

**Racing's response to the Opinions obtained
by the Horserace Betting Levy Board from
Michael Fordham QC and David Pannick QC**

8 April 2011

**Response to the Opinions obtained by the Horserace Betting Levy Board ("the Levy Board")
from Michael Fordham QC and Lord Pannick QC by the British Horseracing Authority, the
Racecourse Association and the Horsemen's Group (together "Racing")**

1. INTRODUCTION

- 1.1. This paper with its accompanying documents, sets out Racing's response to the legal opinions ("the Opinions") of Michael Fordham QC (dated 5 December 2010) and Lord Pannick QC (dated 3 March 2011) obtained by the Levy Board as part of the consultation it launched on 6 July 2010 into the Levy liability of betting exchanges and their customers.
- 1.2. Accompanying this paper are two further legal opinions which Racing has obtained in relation to the same issues from:
- (a) Dinah Rose QC¹, a leading public law silk, and Ben Jaffey², a leading public law junior; and
 - (b) Kevin Prosser QC, a top-tier rated tax law silk and Deputy High Court Judge.

2. MR FORDHAM AND LORD PANNICK'S CONCLUSIONS

- 2.1. The key conclusions reached by Mr Fordham and Lord Pannick (as summarised in the Herbert Smith note dated 3 March) were as follows:
- (a) On the proper construction of the Betting, Gaming and Lotteries Act 1963 ("the 1963 Act"), the Levy provisions do not apply to customers of betting exchanges.
 - (b) It is possible that some users of betting exchanges are carrying on a business.
 - (c) However, a user of a betting exchange does not carry out the sort of business specified by the relevant provisions of the 1963 Act – namely, carrying on a business of receiving or negotiating bets and effecting betting transactions.
 - (d) That applies also to traditional bookmakers using betting exchanges.
- 2.2. These conclusions are underpinned by Leading Counsel's interpretation of the term "*effecting betting transactions*" in section 27(1) of the 1963 Act as requiring some quality of "*facilitating*" or "*arranging*" the transactions over and above the ordinary meaning of the word "*effecting*".
- 2.3. Mr Fordham for example equates "*effecting*" with "*making the arrangements for*" betting transactions, "*making them happen*", "*bringing them about*" and "*causing them to happen*", whilst Lord Pannick considers the term to mean the "*facilitating*" or "*bringing about*" of betting transactions.

¹ Ms Rose was Counsel for Sporting Options in its successful Judicial Review of the Levy Board's decision on the 42nd Levy Scheme, in relation to which the Levy Board was represented by Mr Fordham and Lord Pannick. She was Barrister of the Year in 2009.

² Mr Jaffey was the Public Law and Human Rights Junior of the Year in 2010.

3. RACING'S VIEW

3.1. It is the view both of Racing, and collectively of Ms Rose, Mr Jaffey and Mr Prosser, that this interpretation of the term "*effecting betting transactions*" in the Opinions is demonstrably incorrect and that properly construed, this term would plainly include the activities of customers on betting exchanges. The issue is in particular put beyond doubt for two reasons.

(a) The term "*effecting betting transactions*" has been definitively determined for these purposes by the Court, albeit in authorities not referred to or addressed by Mr Fordham or Lord Pannick.

(b) The term "*effecting betting transactions*" is used in section 1 of the 1963 Act in a manner which is inconsistent with the interpretation of Mr Fordham and Lord Pannick and consistent only with an interpretation which includes the activities of customers of betting exchanges.

3.2. As regards the authorities, the case of *Stovell v Jameson*³ dealt with exactly this point in the context of the Betting and Lotteries Act 1934, a precursor to the legislation with which we are presently concerned. In that case, the issue was over the phrase "*may effect pari mutuel or pool betting transactions*". In construing that phrase, Lord Hewart held:

"There is no magic about the word 'pool'. There is no magic about the interpolation of words about 'pari mutuel'; it is: 'may effect betting transactions'. ...

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 the mind of the legislature was directed to any such point. ... I think it is only another way of saying what had been said again and again in various antecedent cases ... 'where a material and necessary step for the purpose is completed'. ...

I think 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, more detailed on the other hand, than one would gain from the use of an ordinary simple verb."

3.3. This view was affirmed in the case of *Zeidman v Ower*⁴, and subsequently applied to the 1963 Act in the case of *Heaney v Smith*⁵, in which Judge Chapman expressed the view that "*the draftsman must plainly, I think, have had in mind [the cases of Stovell and Zeidman] when framing the new legislation [the 1963 Act].*"

3.4. The same view is reached from an analysis of the earlier provisions of the 1963 Act itself, section 1 of which provides:

³ [1939] 4 All ER 76

⁴ [1950] 1 All ER 290

⁵ [1964] 1 All ER 336

Subject to subsections (4A) and (5) of this section and section 9(1) of this Act, no person shall—

- (a) save as permitted by section 4(1) of this Act, use any premises, or cause or knowingly permit any premises to be used, as a place where persons resorting thereto may effect pool betting transactions; or*
- (b) use, or cause or knowingly permit any other person to use, any premises for the purpose of the effecting of any other betting transactions by that person or, as the case may be, that other person with persons resorting to those premises;*

and every person who contravenes any of the provisions of this subsection shall be guilty of an offence." (emphasis added)

- 3.5. This provision was plainly intended to prohibit ordinary punters going into premises (unless those premises were licensed) and entering into bets. In this context it would be absurd to imbue the word "effecting" as requiring the additional qualities of "arranging" or "facilitating" that Mr Fordham and Lord Pannick seek to do, as the mischief to which the provision is directed undoubtedly includes simply the actual entering into of the betting transaction.
- 3.6. Bearing in mind that the Opinions turned specifically on the issue of the interpretation of the term "effecting betting transactions" (it is for example correctly accepted in the Opinions that some users of betting exchanges are likely to be in business⁶, and that the "receiving and negotiating" of bets could be said to include all customers of betting exchanges⁷), it follows that on the analysis of Mr Fordham and Lord Pannick, but adopting the correct interpretation of the term, exchange customers are indeed potentially liable for Levy.

4. CONCLUSION

- 4.1. For these reasons, and for the reasons additionally set out in more detail in the Opinions of Ms Rose, Mr Jaffey and Mr Prosser, it is clear that it would be an error of law for the Levy Board to accept the conclusions reached by Mr Fordham and Lord Pannick.
- 4.2. Moreover, adopting their own analysis but subject to this definitively correct interpretation of the term "effecting betting transactions", it is clear that exchange customers are indeed potentially liable for Levy.

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⁶ Lord Pannick (para 27): "I agree with MF that it is at least possible that certain customers or betting exchanges could be held to be carrying on a business, given the frequency with which, and the manner in which, they place bets on the exchanges. That requirement is therefore potentially satisfied in relation to those who carry on business as layers and/or backers."

⁷ Lord Pannick (para 29): "On one view, 'receiving or negotiating bets' in section 55 is sufficiently wide, on its face, to include all customers of betting exchanges".