

# Case Report: Attheraces v The British Horseracing Board

Date of publication: February 3 2006

## ATThERACES Ltd v THE BRITISH HORSE RACING BOARD<sup>1</sup>

**The British Horseracing Board ('BHB'), already reeling from the unexpected decision in British Horseracing Board Limited -v- William Hill Organisation Limited<sup>2</sup>, has lost another important High Court action, which has further limited its ability to exploit the commercial rights in pre-race data as it sees fit.**

The BHB produces a database of pre-race data on UK race meetings highlighting names, venues and dates of races, as well as distances of the races, criteria for eligibility to run and entry lists of runners and riders. This information was licensed to Attheraces Ltd ('ATR'), for use in their audiovisual coverage of races; in turn distributed to bookmakers. The dispute arose in the early part of 2004 following BHB's attempts to obtain additional fee income from the supply by ATR of the pre-race data to overseas users. BHB threatened to suspend supply of the data if ATR did not agree to its terms.

ATR was successful in its application for an injunction in 2005 preventing the suspension of supply of the data. It successfully argued that the position adopted by BHB represented an abuse of its dominant position in the market for the supply of pre-race data, and that this was an unlawful breach of Chapter II of the Competition Act 1998 ('the Competition Act') and of Article 82 of the EC Treaty both of which prohibit the abuse by an operator of a dominant market position.

At trial, the Court was faced with having to make a decision by reference to two initial issues:

1. What was the relevant market? The more widely the market was drawn the less likely that BHB would be found to have had a dominant position to abuse. Accordingly, BHB argued that the relevant market was the supply of both British pre-race data and British racing pictures. That contention ultimately failed and the court held that the market was for British pre-race data outside the UK and Ireland.
2. Was BHB dominant in that market? The court relied in particular on the absence of downstream market constraints in concluding that the BHB did enjoy a dominant position.

Having decided that the BHB had a dominant position in the relevant market, the court had to rule on whether it had abused that dominant position. It was unequivocal in concluding that there had been unlawful abuse. This was because:

1. Supply was effectively refused because the terms on which it was ostensibly offered were patently unreasonable. Moreover, the court made clear that the pre-race data - forming part of the subject-matter of the dispute was an essential facility for downstream operators such as ATR, whose participation in the market was impossible without it. The essential facility doctrine is an aspect of competition law which has been developed by the European Court of Justice, whose judges have gradually widened its scope and refined its application over recent years. Although it has not traditionally been applied to intellectual property, the principle that a dominant firm must under

---

<sup>1</sup> [2005] EWHC 3015 (Ch); Judgment given on 21 December 2005

<sup>2</sup> [2005] EWCA Civ863

certain circumstances, share certain of its facilities with a rival has begun to take root in intellectual property cases decided by the court<sup>3</sup>.

2. BHB's pricing had been excessive since it bore no reasonable relationship with production costs, nor did it represent a reasonable return on investment.
3. BHB's pricing policy had unfairly discriminated against ATR as compared with third party licensees who had not distributed the pre-race data overseas. The court ruled that the distribution of the data overseas did not justify the substantial price differential.

BHB's ability to exploit its data has been further eroded by this decision. The earlier decision in the William Hill litigation<sup>4</sup> that it enjoyed no database rights in the pre-race data had deprived it of the relatively unfettered monopolistic control that intellectual property protection provides. This had seriously dented BHB's commercial bargaining power in the exploitation of the pre-race data and has had profound industry-wide implications; not least of which was the government's decision to retain the Tote Levy as a means of its financing instead of abolishing it in the expectation that revenues could be generated instead by the commercialisation of the BHB's data rights.

Ultimately, the financial pressures on BHB to maximise their revenues appear to have contributed to their adoption of a bargaining position that fell outside the parameters permitted under competition law. Certainly, BHB's rights are no longer intellectual property, but contractual. And the contracts underpinning those rights are subject to domestic and European competition law. The court need never have made this important ruling had BHB adopted a less aggressive position in seeking payment for the licensing of its commercial rights. Moreover, data owners will need to be circumspect in threatening to withhold supply as a bargaining chip given the court's ruling in respect of the essential facilities doctrine. It remains to be seen whether the owners of commercially valuable data in the sports business will be able to adjust their perspective and perhaps lower their revenue expectations in light of the judgment.

*For further information on these issues, please contact:*

*Adrian Rubenstein*  
*Tel: 020 7611 9668*  
*Email: [adrian.rubenstein@couchmanharrington.com](mailto:adrian.rubenstein@couchmanharrington.com)*

*Or*

*Dan Harrington*  
*Tel: 020 7611 9662*  
*Email: [dan.harrington@couchmanharrington.com](mailto:dan.harrington@couchmanharrington.com)*

---

<sup>3</sup> See for example IMS Health, ECJ Judgment C-418/01

<sup>4</sup> See *ibid*