IN THE MATTER OF:

THE HORSERACE BETTING LEVY BOARD

AND

THE LIABILITY OF USERS OF BETTING EXCHANGES TO PAY THE HORSERACE BETTING LEVY

JOINT OPINION

A. Summary of opinion

1. We are asked to advise the British Horseracing Authority, the Racecourse Association and the Horsemen's Group (together "Racing") whether certain users of internet betting exchanges are capable of being regarded as leviable bookmakers, who are required to pay the Horserace Betting Levy ("the Levy").

2. We have been provided with copies of opinions prepared for the Horserace Betting Levy Board ("the Board") by Mr Michael Fordham QC and Lord Pannick QC, a consultation paper issued by the Board on 2 July 2010 and the publicly available responses to the consultation. This Joint Opinion should be read alongside those documents which summarise the purpose of the consultation and the development of internet betting exchanges.

3. Mr Fordham QC and Lord Pannick QC have both concluded, as a matter of statutory construction, that users of betting exchanges are not capable of being regarded as leviable bookmakers. The essential reasons for their conclusions are that they contend that:

a) users of betting exchanges are not to be regarded as "bookmakers" as defined at section 55 of the Betting, Gaming and Lotteries Act 1963 ("the 1963 Act"); and

b) the activities of betting exchange users may not be regarded as "effecting betting transactions on horse races" which is a necessary condition for being a leviable bookmaker within the scope of section 27(2) of the 1963 Act.

4. In summary, for the reasons set out below, we disagree with the opinions of Mr Fordham QC and Lord Pannick QC, and, in particular, with their very narrow interpretation of the phrases "receiving and negotiating bets", and "effecting betting transactions". It is our view that certain users of internet betting exchanges are in fact capable of being regarded as leviable bookmakers.

5. Given the existence of differing opinions on this issue of law, which has significant practical consequences for the funding of horseracing, the Board may wish to consider applying to the High Court for a declaration under Part 8 of the CPR.

6. Alternatively, it would be open to Racing to apply for judicial review of any decision of the Board refusing to charge the Levy on users of betting exchanges who are carrying on business as bookmakers, and using betting exchanges for the purposes of betting on horseracing.

B. The Levy

7. The scope of the Levy is governed by section 27(2) of the 1963 Act[1]:

> (2) Any such scheme shall include provision-
>
> > (a) for securing that the levy shall be payable only by a bookmaker who carries on on his own account a business which includes the effecting of betting transactions on horse races, and only in respect of so much of the business of the bookmaker as relates to such betting transactions.

8. Section 55 contains interpretation provisions:

[1] The 1963 Act was repealed by the Gambling Act 2005 but sections 24-30 and the definitions in section 55 remain in force for the purposes of assessing the Levy. See Article 2 of the Gambling Act 2005 (Horserace Betting Levy) Order 2007 (SI 2007/2159).

> "betting transaction" includes the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a bookmaker;
>
> "bookmaker" means any person other than the Totalisator Board who-
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> > (a) whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets or conducting pool betting operations; or
> >
> > (b) by way of business in any manner holds himself out, or permits himself to be held out, as a person who receives or negotiates bets or conducts such operations...[2]
>
> and the expression "bookmaking" shall be construed accordingly;

9. The concept of "effecting betting transactions" is used throughout the 1963 Act. Sections 1 and 9 (now repealed) prohibit the use of unlicensed premises for "effecting... betting transactions". By section 21 (also now repealed) it is an offence to employ a young person "in the effecting of any betting transaction" save for in "the employment of a young person in the effecting of betting transactions by post".

10. The current Levy Scheme is the 50th Scheme[3]. It provides for the collection of the Levy from:

> Every person who is a Bookmaker (as defined in paragraph 36 below) and who carries on, on his own account, at any time in the Fiftieth Levy Period a business which includes the effecting of betting transactions on horse races...

11. The amount of levy payable is determined by the category into which the Bookmaker (as defined) falls. The relevant category for present purposes is Betting Activity 1.4:

> British Horseracing Betting Business by use (as distinct from operation) of one or more Betting Exchanges and/or Bet-brokers.

12. Paragraph 36 of the Scheme contains definitions:

> (3) "Betting Exchange" means a person carrying on betting exchange business as defined in section 5C of the Betting and Gaming Duties Act 1981...
>
> (8) "Bookmaker" means such a person as defined by section 55(1) of the Betting, Gaming and Lotteries Act 1963 (as that provision had effect immediately before 1st September 2007)...

[2] A "bookmaker" is defined in materially identical terms in section 12 of the Betting and Gaming Duties Act 1981, which provides for the imposition of general betting duty.
[3] The 50th scheme is materially identical to the 49th scheme, which was applicable when the consultation paper was issued.

(11) "British Horseracing Betting Business" means the business of effecting betting transactions by Bookmakers on horse races, where such races take place anywhere in England, Wales, or Scotland, whether such business is carried on personally or through servants or agents and whether carried on by post, telephone or in any other manner whatsoever. This includes the carrying on of such business through the medium of a Betting Exchange or a Bet-broker, carried out by whatever means.

13. At present, the approach of the Levy Board is that a 'traditional bookmaker' will pay Levy for its use of an internet betting exchange insofar as that use concerns British Horseracing Betting Business. However, the Levy Board has not sought to collect Levy from any other users of internet betting exchanges. The purpose of the current consultation is to assist the Board in deciding whether these practices are lawful.

C. Scope of the Levy

14. The Levy is only payable:

a) by a bookmaker as defined at section 55 of the 1963 Act;

b) who carries on on his own account;

c) a business;

d) which includes the effecting of betting transactions on horse races;

e) in respect of so much of the business as relates to such betting transactions.

We analyse each of these conditions below.

A bookmaker

15. A bookmaker is a person who carries on the business of receiving or negotiating bets (section 55 of the 1963 Act).

16. The act of receiving a bet includes, but extends more broadly than, receipt of a stake. A person can receive a bet even if no stake changes hands, as when a bookmaker offers credit. It is thus no bar to the activity of "receiving a bet" that the stake is held by a third party (as when, in the case of a betting exchange, two users bet with each other, and the exchange holds the stake).

17. On the traditional bookmaking model as envisaged by Parliament in 1963, the bookmaker would be regarded as "receiving" the bet which is made by the punter. These activities might be regarded as translating into the activities of "layers" and "backers" using betting exchanges. On such an analysis, only those laying bets on betting exchanges would be regarded as receiving them. However, we doubt that there is in fact any meaningful distinction to be made between backing and laying in the context of a betting exchange that matches backers and layers. We consider that both a backer and a layer on a betting exchange may be regarded as receiving a bet. As Lord Pannick QC put it in his opinion:

> 29. On one view, "receiving or negotiating bets" in section 55 is sufficiently wide, on its face, to include all customers of betting exchanges... "Receiving" is, however, potentially an extremely wide term. As set out above, bets through betting exchanges may be either "back" or "lay" bets: in either case, the bet is placed by one party, and thereafter "received" by the other (whether a layer or a backer).

18. We agree with this analysis. The transaction between the backer and layer on a betting exchange necessarily involves the making of the bet by one party, and its receipt by the other. We would add that both parties are in addition "negotiating" the bet, since they identify the odds which they are prepared to offer or accept.

19. However, Lord Pannick QC rejected this interpretation of "receiving" in the following paragraph of his opinion:

> 30. But it is inconceivable that Parliament would have intended all customers of betting exchanges, whether backing or laying, to be caught in this way. Its aim, in enacting the 1963 Act, was to ensure that bookmakers (and not traditional punters) were subject to appropriate regulation.
>
> 31. "Receiving or negotiating bets" therefore requires some reading down...

20. We agree that Parliament did not intend 'traditional punters' to be included as bookmakers. However, there is no need to read down the phrase "receiving bets" in order to achieve this result. Such customers will not be "carrying on ... the business of receiving or negotiating bets" (section 55 of the 1963 Act). The requirement of "carrying on a business" ensures that "traditional punters" are not to be regarded as

bookmakers, and are thus not caught by the Levy Scheme. We therefore disagree that the phrase "receiving or negotiating bets" requires reading down because it otherwise has results that are "inconceivable" or absurd, as Lord Pannick QC argued.

21. Lord Pannick QC supported his conclusion by reference to the licensing regime under the Gambling Act 2005 ("the 2005 Act"):

> 38. Licensing is now governed by the 2005 Act, and traditional bookmakers (and betting exchanges and trading rooms) are required to have one or more operating licences from the different categories of licence set out in section 65 of the 2005 Act. As set out above, a general betting operating licence is required for anyone who "provides facilities" for betting. "Providing facilities" for betting is defined, in section 5 of the 2005 Act (read with section 3) as including inviting others to bet in accordance with arrangements made by the facilitator; providing, operating or administering arrangements for betting by others; or participating in the operation or administration of betting by others. <u>These definitions are apt to cover the activities of betting exchanges and traditional bookmakers; they are not apt, in my view, to cover the activities of punters, even where they are layers.</u> None of the other categories of licence in section 65 of the 2005 [Act] appears apt to apply to punters either. (emphasis added).

22. However, at the time of the passage of the 2005 Act, it was intended that the Levy would be abolished. Racing was to be funded by commercial relationships between the bookmakers and the sport, based on the sale of intellectual property licences. The 2005 Act thus provided (at section 356 and Schedule 17) for the repeal of the whole of the 1963 Act. It was only as a result of the decision of the ECJ in *Case C-203/02 British Horseracing Board v William Hill* that this policy was reversed, and those sections of the 1963 Act that governed the raising of the Levy were preserved.

23. It is accordingly impossible to draw any inference from the licensing provisions in the 2005 Act as to the proper scope of the Levy under the 1963 Act. In particular, there appears to us no reason to conclude that the concept of "providing facilities for betting" under the 2005 Act should be construed as being the same as "receiving or negotiating bets" under the 1963 Act. On the contrary, the use of very different language suggests a different intention in the later statute.

Own account

24. This term causes no particular difficulty in the present context. A user of an online betting exchange placing bets in the hope of making profits will be acting on his or her own account.

A business

25. We agree with Mr Fordham QC that "it is not convincing to say that customers of betting exchanges are incapable of meeting the 'business' requirement, properly approached" (paragraph 73). Lord Pannick QC reaches the same conclusion (paragraph 27). For example, it is clear that traditional bookmakers who use betting exchanges (whether to hedge their risk or otherwise) are doing so in the course of their business. Moreover, it is very likely that a user of a betting exchange who undertakes a large volume of betting transactions, who has invested in sophisticated computer systems for the purpose, who systematically hedges his risk, and who makes consistent profits would be carrying on a business. We note that Betfair's charging structure envisage precisely this type of operation. Additional charges are levied for customers who place over 1,000 bets *per hour* and for other extremely heavy users of their services. See the description of the Betfair charging structure annexed to the Supplementary Advice of Sir Philip Otton.

26. We concur with Mr Fordham QC's summary at paragraph 72 of his Opinion:

> As to "business", there is no reason why the customer of the betting exchange cannot be seen as satisfying this statutory concept. Whether it does so will be a question of fact and judgment, which would need to be answered after a fair process of due inquiry.

Effecting betting transactions on horse races

27. Both Mr Fordham QC and Lord Pannick QC interpret "effecting" narrowly. Their analysis of this term is the primary reason for their conclusion that users of betting exchanges are not capable of being regarded as leviable bookmakers.

28. Mr Fordham QC defines "effecting" as follows:

> 32. The most natural and convincing interpretation of the specified-business described by Parliament is one which focuses on business activities of 'arranging' betting transactions. In other words, the specified business is concerned with 'making the arrangements for' betting transactions to happen; it is concerned with 'making them happen'; with 'bringing them about'; with 'causing them to happen'.
>
> 33. ... It is the natural meaning of "effecting".

29. Lord Pannick QC reaches the same view:

> 32. The everyday meaning of effecting is "bringing about" or "facilitating". If this meaning were adopted, as I consider it should be, the effect would be that "effecting betting transactions" meant "facilitating" or "bringing about" betting transactions. This would be apt to cover traditional betting agencies, which make a book, enabling punters to lay stakes at particular odds: and the betting exchanges, which, although not in existence at the time of the 1963 Act, operate to bring layers and backers together, so facilitating, or bringing about, betting transactions between them. A statutory phrase need not be confined to the understanding of the relevant term as at the date of enactment: see Yemshaw v Hounslow LBC...
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> 33. But layers and backers do not "facilitate" or "bring about" bets: they use services provided for them by third parties to place bets: the betting transaction is "effected" when the betting exchange matches that bet with another corresponding but opposing bet. The traditional betting agency "facilitates" a betting transaction by specifying the odds and inviting bets...

30. In summary, Mr Fordham QC's conclusion is that "it is unconvincing to speak of the customer of the betting exchange as arranging the bet or betting transactions; of causing it to happen; of bringing it about" (paragraph 75). Lord Pannick QC concludes that "effecting" means "facilitates" or "brings about", but that the concept does not include a person who merely places a bet.

31. We do not agree that these definitions of the term "effecting" in section 27(2) of the 1963 Act are correct.

32. The natural meaning of "effect" used as a verb is "to cause something to happen" or "bring it about" (OED Online). The word certainly *includes* "arranging" or "facilitating" a transaction, as Mr Fordham QC and Lord Pannick QC argue, but (crucially) it is not *limited* to those activities. There is no basis for interpreting it as including the arranger or facilitator of a transaction, but as *excluding* the parties who actually agree to enter into, and do enter into, that transaction. We consider that both

the "arranger" and the parties who enter into the transaction are "effecting" or bringing about the transaction.

33. The correctness of our interpretation is confirmed by a line of authority which is inconsistent with the construction adopted by Mr Fordham QC and Lord Pannick QC, but which is not considered or discussed in their opinions.

34. "Effect" used as a verb is a term that first appeared in the predecessor to the 1963 Act, the Betting and Lotteries Act 1934 ("the 1934 Act"). Section 3(2) of the 1934 Act provides:

> Save as is permitted by the preceding sub-section, no person shall use any premises whether situate on a track or not, or cause or knowingly permit any such premises to be used, as a place where persons resorting thereto may effect pari mutuel or pool betting transactions.

35. The meaning of "effect... betting transactions" in the 1934 Act was considered by the Divisional Court (Lord Hewart CJ, Charles and Humphreys JJ) in *Stovell v Jameson* [1940] 1 KB 92. Jameson acted as a collector for football pools. Customers delivered completed coupons and sums of money owing. Jameson then forwarded the coupons and money to the promoter by post. He was prosecuted for a breach of section 3(2) of the 1934 Act.

36. Lord Hewart CJ explained the meaning of the phrase "effect... betting transactions" at [96-97]:

> The draftsman had to use some verb if he was going to use a word like "transactions," and perhaps an obvious verb was "effect," but what does this expression "may effect pool betting transactions" mean? Does it mean "carry out the process of making the transaction to the last possible step, so that it is a complete, rounded, accomplished whole"? I do not think that the mind of the Legislature was directed to any such point. The mischief aimed at was the user of places where persons resorting thereto might come and bet or make bets, and I think that the word "effect" is used to convey what had been said again and again in various antecedent cases, namely "the doing of a substantial part of the business of "betting," "the carrying out of an essential part of the "system," or "the completion of a material and necessary step for the purpose."
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> ...

> I think that it is really artificial and fantastic to seek to extract out of these words, "may effect betting transactions," something more comprehensive on the one hand, or more detailed on the other, than one would gain from the use of an ordinary simple verb.
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> ...
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> The important words, in my opinion, are the words "may effect betting transactions." What do they mean? Is it true to say that a betting transaction is not, within the meaning of this section "effected," unless and until every step is completed and the bet which is offered has been formally and authoritatively received? In my opinion, the plain meaning of these words is different from that, and the offence is committed, the mischief arises, if that which is done is a substantial part of the business of betting. (emphasis added)

37. Charles J and Humphreys J agreed. Charles J held at [97]:

> It is very difficult to understand why effecting a betting transaction should be regarded as meaning anything other than betting.

38. In *Zeidman v Owen* [1950] 1 All ER 290 a differently constituted Divisional Court (Lord Goddard CJ and Lynskey J) approved *Stovell v Jameson* and upheld the conviction of another football pools collector.

39. The draftsman of the 1963 Act should be taken to have been aware of this line of authority when he decided to continue to use the same phraseology. The way in which the word or phrase has been construed in the 1934 Act is thus an important aid to the construction of the 1963 Act: see *A v Hoare* [2008] 1 AC 844 at [15] per Lord Hoffmann.

40. Indeed, after the 1963 Act had come into force this point was confirmed in *Heaney v Smith* [1964] 1 All ER 336 (HHJ Chapman) at [339]:

> I should perhaps deal first with a subsidiary contention raised by counsel for the respondent based on the phrase "betting transactions are effected on those premises". He said that unless and until the punter's offer was accepted, it could not properly be said that a betting transaction was effected, relying on the ordinary principles of contract law to this effect and underlining the express words of the William Hill coupon "if it is accepted by you." What was contemplated therefore was the effecting of betting transactions with the licensee of the betting office, any other transaction being

left untouched. This argument at first sight was rather attractive. It seems to me, however, to be completely undermined by the decisions in *Stovell v Jameson* and *Zeidman v Owen*.

These cases decided that for the purposes of the earlier legislation a betting transaction was effected whenever a substantial part of the transaction, such as the handing in of a betting slip or coupon plus the stake, took place. The draftsman must plainly, I think, have had these cases in mind when framing the new legislation... [emphasis added]

41. In light of these authorities, as well as the natural meaning of the word, we construe the phrase "effecting of betting transactions on horse races" in section 27(2)(b) of the 1963 Act, and its application to users of betting exchanges, as follows:

a) A "betting transaction" includes any transaction in which one or more of the parties is acting as a bookmaker (i.e. carrying on "the business of receiving or negotiating bets" – section 55 of the 1963 Act).

b) Accordingly, an internet betting exchange transaction on a horse race in which one or both of the parties is a "bookmaker" will be a relevant betting transaction.

c) In accordance with *Stovell v Jameson* and later authorities, the term "effecting" in the 1963 Act encompasses doing any substantial part of the business of betting on horses, any essential part of the "system" or the completion of a material and necessary step for the purpose of the bet.

d) A user of an internet betting exchange betting on a horse race:

i) sets or selects odds;

ii) determines how much money he or she wishes to risk;

iii) agrees to undertake a particular risk;

iv) enters into the actual bet with another user; and

v) (where appropriate) is the source of the funds which are used to pay out on the bet.

e) Each one of the above steps is a substantial part of the business of betting on horses; an essential part of the system of betting on a betting exchange, without which the betting transaction could not occur; and, moreover, constitutes the completion of a material and necessary step for the purpose of the bet. Users of betting exchanges are accordingly effecting betting transactions.

42. Our interpretation of "effecting" applies equally to traditional bookmakers who use betting exchanges. If they are acting as a "bookmaker" in placing bets using betting exchanges, they should continue to pay Levy.

So much of the business as relates to such betting transactions

43. This term causes no difficulty in the present context. A user of an online betting exchange who is a bookmaker will be liable to pay the Levy for betting transactions on horse races, but not for other types of betting.

D. Conclusions

44. Our conclusions are that:

a) some users of betting exchanges are capable of being leviable bookmakers pursuant to the 1963 Act;

b) it is a question of fact whether particular users of betting exchanges are carrying on the business of receiving or negotiating bets, so that they are properly to be regarded as bookmakers; and

c) the Levy Board ought not proceed with the proposal to cease to raise the Levy from traditional bookmakers who use betting exchanges as part of their business, for the purpose of betting on horse racing.

45. We agree with Mr Fordham QC and Lord Pannick QC that the proper scope of the Levy is a pure question of statutory construction (Fordham QC at paragraph 85, Lord Pannick QC at paragraphs 15 and 24). We also agree that it is only the Courts who can authoritatively decide the proper interpretation of the 1963 Act (Fordham QC at paragraph 86). In these circumstances, the Levy Board may wish to consider bringing

a Part 8 claim for a declaration as to the true construction of the 1963 Act, joining all interested parties as Defendants. This will ensure that the Board proceeds lawfully.

46. The relevant principles for such an application were summarised by Lord Steyn in *R (Rusbridger) v Attorney General* [2004] 1 AC 357 per Lord Steyn:

a) First, the Court has jurisdiction to make a declaration (in civil and, more exceptionally, criminal matters) [16-17].

b) Secondly, there must be a genuine dispute about the subject matter [22].

c) Thirdly, the Court is less likely to be willing to make a declaration in disputes that are fact sensitive. However, "a question of pure law may more readily be made the subject matter of a declaration" [23].

d) Finally, there must be a cogent public or individual interest which could be advanced by the making of a declaration [24].

47. Where a regulator wishes to seek clarification of its legal position, a Part 8 claim is an appropriate procedure. See *Human Fertilisation & Embryology Authority v Amicus Healthcare and others* [2005] EWHC 1092 (QB).

48. We consider that each of the criteria identified by Lord Steyn in *Rusbridger* are satisfied:

a) As can be seen from the consultation responses and from the consultation paper itself there is a genuine dispute on a matter of considerable importance to the betting and horseracing industry.

b) The issue is not fact sensitive. It involves a question of pure law.

c) There is a cogent public and private interest in the resolution of this dispute. It is in the public interest that Levy is collected from those businesses required to pay it, in order to support horseracing in the United Kingdom. There is also an important issue of fairness between different types of bookmaker.

49. If the Levy Board are unwilling to follow this course, it would be open to Racing to bring a claim for judicial review of any decision:

a) not to collect Levy from customers of betting exchanges who are in business as bookmakers; or

b) not to continue to apply Betting Category 1.4 in the Levy Scheme (use of betting exchanges by 'traditional bookmakers').

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