

Protecting the Commercial Interests of Sportspeople

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The mere fact that we are today discussing this topic indicates the distance that sport has come in New Zealand over the past few years. It is often quoted that in societal attitudes and activities, New Zealand is at least ten years behind the Northern Hemisphere and, in sport, that has been no exception. Partly that has been due to the overwhelming amateur ethic that has prevailed in sport in this country, partly it has been because funds to support sport have been limited. In more recent times, however, New Zealand has made strides to catch up with the way in which sport operates in the wider world and the benefits to sportspeople have increased. Greater protection has therefore become important.

The sports market has exploded in the past 15–20 years and is still exploding. It is true that millions still play for fun. Under the rules of many international sports bodies, “earnings” or “winnings” for competitors go into trust funds, supposedly. The Olympic Games are still “amateur” in that they offer no fees nor prize moneys. But the competitors are not. In all sports, anywhere near the top, such phrases are whitewash. Few even bother to use them, except perhaps in rugby and then, maybe, only its administrators. The Olympic motto “*citius, altius, fortius*” is meant for athletes. It applies still better to the flow of money around them. And why should the competitors not benefit? We must remember the sporting lives or careers of most sports people are limited and their opportunities for gain from their undoubted skills are therefore similarly limited. It is important therefore in their interests for that gain to be turned to as many dollars as possible.

Loosely speaking, we can say that the western world is based on a system of work for reward. Money is the normal recompense and there is no longer justification for the view that sport is special and different from other vocations. Long has it been argued that its physical, mental and, perhaps even spiritual rewards were all important and that financial returns for participants would take and undermine sport’s intrinsic goodness and values.

This “amateur ethic” has been defended vigorously by some sports, in particular against the wave of commercialism and professionalism. But if talent can usually demand a fee, why is a sportsman or woman treated any differently? Some of the bitterest arguments in sport lie in the amateur/professional discussion and New Zealand has certainly been to the fore in that arena. Only now in the rugby world is there a debate again festering as to “payments” for players representing South African provinces.

The Hillary Commission recently commissioned a report on the business of sport and leisure in New Zealand. The study was undertaken because although sport, fitness and leisure have played a major role in the lives of most New Zealanders, it had never before been measured in terms of its social and economic outcomes. The report revealed that

investment in sport and leisure pays a double dividend, “it is an investment both in the economy and in the well-being of New Zealanders”. The findings included:

- (i) Sport and leisure is a \$4.5 million-a-day business.
- (ii) New Zealand’s sport and leisure industry supports 22,745 jobs.
- (iii) Sport and leisure pays \$300 million a year in taxes.
- (iv) Sport and leisure directly and indirectly contributes \$1,648 million to New Zealand’s gross domestic product.
- (v) Tourism generated by sport and leisure contributed \$210 million and supported 4,013 jobs in 1991.
- (vi) Sport and leisure benefits from \$200 million of free volunteer effort every year.
- (vii) Membership of sport and leisure organisations totals 1.4 million people.

So sport is a big business now in New Zealand. Sport and money are now married or, at least, living together. Their union may be still regarded as an uneasy one with the two partners striving to protect separate codes, interests and priorities. Sports business is a complex mix of activities and enterprises. With the financial opportunities that sport has provided for the entrepreneurs of the world there are very interesting people that the sportsperson must deal with in his or her business. The list is long—agents, coaches, managers, public relations consultants, promoters, manufacturers, sponsors of all kinds, clubs, associations, national sports bodies, the media and many others. It is important for the sportsperson entering into this business world to be properly and carefully advised.

The job of the sports lawyer is to give that careful advice, to remain professional, a lawyer not an agent and to provide the legal guidance required by sportspeople to appropriately benefit from their business. Today in New Zealand there are individual sports stars who can earn substantial incomes from playing sport. It is important when looking at the range of those individuals and those others in the sports business to understand several distinctions—that between amateur and professional, as it still exists or tries to exist for instance in the world of rugby union and athletics, the distinction between team sports and individual sports, and the differences encountered by individuals who belong to clubs or organisations where there are international rules, national rules, and local rules relating to their sports.

To return to the topic of protecting the commercial interests of sportspeople in New Zealand it is important that the lawyer representing such individuals has a full and working knowledge of the sporting code in which that individual participates, or competes, the constitution and rules pertaining to that code on an international and national, and sometimes local level, the rules relating to the competition in which the individual may be participating, and the contracts that that individual might already be a party to, or the contracts that the association to which he or she is affiliated might already be a party to. The background information can be vital and should not be ignored.

Already we are entering into an age where sponsorship contracts are providing disputes because an individual might have a different sponsorship contract from the one later entered into by his or her team. In that respect there was a recent dispute that the Cronulla Sutherland rugby league team in Sydney and their new team sponsor “Reebok” had with

one of its star players, Andrew Ettinghausen, who had a separate boot and clothing contract with another sporting manufacturer.

There are several areas of commercial protection that lawyers should be alerted to when representing sportspeople. Generally speaking, there is no different law or legal concepts which apply to sportspeople as opposed to others, and as a basic premise one should not have to adopt any different stance when representing sports stars as opposed to any other client. It is the high profile of the sports star, the personality politics that come to the fore in New Zealand in sport, the major attention the media pay to our sports stars, and perhaps even the involvement in an area of law which provides novelty and enjoyment which has created a higher interest in the work.

There are a number of areas in which the lawyer can give proper and appropriate advice to a sportsperson and thereby protect commercial interests. They include any contact the sportsperson has with business, the operations of the sports and in particular from my experience:

- (i) sponsorship contracts
- (ii) endorsement contracts
- (iii) player contracts
- (iv) team contracts
- (v) taxation advice
- (vi) advice in relation to disciplinary issues
- (vii) advice in relation to the general rules of competition.

Sponsorship and endorsements

It is vital for a sportsperson to be aware of reasons apart from money for involving themselves in sponsorship or endorsement deals. They must focus on the reputation and integrity they enjoy and the way in which that will be enhanced by linking with some product or goods. Does the endorsement suit the individual? Is there a conflict with any other endorsement? Does it suit the sportsperson's image? Will the endorsement preclude any involvement in any event or any other future endorsement or sponsorship? Are there any restraints imposed by the body to which the individual is a member?

In dealing with sponsorship and endorsement there is a major sub-issue relating to "agents". In the United States of America there have been several major contract disputes between sportsperson and agent, notable are those involving Kareem Abdul-Jabbar and Eric Dickerson. Also prominent in terms of agent disputes was the change made by Stefan Edberg from one agent to another only a few years ago. Lawyers in this country are not agents and should be wary of participating as such. They should however have a working knowledge of the agents who participate in sport in New Zealand, the contracts which they ask individuals to sign, and the terms and conditions of such contracts.

Few people in sport have to take such a hammering as sports agents, although their main crime appears to be to make more money for their clients and take a large commission for themselves. One of the more major complaints in relation to agents is that they wear more

than one hat and thereby create conflicts of interest. For example, IMG is often criticized in the tennis world for owning tournaments, and owning the players who participate in such tournaments. A similar criticism has been made in relation to IMG golf tournaments. There are some well known sports agents in New Zealand and, certainly, their contribution to the business of sport has been very useful and has assisted in advancing sport fairly and squarely into the 20th century. But the sportsperson should be wary of throwing his or her lot in with an agent without having a very complete agreement.

The key for the protection of the commercial interests of the sportsperson is that the agency contract must be clear and plain. There are many examples of contracts going wrong, one of the most famous being the Kevin Keegan case in the UK when he sued his former public relations and promotion company shortly after the 1982 World Soccer Cup.

One key issue went to the heart of the case. Keegan admitted in evidence that he had wrongly believed a written agreement for five years lasted for only three. He lost (*Public Eye Enterprises Ltd v Keegan* (1982) *The Times* 28 October 1982).

Of course, the agent can only succeed for the sportsperson if there is a market. The best agent can make few bricks when there is not much straw. For example, the England 1990 World Cup footballers earned about £30,000 per player from commercial activities and their 1992 cricket equivalents only £4,000.

In endorsement or sponsorship contracts, the lawyer should be alerted to fine detail. It is better included to prevent later misunderstandings. This comment is made although the prevalence in New Zealand is for simple documentation and often non-legal style documents, such as the exchanging of letters. It is perhaps indicative of the amateur ethic and the urge to be non-legal which still prevails. This should be moved to the more professional approach to ensure that the athlete is properly protected.

In endorsement contracts, one should be extremely careful to ensure that the sportsperson is, in fact, going to be portrayed in the way that he or she anticipates. It is often useful to include terms relating to photograph approval, use of name approval, and even some editorial content approval before final documentation is achieved. In conducting sponsorship deals for individuals, one needs to be extremely wary of the prevailing sponsorship deals already reached by his or her association, club or team to ensure there is no conflict.

In the area of endorsements, there are still signs of innocence in the New Zealand market. The range of activities in which a sportsperson could be involved range from cameo roles in commercials at one extreme, to the position where the sportsperson acts as a spokesperson for the company's products. In between are a wide range of opportunities for the sportsperson including:

- (a) tools of trade endorsements;
- (b) tools of trade licensing;
- (c) non-tools of trade endorsements;
- (d) non-tools of trade licensing; and
- (e) group endorsements.

In addition there are other sources of marketing or commercial opportunities for sportspersons such as club and resort affiliations, corporate spokespersons, instructional books and videos, in addition to a greater availability of name product and royalty arrangements, especially in tool of trade type endorsements.

Robert Dowling, former editor of *Sports Marketing News*, gave the following advice on athletes' endorsements:

- (a) individual sports are more popular for endorsement than team sports, golf and tennis being the most popular;
- (b) corporate advertisers prefer to equate their images with individual winners rather than team sport winners;
- (c) winning with style is important to corporate advertisers;
- (d) athletes turn down many endorsements. They either don't believe in the products or they don't want to become overexposed;
- (e) protecting the integrity, name and long term value of the athlete's personality is important;
- (f) it is important not to over-expose the athlete in an endorsement sense. The agent should not be giving the player away, monetarily;
- (g) successful athlete endorsers should earn three times off the field what they earn on the field;
- (h) protect your athlete from over-saturation.

There are key contract provisions in relation to endorsement contracts including, it is suggested:

- (i) **The endorsed products:** any loose definition of endorsed products may result in a wider agreement than required and, thereby, preclude competitive endorsements with other companies. This is obvious in the area of sporting goods.
- (ii) **Contract territory:** this is particularly vital in the realm of international sport when sportspeople are, in fact, competing in many countries around the world. The obvious benefits in having a product endorsement with a company that operates internationally become clear. On the other hand, it is also clear that should a company not operate internationally, then perhaps the endorsement of it should be limited to the country in which it does operate.
- (iii) **Warranties and grants of right:** as mentioned above, it is important that the rights given by the athlete are expressed fully. For example, the right to use the name, nickname, initials, autograph, signature, photograph and the like should be spelled out. Normally there is a requirement relating to exclusivity in relation to the use of the sportsperson's endorsement in relation to the advertising of the product.
- (iv) **Promotional appearances and activities:** it is important for these to be spelled out carefully rather than too generally. There needs to be consideration of reimbursement of out-of-pocket expenses and a restriction on scheduling so that the appearances required do not conflict with the sportsperson's performance or his obligations as a player.

- (v) **Right of approval to promotional material:** there are two matters which arise in this category. One relates to the sportsperson's need to test the equipment that he or she is endorsing, and the other is to approve of the way in which the endorsement is conveyed whether it be by way of advertisement or otherwise.
- (vi) **Compensation:** no need to expand further.
- (vii) **Increase or reduction in compensation:** this clause is important in case there is failure by the athlete to be selected in a certain team, the failure by an athlete to compete and the like.
- (viii) **Bonuses:** are there to be bonuses for performance in the sports sense? This is often used, for instance, in tennis players' endorsement contracts.
- (ix) **Inducement:** is there to be a signing-on fee which may be categorized as a capital payment and, therefore, have tax advantages?
- (x) **In kind compensation:** are there to be such contra deals?
- (xi) **Term of the contract:** this is vital and should be explicit, perhaps with the option clauses as are normally contained in any commercial contract.
- (xii) **Termination of contract;**
- (xiii) **Conduct clauses;**
- (xiv) **Morality and drug use clauses;**
- (xv) **Indemnity and insurance matters;**
- (xvi) **Dispute resolution clause.**

Player contracts

There are obviously two sides to this coin. If one is representing the individual, then there needs to be some care to ensure that some commercial benefits that might otherwise accrue to a player are not eroded by stern or strict clauses in the playing contract. This is an area of negotiation but includes such areas as the ability to participate in any sponsorship deals which conflict with the team's sponsors, bonus fees, clauses which deal with conduct or misconduct, morality or drug use clauses and, of course, termination clauses. In New Zealand, of course, the Employment Contracts Act 1991 means that one must be very careful to determine whether the sportsperson is an employee or an independent contractor, and the implications relating to all issues such as accident compensation, tax and the like are obvious and need not be expounded within this paper.

Similar issues arise in relation to team contracts.

In the Federal Court of Australia in *Honey v Australian Airlines* (1989-1990) 18 IPR 185, the Court held that Gary Honey, the well-known Australian long jumper, could not prevent Australian Airlines and a publishing company from publishing a photograph of him on posters and on the cover of a religious book and magazine. The Court reasoned that the poster did not constitute a representation that Australian Airlines was connected with Gary Honey, that it was permitted or licensed by him in respect of his name and photograph, that its services were sponsored or approved by him or that it was sponsored, approved by or affiliated with Gary Honey. The Court regarded the poster as merely a

piece of artwork supporting participation and excellence in sport, and one that did not represent any connection between the parties. Honey therefore failed to show that the Australian Trade Practices Act 1974 (the equivalent New Zealand provisions being ss 9 and 13(e) and (f) of the Fair Trading Act 1986) had been contravened.

Honey also claimed that without his permission, Australian Airlines and the publishers had exploited his name and identity and that this constituted passing-off. Unfortunately, he failed, the Court saying that he had failed to establish that a reasonably significant number of persons seeing the poster, the magazine or the book would draw or be likely to draw from them the message that Honey had given his endorsement in some way. That seems to be a strange result, but, at present, represents the state of the law in Australia.

Clearly in New Zealand one would need to take particular care if representing any sportsperson to ensure that a similar disaster did not occur. Without commenting on the likely path a New Zealand Court would take it is easy to say that a sportsperson has at present much to lose. The Fair Trading Act in New Zealand is a vehicle that all sports lawyers should be familiar with.

Taxation

This paper has not been written by a taxation expert. It would be wrong however to ignore the area. Below are simple reminders of two or three areas in which taxation matters are vital.

There are occasions in which payments to sportspersons can be regarded as capital payments and therefore not liable for taxation. In this category fall inducement payments, bonus payments, and perhaps benefit payments. Cases in this area include *Jarrold v Boustead* [1964] 3 All ER 76, where an inducement fee to a player to turn to rugby league from rugby union was treated as a capital payment and therefore not subject to income tax. In *Commissioner of Taxation v Woite* (1982) 31 SASR 223, where a football player was made a payment of \$10,000 by the North Melbourne Football Team not to play for any other club, the payment was also regarded by the Court as capital payment. Finally, the bonus payments made to the English Soccer Team in 1966, following their victory in the World Soccer Cup were also regarded as capital payments and therefore not subject to taxation.

A second part of the taxation syndrome in New Zealand is the GST factor and yet a third relates to the individual's tax status. Some international sportspersons are not New Zealanders for taxation purposes. Care must be taken when asking those who compete overseas for much of their income—golfers and tennis players are obvious candidates.

Disciplinary matters

It is very important when acting for any sportsperson in a disciplinary issue to realize the impact that mandatory disqualification, suspension or the like will have on that person's business. The example that the Richard Loe saga sets in that respect needs no amplification. When acting for an individual in such a circumstance it is suggested that one must not only have regard to the playing implications of any disqualification or suspension but must also very carefully consider the results upon business matters. The reason that this

head is raised within the paper as being yet another impact upon a sportsperson's livelihood is exemplified in the case of Martin Vinnicombe in Australia. Vinnicombe was banned from competing in cycling events as a result of a positive drug test taken in Canada under the auspices of the Australian Sports Drug Agency. Litigation has ensued as a result of Vinnicombe's contention that the correct procedures were not followed and huge damages have been claimed by Vinnicombe against a number of sporting organizations as a result of his ban. He claims that the disciplinary action that resulted has prevented him from earning money he would otherwise have earned as a cyclist, and if the ban was defective because the drug test had not been taken properly then he was entitled to sue for the resultant loss of income. A better message could not be sent to all sporting organisations in this country.

Restraint of trade is a topic which has filled many previous articles and has been the subject of two important cases in New Zealand, namely *Blackler v The New Zealand Rugby Football League* [1968] NZLR 547 (CA), and *Kemp v The New Zealand Rugby Football League* [1989] 3 NZLR 463. It is not intended to go into this area at any depth within this paper, but it is useful to be fully aware of restraint matters which could arise following disciplinary hearings.

One must be very careful to ensure that disciplinary proceedings are conducted properly bearing in mind the rules of natural justice and the like and that action when taken, is done according to the rules of the sporting code. If a player is restrained improperly or illegally then sporting bodies might expect claims for big damages.

In addition all sporting organizations should look carefully at their rules, constitutions or by-laws which affect players and the ability that sportspersons have to compete in that code. Quite clearly in New Zealand a number of sports have rules or constitutions which were formulated in the earlier part of this century. They are now much outmoded and require not piecemeal amendments but wholesale changes to ensure the code is meeting with the needs of the sport at this time. There are many sports which have not moved with the times and which would currently leave themselves open to claims such as restraint of trade if their rules or constitutions are not amended. Change has occurred rapidly in society, and sport is moving with such change in this country but still at a slower rate. The sooner this is realised the sooner the interests of the sportspersons will be better protected. Further, sports organizations will be alert to the fact that with the increased business nature of sport, the awareness of the need to be professional and legal, the chances of being wrong and being sued are multiplying. It is in the interests of all sportspersons that certainty is achieved in business arrangements and that disputes are minimised.

Conclusion

The two languages of sport and business have not always merged. At the local level, sport remains the corner shop, run by the family. When it gets bigger it becomes a self-help co-operative staffed by volunteers. It has got bigger still now and must be seen as the high-rise department store run by professionals. As Bob Dylan said, "money doesn't talk, it swears". Sport and business are inextricably entwined and the need for professional assistance is obvious. Sporting individuals must be given high quality high class professional advice to ensure that their limited life at the top is properly compensated.

