R v Disciplinary Committee of the Jockey Club, ex p. The Aga Khan [1992] APP.L.R. 12/04

CA on appeal from QBD before Sir Thomas Binqham MR. Farquharson LJ; Hoffmann LJ. 4th December 1992.

THE MASTER OF THE ROLLS:

1. On 10th June 1989 the filly Aliysa, owned by his Highness the Aga Khan, won the Oaks at Epsom. In a routine examination after the race, a metabolite of camphor was said to be found in a sample of the filly's urine. Under the Jockey Club's Rules of Racing camphor was a prohibited substance and the Disciplinary Committee of the Jockey Club held an enquiry. On 20th November 1990 the committee ruled that the urine contained a metabolite of camphor, that the source of the metabolite was camphor, that the filly should be disqualified for the race in question and that the filly's trainer should be fined £200.

2. The Aga Khan sought leave to move for judicial review of the committee's decision. In granting leave Macpherson J. suggested trial of a preliminary issue whether the committee's decision was susceptible to judicial review. This suggestion was adopted, and on 3rd July 1991 a Queen's Bench Divisional Court (Woolf L.J. and Leonard J.) ruled against the Aga Khan on this issue. In reaching that conclusion the court was much influenced by earlier authority, from which it held it should not depart.

3. The Aga Khan (hereafter the applicant) challenges that conclusion. The issue squarely raised before this court is whether the Jockey Club's decision here in issue can be challenged by judicial review.

4. The substance of the complaint, which is that the committee's proceedings were vitiated by fundamental unfairness, is not germane to this jurisdictional issue. Nor are the underlying facts. It should, however, be recorded that neither the applicant nor the trainer were said to have caused or connived at the doping of the filly. No source of camphor was identified. The filly's performance was not said to have been affected. The case rested on the presence of the metabolite, held to derive from camphor (a prohibited substance), in the urine. But the applicant deposes that the decision was damaging to his standing as a religious leader. It was plainly damaging to his reputation as a very major horse-owner and breeder. It deprived him of the prize money for this classic race. And it greatly depreciated the value of the filly for breeding purposes.

The facts

5. For purposes of this appeal I must attempt to describe, necessarily in very general terms, the salient features of the British racing industry and the role of the Jockey Club within it.

6. The evidence before the court makes plain that racing is aptly described as an industry. There are 59 active race courses in Great Britain which in 1990 attracted nearly five million race goers to over 1,000 meetings with some 7,000 races, 69,000 runners and prize money of nearly £48 million.

7. The turnover of off-course betting subject to the Levy on Horserace Betting in 1989-90 was some £4 billion. In the same period General Betting Duty (not all derived from bets on horseracing) yielded revenue of some £327 million. It has been estimated that over 100,000 people depend for their livelihood on racing and betting. There were (at the end of 1990) some 19,000 owners, 6,500 stable lads, 550 trainers and 1,000 jockeys registered with or licensed by the Jockey Club.

8. In a recent memorandum to the Home Affairs Committee of the House of Commons, the Jockey Club accurately described itself as *"officially responsible for the proper organisation, administration and control of all horseracing, race meetings and racehorse training in the United Kingdom (excluding Northern Ireland ...)"*

9. It is, as the Royal Commission on Gambling reported in 1978, the *"supreme authority in British racing"*. The Royal Commission succinctly summarised the historical origins and present standing of the Jockey Club:

> *"9.24 The Jockey Club acquired its position as the governing body of racing in the 18th century because the organisers of race meetings submitted themselves to its jurisdiction. The fact that racing was being conducted under Jockey Club rules was some assurance of integrity. As a result, the Jockey Club came to be voluntarily accepted as the rule making and disciplinary authority in all matters concerned with racing.*
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> *9.25 Racing over fences did not develop until the late 18th century. In 1863 two members of the Jockey Club (and one other) formed the Grand National Hunt Steeplechase Committee (afterwards simply the National Hunt Committee) to act as the governing body for jumping races. In 1970 the National Hunt Committee merged with the Jockey Club.*
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> *9.26 In 1970 the Jockey Club was incorporated by Royal Charter. The objects for which the Club exists are stated in the Charter to include undertaking responsibility for the 'proper conduct and due encouragement' of horseracing and encouraging and fostering the breeding of bloodstock. The Royal Charter does not of course give the Jockey Club any authority which it did not have before.*
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> *9.27 The racing industry makes heavy demands upon the Club, which is today far more than a law-making and disciplinary authority for the sport. Its unpaid stewards have the responsibility of directing what amounts to an extremely complicated multi-million pound business. Among its numerous activities it licenses trainers, jockeys, officials and racecourses, employs its own officials to attend and supervise all race meetings, administers discipline and, perhaps most important of all, decides how many race meetings there will be, where they will be held and what kind of races each meeting may include.*
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> *9.28 The Jockey Club's control of the fixture list affects the whole racing industry. The extent to which a race course makes a profit or not can depend on how many meetings it is allowed to hold, the importance of the races to be run and whether they are on days when the public are likely to attend. The efforts of the breeders are directed*

towards supplying the kind of horses likely to win the race to which the Jockey Club attaches the most prize money and prestige. Since 1967, these have been the Pattern Races which are a series of races designed to provide tests for the best horses over appropriate distances according to their ages. The number of fixtures also has a direct effect upon the financial commitments of the Levy Board, which has to provide the necessary technical and security services for each meeting, contribute to the prize money and frequently to subsidise the racecourse."

10. The Royal Commission concluded: *"Largely due to the efforts of the Club, British racing is considered to be as fair and honest as any in the world".*

11. The powers which the Jockey Club exercised in the present case (to order the taking of samples, to fine and to disqualify) are among those assumed by the Club to safeguard the integrity of British racing. Under its Rules of Racing, the finding of a prohibited substance obliges the Club to fine the trainer (unless the administration of the substance is shown to be accidental) and to disqualify the horse for the race in question. The applicant has not criticised the stringency of these rules. There is no ground for doing so. For a variety of reasons, including the large sums of money which stand to be won or lost on the outcome of a single race, horseracing is an activity peculiarly prone to criminality, cheating and chicanery of many kinds. Experience no doubt shows that strong measures of control and close vigilance are necessary pre-conditions of fair and honest competition.

12. The Royal Charter granted to the Jockey Club included among its objects

"(ii) to take over the activities connected with the control and regulation of horse-racing throughout Our United Kingdom of Great Britain and Northern Ireland heretofore carried on by the Old Club and to undertake all such responsibilities and activities as may be necessary or convenient for the proper conduct and due encouragement of horse-racing howsoever carried on and whether or not of a kind heretofore controlled or regulated by the Old Club."

13. The governing rules of the Club were set out in a schedule and were capable of alteration only with Privy Council approval. Among these rules was rule 11, defining the role of the stewards as the main officials of the Club:

"(1) The Stewards shall publish or cause to be published on behalf of the Club such Rules (hereinafter called "the Rules of Racing") regulations, orders and directions as they may think necessary for the proper conduct of horse-racing, race meetings and racehorse training.

(2) The Stewards shall have power on behalf of the Club to issue licences and permits in relation to horse-racing, race meetings or racehorse training ..."

14. The Rules of Racing are a skilfully drafted, comprehensive and far-reaching code of rules through which the Jockey Club exercises its control over racing in this country. So far as relevant for present purposes, the effect of the rules is broadly speaking as follows:

(1) The stewards have power to licence racecourses and allocate fixtures. Any meeting not held at a licensed racecourse is unrecognised.

(2) The stewards have power to license Clerks of the Course, jockeys, trainers and others and issue permits to trainers, amateur riders and others.

(3) No one may act as a Clerk of the Course, trainer or jockey under the Rules unless he holds an appropriate licence or permit.

(4) A horse may not (subject to certain exceptions) be entered for a race by any owner whose name is not registered with the Club.

(5) A horse is not qualified to run in any race if it has run at any unrecognised meeting.

(6) A trainer may not employ any person whose name has not been registered with the Club and may not employ any person to work in his stable who has previously been employed in a training stable without referring to the last trainer to employ him and receiving a reply. A person thus prevented from obtaining employment has a right of appeal to the stewards.

(7) Where any person subject to the Rules of Racing has committed a breach thereof the stewards have power (among other penalties) to declare him a disqualified person.

(8) A person reported by the Committee of Tattersalls is a disqualified person or subject to exclusion from any premises owned, licensed or controlled by the Club. A person disqualified by a sister authority abroad is a disqualified person here unless the stewards decide otherwise.

(9) Any person who owns, trains or rides a horse at an unrecognised meeting in Great Britain or Ireland or who acts in any official capacity in connection with such a meeting is liable to be declared a disqualified person.

(10) A disqualified person may not act as a steward or official at any recognised meeting; enter, run, train, or ride a horse in any race at any recognised meeting; enter any racecourse, stand, enclosure or other premises owned, used, or controlled by the stewards of any meeting; be employed (without the permission of the stewards) in any racing stable; or deal in any capacity with a racehorse. Any person (whether subject to the rules or not) may be excluded from any premises owned, licensed or controlled by the stewards.

15. The Jockey Club brings these rules to bear in two main ways. First, and most importantly, it does so by contracts entered into with racecourse managements, owners, trainers and jockeys. The present case illustrates the routine practice. Thus the applicant when applying for registration as an owner (and, probably, when entering the filly for the race) and the trainer when seeking renewal of his trainer's licence each agreed to be bound in all respects by the Rules of Racing. All those seeking any licence or permit from the Club, on being registered with it, become similarly bound.

16. The Jockey Club cannot, of course, impose contractual conditions on those who do not seek any licence or permit from it and therefore do not enter into any contract with it. This is a class which includes members of the general public and also racecourse owners, owners, trainers and jockeys who, for whatever reason, do not choose to act under the Jockey Club rules. The Club's sanction here lies not in contract but in its domination of the market. While unrecognised meetings do occur in some parts of the country, they are insignificant. No serious racecourse management, owner, trainer or jockey can survive without the recognition or licence of the Jockey Club. There is in effect no alternative market in which those not accepted by the Jockey Club can find a place or to which race goers may resort. Thus by means of the rules and its market domination the Jockey Club can effectively control not only those who agree to abide by its rules but also those - such as disqualified or excluded persons seeking to participate in racing activities in any capacity - who do not. For practical purposes the Jockey Club's writ runs in the British racing world, to the acknowledged benefit of British racing.

The arguments

17. The arguments on both sides have been so clearly and well put that they can, I hope, be briefly summarised.

18. The central thrust of the applicant's case is this. The Jockey Club is the effective de facto controller of a significant national activity. Its functions are essentially public. Its powers are of a nature and scope which affect the public. It matters not that it is a private body: that is an accident of history. What matters is that if it or some other private body did not perform the functions it does the government would be obliged to create a body to perform those functions. It makes no difference that it exerts control in the main by contract, since those who contract with it have no effective alternative to accepting the obligations thus imposed, and authority is effectively exerted over those not bound by contract. Although in the past what were apparently private law remedies have been held to be available against the Jockey Club to a trainer not in contractual relations with it (in ***Naqle v. Feilden*** [1966] 2 Q.B. 633), that case lacked a clear foundation in principle and would now result in the grant of a public law remedy. It is wrong to seize on any single feature or test to determine whether a body or a decision is susceptible to judicial review. That is a question to be determined in the light of all the circumstances. The decision here in question was an exercise of power public in character and of serious consequence to the applicant and is as such susceptible to judicial review, by which means alone he can obtain the decision he wants, or order that the decision be quashed.

19. The Jockey Club takes radical issue with this argument. On its argument, it is a private body independent of government in origin, constitution and function and forming no part of any governmental system of regulation. Its relationship with those who, like the applicant, agree to be bound by the Rules of Racing is an essentially private law relationship based on contract. A duty to conduct any enquiry fairly would be implied into this contract and if the applicant could establish a breach of that duty he could recover appropriate private law remedies by way of declaration, injunction and damages. Remedies developed to curb abuses and excesses of power by government and public tribunals cannot appropriately be applied to a private body exercising a domestic jurisdiction pursuant to contract. Even in ***Naqle v. Feilden***, where the plaintiff could rely on no contract, the remedy given lay in private and not public law.

Authority

20. We were referred to a considerable body of authority relied on as relevant in determining the scope of judicial review and identifying the bodies and decisions which are susceptible to judicial review. I shall confine my citation to the authorities which seem to me most pertinent.

21. In ***R. v. Criminal Injuries Compensation Board, ex parte Lain*** [1967] 2 Q.B. 864 Lord Parker C.J., an acknowledged master of this field, made certain general observations which have been much quoted since and are of undoubted authority. At page 882 he said:

> *"The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned.*
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> *We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely within the jurisdiction of this court. It is, as Mr Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.' It is clearly, therefore, performing public duties."*

22. Lord Diplock pointed out, at page 883, that the board's performance of quasi-judicial functions as an inferior tribunal *"is not derived from any agreement between Crown and applicants but from instructions by the executive government, that is, by prerogative act of the Crown. The appointment of the board and the conferring upon it of jurisdiction to entertain and determine applications, and of authority to make payments in accordance with such determinations, are acts of government, done without statutory authority but nonetheless lawful for that."*

    Thus the court declined to set firm bounds to the grant of public law remedies, but did not extend them beyond acts of government performed by a creature of executive government.

23. In ***Law v. National Greyhound Racing Club Limited*** [1983] 1 W.L.R. 1302 the plaintiff was a trainer whose licence had been suspended because he had had charge of a greyhound which had been found on examination to have prohibited substances in its tissues. He had issued an originating summons seeking a declaration that the stewards' decision was void and ultra vires because reached in breach of an implied duty of fairness and an injunction or damages. The NGRC moved to strike out the plaintiff's action on the ground that he should have sought judicial review under section 31 of the Supreme Court Act 1981. This contention was rejected by Walton J. at first instance and by the Court of Appeal (Lawton, Fox and Slade L.JJ.).

24. The crux of Lawton L.J.'s judgment is to be found in this passage on page 1307: *"In my judgment, such powers as the stewards had to suspend the plaintiff's licence were derived from a contract between him and the defendants. This was so for all who took part in greyhound racing in stadia licensed by the defendants. A stewards' inquiry under the defendants' Rules of Racing concerned only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself. Its exercise, however, could have consequences from which the public benefited, as, for example, by the stamping out of malpractices, and from which individuals might have their rights restricted by, for example, being prevented from employing a trainer whose licence has been suspended. Consequences affecting the public generally can flow from the decisions of many domestic tribunals. In the past the courts have always refused to use the orders of certiorari to review the decisions of domestic tribunals."*

25. He then quoted from Lord Parker's judgment in ***Lain*** and held that section 31 had regulated the court's procedure in judicial review and not extended its scope. Fox L.J. expressed the rationale of his concurring judgment at page 1309: *"Accordingly, in my view, the authority of the stewards to suspend the licence of the plaintiff derives wholly from a contract between him and the defendants. I see nothing to suggest that the defendants have rights or duties relating to members of the public as such. What the defendants do in relation to the control of greyhound racing may affect the public, or a section of it, but the defendants' powers in relation to the matters with which this case is concerned are contractual."*

26. Slade L.J. referred to the NGRC's concern about the increased incidence of doping and continued: "I do not doubt the genuineness of this concern or the importance to the general public of the activities which the NGRC performs, not least its disciplinary functions. Furthermore, it is easy to understand why the NGRC would prefer that any person who seeks to challenge the exercise of its disciplinary functions should be compelled to do so, if at all, by way of an application for judicial review. In this manner the NGRC would enjoy the benefit of what Lord Diplock in ***O'Reilly v. Mackman*** [1983] 2 A.C. 237, 282, described as *'The safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law."*

27. Notwithstanding recent procedural changes, these safeguards are still real and substantial. Leave is required to bring proceedings. Terms may be imposed as to costs and the giving of security. There is a time bar of three months, though the court has power for sufficient reason to extend this. The court retains firm control over discovery and cross-examination: see generally ***O'Reilly v. Mackman*** [1983] 2 A.C. 237, 262-263 per Ackner L.J.

28. The difficulty, to my mind insuperable, which has faced Mr Henderson in contending that the process of judicial review is a procedure, and indeed the only procedure, available to the plaintiff in the present case, is that, as he frankly accepted, the Rules of Racing of the NGRC and its decision to suspend the plaintiff in purported compliance with those rules have not been made in the field of public law. Furthermore, its authority to perform judicial or quasi-judicial functions in respect of persons holding licences from it is not derived from statute or statutory instrument or from the Crown. It is derived solely from contract. Rule 2 of the NGRC's Rules of Racing provides that every person who is the holder of a licence shall be deemed to have read the rules and to submit himself to them and to the jurisdiction of the NGRC. The relief, by way of declaration and injunction, sought by the plaintiff in his originating summons is correspondingly based primarily and explicitly on alleged breach of contract.

29. Thus, this is a claim against a body of persons whose status is essentially that of a domestic, as opposed to a public, tribunal, albeit one whose decisions may be of public concern."

30. The parallel between the Jockey Club and the NGRC is not exact. The former is incorporated by Royal Charter, the latter is a company limited by guarantee. The NGRC's effective monopoly is territorially more limited than that of the Jockey Club. Its history is shorter and less glamorous. The industry it regulates is smaller and, some would feel, more dispensable. But the two bodies, within their respective spheres, exercise much the same powers in much the same way. The NGRC's Rules of Racing plainly owe much to those of the Jockey Club. If the NGRC's contentions were rightly rejected in ***Law*** for the reasons given, the applicant's contentions could not without anomaly be upheld on this appeal, unless the bounds of judicial review have been significantly extended in the years since that case was decided.

31. In arguing that such extension has indeed occurred, the applicant relies principally on ***R. v. Panel on Takeovers and Mergers ex parte Datafin PLC*** [1987] Q.B. 815. In that case the Court of Appeal (Sir John Donaldson M.R., Lloyd and Nicholls L.JJ.) held that the Panel was in principle amenable to judicial review. The decision was novel, because the Panel was not created by statute or by any exercise of prerogative or governmental power. But there was evidence that the Department of Trade and Industry had decided not to regulate takeovers by statutory instrument and to rely instead on the Panel's enforcement of the City Code on Takeovers and Mergers. As the Master of the Rolls put it at page 835:

"The picture which emerges is clear. As an act of government it was decided that, in relation to takeovers, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.

No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide. The explanation is that it is an historical "happenstance", to borrow a happy term from across the Atlantic. Prior to the years leading up to the "Big Bang", the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, but the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the Prevention of Fraud (Investments) Act 1958 and allied statutes, such as the Banking Act 1979."

32. The Master of the Rolls cited at length from ***Lain,*** and came to the core of his decision in principle at page 838: "The Criminal Injuries Compensation Board, in the form which it then took, was an administrative novelty. Accordingly it would have been impossible to find a precedent for the exercise of the supervisory jurisdiction of the court which fitted the facts. Nevertheless the court not only asserted its jurisdiction, but further asserted that it was a jurisdiction which was adaptable thereafter. This process has since been taken further in ***O'Reilly v. Mackman*** [1983] 2 A.C. 237, 279 (per Lord Diplock) by deleting any requirement that the body should have a duty to act judicially; in ***Council of Civil Service Unions v. Minister for the Civil Service*** [1985] A.C. 374 by extending it to a person exercising purely prerogative power; and in ***Gillick v. West Norfolk and Wisbech Area Health Authority*** [1986] A.C. 112, where Lord Fraser of Tullybelton, at p. 163F and Lord Scarman, at p. 178F-H expressed the view obiter that judicial review would extend to guidance circulars issued by a department of state without any specific authority. In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

33. Lloyd L.J. pointed out at page 846 that "*The City is not a club which one can join or not at will. In that sense, the word* ***'self-regulation'*** *may be misleading. The panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies."*

34. Having referred to Lord Diplock's pronouncement in the ***GCHQ*** case ([1984] A.C. 374 at 409) that a decision-maker whose decisions are susceptible to judicial review must be empowered by public law, and to an argument advanced on behalf of the Panel, Lloyd L.J. said at page 847:

"I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see ***Reg, v. National Joint Council for the Craft of Dental Technicians (Disputes Committee), ex parte Neate*** *[1953] 1 Q.B. 704.*

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other."

In his view, what mattered was not just the source of the power but also the nature of the duty (page 848).

35. Nicholls J.J. expressed his conclusion at page 852: *"In my view, and quite apart from any other factors which point in the same direction, given the leading and continuing role played by the Bank of England in the affairs of the panel, the statutory source of the powers and duties of the Council of the Stock Exchange, the wide-ranging nature and importance of the matters covered by the code, and the public law consequences of non-compliance, the panel is performing a public duty in prescribing and operating the code (including ruling on complaints)."*

36. The effect of this decision was to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of takeovers and mergers. ***R. v. Advertising Standards Authority Limited ex parte The Insurance Service PLC*** [1990] 2 Admin L.R. 77 appears to me to be a precise appliction of the principle thus established to analogous facts.

37. Mention should be made of two cases, both in the Divisional Court and both involving the Jockey Club. The earlier of the two was ***R. v. Disciplinary Committee of the Jockey Club ex parte Massinqberd-Mundy*** (20th December 1989). In this case the applicant sought judicial review of a decision that his name be removed from the list of those qualified to act as chairman of a panel of local stewards. The Jockey Club challenged the jurisdiction of the court to grant judicial review. Neill L.J. observed that if the matter were free from authority he might have been disposed to conclude that some decisions at any rate of the Jockey Club were capable of being judicially reviewed, but found it impossible to distinguish the binding authority of Law. Roch J., with some difference of emphasis, reached the same decision. The case may be distinguished from the present on two grounds. First, it does not appear (although this may not be entirely clear) that there was any contract between the applicant and the Jockey Club. Secondly, the question whether the applicant or some other local steward should act as chairman may fairly be seen as a domestic question lacking public significance and involving no exercise of power which could be seen as affecting the public.

38. The later decision was ***R. v. The Jockey Club ex parte RAM Racecourses Limited*** (30th March 1990). In that case the applicant for judicial review was a racecourse management which sought to challenge the Jockey Club's allocation of racing fixtures. The Jockey Club again challenged the court's jurisdiction to grant judicial review. On this issue Stuart-Smith L.J., being unconvinced that the court's decision in ***Massingberd-Mundy*** was wrong, felt bound to follow it although adding that he would but for that authority have held that the Jockey Club were amenable to judicial review. Simon Brown J. held himself similarly bound to follow ***Massinqberd-Mundy,*** but in doing so expressed some criticism of the wider grounds of that decision. He thought it possible to distinguish ***Law,*** in which the applicant had been bound to the club by contract, particularly in the light of ***Datafin.*** In the course of his judgment he said: *"I find myself, I confess, much attracted by Mr Beloff's submissions that the nature of the power being exercised by the Jockey Club in discharging its functions of regulating racecourses and allocating fixtures is strikingly akin to the exercise of a statutory licensing power. I have no difficulty in regarding this function as one of a public law body, giving rise to public law consequences. On any view it seems to have strikingly close affinities with those sorts of decision-making that commonly are accepted as reviewable by the courts. And at the same time I certainly cannot identify this particular exercise of power with that of an arbitrator or other domestic body such as would clearly be outside the supervisory jurisdiction."*

39. But he concluded: *"Plainly the Jockey Club for the most part take decisions which affect only - or at least essentially - those voluntarily and willingly subscribing to their rules and procedures. The wider public have no interest in all this, certainly not sufficient to make such decisions reviewable. But just occasionally, as when exercising the quasi-licensing power here under challenge, I for my part would regard the Jockey Club as subject to review."*

40. In that case, as in ***Massinqberd-Mundy***, but unlike ***Law*** and the present case, there was no contract between the applicant and the club.

41. In ***R. v. The Football Association Limited ex parte The Football League Limited*** (31st July 1991) Rose J. had to consider the susceptibility of the Football Association to judicial review. Having reviewed the authorities (including some not touched on here) at some length, the learned judge gave reasons based both on principle and pragmatism for rejecting the application:

    "I have crossed a great deal of ground in order to reach what, on the authorities, is the clear and inescapable conclusion for me that the FA is not a body susceptible to judicial review either in general or, more particularly, at the instigation of the League with whom it is contractually bound. Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the State or any potential government interest, as Simon Brown J. put it in Wachmann, nor is there any evidence to suggest that if the FA did not exist the State would intervene to create a public body to perform its functions. On the contrary, the evidence of commercial interest in the professional game is such as to suggest that a far more likely intervener to run football would be a television or similar company rooted in the entertainment business or a commercial company seeking advertising benefits such as presently provides sponsorship in one form or another.

    I do not find this conclusion unwelcome. Although thousands play and millions watch football, although it excites passions and divides families, and although millions of pounds are spent by spectators, sponsors, television companies and also clubs on salaries, wages, transfer fees and the maintenance of grounds, much the same can also be said in relation to cricket, golf, tennis, racing and other sports. But they are all essentially forms of popular recreation and entertainment and they are all susceptible to control by the courts in a variety of ways. This does not, of itself, exempt their governing bodies from control by judicial review. Each case will turn on the particular circumstances.

    But, for my part, to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources. It will become impossible to provide a swift remedy, which is one of the

conspicuous hallmarks of judicial review, if the courts become even more swamped with such applications than they are already. This is not, of course, a jurisprudential reason for refusing judicial review, but it will be cold comfort to the seven or eight other substantive applicants and the many more ex parte applicants who have had to be displaced from the court's lists in order to accommodate the present litigation to learn that, though they may have a remedy for their complaints about the arbitrary abuse of executive power, it cannot be granted to them yet."

42. No case directly raising the issue whether a sporting regulatory body is susceptible to judicial review, and if so in what circumstances, has yet reached the House of Lords. But our attention was drawn to ***Calvin v. Carr*** [1980] A.C. 574, a Privy Council case in which an owner challenged a disciplinary ruling of the Australian Jockey Club. He proceeded by writ in the ordinary way, there was no argument on procedure and the hearing preceded ***O'Reilly v. Mackman*** [1983] 2 A.C. 237, which had the effect of directing professional attention to these jurisdictional issues. To that extent this authority must be viewed with caution. It is nonetheless evident that their Lordships regarded the disciplinary hearing as "an essentially domestic proceeding" in which all who took part had accepted the Rules of Racing (page 597).

Conclusions

43. I have little hesitation in accepting the applicant's contention that the Jockey Club effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public. I am willing to accept that if the Jockey Club did not regulate this activity the government would probably be driven to create a public body to do so.

44. But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body. While the grant of a Royal Charter was no doubt a mark of official approval, this did not in any way alter its essential nature, functions or standing. Statute provides for its representation on the Horseracing Betting Levy Board, no doubt as a body with an obvious interest in racing, but it has otherwise escaped mention in the statute book. It has not been woven into any system of governmental control of horseracing, perhaps because it has itself controlled horseracing so successfully that there has been no need for any such governmental system and such does not therefore exist. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental. The discretion conferred by section 31(6) of the Supreme Court Act 1981 to refuse the grant of leave or relief where the applicant has been guilty of delay which would be prejudicial to good administration can scarcely have been envisaged as applicable in a case such as this.

45. I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.

46. It is unnecessary for purposes of this appeal to decide whether decisions of the Jockey Club may ever in any circumstances be challenged by judicial review and I do not do so. Cases where the applicant or plaintiff has no contract on which to rely may raise different considerations and the existence or non-existence of alternative remedies may then be material. I think it better that this court should defer detailed consideration of such a case until it arises. I am, however, satisfied that on the facts of this case the appeal should be dismissed.

LORD JUSTICE FARQUHARSON:

47. This appeal constitutes another attempt to extend the frontiers of judicial review. The Aga Khan is an owner of racehorses and is registered as such with the Jockey Club.

48. In 1989 he owned a filly called Aliysa which he entered for the Oaks in 1989. She won the race and a routine sample of her urine was taken from her. Upon analysis at the Horseracing Forensic Laboratory it was discovered that the sample contained 3-hydroxycamphor (3-HC) which is a metabolite of camphor. The origin of the 3-HC was and remains unknown, but camphor is under the rules a prohibited substance.

49. In 1990 an enquiry was held which Mr Stoute, the filly's trainer, was required to attend. On 20th November the Disciplinary Committee concluded that while 3-HC is a metabolite of other substances besides camphor it was satisfied that camphor was the source of the 3-HC found in the sample. By that finding Aliysa was automatically disqualified under Rule 180(2). Mr Stoute was fined £200 under the provisions of Rule 53(1). While the committee's findings imputed no blame to the owner the Aga Khan considered that they reflected on his position as head of a large religious group as well as on his reputation as an owner and breeder of racehorses.

50. It was for these reasons that he resolved to bring proceedings against the Jockey Club on the basis of a number of allegations with which this court is not presently concerned. The Aga Khan elected not to proceed by writ but instead sought leave to apply for judicial review of the decisions of the Disciplinary Committee of the Jockey Club. Leave to apply was granted by Macpherson J. who warned the applicant that his "first hurdle" would be to establish that the decision of the committee was susceptible to judicial review.

51. On 30th May 1991 the Master of the Crown Officer made an order that the question of jurisdiction raised by Macpherson J. should be tried as a preliminary issue. The motion came before the Divisional Court (Woolf L.J. and

Leonard J.) on 3rd July 1991, which held that on the authorities the court did not have jurisdiction to entertain a motion for judicial review of a decision of the Jockey Club. The present appeal is therefore confined to the issue of whether that ruling was correct.

52. The remaining facts are set out in the judgment of the Master of the Rolls. I respectfully adopt his analysis of the status, function and rules of the Jockey Club.

53. Historically, an order of certiorari was never granted to review the decision of a domestic tribunal. This was made clear in the case of ***R. v. Criminal Injuries Compensation Board ex parte Lain*** [1967] 2 Q.B. 864. At that time the Board had been newly set up by the prerogative act of the Crown. The court had to consider whether in those circumstances certiorari would issue against the Board.

54. In describing the remedy Lord Parker C.J. said:

"The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned. ....

We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely within the jurisdiction of this court. It is, as Mr Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.' It is clearly, therefore, performing public duties."

55. This dichotomy was recognised by this court in the case of ***Law v. Greyhound Racing Club Ltd*** [1983] 1 W.L.R. 1302; which on its facts bears some similarity to the present appeal. The defendants, a company limited by guarantee, acted as a judicial body for the conduct and discipline of greyhound racing in England, Wales and Scotland. They administered a code of rules to achieve an orderly conduct of the sport. All who wished to take part in greyhound racing in stadia licensed by the defendants were deemed to have read the Rules of Racing and submitted to them and to the jurisdiction of the defendants. A greyhound in the plaintiff's charge was proved to have prohibited substances in its tissues which would affect its performance. There was a disciplinary hearing at which the plaintiff was present and the stewards who conducted the hearing suspended the plaintiff's trainer's licence for a period of six months.

56. The plaintiff brought proceedings for a declaration that the decision was void by way of an originating summons. The defendants sought to have the proceedings struck out on the grounds that the plaintiff should have made an application for judicial review. Lawton L.J. said at page 1307B-D: *"In my judgment, such powers as the stewards had to suspend the plaintiff's licence were derived from a contract between him and the defendants. This was so for all who took part in greyhound racing in stadia licensed by the defendants. A stewards' inquiry under the defendants' Rules of Racing concerned only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself. Its exercise, however, could have consequences from which the public benefited, as, for example, by the stamping out of malpractices, and from which individuals might have their rights restricted by, for example, being prevented from employing a trainer whose licence has been suspended. Consequences affecting the public generally can flow from the decisions of many domestic tribunals. In the past the courts have always refused to use the orders of certiorari to review the decisions of domestic tribunals."*

57. More recently in a Divisional Court decision, **R. v. Jockey Club ex parte RAM Racecourses Ltd** (unreported) Stuart-Smith L.J. said (at page 38): *"Quite clearly the majority of cases, involving disciplinary disputes or adjudications between participants in the sport, will be of an entirely domestic character and based upon the contractual relationship between the parties. Such disputes have never been amenable to judicial review."*

58. The last citation I make in this context is by Rose J. in ***R. v. The Football Association Limited ex parte the Football League Limited*** where, in referring to the position of the Association, be said:

"Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the State or any potential government interest.

59. *The learned judge accordingly found that the Football Association was not susceptible to judicial review. The references to underpinning by the State and potential governmental interest derive from the decision of this court in **R. v. Panel on Take-overs and Mergers, ex parte Datafin PLC** [1987] 1 Q.B. 815. Up till that time a remedy in public law was only available against a body if it derived its authority from statute, prerogative power or other delegated authority. The Take-over Panel did not come within any of those categories but was described by Sir John Donaldson M.R. (at page 835F) in this way:*

"As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.

... Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel."

Both the chairman and deputy chairman of the Take-over Panel are appointed by the Governor of the Bank of England. The Panel was and is in its function a unique body, but the court found that it was an integral part of a system which performed public law duties. In so deriding the court rejected the argument that the sole test of whether such a body was susceptible to judicial review was its source of power, and held it was entitled to consider such factors as the nature of the power. The Master of the Rolls said (at page 838E):

"In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

60. Understandably the decision in ***Datafin*** involved some development of the law relating to judicial review but, bearing in mind the concluding words of the citation just made, the court did not question the decision in ***Law's*** case, which was cited to it in argument.

61. There have been two attempts to bring proceedings for judicial review against the Jockey Club since the decision in ***Datafin***. In the first, ***R. v. The Jockey Club ex parte Massingberd-Mundy,*** decided on 20th December 1989, the applicant sought to challenge a decision of the Jockey Club to remove him as chairman of the panel of local stewards. There was no contractual relationship between the parties in regard to the appointment. The Divisional Court held that it was bound by the decision in ***Law's*** case to refuse the application, although both judges indicated that if the matter had been free from authority they would have been disposed to say that at any rate some of the decisions of the Jockey Club were amenable to judicial review.

62. The second case already referred to is ***R. v. The Jockey Club ex parte RAM Racecourses Limited.*** The applicant's complaint was that the Jockey Club had allocated an insufficient number of meetings to their racecourse. Here again there was no contractual relationship, and the allocation of meetings was exclusively a matter for the Club. Although dismissing the application on its merits the Divisional Court went on to consider the question of jurisdiction. Both Stuart-Smith L.J. and Simon Brown J. considered themselves bound by the decision in ***Massingberd-Mundy,*** but both said that if they had not been they would have held the Jockey Club susceptible to judicial review.

63. In argument Mr Kentridge for the applicant has said that it is not necessary for him to assert that ***Law*** was wrongly decided, but he submits that in the light of ***Datafin*** the decision was on too narrow a basis. Furthermore he seeks to distinguish the two cases on their facts.

64. In the light of the authorities already referred to in this judgment the issue in this appeal is whether on the one hand the Jockey Club is a domestic body which exercises its powers consensually or whether on the other there are public elements in the discharge of its functions which render it amenable to judicial review.

65. It is well known that all the major sports in this country are controlled by bodies whose task it is to ensure that the rules are properly observed and so far as possible to maintain proper standards and ensure fair play. It may well be that the Jockey Club is the most powerful of them all. Although it is now governed by a charter it has exercised control over horseracing for over 200 years. Its licensing and disciplinary powers are so extensive that nobody can play any significant part in the sport, whether as owner, trainer, jockey or racecourse owner without the approval of the Club. Racing is now so popular and widespread that it takes on the character of an industry, with a huge turnover of money in the betting which depends on it. It is with this general background that Mr Kentridge submits that the Jockey Club cannot realistically be described as a domestic body and that there are elements in its make-up and duties which make it properly susceptible to public law remedies. He accepts that it is not part of any government scheme of regulation, nor backed by any statutory sanctions, but argues that:

(1) although its jurisdiction is nominally consensual the Jockey Club powers go far beyond the consent of a particular person;

(2) that it is in fact supported by extensive powers in its overall control of racing;

(3) by its rules it exercises powers over persons who have never submitted to those rules, as when those who are deemed to be undesirable are warned off racecourses under the Club's control;

(4) the Club's activities and functions are carried out not, or perhaps not only, in the interest of its members but also for the benefit of the public, in particular those who go racing or bet on horses;

(5) the position of the Jockey Club, as the controller of racing, is recognised by Parliament by its association with the Betting Levy Duty, which is applied in the interests of racing;

(6) unlike most clubs incorporated under Royal Charter it has imposed upon it both powers and duties; and

(7) if there was no voluntary body like the Jockey Club to exercise disciplinary control over the sport, Parliament would be likely to create a body with similar powers to the Jockey Club.

66. It is conceded that there is or at all events was a contractual relationship between the Club and the applicant, both when he applied to be and was accepted as a registered owner and when he entered Aliysa for the Oaks. There was in all probability also a contract between the applicant and those responsible for Epsom Racecourse. By entering into those agreements the applicant was expressly submitting to the Rules of Racing and acknowledging that he was governed by the disciplinary powers of the Jockey Club. Mr Kentridge has referred to the lack of reality of describing such a relationship as consensual. The fact is that if the applicant wished to race his horses in this country he had no choice but to submit to the Club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality.

67. Mr Kentridge criticises the decision in ***Law's*** case in that the court concentrated particularly on the source of the power of the Greyhound Racing Association. That power was of course consensual. As a result of ***Datafin*** the source of power is only one element to consider in deciding whether there was a sufficient public element to make the activity of the body concerned amenable to public law.

68. Mr Kentridge also seeks to distinguish ***Law's*** case from the present one on its facts. He asserts that the Greyhound Racing Association is not in the same powerful position with regard to its sport as the Jockey Club. If there was no Greyhound Racing Association the government would not step in to control the sport as it is not of the same importance.

    Moreover he claims that the decision is authority only for the propositions that
    (a) a domestic tribunal whose powers are derived solely from contract is not subject to judicial review and
    (b) the provisions of section 31 of the Supreme Court of Judicature Act 1981 are purely procedural.

69. Mr Milmo submits that the Jockey Club is not amenable to judicial review on the grounds that the exercise of its functions is consensual and there was no public element in the making of the decision. He emphasises that the particular decision under review concerns the disqualification of one horse in one race. However, Mr Milmo goes much further and asserts that the overall control which the Jockey Club exercises over racing is a comprehensive structure so that one cannot isolate one rule. Either all or none of the Club's decisions are susceptible to judicial review. In the present case the Club's power to enforce the rules is grounded solely in contract, and there is no statutory input. The fact that their powers are consensual is demonstrated by the fact that the same duty is owed by the Club to all the other participants in the race. Mr Milmo rejects the criticism of ***Law's*** case which he submits is good law.

70. There was no effective distinction between the functions of the Greyhound Racing Association and the Jockey Club. The rules of the two bodies are similar, and so in consequence are their powers. The fact that the Jockey Club was granted a charter while the Greyhound Racing Association is incorporated makes no real difference. Put shortly, Mr Milmo's argument is that, if the jurisdiction is based solely on consent, it matters not if there is a public law element. The feature of consent provides the private right and in those circumstances one never gets to what might be called the ***Datafin*** stage.

71. For my part I cannot find that ***Datafin*** affects the ratio of the decision in ***Law's*** case. I bear in mind Lord Parker C.J.'s observations that there should be an element of flexibility in the use of certiorari so that it can be adapted to changing situations but there has never been any doubt that public law remedies do not lie against domestic bodies, as they derive solely from the consent of the parties. In ***Law's*** case the court was applying well established principles. The question remains whether the Jockey Club, or this particular decision of it, can properly be described as a domestic body acting by consent.

72. In principle it is difficult to see any distinction between the Greyhound Racing Association (or its corporate equivalent) and the Jockey Club. The only apparent factual difference lies in the extent of its jurisdiction. For that matter the other governing bodies of the major sports come in the same category unless some distinction can be found in the rules. Neither do I find any public element in the Jockey Club's position and powers within the meaning of that term as explained in ***Datafin.*** No doubt, as Lawton L.J. observed in ***Law's*** case, many of the decisions of the Jockey Club through its committees will affect members of the public who have no connection with it, but there is a difference between what may affect the public and what amounts to a public duty. It is difficult to see that the disqualification of this particular filly - important though the race was - could transform the role of the Jockey Club from a domestic to a public one. The courts have always been reluctant to interfere with the control of sporting bodies over their own sports and I do not detect in the material available to us any grounds for supposing that, if the Jockey Club was dissolved, any governmental body would assume control of racing. Neither in its framework or its rules or its function does the Jockey Club fulfil a governmental role.

73. I understand the criticism made by Mr Kentridge of the reality of the consent to the authority of the Jockey Club. The invitation to consent is very much on a take it or leave it basis. But I do not consider that this undermines the reality of the consent. Nearly all sports are subject to a body of rules to which an entrant must subscribe. These are necessary, as already observed, for the control and integrity of the sport concerned. In such a large industry as racing has become, I would suspect that all those actively and honestly engaged in it welcome the control of licensing and discipline exerted by the Jockey Club.

74. For these reasons I would hold that the decision of the Disciplinary Committee of the Jockey Club to disqualify Aliysa from the 1989 Oaks is not susceptible to judicial review.

75. As to Mr Milmo's assertion that the question of the Jockey Club's susceptibility to judicial review must be answered on an all or nothing basis, I can only say as at present advised that I do not agree. In ***RAM Racecourses*** Simon

Brown J. had similar reservations. In both that case and ***Massinqberd-Mundy*** the applicants had no contractual relationship with the Jockey Club. While I do not say that particular circumstances would give a right to judicial review I do not discount the possibility that in some special circumstances the remedy might lie. If for example the Jockey Club failed to fulfil its obligations under the charter by making discriminatory rules, it may be that those affected would have a remedy in public law.

76. In the present appeal there is no hardship to the applicant in his being denied judicial review. If his complaint that the Disciplinary Committee acted unfairly is well-founded there is no reason why he should not proceed by writ seeking a declaration and an injunction. Having regard to the issues involved it may be a more convenient process.

77. I would dismiss the appeal.

LORD JUSTICE HOFFMANN:

78. The Jockey Club is an exclusive private club incorporated by Royal Charter which controls the racing industry. It does so by tradition, widespread acceptance and the contractual consent of almost all active participants in racing to the Club's Rules of Racing and the jurisdiction of its Disciplinary Committee. This control gives the Club considerable power over a section of the economy which is not only important in itself but supports another important economic activity, namely horserace betting. The question in this appeal is whether the power exercised by the Club brings its decisions into the realm of public law, so that they are amenable to judicial review. In my view it does not. However impressive its powers may be, the Jockey Club operates entirely in the private sector and its activities are governed by private law.

79. There is no reason why a private club should not also exercise public powers. The Law Society is essentially a club, incorporated by Royal Charter, perhaps less exclusive than the Jockey Club, but private nonetheless. Not all solicitors choose to belong. But the Law Society also exercises public powers, conferred by statute in the public interest. In exercising these powers, the Law Society operates in the realm of public law (***Swain v. The Law Society*** [1983] 1 A.C. 598). In the case of the Jockey Club, however, there is no public source for any of its powers. It operates directly or indirectly by consent. The power is direct against those who have agreed to be bound by the Rules of Racing and indirect against those who have not. So for example, the Club has power under Rule 2(iv) to exclude persons not bound by the Rules of Racing from premises which it licenses, such as racecourses or training stables, and the power can be effectively exercised because the occupiers of those premises have agreed not to admit anyone whom the Club has decided to exclude.

80. ***R. v. Panel on Take-overs and Mergers, ex parte Datafin PLC*** [1987] 1 Q.B. 815 shows that the absence of a formal public source of power, such as statute or prerogative, is not conclusive. Governmental power may be exercised de facto as well as de jure. But the power needs to be identified as governmental in nature. In ***Datafin*** Sir John Donaldson M.R. explained how in 1986 the Panel had come to occupy the position it did:

"As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.

No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. ... Prior to the years leading up to the 'Big Bang', the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, but the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the Prevention of Fraud (Investments) Act 1958 and allied statutes, such as the Banking Act 1979."

81. What one has here is a privatisation of the business of government itself. The same has been held to be true of the Advertising Standards Authority ***(R. v. Advertising Standards Authority, ex parte The Insurance Service PLC*** [1990] 2 Admin. L.R. 77) and the Investment Management Regulatory Organisation (IMRO) (***Bank of Scotland v. Investment Management Regulatory Organisation Ltd [***1989] Scots L.T. 432). Both are private bodies established by the industry but integrated into a system of statutory regulation. There is in my judgment nothing comparable in the position of the Jockey Club. It is true that it has been incorporated by Royal Charter, but this seems to me simply a mark of royal favour to racing. The Club nominates three members of the Horserace Betting Levy Board, but this is to represent the disparate private interests of the racing industry, which enjoys the benefit of the levy. There is nothing to suggest that, if the Jockey Club had not voluntarily assumed the regulation of racing, the government would feel obliged or inclined to set up a statutory body for the purpose. The reactions of successive governments to the proposals of, among others, the 1978 Royal Commission on Gambling (Cmnd. 7200) and the 1991 Fourth Report of the House of Commons Home Affairs Committee on the Levy on Horserace Betting suggest a determination to leave racing firmly in the private sector.

82. In ***Law v. National Greyhound Racing Club Ltd*** [1983] 1 W.L.R. 1302 this court decided that the National Greyhound Racing Club was not amenable to judicial review notwithstanding that it controlled the greater part of the dog racing business in much the same way as the Jockey Club controls horse racing. The Club was held to be a purely domestic tribunal because the source of its power lay in contract and nothing else. The case was decided before ***Datafin*** and did hot consider whether, notwithstanding the lack of any public source for its powers, the Club

might de facto be a surrogate organ of government. I would accept that, if this were the case, there might be a conflict between the principle laid down in ***Datafin*** and the actual decision in ***Law*** which required a re-examination of whether ***Law*** still governed the present case. I would also accept that a body such as the Take-over Panel or IMRO which exercises governmental powers is not any the less amenable to public law because it has contractual relations with its members. In my view, however, neither the National Greyhound Racing Club nor the Jockey Club is exercising governmental powers and therefore the decision in ***Law*** remains binding in this case.

83. It is true that in some countries there are statutory bodies which exercise at least some control over racing. It appears from ***Heatley v. Tasmanian Racing and Gaming Commission [***1977] 137 C.L.R. 487 that this is the position in Tasmania and we were told that it was also true of certain of the United States. But different countries draw the line between public and private regulation in different places. The fact that certain functions of the Jockey Club could be exercised by a statutory body and that they are so exercised in some other countries does not make them governmental functions in England. The attitude of the English legislator to racing is much more akin to his attitude to religion (See ***R. v. Chief Rabbi, ex parte Wachmann*** [1992] 1 W.L.R. 1306): it is something to be encouraged but not the business of government.

84. All this leaves is the fact that the Jockey Club has power. But the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. If control is needed, it must be found in the law of contract, the doctrine of restraint of trade, the Restrictive Trade Practices Act 1976, Articles 85 and 86 of the Treaty of Rome and all the other instruments available in law for curbing the excesses of private power.

85. It may be that in some cases the remedies available in private law are inadequate. For example, in cases in which power is exercised unfairly against persons who have no contractual relationship with the private decision-making body, the court may not find it easy to fashion a cause of action to provide a remedy. In ***Naqle v. Feilden*** [1966] 2 Q.B. 633, for example, this court had to consider the Jockey Club's refusal on grounds of sex to grant a trainer's licence to a woman. She had no contract with the Jockey Club or (at that time) any other recognised cause of action, but this court said that it was arguable that she could still obtain a declaration and injunction. There is an improvisatory air about this solution and the possibility of obtaining an injunction has probably not survived ***The Siskina*** [1979] A.C. 210.

86. It was recognition that there might be gaps in the private law that led Simon Brown J. in ***R. v. The Jockey Club, ex parte RAM Racecourses Ltd*** (D.C., unreported, 30th March 1990) to suggest that cases like ***Naqle v. Feilden,*** as well as certain others involving domestic bodies like the Football Association in ***Eastham v. Newcastle United Football Club Ltd*** [1964] Ch. 413 and a trade union in ***Breen v. Amalgamated Engineering Union [***1971] 2 Q.B. 175, *"had they arisen today and not some years ago, would have found a natural home in judicial review proceedings"*. For my part, I must respectfully doubt whether this would be true. Trade unions have now had obligations of fairness imposed upon them by legislation, but I doubt whether, if this had not happened, the courts would have tried to fill the gap by subjecting them to public law. The decision of Rose J. in ***R. v. The Football Association Ltd, ex parte The Football League Ltd*** (Unreported, 31st July 1991), which I found highly persuasive, shows that the same is probably true of the Football Association. I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.

87. In the present case, however, the remedies in private law available to the Aga Khan seem to me entirely adequate. He has a contract with the Jockey Club, both as a registered owner and by virtue of having entered his horse in the Oaks. The Club has an implied obligation under the contract to conduct its disciplinary proceedings fairly. If it has not done so, the Aga Khan can obtain a declaration that the decision was ineffective (I avoid the slippery word void) and, if necessary, an injunction to restrain the Club from doing anything to implement it. No injustice is therefore likely to be caused in the present case by the denial of a public law remedy.

88. I would dismiss the appeal.

Order: Appeal dismissed with costs; leave to appeal to the House of Lords refused.

MR SYDNEY KENTRIDGE Q.C., MR ANTHONY BOSWOOD Q.C. and MR DERRICK PALE (instructed by Messrs McCloy Day-Wilson & Co., Newbury, Berkshire) appeared for the Applicant.

MR PATRICK MILMO Q.C. and MR RICHARD SPEARMAN (instructed by Messrs Charles Russell) appeared for the Respondents.