidence which questioned whether the sample should have been analysed at all. The tribunal concluded that it was proper for the laboratory to analyse the sample as the question was essentially one of reliability. As to the fourth issue, it concluded that the analyses had been properly carried out.

14. It was as to the fifth issue that the bulk of the hearing had been directed. Evidence was called before it which had not been before the Disciplinary Committee. This evidence was to the effect that if urine was degraded by bacterial action, it was possible for the testosterone level to be increased. In the light of that evidence the Tribunal concluded that there was a possibility which could not be ignored that the samples had been degraded by bacterial contamination which could have affected the reliability of the results. The Tribunal expressly noted that the evidence which caused it to doubt the reliability of the findings had not been available to the Disciplinary Committee.

15. The essence of the appellant's case before the judge was that the Disciplinary Committee was tainted by bias. The most serious allegation of bias was made against Dr Lucking. The judge heard evidence of an incident at the Dairy Crest Games held at Gateshead in June 1990, when Dr Lucking was in charge of the Doping Control Testing Centre. An altercation took place between him and Mr Linford Christie. Mr Christie's account was that Dr Lucking accused him of taking drugs, and stated, with reference to the Olympic Games at Seoul in 1988, that Mr Christie had been very lucky to have escaped being banned as a result of a positive test he provided at those games. Mr Christie described the argument as heated. A Miss Short, an athlete who was being tested at the time, clearly remembered the argument, as during the course of it Dr Lucking, according to her, said that all athletes were on drugs, and as far as he was concerned all athletes were guilty until proved innocent. Mrs Betts, an Independent Dope Sampling Officer, also witnessed the altercation. She described it as a fierce argument, although she could not remember any details of what was said. Dr Lucking said that he had remained calm throughout, and denied having said that as far as he was concerned all athletes were guilty until proved innocent. He did, however accept that he suspected athletes of taking drugs, which was the whole reason for the testing procedure, and may have said so. The judge found that Dr Lucking had, in the heat of the moment, said words to the effect that all athletes were guilty until proven innocent.

16. The judge considered two further incidents relating to Dr Lucking which provided the basis for the allegation of bias. First, at a press conference after the Disciplinary Tribunal hearing, Dr Lucking was said by a journalist to have stated:

> "We held a preliminary hearing at the beginning of October and there were very few points of contention when it came to the hearing, but we had to rubber stamp it all as it came through."

17. Dr Lucking did not remember using such words and did not consider that it was a phrase that he would normally have used. The judge concluded that at some stage Dr Lucking had used the phrase "rubber stamped" but was clear that he could not have been using it in relation to the substantive hearing bearing in mind the fact that the Disciplinary Committee had spent two or three hours considering its decision.

18. Second, Dr Lucking accepted that, after the Independent Appeal Tribunal hearing, he had said:

> "From what I have learned the new evidence was only a very small scientific experiment carried out to show the sample could have deteriorated. It was not proven on a large scale. There was only a small element of doubt the Appeal Panel gave Modahl the benefit of the doubt. I believe that the IAAF should consider an appeal because the Panel decision could have destroyed confidence in our testing procedures. Yet hundreds of thousands of samples are tested at laboratories here and we have never had an episode like this."

19. The judge concluded that Dr Lucking was a responsible and sensible man, who was rather careless in his phraseology at times but did not carry into the Disciplinary Committee a prejudice that all athletes were guilty until proven innocent. He accepted Dr Lucking's evidence that he was fully aware that the rules required proof beyond reasonable doubt, that he approached the hearing on that basis, and that the suspicions which he considered justified the testing procedure played no part in the decision making process. He rejected the suggestion that the statement that he made after the decision of the Independent Appeal Tribunal was evidence of bias; it was merely evidence that Dr Lucking still considered his original decision to have been correct. He concluded that there was, accordingly, no actual bias on the part of Dr Lucking, nor was there in the light of his findings of fact, any real danger of bias.

20. The allegation of bias in relation to Mr Guy was more inferential. As originally pleaded, it was based on the fact that Mr Guy was on the Technical Committee of the IAAF, and that in September 1994 Mr Winner a publicity officer for the IAAF is reported to have said to a newspaper that the appellant was guilty of the offence of doping. It was accordingly submitted that Mr Winner must have been speaking with the authority of the IAAF, and that Mr Guy as a member of the Technical Committee must have held similar views. This was known to the appellant's legal advisors before the hearing. No formal objection was made at the hearing that he should be a member of the Disciplinary Tribunal. At trial, the appellant's advocate, Mr Julius, suggested further that Mr Guy was essentially a judge in his own cause. The basis for this was that he had been involved in dope testing control since the 1970's, and indeed had been the Doping Control Officer at the European Championship

at Helsinki in the summer of 1994. As the hearing was in part concerned with the storage, preservation and transportation of the samples, it was therefore suggested that he was being asked to judge procedures for which he was in part responsible and the actions of the Testing Control Officer at Lisbon who was his "colleague". Mr Guy said that he had never met Mr Santos, who was the relevant Doping Control Officer and only agreed that he was his "colleague" in the sense that Mr Santos was carrying out a similar task at Lisbon to the task that he had carried out at Helsinki.

21. The judge considered that Mr Guy was a "truly impressive witness, obviously imbued with a sense of fairness". He did not consider that Mr Guy could in any real sense be described as a judge in his own cause, as he had no responsibility for doping control at the Lisbon meeting and the IAAF's general procedures were in truth not in issue. He concluded that Mr Guy was genuinely independent and that the suggestion that he was in any way biased failed completely.

22. Unlike Dr Lucking and Mr Guy, Sir Arthur Gold did not give evidence, as he was unwell. The allegation against him was that he was personally biased and deliberately chose Dr Lucking as the Chairman of the Committee because of the views that Dr Lucking had expressed at Gateshead in his altercation with Mr Christie. Sir Arthur had been made aware of that altercation by a report which had been made about it at the time to the respondent's Board. Dr Lucking's account had then been, as it was at trial, that he had said that he suspected all athletes, because otherwise there would be no point in testing. The judge rejected the allegation that Sir Arthur was himself guilty of bias, or that there was anything wrong about his appointing Dr Lucking to chair the Committee in the light of what had happened at Gateshead.

23. In coming to his conclusions in relation to the allegations of bias, the judge took into account the evidence of Mr Nicholls and Mr Carter, two of the other members of the Disciplinary Committee. Mrs Hoyte-Smith was abroad at the time of the trial. The judge recorded the fact that having heard Mr Nicholls and Mr Carter, Mr Julius had not persisted in the original allegation that the whole committee had been guilty of bias. The judge was particularly impressed by the evidence of Mr Nicholls, which included the following:

> "I understand that it is alleged that the Chairman of the Drug Advisory Committee, Sir Arthur Gold, was biased against the claimant, and that he influenced our selection. This is not true. I was certainly not aware of any bias on the part of Sir Arthur Gold. I can confirm that the Drug Advisory Committee put careful thought into the selection of the Disciplinary Committee and in fact tried to ensure that all members were as impartial as possible. I did raise the question concerning my own selection since being local I knew the claimant. It was however considered this was a good thing since I would be seen to be a more sympathetic figure as a result. In any event, all members of the Disciplinary Committee selected were on good terms with and trusted by, the athletes."

24. The judge accordingly rejected all the allegations of bias. He further concluded that the hearing before the Disciplinary Committee was a full and fair hearing, after which the Committee spent a substantial period deliberating. The conclusion it reached was

unanimous and was based upon the evidence which had been presented. He concluded that the Disciplinary Committee carried out its function conscientiously and fairly. The Independent Appeal Panel had only come to a different decision because of new material which was presented to it which had not been available at the time of the hearing before the Disciplinary Committee. He concluded therefore that the appellant had had "a fair deal". Further, on the basis of the evidence, he was satisfied that even if there had been any bias on the part of Dr Lucking and Mr Guy, that bias had not affected the decision in that the other three members of the Disciplinary Committee had come to precisely the same conclusion, and that the decision was a proper decision on the evidence before it. It followed that even if there had been any breach of contract, no loss had been caused. In any event, in his judgment, the procedures had to be considered in their entirety. Any deficiency at the Disciplinary Committee stage had been rectified by a fair hearing before the Independent Appeal Panel.

25. The appellant's claim is based fairly and squarely in contract. If she cannot establish that there was a contract between her and the respondent, there is no basis for her claim for damages. The judge concluded that there was no contract. Mr Julius submits to us that he was wrong, and that there are three bases on which a contract can be construed from the material before the court or a combination of the three. First, is what he describes as "the Club basis", second is what he describes as the "participation basis"; and third is what he describes as the "submission basis".

26. The first is based upon her membership of her club. The copy of the rules of Sale Harriers with which we have been provided, expressly makes reference to the respondent's rules in that Rule 2 identifies the aims and objects of the Club as "the furtherance of amateur athletics, as defined by the BAF…."; and the 1996 membership application form (which is the only form with which we have been provided) states: "I understand my obligations under the BAF Rules." These rules govern the individual athlete as well as the clubs. It follows, it is submitted, that the club can properly be described as the agency by which the individual athlete became contractually bound by the BAF rules and the respondent became contractually bound to apply them to the athlete and to athletes generally.

27. The second basis is by participation in particular athletic events. It is submitted that by virtue of Rule 6(4)(a) of the BAF Rules the appellant could only compete outside the United Kingdom with the respondent's permission. She in fact competed in such events under the IAAF Rules which gave to the respondent all relevant disciplinary functions. By participating at Lisbon, she was therefore submitting to the jurisdiction of the IAAF Rules which gave to the respondent a disciplinary jurisdiction, which could only sensibly be exercised within the structure of a contract. Mr Julius submits that authority for this proposition is the judgment of Lightman J in *Korda –v- ITF* Times Law Reports 4th February 1999. We have been provided with a transcript of the judgment. In that case, the plaintiff was a professional tennis player who signed an application form to the All England Tennis Club for the 1998 Wimbledon Lawn Tennis Championship Meeting in which he agreed to abide by conditions which included:

> "1. The meeting is sanctioned by the Lawn Tennis Association and will be played under the Rules of Tennis as approved by the International Tennis Federation (ITF).
>
> ……

> 16. Competitors should be prepared to undergo drug testing as a result of governmental or other binding regulations imposed in the championships by authorities outside its control or by the governing bodies of the game"

28. During the course of the championships, the plaintiff provided a positive urine sample for testing under the ITF anti-doping procedures. Under those procedures he was subject to a mandatory disqualification for a year, together with other sanctions, unless he appealed. He appealed successfully in that the disqualification was not upheld. The ITF then sought to appeal to the Court of Arbitration for Sport against the leniency of the penalty. The plaintiff in turn sought a declaration that the ITF was not entitled to appeal. His primary argument was that there was no contractual relationship between him and the ITF which entitled it to appeal. The judge held that an agreement was "plainly to be inferred from the facts", including his acceptance of the procedures. In dealing with the argument that submitting to the procedures did not create any contractual relationship, the judge said:

> "This appears to me to be totally unreal. Any submission to the jurisdiction of the AC (Appeal Committee) must in the circumstances be part of an acceptance of a contractual relationship on the terms of the programme which defines the status, jurisdiction and procedures of the AC."

29. This case is also, it is said, support for the third basis from which Mr Julius seeks to establish the contract. It is submitted that once the appellant had been notified of the positive drug test, she invoked her right to a hearing before the Disciplinary Committee and her right to an appeal to the Independent Appeal Panel. Accordingly a contractual relationship was created. In addition to *Korda*, Mr Julius relies upon the judgment of Pilcher J in *Davis –v- Carew-Pole and Others* [1956] 2 All ER 524 and the decision in *Mundir –v- Singapore Amateur Athletic Association* [1992] Singapore Law Reports 18.

30. In the former case, the plaintiff was an unlicensed trainer who was summoned before the Stewards of the National Hunt Committee to answer an allegation that a horse trained by him had been entered to run in a steeple chase contrary to the National Hunt Rules. He attended; but the stewards found the allegation proved and declared him a disqualified person. He brought proceedings alleging that the hearing had been in breach of natural justice and that the stewards had misconstrued the rules. The judge accepted that they had misconstrued the rules. He considered that this in itself entitled him to grant declaratory relief, which was all the plaintiff sought by the time of the hearing, even in the absence of contract. But he considered that, although it was not necessary for his decision, there was a contract. At page 530 he said:

> "…. I am not prepared to hold that any implied contract could properly be inferred, at any rate until the plaintiff received the summons to attend the inquiry and submitted himself to the jurisdiction of the stewards ……. In the present case the plaintiff has submitted to the jurisdiction of the stewards of the National Hunt Committee and at least from the moment when he did so, impliedly to agree to abide by their finding, subject to a legal right which he might have to impugn it. From that moment it seems to me that he was in

> contractual relations with the stewards of the National Hunt Committee ……."

31. In the second case, the plaintiff was member of an athletics club affiliated to the defendant who had been sent by the defendant to Japan for training but returned prematurely. A Disciplinary Committee was constituted to enquire into alleged misbehaviour on his part. He was suspended from all forms of track and field activities in and outside Singapore for 18 months. He sought, amongst other remedies, damages. The judge held that a contract was to be implied from the plaintiff's acceptance of the defendant's offer to go to Japan for training. The judge also considered that in the circumstances, a contract had been created between the plaintiff and the defendant through the agency of his club. There was no elaboration of the reasoning for the judge's conclusions.

32. If none of these three bases is sufficient in itself, Mr Julius submits that a combination of all three sets out a factual background against which the only proper inference is that there was a contract. He submits that we should take into account the fact that there is a benefit to be obtained by the respondent from the fact that an athlete, in particular an athlete of the appellant's distinction, participates in events sanctioned by the respondent or its affiliated associations, and submits to its disciplinary jurisdiction. This in turn provides a benefit to the appellant in that she knows that the respondent's rules apply to all those against whom she is competing. The competition structure created by the rules can only, therefore, operate if the athletes, on the one hand, and the respondent on the other, consider themselves to be committed by a legally enforceable arrangement to those rules.

33. Mr Flint QC on behalf of the respondent submits that the evidence goes nowhere near establishing a contract. He submits that it is not possible to spell out from the facts any intention to create legal relations, any offer and acceptance of terms which have sufficient certainty to constitute contractual obligations, nor was there any consideration. As there was no written agreement, and therefore any contract has to be implied from the conduct of the parties, that could only be so if it was clear that both parties intended their conduct to give rise to contractual obligations. None of the three bases put forward by the appellant can be sufficient either individually or together. He submits that her membership of the club constituted a contract with the club only. If she never competed in events sanctioned by the respondent or its affiliated associations the rules would never apply to her. It was not pleaded or argued that the club acted as the respondent's agent.

34. As to participation, Mr Flint submits that the only participation pleaded and argued was participation in the Lisbon meeting which was an EAA athletics meeting the responsibility for doping control being that of the Portuguese Athletic Federation. The only part which the respondent played in her participation was to give her permission to compete under Rule 6(4)(a); which could not in itself, be the basis for implying a contract. Equally, her submission to the jurisdiction of the respondent, could not give rise to the implication that each intended a contract with the other. The respondent acted as it did because it was bound to pursuant to the IAAF Rules; and the appellant submitted because she was determined to avoid the mandatory ban which would be imposed if she was unable successfully to challenge the findings of the drug test conducted by the Portuguese Athletic Federation.

35. It follows, Mr Flint submits, that no offer or acceptance can be identified which could give the certainty necessary to be able to determine what the terms of such a contract were. The lack of certainty further makes it impossible to identify what consideration exists in terms of benefit to the respondent or detriment to her. The facts do not therefore establish the criteria necessary for the existence of an implied contract described by Bingham LJ, as he then was, in *Blackpool Aero Club –v- Blackpool BC* [1990] 1WLR 1195 at 1202 as follows:

> "I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill LJ in *Hispanica de Petroleos SA –v- Vencedora Oceanica Navegacion SA (No 2) (Note) [1987] 2 Lloyds Rep 321 at 331:* "What was the mechanism for offer and acceptance?""

36. He submits that this does not leave an athlete without remedy, in the event of any unfairness or other defect in the procedures adopted. In cases which affect a person's livelihood, that person is entitled to ask the courts to exercise their supervisory jurisdiction to ensure fairness, even where there is no contractual nexus between the person affected and the body making the relevant decision. He submits that this was made clear by Lord Denning in *Nagle –v- Feilden* [1966] 2 QB 633 where at page 653, he described the contract accepted by Pilcher J in *Davis –v- Carew-Pole and Others* (supra) as "a fictitious contract". Lord Denning repeated this in *Enderby Town Football Club –v- The Football Association* [1971] Ch 591, where in relation to the rules of the Football Association he said at page 606:

> "The rules of a body like this are often said to be contract. So they are indeed in theory. But it is a fiction ….. putting the fiction aside the truth is that the rules are nothing more or less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the court. If they are in unreasonable restraint of trade they are invalid: see *Dickson –v- Pharmaceutical Society* …… If they unreasonably shut out a man from his right to work, they are invalid……. See *Nagle –v- Feilden* …."

37. This was cited with apparent approval by Millett LJ, as he then was, in *Stevenage Borough Football Club Ltd –v- The Football League Ltd* [1997] 9 Admin LR 109 at page 115. In that case, Millett LJ stated at page 116 H that in this type of case, "the role of the court is essentially supervisory". Mr Flint submits that this gives a proper and adequate role to the courts to secure fairness to an athlete under the rules in question and that there is no need in those circumstances to resort to the fiction of a contract in order to achieve justice.

38. The only case in this country in which the IAAF Rules have been considered is *Gasser –v- Stinson and Another* in which Scott J, as he then was, gave judgment on the 15th June 1988. The plaintiff had given a positive test and was suspended under the then rules for two years. She alleged that the procedure adopted was not in accordance with the rules, and that, in any

event, the rules were in unreasonable restraint of trade and void. In relation to her claim in contract, Scott J said as follows at page 24 F of the transcript:

> "There is an unreality, I think, about the notion of a contract coming into existence between each competitor and the IAAF – not least because entries in competitions are made by the National Federations and not by the competitors themselves – and even more unreality about the notion of a contract being formed when the competitor presents himself or herself for dope testing. The *animus contrahendi* must be open to question. I need not resolve these issues, however, since the plaintiff has dropped from the hearing before me her claim for injunctive relief and her claim for damages: all that she is seeking is declaratory relief. The IAAF for its part accepts that the plaintiff has *locus standi* to seek to declaratory relief even if there is not a contractual nexus between itself and the plaintiff. I think this concession by the IAAF is rightly made. The plaintiff, as an athlete under disqualification, has an obvious and sufficient interest in establishing whether disqualification was imposed in accordance with the rules under which the IAAF had purported to act or whether those rules are open to challenge on restraint of trade grounds."

39. This dictum is therefore some support for Mr Flint's argument as to the nature and extent of the jurisdiction of the court in cases such as this. It is, in particular, support for the argument that mere participation in an event or submission to testing may not of itself give rise to a contractual relationship.

40. It is perhaps surprising that the position of an individual such as the appellant in relation to rules such as the ones in question has not been considered previously by the courts, apart from the case to which I have just referred. And that case is on any view distinguishable on its facts and of limited value. The plaintiff was there seeking to impose contractual obligations on the IAAF, which, bearing in mind, its purpose and constitution, was unlikely to have intended to create contractual relationships with individual athletes in the absence of some express contract.

41. We have been taken through a substantial number of authorities dealing with the exercise by what have come to be called domestic bodies of disciplinary jurisdictions in order to help us determine whether or not a contract is to be implied in the present situation. I say implied, because there is no question on the material before us, of any express contract. As I have already indicated, the only express contract entered into by the athlete identifiable in that material would appear to be with his or her club.

42. The earlier authorities tended to suggest that where domestic tribunals sought to exercise jurisdiction in respect of rules, the only basis for the exercise of such jurisdiction could be contract. This was stated trenchantly, and ironically in the light of later events, by Denning LJ, as he then was, in *Lee –v- The Showmen's Guild of Great Britain* [1952] 2 QB 329 at page 341:

> "The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied.

> Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorises it or the parties agree to it."

43. In practical terms, this issue is now only relevant to the remedies which the Court can grant. Pilcher J considered in *Davis and Carew-Pole and Others* (supra) that the decision of the court of Appeal in the case of *Abbot –v- Sullivan & Others* [1952] 1 All ER 226 was authority for the proposition that a declaration and an injunction might be granted against a domestic tribunal acting in excess of jurisdiction or in breach of the rules of fairness, even in the absence of contract. But in *Byrne and Another –v- Kinematograph Renters Society Ltd and Others* [1958] 2 All ER 579, Harman J, as he then was, disagreed. He was clearly of the view that no remedies by way of declaration, injunction or damages could be granted unless a breach of contract or a tort had been established.

44. However this particular debate has been resolved, certainly in this court, in *Nagle –v- Feilden* [1966] 2 QB 633 in which the court unanimously held that where a man's right to work was in issue, a decision of a domestic body which affected that right could be the subject of a claim for a declaration and an injunction even where no contractual relationship could be established. The case concerned the rejection of an application by the plaintiff for a trainer's licence from the Jockey Club. The claim was based fairly and squarely on an allegation that the Jockey Club's policy was to refuse to grant any women such a licence. Her statement of claim had been struck out. Her appeal to the Court of Appeal was unanimously allowed. Lord Denning, without reference to his judgment in *Lee –v- The Showmen's Guild of Great Britain* (supra) said:

> "We live in days when many trading or professional associations operate "closed shops". No person can work at his trade or profession except by their permission. They can deprive him of his livelihood, When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or a tort. But he may get a declaration and injunction."

45. Then dealing with the debate about the effect of *Abbott –v- Sullivan* (supra) and the views of Harman J that a case had to be based on contract, he said

> "But I think that could only be done by inventing a fictitious contract. All through the centuries courts have given themselves jurisdiction by means of fictions; but we are mature enough, I hope, to do away with them."

46. Salmon LJ had no doubt that it was impossible to spell a contract out of the fact that the plaintiff had submitted an application for a trainer's licence to the stewards which had been adjudicated upon. He also considered that a case such as *Davis –v- Carew-Pole* (supra) was one in which the contract might be considered "fictitious". He, as had Danckwerts LJ in his

earlier judgment, agreed with Lord Denning that the proper basis for jurisdiction was the alleged interference with the plaintiff's right to work.

47. Despite the comment by Hoffmann LJ, as he then was, in *R –v- Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909, 933 to the effect that that there was "an improvisatory air about this solution" and his doubts as to whether the possibility of obtaining an injunction had survived *Siskina (Owners of cargo lately laden on board) –v- Distos Compania Naviera SA* [1979] AC 210, this court was clearly of the view in the *Stevenage Borough Football Club Ltd –v- The Football League* (supra) that the court retained a supervisory jurisdiction over such tribunals in the absence of such contracts, at least for the purposes of granting declarations. And in *Newport Association Football Club Ltd and Others –v- Football Association of Wales Ltd* [1995] 2 All ER 85, Jacob J held that the jurisdiction to grant an injunction in such cases where the allegation was there had been an unreasonable restraint of trade, had survived the *Siskina*.

48. Interesting though these debates have been, they are only of limited assistance in the context of the present case, where the appellant accepts that she has no claim for damages unless a contract can be established.

49. The importance of these authorities is that they establish that a court should not merely assume a contract to exist, but must consider all the surrounding circumstances to determine whether or not the contract can properly be implied. We are handicapped in the present case by a lack of basic factual material. Although the court has been provided with the rules of the IAAF and the respondent, the court has not seen any document setting out the constitution of either organisation, although we have been given a general description of both. We have not seen any documents which indicate whether or not any individual athlete on entering any relevant competition, signs any document by which he or she agrees to be bound by either set of rules; and in particular we have not been shown any documents in relation to the applicant's entry for the meeting at Lisbon. It may or may not be, therefore, that, contained in such documents was the sort of wording which enabled Lightman J to conclude that Mr Korda became contractually bound by the ITF Rules when entering the All England Lawn Tennis Championships. It is clear from documents that we have seen that the successor body to the respondent envisages that individual contracts may be entered into by athletes which could contain such express provisions. This suggests to me that there is nothing inherently improbable about the concept of a contractual obligation being entered into by an individual athlete which would create a contractual relationship between the athlete and the respondent. The question therefore is whether or not on the material which we do have, it is proper to infer such a contract.

50. There is no doubt that over a period of many years the applicant accepted that if she entered meetings under the auspices of the respondent or of the IAAF, she would be subject to the relevant rules. Equally, it seems to me to be a proper inference that the respondent in its turn accepted the responsibility to administer those rules in relation to all subject to its jurisdiction who competed in those meetings. I see no difficulty, therefore, in identifying with certainty the basic obligations undertaken by both the athlete and the respondent. There is a benefit and a detriment to both. The benefit to the athlete is that he or she knows that every athlete competing will be subject to the same rules, and that to remain entitled to compete, both nationally and internationally, he or she must comply with those rules. The respondent accepted the burden of administering those rules, and the benefit of having

recognised athletes compete both in national and international events. The latter benefit has become the more significant over the years as, from the documents we have, it is clear that the respondent obtained financial benefit in terms of sponsorship and media exposure for its events. I therefore see no difficulty in determining the consideration which each provides. Further, it seems to me to be clear that the athlete accepts the obligations under the rules whenever he or she enters a competition, or undergoes out of competition testing in order to be eligible to enter such competitions. The basic structure for a contract is, in my view, readily identifiable.

51. The remaining question is whether or not the parties can have had an intention to create a legal relationship. This seems to me to be the difficult part of the problem. It could be said that in the context of a sport, that involves imposing an inappropriate legal structure on for what for many will be recreation. This could justify the conclusion that only in those cases in which an athlete is offered and accepts an express contractual obligation can it properly be said that there is a contract between him or her and a body such as the respondent. Further, an inevitable corollary of the existence of a contractual relationship is that both parties are bound by obligations, the breach of which are capable of giving rise to a claim for damages. It would follow that breaches by the athlete of his or her obligations would potentially give rise to a claim for damages on the part of a body such as the respondent. But that seems to me to beg, rather than answer, the problem. There are many contractual situations, the paradigm being employer and employee, where neither party may have applied their minds to or appreciated the consequence of the contractual obligations, namely that both parties are liable in damages for its breach, subject always to the proper construction of the relevant obligations under that contract.

52. In my judgment if a legally enforceable contract can be created, as seems to me is inevitable, where an athlete expressly agrees in an entry form to be bound by the relevant rules, I can see no escape from the conclusion that a contract can properly be implied when the circumstances make it clear that that is, in essence, what the athlete has promised. I consider for the reasons that I have already given, that the appellant, even on the facts that have been established in this case, undertook to be so bound, and the respondent in turn undertook the obligation to apply those rules. In my judgment, the contract extended in the present case to the meeting in Lisbon. Under the rules the appellant must have sought permission from the respondent to compete, and thereby accepted the offer to compete in the knowledge of the disciplinary consequences; and the respondent in giving permission obtained the benefit of her competing . The remaining question is what was the ambit of the obligations undertaken by the respondent?

53. In one sense, the obligations can be easily stated. First the respondent undertook to carry out the disciplinary procedures in accordance with the rules. Second, it undertook to carry them out fairly. Both these obligations are accepted by the respondent even in the absence of contract. It is the ambit of the second which is the subject of debate.

54. It does not seem to me that the nature or extent of the obligation to act fairly depends upon the existence or otherwise of a contract. In other words, the answer to the question whether or not the respondent did act fairly should be the same whether or not a contract exists. I can see no justification for implying into the contract any further or different obligation from that which would be considered the appropriate test in considering in the exercise of the courts' supervisory jurisdiction whether or not the proceedings were fair. That question

remains one to be answered within the context of the obligations that can properly be said to have been accepted by both parties in relation to the conduct of the disciplinary proceedings.

55. The first question which has to be answered is whether or not those proceedings have to be looked at overall, or whether there was a separate obligation to deal with the proceedings before the Disciplinary Committee fairly, even if no criticism can be made of the Independent Appeal Panel. Second, if the obligation required fairness at the Disciplinary Committee stage and there was a breach, what consequences should follow? The appellant, in this context, challenges the conclusions of the judge that there was no bias on the part of Sir Arthur Gold either actual or apparent, or bias on the part of Dr Lucking or Mr Guy again either of actual or apparent, which could properly characterise the proceedings of the Disciplinary Committee as being in breach of the obligation of fairness.

56. In submitting that the respondent was under a discrete obligation of fairness in relation to the Disciplinary Committee, Mr Julius relies in part on a passage in an affidavit sworn by Professor Radford, the respondent's Executive Chairman, in the course of the proceedings. At paragraph 52 he said:

> "BAF also agrees that it would be a term of any contract that those responsible for selecting the Disciplinary Committee and that those sitting on the Disciplinary Committee would act in a bona fide manner and would not be biased …."

57. He further relies on the fact that the adverse decision of the Disciplinary Committee resulted in his client being declared ineligible for the period between the Disciplinary Committee hearing and the hearing before the Independent Appeal Panel for which the rules themselves provide no remedy. He submits, accordingly, that unless there is a discrete obligation in relation to the Disciplinary Committee, any unfairness at that stage would leave her without any remedy for any loss which she may have sustained as a result of that unfairness between the hearings.

58. Mr Flint however submits that the structure put in place by the Rules is, in itself, a discharge of the obligation on the part of the respondent to act fairly. The appeal to the Independent Appeal Panel is the safeguard which both the respondent and the athlete have accepted as the means of dealing with any deficiencies at the Disciplinary Committee stage. Precisely because the Rules make no reference to any entitlement of the athlete to a remedy by way of costs or damages in the event of the Independent Appeal Panel reversing a decision of the Disciplinary Committee, it must have been the intention of the parties that this was the method by which any such deficiencies were to be resolved.

59. Both Mr Julius and Mr Flint rely on the opinion of the Privy Council in *Calvin –v- Carr & Others* [1979] 2 All ER 440. In that case the appellant was part owner of a racehorse which ran in a race in Australia. A stewards inquiry found that there had been a breach of the Rules of Racing; and the appellant was disqualified for a year and his membership of the Australian Jockey Club forfeited. He appealed to the Committee of the Club but his appeal was dismissed. He then brought an action seeking a declaration that his disqualification was void on the basis that the stewards had failed to observe the rules of natural justice and that there was accordingly no jurisdiction in the Appeal Committee to hear his appeal. The

opinion of the Privy Council, given by Lord Wilberforce, was that there was no absolute rule that defects in natural justice at an original hearing could or could not be cured by appeal proceedings, and that where a person had joined an organisation or body and was deemed on the rules of that organisation in the context in which he joined to have agreed to accept what in the end was a fair decision notwithstanding some initial defect, the task of the courts was to decide whether in the end there had been a fair result reached by fair methods.

60. The problem for the court was set out in the following terms by Lord Wilberforce at page 448:

> "First there are cases where the rules provide for a rehearing by the original body, or some fuller or enlarged form of it. This situation may be found in relation to social clubs. It is not difficult in such cases to reach the conclusion that the first hearing is superseded by the second, or, putting it in contractual terms, the parties are taken to have agreed to accept the decision of the hearing body, whether original or adjourned ..……
>
> At the other extreme are cases, where, after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment etc) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage. This is the result reached by Megarry J in *Leary –v- National Union of Vehicle Builders* In his judgment in that case the judge seems to have elevated the conclusion thought proper in that case to rule a general application. In an eloquent passage he said:
>
> > "If the rules and the law combined to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? ….. As a general rule ….. I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body"
>
> In their Lordships' opinion this is too broadly stated. It affirms a principle which may be found correct in a category of cases; these may very well include trade union cases, where movement solidarity and dislike of the rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first (probably branch) level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.
>
> In their Lordships' judgment such intermediate cases exist. In them it is for the court, in the light of the agreements made, and in addition

> having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect; it may be vitiated by the same defect as the original proceedings, or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full enquiry, for example where it has no material but a transcript of what was before the original body. In such cases it would no doubt be right to quash the original decision. These are all matters (and no doubt there are others) which the court must consider. Whether these intermediate cases are to be regarded as exceptions from a general rule, as stated by Megarry J, or as a parallel category covered by a rule of equal status, is not in their Lordships' judgment necessary to state, or indeed a matter of great importance. What is important is recognition that such cases exist, and that it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a measure of formal judicialisation. While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency in their Lordships' opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced."

61. It seems to me that in cases such as this, where an apparently sensible appeal structure has been put in place, the court is entitled to approach the matter on the basis that the parties should have been taken have agreed to accept what in the end is a fair decision. As Lord Wilberforce said, this does not mean that the fact that there has been an appeal will necessarily have produced a just result. The test which is appropriate, is to ask whether, having regard to the course of the proceedings, there has been a fair result. As Lord Wilberforce indicated, there may be circumstances in which by reason of corruption or bias or such other deficiency, the end result cannot be described as fair. The question in every case is the extent to which the deficiency alleged has produced overall unfairness.

62. The case for the appellant depends upon her being able to establish bias sufficient to produce such unfairness. As I have said, she challenges the findings of Douglas Brown J which exonerated Dr Lucking, Mr Guy and Sir Arthur Gold of both bias and apparent bias. I cannot see any justification for concluding that the judge was wrong to acquit Mr Guy and Sir Arthur Gold of both actual and apparent bias. There was wholly insufficient evidence to justify those allegations. Nor do I consider that the appellant can challenge the conclusion of the judge that Dr Lucking was not in fact biased. There was ample material from the witnesses who were members of the Disciplinary Committee to justify that conclusion. Equally, there was nothing about the decision itself which could in any way could suggest it was infected by bias. The judge rightly concluded, in my view, that there was no real

prospect of any different decision being reached on the material before the Disciplinary Committee, by any other Committee, however constituted.

63. The appellant is, however, on stronger ground in arguing that the judge was wrong to hold that Dr Lucking was not infected by apparent bias. This concept has to be approached with some caution in a contractual context. It is essentially a precautionary concept intended to exclude the risk of bias, hence the definition in domestic law enunciated by Lord Goff in *R –v-Gough* [1993] 646E. At page 668C, he expressed the test in the following well known words:

> "In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand."

64. It is clear that Lord Goff envisaged that the court should examine all the facts whether they be known or unknown to anyone considering the matter at the time of the original hearing. As Sir Thomas Bingham MR (as he then was) said in *R –v- Inner West London Coroner ex parte Dallaglio* [1994] 4 All ER 139 at page 162g:

> "the famous aphorism of Lord Hewitt CJ in *R –v- Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 …. "justice ….. should manifestly and undoubtedly be seen to be done" it is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias."

65. This approach has been modified, it seems to me, in relation to decisions of public bodies by the effect of the Human Rights Act 1998, as explained in the judgment of the Master of the Rolls in *Director General of Fair Trading the Proprietary Association of Great Britain and the Proprietary Articles Trade Association* given on the 21st December 2000. The court there concluded that the provisions of Article 6 entitling a person to a fair public hearing by an independent and impartial tribunal in the determination of his civil rights and obligations required a modest adjustment to the test in *Gough*. In paragraph 86 of the judgment the Master of the Rolls said:

> "When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied to most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a danger, the two being the same, that the tribunal was biased."

66. It is clear that this test, whichever way it is formulated, is intended to obviate both the appearance of unfairness, and the risk of unfairness. As far as the appearance of fairness is concerned, that is an essential ingredient of public justice in order to ensure a respect for the

administration of justice, and is clearly an appropriate concept also for the supervision of public bodies. It may also be an appropriate tool in certain circumstances for the supervision of domestic bodies. For example a court may well consider it appropriate to interfere by way of injunction to prevent a particular person or persons from hearing disciplinary proceedings where a real danger of bias could be established on the basis that it might produce a real risk of unfairness.

67. But it does not seem to me to be appropriate to apply this test after the event to the determination of the question of whether or not there has been a breach of contract giving rise to a claim for damages. One returns at that stage to ask the question posed in *Calvin –v- Carr* (supra). The court's task is to determine whether or not, on the evidence, there has been a fair result. In a case such as the present, where the danger of bias can be evaluated and excluded, I consider that taken together with a wholly untainted appellate process, a fair result has been achieved. Any apparent bias on the part of Dr Lucking did not amount to a breach of the obligation on the disciplining body to provide a fair hearing overall.

68. If I am wrong in approaching the matter on this basis, I am prepared to accept that Dr Lucking was tainted by apparent bias. An informed person, that is a person knowing, as the judge found, that Dr Lucking had in 1991, albeit in the heat of the moment, asserted that athletes were guilty unless they were able to prove that they were innocent of doping, would consider that there was a risk that he might, albeit unconsciously, be affected by that attitude. His comments after the decision by the Independent Appeal Panel could not have allayed any such concern, so that, in my view, it would be likely that such a person would conclude that there had been a real risk of bias absent any further inquiry into the way the hearing was in fact conducted. If, contrary to my preferred view, this, of itself, produced unfairness amounting to a breach of contract, the judge's findings of fact however conclusively establish that that breach caused no loss. Whatever Dr Lucking's state of mind, the evidence of the other three members of the Committee who gave evidence satisfied the judge that they were not in anyway infected by Dr Lucking, and came to a wholly independent judgment on the evidence which was fully justified by the material before them. The judge was correct, as I have already indicated, in concluding that the only basis for the decision of the Independent Appeal Panel in the appellant's favour was the new material giving support for what had previously merely been assertion as to the possibility that bacterial contamination could affect the testosterone reading.

69. But for the reasons I have already given, I consider that the appeal should be dismissed.

Lord Justice Jonathan Parker:

70. I also agree that this appeal must be dismissed, and I also gratefully adopt the account of the relevant facts contained in the judgment of Latham LJ, a draft of which I have had the advantage of reading.

71. The judge's finding that the hearing before the Disciplinary Committee was not tainted by any actual bias seems to me to mark the beginning and the end of Mrs Modahl's case.

Even if the selection of one or more of the members of the Disciplinary Committee gave rise to apparent bias – in the sense of a real risk of actual bias – the finding of no actual bias means, in my judgment, that a claim by Mrs Modahl against the BAF for damages for breach of contract based on apparent bias must fail, since in the event no loss resulted.

72. In any event, I am not persuaded that there was any contract between Mrs Modahl and the BAF. There is no written or oral contract, but Mr Julius puts forward three possible bases for implying a contract containing an obligation of fairness on the part of the BAF in relation to the disciplinary process (I return below to the scope of the alleged obligation). His first basis (the "club basis") is that a contract is to be implied between Mrs Modahl and the BAF via her membership of Sale Harriers. His second basis (the "participation basis") is that a contract is to be implied each time Mrs Modahl competed in an athletics event, whether at home or abroad, entry to which was controlled directly or indirectly by the BAF, and that a contract is accordingly to be implied from her participation in the event in Lisbon. His third basis (the "submission basis") is that a contract is to be implied when Mrs Modahl submitted herself to the BAF's disciplinary process. I will consider each of these suggested bases in turn.

The "club basis"

73. Mr Julius relies on the terms of the application form for membership of Sale Harriers, which (in its 1996 version) includes the words "I hereby apply for membership of Sale Harriers Manchester and I understand my obligations under BAF rules". He submits that by becoming a member of Sale Harriers Mrs Modahl impliedly contracted with the BAF in the terms of their rules (so far as applicable to her). Under that contract, he submits, Mrs Modahl undertook with the BAF to comply with its doping control procedures, and the BAF for its part undertook with Mrs Modahl that those procedures would be fair at every stage, and in particular that they would not be tainted by bias (actual or apparent).

74. I agree with the judge that on the material before the court the "club basis" for implying a contract between Mrs Modahl and the BAF cannot succeed. In the first place, the form which Mrs Modahl signed when applying for membership of Sale Harriers in 1977 has not been produced, nor is there any secondary evidence as to its terms. Secondly, the relevant disciplinary body in 1977 was the BAAB, and its rules have not been produced. Nor, for that matter, does the court know in what circumstances and on what terms the BAF succeeded the BAAB as the relevant disciplinary body. Thirdly, Mr Julius expressly disclaimed any argument based on agency.

75. In my judgment, the requisite evidential foundation for the implication of a contract between Mrs Modahl and the BAF via her membership of Sale Harriers has simply not been laid.

The "participation basis"

76. In support of the "participation basis" Mr Julius relies strongly on the decision of Lightman J in *Korda* (above). In my judgment, however, there are significant differences between *Korda* and the instant case. In the first place, the relevant event in *Korda* (the 1998 Wimbledon Lawn Tennis Championship Meeting) was an event "organised, sanctioned and

recognised by the ITF" within the meaning of Section B of the ITF's Tennis Anti-Doping Programme. In the instant case, by contrast, the Lisbon event was an EAA event, in respect of which the responsibility for doping control lay with the Portuguese Athletic Federation. The BAF exercised no control over the Lisbon event. The involvement of the BAF in the Lisbon event derives solely from its obligation under the rules of the IAAF to carry into effect its disciplinary procedures. In the second place, in *Korda* the evidence was that Mr Korda applied to the All England Tennis Club to participate in the Wimbledon Championship by signing a form in which he expressly agreed to abide by the conditions set out in the Competitor's Guide, which in turn provided that the Championship would be governed by ITF rules. In the instant case, by contrast, there is no evidence as to the terms of the form (if any) which Mrs Modahl signed when applying to enter the Lisbon event, or, for that matter, to whom any such form was addressed. On such facts as are known, it seems that the application might have been addressed to the IAAF, to the EAA, or to the Portuguese Athletic Federation. In the third place, in contrast to the BAF rules, the sanctions available under the ITF rules extended beyond ineligibility to compete and included loss of prize money and of world ranking points.

77. Further, on the material available it seems to me unlikely, to put it no higher, that in applying to participate in the Lisbon event Mrs Modahl intended to create legal relations between herself and the BAF; still less that the BAF had such an intention. As already noted, the BAF was obliged under the IAAF rules to operate its disciplinary process in respect of Mrs Modahl. The inference which I would draw is that in so doing the BAF was doing no more, and was intending to do no more, than fulfil that obligation.

78. I accordingly conclude that Mrs Modahl does not succeed in implying a contract on the "participation basis".

The "submission basis"

79. If there is a sound basis for implying a contract between Mrs Modahl and the BAF in relation to its disciplinary process then in my judgment this must be it. To my mind, however, the "submission basis" gives rise to significant difficulties both as to intention to create legal relations and as to consideration.

80. As to intention to create legal relations, it seems to me that the natural inference is that in submitting herself to the BAF's disciplinary process Mrs Modahl's intention was merely to seek to defend herself against the finding of a positive drugs test and to avoid the imposition of a mandatory ban which would have had the practical effect of preventing her competing at national or international level for the period of the ban. As for the BAF, I have already stated my view that the natural inference is that its intention was merely to fulfil its obligation to the IAAF.

81. In my judgment, it is also material to bear in mind in this connection that the absence of a contract does not, on the authority of *Nagle v. Fielden* (above), mean that Mrs Modahl is without a remedy should the sanction imposed as a result of the disciplinary process amount to an unreasonable restraint of trade. This is not, of course, a substitute for an action for damages for breach of contract, but it is a relevant feature of the context in which a contract is sought to be implied.

82. As to consideration, on the available evidential material I am unable to identify any benefit to the BAF capable of supporting the alleged contract, or for that matter any detriment to Mrs Modahl. As I see it, Mrs Modahl's interest in submitting to the BAF's disciplinary process was in maintaining her eligibility for national and international competition.

83. As Bingham LJ said in *Blackpool Aero Club v. Blackpool B.C.* (above) at 1202, "contracts are not lightly to be implied". In my judgment the fact that the factual context may be consistent with the parties having made a contract does not suffice for this purpose, nor (by the same token) does the fact that the parties would have acted no differently had a contract been concluded. To my mind, that is simply the starting-point for the inquiry whether a contract is to be implied. Something more is required. I am, however, unable to find anything more in the instant case. I accordingly agree with the judge that the circumstances of the instant case, as they appear from the available evidential material, do not justify the implication of a contract between Mrs Modahl and the BAF.

84. On the assumption that that conclusion is wrong, however, I consider next the particular term which is sought to be implied, breach of which is said by Mrs Modahl to give her a right to damages.

85. In the first place, the notion of the body which has the obligation to set up a disciplinary tribunal being in some way contractually responsible for the manner in which that tribunal, once set up, conducts the proceedings, seems to me to be something of a contradiction in terms, since it is inherent in the process itself that the tribunal should so far as practicable be free from influence by the body which sets it up.

86. In the second place, it seems to me in any event that it is reasonable to assume that no such body, properly advised, would voluntarily assume contractual responsibility for matters outside its control.

87. In those circumstances, it seems to me that any implied contractual obligation on the part of the BAF relating to the disciplinary process should be limited to the setting up of the Disciplinary Committee, and should not extend to the exercise by the Disciplinary Committee of its functions once it has been set up. That, however, brings one back to the allegations of unfairness made by Mrs Modahl. The only allegation which relates to the setting up of the Disciplinary Committee, as opposed to the conduct of the Disciplinary Committee itself once it has been set up, is the allegation of apparent bias in the selection of its members. But, as I pointed out earlier, that allegation is rendered nugatory by the judge's finding that in the event there was no actual bias, since even if there was an implied obligation on the BAF not to select members of the Disciplinary Committee whose presence on the Committee would give rise to apparent bias, and even if that obligation was breached by the BAF, in the event no loss resulted from the breach.

88. Finally, it seems to me highly significant that the disciplinary process itself allows for an appeal. I take that as a strong indication that if there is a contractual obligation of fairness, it is, as the judge concluded, an obligation of fairness in the operation of the disciplinary process as a whole, that is to say, including any appeal. In the instant case, it is not suggested and cannot be suggested that the appeal hearing did not cure any unfairness which may have existed in the hearing before the Disciplinary Committee. It follows that even if the BAF was under some implied contractual obligation of fairness towards Mrs Modahl in relation to the conduct of the disciplinary process, on the facts of the case that obligation was not breached.

Lord Justice Mance:

89. I have had the advantage of reading in draft the judgment of Latham LJ, and gratefully adopt his statement of the facts.

90. The four issues are: whether the appellant was in a contractual relationship with the respondents; if so, what were its terms as regards the fair conduct of disciplinary proceedings; whether the respondents were in breach of any such terms; and, if so, whether the appellant can, as a matter of causation, attribute her inability to compete between 14th December 1994 and 25th July 1995 to any such breach. I take these issues in turn.

(1) Was the appellant in a contractual relationship with the respondents?

91. Like Latham LJ (para. 49) I regret the lack of basic factual material. This issue, which is one of general interest, merited a more complete and satisfactory picture. However, because of the conclusions I reach on other points, its resolution is not, as it happens, critical. While the absence of a firm background affects the force of any conclusion on this point, I would, on the material before us, analyse the situation contractually.

92. Any athlete like the appellant wishing to compete as an amateur must be taken to be familiar with the basis from time to time on which she would be permitted and able to compete. That appears in the respondents' rules, which for the years 1994-1995 provided as follows:

> "RULE 1 ELIGIBILITY TO COMPETE
>
> All competitions held under the Rules of the British Athletic Association (BAF) are confined to amateurs under the following definitions (hereinafter termed amateurs under BAF Rules):
>
> (1) Definition of Amateur
>
> An amateur is a person who abides by the eligibility rules of the Federation [i.e. BAF]
>
> (2) Restriction of Competition to Amateurs
>
> Competition under Federation Rules is restricted to amateur athletes who are under the jurisdiction of a Member of the International Amateur Athletic Association (IAAF) and who are eligible under the rules laid down by the British Athletic Federation.
>
> (3) Ineligibility to Compete
>
> The following persons are ineligible to take part in competitions under Federation Rules:
>
> Any persons who:

….

(f) are suspended or banned for a doping offence under Rule 24(15) or (16), ….

….

(5) Eligibility

An athlete does not cease to be an amateur under Federation Rules:

….

(b) by achieving a performance of merit in a competition and becoming eligible for a training grant or subvention donated by a sponsor or organiser. All monies awarded will be administered in a manner approved by the Federation.

….

RULE 2 CLUBS

(1) A Club is a bona fide Club or Society of amateur athletes affiliated to the Federation in accordance with its Articles of Association and Rule Book.

….

RULE 3 CLUB MEMBERSHIP

(1) Membership of a Club commences upon the actual date of election by the Committee of the Club at a properly convened meeting. The application for membership must be made on a form approved by the Federation.

(2) After one year of competition an athlete taking part in any event within disciplines listed in Rule 2(6)(a) ….[i.e. Track and Field] must be a member of a Club or Association affiliated directly or indirectly to the Federation.

….

RULE 6 COMPETITION CONDITIONS

….

(3) Jurisdiction

Every promoter of an athletics meeting or competition under Federation Rules, and every person tendering an entry for such

meeting or competition shall be considered to have submitted to the jurisdiction of the Federation on all questions which may arise concerning the application, construction, meaning or effect of the Rules of the Federation.

(4) Competitions involving Foreign Clubs and Foreign Athletes

(a) No Club or member of a Club under the jurisdiction of the Federation may compete outside the United Kingdom of Great Britain and Northern Ireland, and no foreign Club or a member of a foreign Club may compete or be invited to compete within the United Kingdom without the permission of the Federation.

(b) Any application to compete outside the United Kingdom or for permission to invite any foreign Club or member of a foreign Club to compete within the United Kingdom must be made to the Federation.

(c) Athletes desiring to compete outside the United Kingdom and any foreign athletes desiring to compete within the United Kingdom must present to the body promoting the meeting at which they desire to compete, a letter signed by the proper official of their Governing Body stating that they are amateurs as defined by IAAF Rules and are permitted to compete.

….

Rule 24 DOPING

(1) Doping in or out of competition is strictly forbidden and is an offence.

(2) The Federation is responsible for the co-ordination and disciplinary procedures of all doping related matters. It is responsible for the supervision of testing both in and out of competition. All such testing is operated and co-ordinated by the relevant Sports Council Doping Control Unit, or the IAAF. All other doping matters are delegated to its Drug Advisory Committee.

(3) To be eligible for participation in athletic competitions held under Federation and IAAF Rules all athletes must make themselves available for testing when required.

(4) Athletes who may be considered for selection for Great Britain and Northern Ireland Teams at international competitions will be placed on the “out of competition register” and must notify the Federation with details of their contact address and any subsequent changes of address (e.g. at college, or university, whilst training abroad, whilst on holiday etc.) of more than five days duration. All athletes on the “out of competition register” will be notified of their inclusion by the Federation.

….

(13) Anti-doping tests shall be carried out under the auspices of the relevant Sports Council, or the IAAF, by Independent Sampling Officers unless otherwise required by the BAF

NOTE: See Appendix B for BAF Rules and Procedures relating to testing.

(14) The Federation Drug Advisory Committee will deal with any offences under its Doping Procedures. Under these procedures disciplinary proceedings will take place in three stages:

> (a) suspension (An athlete shall be suspended from the time that the Drug Advisory Committee considers that there is evidence that a doping offence may have taken place and written notice to that effect has been sent to the athlete concerned);
>
> (b) hearing;
>
> (c) decision on eligibility."

93. Appendix B provides:

> "(B1) Testing at competitions should be carried out at a competition venue and out of competition testing must be carried out within 24 hours of notification at a venue convenient to the athlete.
>
> (B7) Following suspension for an offence under Rule 24 there will be a disciplinary hearing before the Disciplinary Committee, at a date to be determined by the Chairman of the Drug Advisory Committee, after consultation with the parties, and, in the absence of an agreement, being a date less than 21 days from the Notice of the hearing being given to the athlete. The Disciplinary Committee will consist of members of the Federation Drug Advisory Committee, or its nominees. At the hearing the athlete will be entitled to be represented and will have the opportunity to present his/her case. The Disciplinary Committee may exercise all the disciplinary powers given by Rule 24.
>
> (B8) After the disciplinary hearing before the Disciplinary Committee and any declaration of ineligibility, the athlete or the BAF will have the right of appeal within 21 days. Any appeal will be made to an Independent Appeal Panel consisting of one representative of the athlete's Member Association, one representative from the Federation and one person nominated by the Federation who may be a Barrister or Solicitor. For this purpose the Independent Appeal Panel shall be the Appeals Committee referred to in the Federation's Disciplinary Procedures.

> (B9) If an athlete is found to have committed a doping offence and this is confirmed by the Independent Appeal Panel, or the right to appeal is waived, the athlete will be deemed ineligible as in Rule 24(15) or (16). The period of ineligibility will be deemed to have begun from the date on which the sample was provided or form the date of the sanctionable offence."

94. Latham LJ has observed that we have only been provided with the application form which would have been used by someone joining Sale Harriers Manchester (the club to which the appellant belonged) for its 1996 season. The appellant had joined the club in March 1977. The respondents (a company limited by guarantee) only took on responsibility for athletics at the national level in 1991. Prior to that, an unincorporated body, the British Athletics Board was responsible. Nonetheless, the phrase which appears in the 1996 application ("I understand my obligations under BAF Rules") must, I think, have reflected the state of mind of any active amateur athlete wishing to be eligible to compete under the aegis of, inter alia, the respondents prior to and in 1994. She or he would have understood that they had the obligations under BAF rules stated in the passages set out above, and have conducted themselves accordingly.

95. The respondents submit that it is unnecessary and inappropriate to regard such "obligations" as contractual. Their rules do no more than state terms for eligibility with which an athlete must comply if he or she is to continue to be permitted to compete, as well as procedures regarding suspension, disciplining and appeals, which will in practice be applied in the same context. An athlete has, they submit, no option but to comply in order to continue to compete in amateur athletics. If the terms or procedures are misapplied or bear so harshly on an athlete, as to be in restraint of trade, then the athlete can obtain declaratory and injunctive relief to establish their ineffectiveness and to restrain their operation, without needing to show any contract: see e.g. *Lee v. Showman's Guild of Great Britain* [1952] 2 QB 329, 346 per Denning LJ; *Nagle v. Feilden* [1966] 2 QB 633; *Gasser v. Stinson* (Scott J; 15th June 1988; unreported); *and Newport Association F.C. Ltd. v. Football Association of Wales Ltd.*. [2995] 3 AER 87.

96. The respondents also invite consideration of the position of the International Amateur Athletic Federation ("IAAF") and its rules. These, as Latham LJ has pointed out, constitute the foundation for the rules of national athletics federation rules. Further, they contain obligations on national federations, in particular the obligation to recognise and give effect to the results of doping control (IAAF Rule 61); Rule 61 bound the respondents to act as they did, when they received the report on the results of the appellant's "A" sample from the Portuguese Athletics Association after the Lisbon meeting. The respondents submit that the IAAF cannot be regarded as party to any contract with the appellant, that she cannot, therefore, have complete contractual protection, and that this militates against recognising or implying any contact between her and the respondents, as her national federation. In response to this submission, the appellant counters that a contractual relationship may well also have come into existence between herself and the IAAF, but that it is unnecessary finally to determine that on this appeal.

97. I observe, first, that on the respondents' case their rules would not contain "obligations" at all. Yet the rules are expressed in terms of obligations, rather than simply conditions for eligibility. Further, it is as obligations that the rules would, I think, be felt in their day to day

operation. I refer in particular to the way in which Rule 24(3) and (4) are expressed and would be felt. It seems evident that any active athlete like the appellant would be in frequent contact with the respondents in every day life. Rule 1(5)(b) is of further interest for the athlete's implicit agreement that "all monies awarded will be administered in a manner approved by" the respondent.

98. Secondly, rules such as Rule 6(3) and (4) seem to me to point to a contractual analysis. Under Rule 6(3), athletes entering competitions under the respondents' rules (as the appellant must have done on numerous occasions) submit to the respondents' "jurisdiction" on all questions. Under Rule 4, athletes are required to obtain from the respondents permission and a letter, before competing outside the United Kingdom; yet, unless there is some contractual nexus, there would be no basis on which the respondents could be required to respond, or made answerable, for any failure to respond, to a request for such a permission and letter.

99. Thirdly, the rules regarding discipline (B7) and appeal (B8) are couched in terms of duties and rights on the part of both the respondent and the athlete. The chairman of the Drug Advisory Committee has to consult and to fix a date within 21 days for the hearing, while the athlete has the right to be represented and to present his/her case, and both sides have the right of appeal. Again, these provisions have a contractual flavour.

100. For there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations and (c) consideration. Both the first two requirements fall to be judged objectively. In Chitty on Contracts (28th ed.) para. 1-034, it is pointed out that:

> "Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination."

101. The same paragraph concludes:

> "Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follow that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."

102. One distinction exists however in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient

certainty to be enforceable, an intention to create legal relations may commonly be assumed: Chitty, para. 2-146. It is otherwise, when the case is that a contract should be implied from the parties' conduct: Chitty, para. 2-147. It is then for the party asserting a contract to show the necessity for implying it: see *The Aramis* [1989] 1 Ll.R. 213, *Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C.* [1990] 1 WLR 1195, *The Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Ll.R. 311.

103. In the present case, although the language of the respondents' rules has the contractual aspects to which I have drawn attention, there is no conversation or document which can be identified as constituting an express agreement. Any contract must be implied from conduct, in the light of the rules. The rules, in my view, contain a framework of rights and duties of sufficient certainty to be given contractual effect, with regard to the athlete's entitlement and ability to compete. Consideration exists in the athlete's submission to the rules and to the respondents' jurisdiction, in the respondents' agreement to operate the rules and to permit the athlete to compete in accordance with them, and in both parties' agreement on the procedures for resolution of any disputes contained in the rules.

104. Neither the fact that the respondents only entered the scene in 1991 nor the fact that the rules may have changed from year to year affects this conclusion. One would expect athletes like the appellant to have been generally aware of such changes, so far as they affected them. The question is whether the conduct of the parties in operating the rules, as they existed from time to time, in relation to each other necessitates the implication of a contract.

105. In my judgment, the necessary implication of the appellant's conduct in joining a club, in competing at national and international level on the basis stated in the rules and in submitting herself to both in and out of competition doping tests, is that she became party to a contract with the respondents subject to the relevant terms of the rules. I have already identified three respects in which the rules appear to point towards a contractual analysis. I find unpersuasive the submission that an athlete had no personal right to enforce the obligations and standards of behaviour imposed expressly or impliedly on the respondents under their rules. The submission that no-one can have intended this in a sporting context seems unrealistic in relation to the modern sporting scene, which, whatever the labels of amateurism, has aspects affecting substantially the career, livelihood and prosperity of participants. Further, since the existence of a contract falls to be assessed objectively, I do not think that it is illegitimate or circular to prefer an analysis which gives enforceable rights and remedies in respect of obligations which are terms expressed or implied in the rules, when compared with an analysis which provides no more than the colder comfort of declaratory or injunctive relief to restrain or annul any conduct by the national governing body which would constitute a restraint of trade. As at present advised, I would prefer to view the appellant's submission in 1994 to the jurisdiction of the respondents' Disciplinary Committee (and thereafter to the Independent Appeal Tribunal) as confirming the existence of a prior contract, although, if necessary, I would regard it as the final step bringing one into existence.

106. I do not consider that it is necessary to seek to determine what relationship was between the appellant and the IAAF, and whether that was in any respect contractual. The appellants' relationship with her own national federation was, on any view, much closer than any with the IAAF. The IAAF rules can, it seems to me, be viewed as directed primarily at national federations. Any relationship which the appellant had with the IAAF is even more sparsely evidenced than that which she had with the respondents. Making the assumption, which I am for the present purposes quite prepared to do, that she had no contractual relationship with the IAAF, that does not preclude or change my conclusion that a contract came into existence with the respondents. An absence of complete contractual protection, if that be the right analysis, is no reason for refusing to recognise the existence of limited contractual protection, if the circumstances indicate that conclusion. As the facts of the present case show, the handling of any alleged incident of doping, wherever it occurred, would devolve upon the respondents.

107. In reaching my conclusion on the contractual issue, I have not found great assistance in most of the various sporting authorities cited to us. However, in *Law v. National Greyhound Racing Club Ltd.* [1983] 3 AER 300, the defendant's rules provided that all who wished to take part in greyhound racing in stadiums licensed by the defendant were deemed to have submitted to the defendant's rules and jurisdiction. This court (Lawton, Fox and Slade LJJ) held that the plaintiff's voluntary submission to the jurisdiction of the defendant and its stewards involved, and such powers as the stewards had derived from, a contract with the defendant. In *Korda v. ITF Ltd.* [1999] AER (D) 84 (aff'd on 25th March 1999 in this court, where the existence of a contract was no longer in issue), the plaintiff had on 7th May 1998 signed an application addressed to the organisers of the Wimbledon Lawn Tennis Tournament, which provided inter alia by Section B that the tournament "will be played under the Rules of Tennis approved by the [ITF]" and that "competitors should be prepared to undergo drug testing as a result of governmental or other binding regulations imposed on the Championships by authorities outside its control or by the governing bodies of the game". The ITF Tennis Anti-Doping Programme 1998 provided that "any player who enters or participates in an event or activity organised, sanctioned or recognised by the ITF or who has an ATP …. Ranking shall comply with and be bound by all the provisions of this Programme". It further provided for testing of players at tournaments, for review by an Anti-Doping Review Board if samples proved positive and for the imposition of various penalties, with a right of appeal to an Appeals Committee. Lightman J. held that a contractual relationship between the plaintiff and the ITF on the terms of the Programme was to be inferred from seven facts and matters. They were the plaintiff's participation in the tournament as a person on whom an obligation was imposed by Section B, his knowledge of the existence of the Programme and the facts that he gave a urine sample, appealed to the Appeals Committee, did not deny that he was bound by the Programme, asserted that he had a further right of appeal from any adverse decision of the Appeals Committee, issued a press release supporting the Committee's actual decision and offered to comply with it. The ITF, in a submission paralleling one which we have heard, argued that Mr Korda was simply submitting to the jurisdiction of the Appeals Committee, without contracting. Lightman J. regarded that as "totally unreal". It was unnecessary in that case to distinguish between the seven facts and matters which the judge identified.

108. Both these authorities support a contractual analysis in cases of voluntary submission to the rules and jurisdiction of a body undertaking to operate and enforce an anti-drug taking

measures. The present case involves an athlete submitting to the respondents' rules and jurisdiction as part of a continuous, long-term relationship covering in and out of competition testing, the procedure and basis for entry into of national and international competitions and other aspects of the athlete's career, including management of awards. These circumstances assist the inference of contract.

109. The fact that the courts have fashioned declaratory and injunctive relief, to assist claimants in private law cases where judicial review is not available and there is no contract, cannot of itself prevent the inference of a contract in other cases. *Nagle v. Feilden*, where the plaintiff obtained such relief against the stewards of the Jockey Club for refusing her entry as a woman is a case where the stewards had refused emphatically to contract with the plaintiff. Lord Denning at p.646D expressed the view that the availability of such relief should enable courts to avoid "inventing a fictitious contract". Although the invention of fictitious contracts should certainly be avoided, Lord Denning was here also pursuing a more general preference for a public over a private law approach in this field, which did not, I think, receive higher endorsement: compare e.g. the judgments at the three instances in *Cheall v. APEX* [1982] 3 AER 855 (Bingham J.), [1983] QB 126 (CA) and [1983] 2 AC 180; and cf Harvey on Industrial Relations and Employment Law (Issue 150; June 2001) M458-476.

110. Lord Denning referred with disapproval to Pilcher J's view that there was a contract on the facts in *Davis v. Carew-Pole* [1956] 2 AER 524. There the plaintiff, a livery stable keeper, had never held any licence under National Hunt Rules, which had been issued by the National Hunt Committee and which provided that the Stewards of the National Hunt Committee had power to investigate and decide any case which appeared to require their interference and to impose a fine not exceeding 100 sovereigns or to disqualify or warn off from all courses where such rules were in force, for such period as they thought fit. The Stewards summonsed the plaintiff for alleged infringement of one of their rules, and he agreed to and did attend the inquiry, as a result of which the Stewards declared him disqualified. Pilcher J. held that the Stewards had failed to comply with their own rules, and thought it unnecessary to find a contract in order to grant declaratory and injunctive relief. But he also considered that it could, if necessary, be said that the plaintiff, by submitting to the Stewards' jurisdiction, and by impliedly agreeing to abide by their finding, entered a contract with the Stewards. This was on any view a more tenuous basis for inferring a contract than that which exists in the present case. The agreement suggested involved someone with no prior involvement with the National Hunt Committee or its Stewards and was expressed to be simply to abide by the Stewards' finding. I find it unnecessary either to challenge or to indorse Lord Denning's criticism of the latter part of Pilcher J's reasoning, in order to decide the present case. While the courts should avoid inventing contracts, they should not be unduly hesitant about giving contractual effect to a continuous, long-term relationship based on a programme and rules couched in language of a contractual character and purporting to impose mutual rights and obligations.

111. For these reasons, while regretting the paucity of material before the court, I would prefer the view that the claimant was in a contractual relationship with the respondents on terms providing for eligibility, drug testing and - what is presently material - dispute resolution.

(2) What were the terms of the contract regarding the fair conduct of the disciplinary proceedings?

112. The rival arguments on this issue were canvassed in the judgments of this court on 28th July 1997 (unreported; CA ref. OBEN1 96/1040/E), given on the respondents' unsuccessful application to strike out the applicant's claim based on actual or apparent bias. The point is not an easy one. An athlete is under Rule 24(14) subject to suspension "from the time when the Drug Advisory Committee considers that there is evidence that a doping offence may have taken place and written notice to that effect has been sent to the athlete concerned". Rule 24(5)(a) and Appendix B, paragraphs (B3) to (B5) indicate that evidence of a doping offence may simply consist of positive results from tests on "A" and, if requested, "B" samples. The next stage is to determine whether a doping offence has in fact occurred, in which case the athlete will be declared ineligible to compete, for a first offence for at least 14 years and for a second offence for life (Rule 24(15)). That stage involves the hearing before a Disciplinary Committee, with a subsequent right to appeal to an Independent Appeal Panel. Rule 24(145) and Appendix B paragraph (B9) treat this stage compositely, as a single stage leading to a declaration of ineligibility if and when this stage is completed unfavourably to the athlete.

113. The appellant's case is that the respondents undertook obligations relating to the appointment, membership and freedom from bias of the Disciplinary Committee, which were separate from any obligations which might exist in respect of the Independent Appeal Panel. In the event of breach of the former obligations, the decision of the Disciplinary Committee was to be regarded as void. This argument reverses the argument presented in cases such as *Calvin v. Carr* [1979] 2 AER 440, where the stewards of the Australian Jockey Club had at first instance failed to act in accordance with natural justice, but there had been a complete and fair rehearing before the committee. There, the appellant was asserting a separate obligation of fairness in relation to the first instance of the disciplinary process, in the hope of undermining an unfavourable determination against him at the second instance. The Privy Council considered, under the particular rules, that the obligation of fairness applied to the process overall, and that the appellant was bound by the committee's ultimate decision against him. Here, in contrast, the appellant wishes to challenge the first instance determination of the Disciplinary Committee, while upholding and maintaining the correctness of the Independent Appeal Panel's contrary conclusion on the different evidence put before it. One possible problem about the appellant's case is therefore that it may prove too much. It may lead to a conclusion (namely that there has been no proper contractual determination at any instance) which, in other contexts, the appellant would understandably disclaim.

114. The problem may be met by recognising the distinction between an issue whether the ultimate decision is one by which parties have agreed to be bound, and an issue whether one party can claim damages for unfair behaviour. The parties may, as in *Calvin v. Carr*, have agreed to be bound by the ultimate outcome of a process involving two different instances. The only term which conditions either party's willingness to be bound is that the overall process shall have been fair. Whether either party undertakes any obligations to the other for breach of which damages may, in a contractual context, be claimable is a different question –not merely in relation to any particular part of the process, but, in my opinion, also in relation to the process overall. The court in *Calvin v. Carr* was concerned with the issue, by what had the parties agreed to be bound, not with an issue as to the extent (if any) that the

committee of the Australian Jockey Club undertook any implied commitment, enforceable in damages, that the stewards, or indeed they themselves, would act fairly.

115. For my part, I would endorse the view that the present parties were implicitly agreeing to be bound by the ultimate outcome of the disciplinary process, taken as a whole and therefore including the Independent Appeal Panel's determination. The rules are draconian in the sense that suspension precedes any disciplinary process. Their language tends, as I have said, to look at the disciplinary process as a single process, leading to a declaration of ineligibility. A conclusion that the process should be looked at overall matches the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with fundamental requirements of fairness: see, in this connection, words of Sir Robert Megarry V-C in *McInnes v. Onslow-Fane* [1978] 1 WLR 1520, 1535F-H, also quoted by Sir Nicholas Browne-Wilkinson V-C in *Cowley v. Heartley* (24th July 1986; The Times).

116. In *Calvin v. Carr* itself, Lord Wilberforce considered that there were "typical situations in which some general principles can be stated", and that the first of these was "where the rules provide for a rehearing by the original body, or some fuller or enlarged body of it", as in relation to social clubs. He said that:

> "It is not difficult in such cases to reach the conclusion that the first hearing is superseded by the second, or, putting the matter in contractual terms, the parties are taken to have agreed to accept the decision of the hearing body, whether original or adjourned."

117. Such a conclusion ensures a measure of consistency with parallel principles of fairness which would apply in a public law context - see the reasoning, particularly in the Court of Appeal, in *Lloyd v. McMahon* [1987] 1 AC 625, to which Lord Woolf MR referred when the present case was previously before this court; and in a human rights context - see e.g. the recent decision of this court in *Director General of Fair Trading v. Proprietary Association of Great Britain (In re Medicaments and Related Classes of Goods (No. 4))* (26th July 2001) referring to a number of authorities in the European Court of Human Rights and refusing to order the Lord Chancellor to pay compensation for costs wasted by reason of the vacation of a trial before the Restrictive Practices Court for apparent bias on the part of a member of that Court. The vacation of the trial by the Court of Appeal was held to have "remedied the situation so that no violation" occurred of the obligation to afford a fair trial under article 6 of the Convention on Human Rights.

118. This conclusion resolves any issue whether the parties were bound by the outcome of the disciplinary process overall. But the present issue, which remains, is whether any implied contractual undertaking exists, which might give the appellant a simple right to damages in respect of unfairness prejudicing her during the course of the disciplinary process. It is of course possible to postulate extremely hard cases, such as a hearing before a first instance Disciplinary Committee which, as a result of actual bias, concluded that there had been a doping offence, followed by an impartial hearing before an Independent Appeal Panel,

which on the same evidence acquitted the athlete of any offence. The athlete might then have suffered very real loss, through the belated determination of his or her innocence. However, equivalent hardship could also result from a simply mis-appreciation by the Disciplinary Committee of the nature or force of the evidence before it. It may be said that an athlete accepts the risk of the latter and not the former situation. But it is also necessary to look at the matter from the perspective of the respondents. The bias in the former case might be a matter of which they had no knowledge or reason to know.

119. Ultimately, the issue is what, if any, term should be implied either as representing the obvious though unexpressed intention of the parties or as necessary for the efficacy of the contract made of the terms of the respondents' rules: see e.g. Chitty on Contracts (28th ed.) Vol. 1 General Principles paras. 13-04 to 13-09. Approaching the matter in this way, I can well understood it being said that the parties would obviously have intended, and that it was necessary for the efficacy of the contract, that the respondents should, when selecting persons to sit on a Disciplinary Committee (or indeed an Independent Appeal Panel), (a) act in good faith and select only persons who they believed to be fit and appropriate, and (b) (probably) act with reasonable care in that respect. It is a different matter to suggest that it must have been intended or was necessary for the efficacy of the contract that the persons should in fact be free from some characteristic making them unfit, but of which the respondents neither knew nor had any reason to know. It is an even more extreme proposition that the respondents undertook that the persons selected would not, even during the disciplinary process let alone at some subsequent date, commit themselves to unwise statements demonstrating apparent, though not actual, bias.

120. I note, in relation to any Independent Appeal Panel, that the rules provide that one of the three members should not even be appointed by the respondents and that one, although nominated by the respondents, should be a barrister of solicitor. Whilst the fair conduct of appeal proceedings by the Independent Appeal Panel was no doubt a condition of both parties' willingness to be bound by their outcome, I would see little attraction, and some incongruity, in holding the respondents contractually responsible in damages for failure by properly appointed members of an expressly "independent" appeal panel to behave fairly. Such a failure might abort the proceedings and be potentially unfortunate for whichever side had lost below, but I do not see why, without more, the respondents should be treated as having contracted that it would not occur.

121. Whilst the Disciplinary Committee is under the rules more closely linked in composition to the respondents, it is inherent in the appellant's own case, as well as in the respondents', that the Disciplinary Committee was intended under the rules to fulfil an independent adjudicatory role. On that basis, which I accept, I again see no reason for treating the respondents as answerable for all aspects of a Disciplinary Committee's behaviour, as if its members were acting as employees or agents.

122. In these circumstances, I would regard any implied obligation on the part of the respondents under their rules as extending, at most, to an obligation to act in good faith and take due care

to appoint persons who so far as they knew or (probably) had reason to believe were appropriate persons to sit on the relevant Disciplinary Committee.

(3) Were the respondents in breach of any such terms?

123. Before us Mr Julius for the appellant effectively repeated the case which he had sought to establish before the judge. The judge was however the tribunal of fact, and made a number of clear findings with which we should only interfere if satisfied that they were probably wrong.

124. The first and, in the light of what I said, most promising case advanced below concerned the selection of the Disciplinary Committee. Sir Arthur Gold was in September 1994 chairman of the respondents' Drug Advisory Committee, which was responsible for the selection. He was too ill to give evidence at trial. He had, at least in 1990-91, been aware that Dr Lucking had in 1990 been involved in an incident with Mr Linford Christie, and that Dr Lucking had then expressed himself in language which demonstrated that actual or at least apparent bias. The appellant's submitted that Sir Arthur Gold was himself biased when he participated in the appointment of the Disciplinary Committee. The judge reviewed the evidence regarding Sir Arthur Gold's knowledge and handling of the 1990 incident, found that he was unaware of any statement made by Dr Lucking presuming all athletes to be guilty unless proven innocent, and concluded that Sir Arthur Gold's knowledge and defence of Dr Lucking's remark that he "suspected all athletes of taking drugs" did not display bias. By writing to Mr Christie in 1991 to say that Dr Lucking's remark was a correct scientific generalisation, since the rationale of doping control rested on an assumption that every athlete was a potential offender, and that Dr Lucking had not in any circumstances intending any reflection on Mr Christie's personal integrity, Sir Arthur Gold was bringing the incident to a close in a conciliatory vein, and certainly not himself displaying any bias towards all or any individual athletes.

125. Bias was further sought to be inferred from a comment made by Sir Arthur Gold in his witness statement to the effect that his interpretation of the IAAF rules was that, if a "B" sample confirmed a positive "A" sample test, the IAAF could decide that the athlete's points since the taking of the sample did not count. But, as the judge pointed out, Sir Arthur Gold immediately went on: "This should not be taken as an indication of the guilt or innocence of an athlete any more than the suspension of an athlete after a confirmatory "B" sample is an indication of an athlete's guilt or innocence". Assuming Sir Arthur to have been under a misconception regarding the IAAF's powers, his witness statement cannot either display or support an allegation of bias.

126. The evidence was, and the judge found, that there was no bias in the appointment or selection of membership of the five-person Disciplinary Committee. On the contrary, appropriate care had been taken to ensure a well-balanced and appropriately experienced committee in what was known to be a high profile case. There was no actual bias, and knowledge of Sir Arthur Gold's involvement in relation to the 1990 incident or of his witness statement could not lead any fair-minded observer to consider that there was a real danger of bias: see *Director General of Fair Trading v. Proprietary Association of Great Britain (In re Medicaments and Related Classes of Goods (No. 2))* [2001] 1 WLR 700 (CA).

Still less could it demonstrate a real danger of injustice having occurred as a result of bias, if that is the test to be applied on the basis that the facts of this case occurred prior to the incorporation of the European Convention on Human Rights: see *R v Gough* [1993] AC 646; and see below.

127. To my mind, that is the end of the allegation of any relevant breach, having regard to what I have already said about the limitations of the respondents' implied obligations in this regard. I shall however say something about the allegations of actual or apparent bias made against Dr Lucking and Mr Guy. Taking Mr Guy first, it is alleged that he was actually or apparently biased by virtue of his involvement in both the IAAF and the European Athletic Association ("EAA") and by virtue of his career as a drugs tester. Mr Guy was not, as pleaded, a "senior official" of the IAAF, but a council member representing Eire and a member of the IAAF's technical committee, a matter known to and not objected by the appellant at the Disciplinary Committee hearing. There was an allegation seeking to associate him with views about the appellant's guilt reported in a newspaper in September 1994 as having been expressed by a spokesman, Mr Winner, for the IAAF. There was no first-hand evidence as to what, if anything Mr Winner had said, and in any event Mr Guy did not know about Mr Winner's reported statements. Nor was Mr Guy appointed to represent or representing the IAAF in any respect. As to the EAA, Mr Guy was a member of the council and had served as the EAA doping control delegate in charge of dope control at the European Championships in Helsinki held under IAAF rules in the summer of 1994. He had great experience in superintending the obtaining of samples, their custody and transmission to accredited laboratories for analysis. The "A" and "B" samples which led to the appellant's suspension were given at an athletics meeting in Lisbon in June 1994, and the appellant's challenge to their apparently positive results before the Disciplinary Committee and Independent Appeal Panel in 1994-95 raised points on the custody of samples, the IAAF accreditation and the procedures and staff of the relevant Portuguese laboratory, the material identity of the samples as analysed with those which she had given, the propriety and significance of the tests undertaken and the significance of apparent degradation of the samples. The EAA doping control delegate in charge of dope control at the Lisbon meeting was a Mr Santos. Mr Guy had never met Mr Santos and knew nothing about the Lisbon meeting. But it was suggested that Mr Guy was being asked in effect to sit in judgment in his own cause.

128. Like the judge, I regard the appellant's case relating to Mr Guy as without foundation. The principles of natural justice or fairness must adapt to their context and be approached with a measure of realism and good sense. Appendix B paragraph (B7) of the respondents' rules makes clear that the Disciplinary Committee "will consist of members of the Federation Drug Advisory Committee, or its nominees". It was both natural and appropriate that the Disciplinary Committee should have among its members someone with experience of doping control and its procedures. Mr Guy was chosen for this reason, and because he spoke English and came from a different national athletic federation. There is no reason to think that he held or would hold any fixed or pre-determined ideas on any of the issues being raised by the appellant in her challenge to the Portuguese results. The judge found him "a truly impressive witness, imbued with a sense of fairness". There was no actual bias, and once again no basis for any fair-minded observer to consider that there was a real danger of bias.

129. I return to Dr Lucking. In 1990 he made the remark that he "suspected all athletes of taking drugs", and the judge found that, in the heat of argument with Mr Linford Christie, Dr Lucking probably did also say that all athletes were guilty unless proven innocent. The judge further found that, after the disciplinary hearing in December 1994 Dr Lucking probably did use the phrase "rubber-stamp" (which appeared in a newspaper report), but that the context was not clear and that he could not have been referring to the way in which the Disciplinary Committee approached their decision. Thirdly, the appellant relied upon Dr Lucking's admitted statement to a journalist, Miss Thompson of the Blackpool Evening Gazette, immediately after the Independent Appeal Panel hearing to the effect that:

> "From what I have learned the new evidence was only a very small scientific experiment carried out to show the sample could have deteriorated. It is not proven on a large scale. There was only a small element of doubt that the appeal panel gave Modahl the benefit of the doubt. I believe that the IAAF should consider an appeal because the panel decision could have destroyed confidence of our testing procedures. Yet hundreds of thousands of samples are tested at laboratories here and we have never had an episode like this."

130. The judge having heard Dr Lucking rejected the suggestion of actual bias. He regarded Dr Lucking as a responsible and sensible man, rather careless in his phraseology at times. He observed that the comments to Miss Thompson had not been pleaded, and that to hold the view that his original decision was right "does not begin to be evidence of bias". To my mind, that tends to undervalue those comments. It was clearly unwise for Dr Lucking to comment publicly as did, in relation to a hearing of an appeal from a committee which he chaired; and his comments tend to suggest a pre-disposition not to accept any result which did not uphold the apparent outcome of the original tests. Nevertheless, making the fullest allowance for that, I do not consider that there is any basis on which we could or should conclude that Dr Lucking was actually biased.

131. The judge regarded his conclusion on actual bias as being "the end of apparent bias because I accept that he did not unfairly regard Mrs Modahl's case with disfavour, and accordingly a real danger of bias did not arise". That appears to have been a straight application of the test in R v Gough, on the basis of the judge's own findings in this case at trial. The judge did not refer to the decision (a week before his judgment) in *Director General of Fair Trading v. Proprietary Association of Great Britain (In re Medicaments and Related Classes of Goods (No. 2))* [2001] 1 WLR 700 (CA). That establishes, as the relevant test after the incorporation into English law of the European Convention on Human Rights on 2nd October 2000, whether any fair-minded observer would consider that there was a real danger of bias. To my mind, the combination of Dr Lucking's comments in argument in 1990 and his observations to Miss Thompson in 1995 would cause a fair-minded observer to consider that there was at the time of the Disciplinary Committee hearing in December 1994 a real danger of bias. Since we are, however, concerned with facts occurring long prior to the incorporation of the Convention on Human Rights on 2nd October 2000, I will take as the appropriate principles those which existed prior to such incorporation. I have already mentioned the test established in *R v Gough*, but in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451, 477 (decided 17th November 1999) this court considered

and elaborated that test, in a way which can be read as giving it a hypothetical or more objective aspect. The court indicated that "the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public", and that there could be no question of cross-examining or seeking disclosure from the judge, or (even) paying "attention to any statement by him concerning the impact of any knowledge on his mind or decision". The court in *In re Medicaments and Related Classes of Goods (No. 2)*, paras. 64-67, commented that would appear to depart from the language, or prior understanding of the language, of the test in *R v. Gough*. In view of the other conclusions which I have reached in this case, it is unnecessary finally to resolve the position. But, taking *Locabail* as an authoritative exposition of the pre-Convention position in this court, I doubt whether Dr Lucking should have been regarded, even pre-Convention, as having been free from apparent, as distinct from actual, bias. The judge's subsequent findings regarding his freedom from actual bias would on any view fall to be disregarded, and the court, personifying the reasonable man, and without reliance on special knowledge, would I think have to take the view that the combination of his comments in 1990 and 1995 disqualified him.

(4) If the respondents were in breach of a relevant contractual term, can the appellant, as a matter of causation, attribute her inability to compete between 14th December 1994 and 25th July 1995 to any such breach?

132. The judge decided against the appellant on this issue, because, as he found, the Disciplinary Committee's decision had been reached without actual bias, and was a fair and reasonable decision on the evidence before that committee. In other words, the Independent Appeal Panel only reached a different conclusion because of the fresh evidence called before it. As a matter of fact, that is in my view the correct reading of the Independent Appeal Panel's decision. The Panel's statement that "When we take all the factors put before us together we come to the conclusion we cannot be sure beyond a reasonable doubt of Mrs Modahl's guilt" was made with reference to the fifth issue ("could the degradation of the sample have given rise to a false result?") and the factors which led to doubt were clearly those deriving from the new evidence adduced on the appeal.

133. On this basis, the appellant faces obvious difficulty on causation. First, assuming (contrary to my conclusions) there was a relevant breach of contract and (as Mr Julius would primarily submit) that it nullifies the Disciplinary Committee decision, the effect is to leave the on-going suspension continuing, so that the appellant would still have been unable to compete after 14th December 1994. The appellant has therefore to submit (and this is a submission available to her, whether or not the assumed breach avoided the Disciplinary Committee's decision) that the breach involved a failure to hold the disciplinary proceedings before a Disciplinary Committee which was neither actually nor apparently unbiased.

134. Mr Julius submits that the appellant has lost the chance that such a Disciplinary Committee might, even on the evidence put before the actual Disciplinary Committee, have decided in the appellant's favour. Accordingly, he submits, the appropriate order should, at least, be for damages for loss of that chance to be assessed, since the trial did not, and this appeal does

not, concern matters of pure quantum. However, since the actual Disciplinary Committee decided on an unbiased basis, and in a sense in which the Independent Appeal Panel would (but for the new evidence) also have decided, there is no appreciable chance that any other Disciplinary Committee would have reached any other decision than that which the actual Disciplinary Committee reached. Any conclusion that Dr Lucking evinced apparent bias is in this context irrelevant, bearing in mind that he personally (and the whole Disciplinary Committee) was actually unbiased.

135. It follows that, even if the appellant had shown a relevant breach, she would have failed to show any prospect of any significance that this or any other Disciplinary Committee acting without actual or apparent bias would, on the evidence available in December 1994, have reached any decision different to the actual decision. The case is not, therefore, one where damages could be ordered or assessed in her favour on the basis of loss of a chance. In order to obtain damages on the basis of loss of a chance, a claimant must "prove as a matter of causation that [she] has a real and substantial chance as opposed to a speculative one": *Allied Maples Group Ltd. v. Simmons v. Simmons* [1995] 1 WLR 1602, 1614, per Stewart Smith LJ (and cf *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563, 575, per Lord Evershed MR). This the appellant has failed to do.

Conclusion

136. For the reasons I have given, I consider that there was no breach of contract and that this appeal must be dismissed.