Neutral Citation Number: [2005] EWHC 2197 (Admin)

Case No: CO/5769/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2005

Before :

MR JUSTICE STANLEY BURNTON

- -

Between :

The Queen on the application of

WILLIAM MULLINS — **Claimant**

- and -

THE APPEAL BOARD OF THE JOCKEY CLUB — **Defendant**

-and-

THE JOCKEY CLUB — **Interested Party**

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- -

Tim Kerr QC, **John Gordon SC (**of the Dublin Bar**) and Graeme McPherson** (instructed by **Holman Fenwick & Willan**) for the **Claimant**
Alex Marzec (instructed by **Charles Russell**) made written submissions on behalf of the **Defendant** but did not appear.
Mark Warby QC and **Iain Christie** (instructed by **Charles Russell**) for the **Interested Party**

Hearing dates: 5, 6 October 2005

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Approved Judgment

Mr Justice Stanley Burnton :

Introduction

1. On 30 November 2002, Be My Royal, a horse of which the Claimant was the trainer, was first past the post in the Hennessy Gold Cup (Showcase Handicap) (Class A) (Grade 3) at Newbury. Gingembre finished second.

2. A urine sample was taken from Be My Royal. It was found to contain morphine. On 2 May 2003, the Claimant was informed that he was required to attend an enquiry before the Disciplinary Committee of the Jockey Club as to whether, in the light of the finding of morphine, there had been a breach of Rule 53 of the Orders and Rules of Racing, and whether Be My Royal should be disqualified under Rule 180(ii).

3. Morphine may be found in a horse entirely innocently. It was accepted by the Jockey Club that the morphine found in Be My Royal resulted from contaminated foodstuff, and that the Claimant bore no blame for that.

4. A preliminary issue was taken before the Disciplinary Committee as to whether there was any minimum amount of morphine required to be found in a horse in order for there to be a breach of Rule 53. The Committee decided that there was not. There was a factual issue between the Jockey Club and the Claimant as to what the quantity of morphine in Be My Royal had been, but on the basis of the decision of the Committee on the preliminary issue it was unnecessary to resolve it. Accordingly, the Committee found that there had been a breach of Rule 53 and disqualified Be My Royal. Gingembre was declared the winner of the race and was awarded the prize money.

5. The Claimant appealed to the Appeal Board established by the Jockey Club. It upheld the decision of the Disciplinary Committee.

6. In these proceedings, the Claimant seeks judicial review of that decision of the Appeal Board of the Jockey Club. He now confines his claim to a declaration that the disqualification of Be My Royal was unlawful.

7. These proceedings were begun under Part 54 of the CPR. The claim form includes allegations of breach of contract, though these have now been abandoned, and in any event the contract alleged was between the Claimant and the Jockey Club rather than between him and the Appeal Board, which was the only Defendant he joined in the proceedings. It also includes the contention that a similar jurisdiction to that exercised by the Administrative Court under Part 54 is available under private law, so that if Part 54 does not apply to his claim, it should be transferred pursuant to CPR Part 54.20 to be tried in the Queen's Bench Division.

8. Andrew Collins J refused permission to apply for judicial review on paper, on the basis that the decision of the Court of Appeal in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 is binding and determinative of the inapplicability of the judicial review jurisdiction of the Administrative Court. However, he expressed sympathy with the contention that it should be reconsidered. The Claimant requested reconsideration of the refusal of permission under CPR Part 54.12(3). On 8 April 2005 Newman J granted permission for the case to proceed by

way of the preliminary issue as to jurisdiction. He did so because, if the decision in *Aga Khan* is binding on this Court, it is also binding on the Court of Appeal, and a refusal of permission based on *Aga Khan* could not be appealed to the House of Lords.

9. This is my judgment on the preliminary issue ordered to be tried by Newman J.

The Claimant's contentions

10. The Claimant's skeleton argument contends that Aga Khan was wrongly decided or is distinguishable. The first of these contentions is not open to him in this Court, or indeed in the Court of Appeal. Mr Kerr QC submitted on his behalf that Aga Khan is to be distinguished principally on the following grounds:

    (i) *Aga Khan* concerned a decision of the Jockey Club, with whom the *Aga Khan* had a contract. In this case, the decision impeached is that of the Appeal Board, with whom the Claimant has no contract.

    (ii) The Jockey Club now purports to exercise jurisdiction unrestricted to its members and those who may wish to enter or to use its property.

    (iii) Sport now occupies a more substantial place in our society, and the decisions of the Jockey Club are now of greater importance than at the time of the decision in *Aga Khan*.

    (iv) The enactment of the Human Rights Act 1998, the amendment to Part 54 of the CPR and the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, have changed the law.

11. Mr Kerr submitted that I should be encouraged to depart from *Aga Khan* by the academic criticism he suggested the decision had received and by the fact that a different decision had been reached in other common law jurisdictions.

12. Mr Warby QC, for the Jockey Club, disputed that there had been any material change in the facts or the law since *Aga Khan*, which remains binding on this Court and good law.

The issue before the Court

13. It is important to be clear what is the issue to be determined by the Court, and to be clear as to the meanings of the expressions used in this context.

14. It is common ground that the only issue before me is a procedural issue, namely the applicability of Part 54 of the CPR to the claim. That depends entirely on the question whether this is a claim for judicial review within the meaning of Part 54.1. "Judicial review", in this context, is a defined term. Judicial review is the subject of Section 1 of Part 54. Part 54.1(2) provides:

    "In this Section –

> (a) a 'claim for judicial review' means a claim to review the lawfulness of -
>
> (i) an enactment; or
>
> (ii) a decision, action or failure to act in relation to the exercise of a public function."

"The judicial review procedure" is defined as the Part 8 procedure as modified by that Section.

15. "Public" is used in at least two different senses in the present context: see the opinion of Lord Nicholls in *Aston Cantlow* at [6]. It may refer to the population generally, as in "a decision affecting the public". But it may also mean "governmental", as in the reference to "a public body" in the last sentence of the first paragraph of the citation below from the judgment of the Master of the Rolls in *Aga Khan*. It is important not to confuse these two meanings of the word. As I shall explain below, in my judgment, and as Mr Kerr accepted, in the phrase "the exercise of a public function" in Part 54.1, "public" has the second meaning.

16. CPR Part 54.2 requires the judicial review procedure under Section 1 to be used where the claimant is seeking a mandatory order, a prohibiting order, a quashing order or an injunction under s 30 of the Supreme Court Act 1981 restraining a person from acting in any office in which he is not entitled to act. Part 54.3(1) permits, but does not require, the judicial review procedure to be used where the claimant is seeking a declaration or an injunction other than under section 30 of the 1981 Act.

17. It is common ground that the High Court has jurisdiction to review the lawfulness of disciplinary decisions of certain bodies that do not exercise a public function: see the judgment of Richards J in *Bradley v The Jockey Club* [2004] EWHC 2164, upheld by the Court of Appeal at [2005] EWCA Civ 1056. That is the jurisdiction that the Claimant seeks to engage if the present preliminary issue is decided against him. But that jurisdiction is not judicial review within the meaning of Part 54. Whether there is any difference between the substantive law as to the exercise of that jurisdiction and the judicial review jurisdiction under Part 54 is something I do not have to decide.

18. In this judgment, I shall use the expression "judicial review" to mean judicial review as defined in Part 54.

The constitution and functions of the Jockey Club

19. Sir Thomas Bingham MR described the salient features of the British horse racing industry and the role of the Jockey Club in his judgment in *Aga Khan* at [1993] 1 WLR 912 to 915, to which reference should be made, and it is unnecessary to repeat that unchallenged description. I shall refer below to the developments since then which are relied upon as requiring me to depart from the decision of the Court of Appeal, but for present purposes the statement at 915G suffices:

> "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 racegoers 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."

20. The Master of the Rolls referred to the Jockey Club's Rules of Racing at 914G:

> "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."

The decision of the Court of Appeal in *Aga Khan*

21. The decision in *Aga Khan* is summarised in the headnote of the report in the WLR:

> "Although the Jockey Club exercised dominant control over racing activities in Great Britain its powers and duties were in no sense governmental but derived from the contractual relationship between the club and those agreeing to be bound by the Rules of Racing; that such powers gave rise to private rights enforceable by private action in which effective relief by way of declaration, injunction and damages was available; and that, accordingly, the club's decision was not amenable to judicial review."

22. The decision of the Jockey Club which was challenged by the Aga Khan was, like the decision in the present case, disciplinary: it was the disqualification by the Disciplinary Committee of the Jockey Club of his horse on the ground that a prohibited substance had been found in its urine. He sought to challenge the lawfulness of that decision by judicial review proceedings.

23. As appears from the headnote, the test applied by the Court of Appeal was whether the powers and duties of the Jockey Club were governmental. The Master of the Rolls said, at 923-4:

> "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.

> 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 Horserace 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.
>
> 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.
>
> 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."

24. Farquharson LJ referred to the decision of the Court of Appeal in *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302, in which it was held that the

National Greyhound Racing Club was not amenable to judicial review, and said, at 929-930:

> "… 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. … The question remains whether the Jockey Club, or this particular decision of it, can properly be described as a domestic body acting by consent.
>
> .... 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 were dissolved, any governmental body would assume control of racing. Neither in its framework nor its rules nor its function does the Jockey Club fulfil a governmental role.
>
> 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.
>
> 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.
>
> 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. … 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.
>
> 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. I would dismiss the appeal."

25. Hoffmann LJ said, at 932 to 933:

> "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 *Reg. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 W.L.R. 1036): It is something to be encouraged but not the business of government.
>
> 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 E.E.C. Treaty and all the other instruments available in law for curbing the excesses of private power.
>
> 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 *Nagle 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 *Siskina* (Owners of cargo lately laden on board) *v. Distos Compania Naviera* S.A [1979] A.C. 210.
>
> It was recognition that there might be gaps in the private law that led Simon Brown J. in *Reg. v. Jockey Club, Ex parte R.A.M. Racecourses Ltd.* [1993] 2 A11 E.R. 225 to suggest that case like *Nagle v Feilden* [1966] 2 Q.B. 633, 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 *Reg. v. Football Association Ltd., Ex parte Football League Ltd*., The Times, 22 August 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.
>
> 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."

The suggested grounds for distinguishing *Aga Khan*.

(a) The decision impeached is that of the Appeal Board and not of the Jockey Club

26. Mr Kerr relied on the fact that the decision impeached in these proceedings is that of the Appeal Board of the Jockey Club and not of the Jockey Club itself. The Defendant is the Appeal Board, with whom the claimant has no contract, whereas the Aga Khan did have a contract with the Jockey Club, which was the defendant in his proceedings. It is suggested that it was crucial to the decision in *Aga Khan* that he had a claim in contract against the Jockey Club. It is the existence of a contract that is decisive of the inapplicability of judicial review.

27. The Appeal Board came into existence in 2001, following a change in the Rules of Racing. Its creation as an independent appellate tribunal was described by the Jockey Club at the time as being one of a "package of measures that take account of the Human Rights Act". That apparently implies that the Jockey Club is a public authority within the meaning of Section 6 of the Act. Mr Kerr relied upon that apparent admission in support of his submissions.

28. I cannot accept these submissions. The Appeal Board's jurisdiction, like that of the Disciplinary Committee in *Aga Khan*, was derived from and entirely dependent upon the Rules of Racing of the Jockey Club. In the *Aga Khan* case the decision of

the Disciplinary Committee was treated as that of the Jockey Club, since it was made by an organ of and with the authority of the Club. The only difference between the Board and the Disciplinary Committee whose decision was the subject of the judgment of the Court of Appeal is that the former is an appellate body the members of which are independent of the Jockey Club. Both the Aga Khan and Mr Mullins had contracts with the Jockey Club that incorporated the Rules of Racing. The nature of the decisions of both was the same, and it is the nature of the decision – whether it was in the exercise of a public function – on which Part 54.1 focuses. Moreover a private body (which on the assumption that *Aga Khan* was correctly decided the Jockey Club was before it created the Appeal Board) cannot by itself either create a public body or convert a private function (the exercise of its domestic disciplinary powers) into a public function. In other words, it could not, by creating an Appeal Board, convert the private function exercised by its Disciplinary Committee into a public function exercised by its Appeal Board. Whether, when it created the Appeal Board, the Jockey Club considered that it was or might be a public authority within the meaning of the 1998 Act is, as a matter of law, irrelevant.

29. I add that the existence of a contractual relationship is not inconsistent with judicial review. Local authorities have contracts with their tenants; this does not mean that their decisions to evict tenants are not challengeable by judicial review. The claimants in *R (Heather and ors) v The Leonard Cheshire Foundation* [2002] EWCA Civ 366 were contractual licensees of the Leonard Cheshire Foundation, but that fact did not of itself lead to the decision that the Foundation was not a public authority for the purposes of Part 54.

(b) The purported exercise by the Jockey Club of jurisdiction over the public.

30. The Rules of Racing include provisions which purport to apply to the world at large. For example, Rule 200 (vi):

> "No person shall make or offer to make a bet on behalf of an amateur rider, or an amateur rider riding under the provisions of Rule 61, on any race in which the rider is riding nor shall he offer such rider the proceeds, or any part thereof, of the bet, on any such race."

However, whether the power which the Jockey Club purports to exercise under such a rule is enforceable is a different matter. The fact remains that the Jockey Club cannot enforce its rules otherwise than by means of its contracts, or the exercise of its property rights. None of its rules has any statutory force. As I have already stated, it seems to me that a body which would otherwise exercise only private functions cannot assume public functions by its own action alone. Some governmental intervention is required. There has been none.

(c) The greater importance of the decisions of the Jockey Club.

31. The short answer to this point is that increases in scale cannot lead to a change in the nature of the functional decision in question. As Mr Warby pointed out, Tesco Plc may wield immense economic power. It is nonetheless a body exercising private functions. It may be that monopolistic bodies exercising powers over the

livelihoods of considerable numbers of people should be regulated and subject of review by the courts. The desirability or otherwise of that regulation and review cannot convert a private function into a public function.

(d) Matters relied upon to encourage the court to depart from the decision in *Aga Khan.*

32. Academic criticism of the decision in *Aga Khan* cannot of itself justify my refusing to follow it at this level. However, in my judgment the criticism that I have been shown is misplaced. It assumes that if judicial review proceedings are unavailable to challenge a disciplinary decision of a body such as the Jockey Club, an aggrieved claimant has no remedy. However, as pointed out in the judgments in *Aga Khan* itself, there are private law remedies available. In this connection, I refer to the last paragraph of the judgment of Farquharson L.J. cited above.

33. Secondly, I do not derive significant assistance from cases decided in other jurisdictions. As Hoffmann L.J. pointed out in *Aga Khan*:

> "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 *Reg. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 W.L.R. 1036): it is something to be encouraged but not the business of government."

34. Moreover, other countries have different procedural rules. The decision in the present case turns not only on the nature of the disciplinary function of the Jockey Club but also on the particular English procedural rules in Section 1 of Part 54. The combination is not replicated in other jurisdictions.

Other matters

35. Mr Kerr suggested that the Court of Appeal in *Aga Khan* had overlooked a relevant factor, namely that the Jockey Club receives substantial sums from the Government derived from the betting levy. I doubt whether this is so. Sir Thomas Bingham MR referred to the Fourth Report of the House of Commons Home Affairs Committee on the Levy on Horserace Betting (1991) (HC 146) at 913A. Even if that factor had been overlooked, the judgment of the Court of Appeal would not be *per incuriam*, certainly at this level. But in any event state funding is a weak indication that a body or its functions are public. Many indisputably private bodies, such as many bodies whose activities are cultural, and many charities, receive state funding; this does not make them governmental in nature. Finally, Mr Kerr accepted that if the Jockey Club

exercises functions of a public nature, it is a so-called hybrid authority for the purposes of section 6 of the Human Rights Act 1998 (see subsection (3)(a)) which exercises both private and public functions. In such a case, it seems to me that unappropriated state funding cannot indicate which of its functions is public.

Changes in the law

36. This seems to me to be the only possible basis for my refusing to follow the decision of the Court of Appeal in *Aga Khan*. The procedural rules applicable to judicial review have changed since it was decided. As I mentioned above, they are now contained in CPR Part 54 Section 1. They were previously contained in Order 53 of the Rules of the Supreme Court. In *R (Heather and ors) v The Leonard Cheshire Foundation* [2002] EWCA Civ 366, at [37], Lord Woolf CJ, giving the judgment of the Court, referred to: "the distinction between the approach of Order 53 of the Rules of the Supreme Court and Part 54 of CPR." He said:

> "Order 53 Rule 1 in identifying cases which were appropriate for an application for judicial review focussed on the nature of the application. Was it an application for an order of mandamus, prohibition or certiorari or an application for a declaration or an injunction which could be granted on an application for judicial review, if having regard to the nature and matters in respect of which relief may be granted by way of one of the prerogative remedies, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review? Part 54 (1) CPR has changed the focus of the test so that it is also partly functions based."

37. The provisions of Section 1 of Part 54 of the CPR came into force on 2 October 2000, i.e. on the same date that the Human Rights Act 1998 came into force. Part 54.1 uses similar language to section 6 of the Act. Section 6, so far as is relevant, is as follows:

> **"**(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) …
>
> (3) In this section 'public authority' includes-
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> (4) ….

> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

38. It is now customary to divide public authorities within the meaning of section 6(1) into two kinds: "core" public authorities (such as government departments and local authorities) and "hybrid" public authorities: see the discussions in the opinions of the House of Lords in *Aston Cantlow*, for example [7] in the opinion of Lord Nicholls of Birkenhead. A hybrid public authority is a public authority for the purposes of section 6 by reason only of the provisions of subsection (3). As mentioned above, Mr Kerr accepts that if the Jockey Club is a public authority, it is not such for all purposes, but is a hybrid authority. In such a case, the applicability of section 6 depends on whether the nature of the act in question is public or private.

39. The similarity between the language of section 6(3) and that of CPR Part 54.1 is striking. They share the context of public law. Section 1 of Part 54 applies if the act in question was done "in the exercise of a public function", and given the identity of context and date of introduction and the similarity of wording I have no doubt that it was intended to track the effect of section 6(3) and (5). It is significant that in discussing the application of section 6 to a hybrid authority, Lord Nicholls, at [9], used the language of Part 54 without referring to it. He said:

> "Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase 'public authority' any person whose functions include 'functions of a public nature'. This extension of the expression 'public authority' does not apply to a person if the nature of the act in question is private."

40. In *R (Heather and ors) v The Leonard Cheshire Foundation* at first instance, [2001] EWHC Admin 429, counsel for the claimants submitted that acts done in the exercise of a public function that were not private in nature for the purposes of section 6 were done in the execution of a public function within the meaning of Part 54. Counsel for the defendant and for the Attorney General did not dispute that submission, which I accepted: see at [65]. The Court of Appeal at [36] of its judgment pointed out the difference between core and hybrid public authorities in this connection. All acts of core public authorities may engage the responsibility of the UK under the European Convention of Human Rights. In the case of hybrid authorities, it is only their acts that are done in the exercise of a public function that engage that responsibility.

41. In both *Leonard Cheshire* in the Court of Appeal and in *Aston Cantlow* in the House of Lords, it was said that decisions as to amenability to judicial review are a guide to what constitutes a public authority for the purposes of section 6, but are not decisive: see [36] and [37] in *Leonard Cheshire* and the opinion of Lord Hope in *Aston Cantlow*:

> "50. The phrase 'governmental organisations established for public administration purposes' in the third sentence of the passage which I have quoted from the *Holy Monasteries* case (1995) 20 EHRR 1 is significant. It indicates that test of whether a person or body is a 'non-governmental organisation' within the meaning of article 34 of the Convention is whether it

> was established with a view to public administration as part of the process of government. That too was the approach which was taken by the Commission in *Hautanemi v Sweden* (1996) 22 EHRR CD 156. At the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law in the domestic legal order. It was held nevertheless that the applicant parish was a victim within the meaning of what was then article 25, on the ground that the Church and its member parishes could not be considered to have been exercising governmental powers and the parish was a non-governmental organisation.
>
> 51. It can be seen from what was said in these cases that the Convention institutions have developed their own jurisprudence as to the meaning which is to be given to the expression 'non-governmental organisation' in article 34. We must take that jurisprudence into account in determining any question which has arisen in connection with a Convention right: Human Rights Act 1998, section 2(1).
>
> 52. The Court of Appeal left this jurisprudence out of account. They looked instead for guidance to cases about the amenability of bodies to judicial review, although they recognised that they were not necessarily determinative: p 62D-E, para 34. But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, '*Chancel repairs and the Human Rights Act*' [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of 'core' public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the "hybrid" class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a 'function of a public nature' within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention."

42. The statement in [52] of Lord Hope's opinion is incontestably correct in relation to domestic case law relating to amenability to judicial under the rules in force before 2 October 2000. The scope of CPR Part 54 was not in issue in *Aston Cantlow*. For the reasons I have given, in relation to hybrid authorities, I believe that Part 54.1 as introduced on that date was intended to apply to the same acts as those that are treated as those of a public authority by virtue of section 6(3)(b) and (5). This

interpretation avoids different meanings be given to similar phrases in the same context. It means that the question whether a particular act of a hybrid authority was done in the exercise of a public function will receive the same answer under section 6 and under Part 54.1. It means that Part 54.1, like section 6, falls to be interpreted by taking into account the jurisprudence of the European Court of Human Rights. I think that these results are sensible and desirable.

43. The essential question that arises in the present case is whether the test to be applied under Part 54.1 differs from that applied by the Court of Appeal in *Aga Khan*. As I have already stated, from the extracts from the judgments of the Court of Appeal cited above, it can be seen that the test applied was whether the functions of the Jockey Club were governmental. In my judgment, that test is in substance the test applied by the House of Lords in *Aston Cantlow*: see the opinion of Lord Nicholls at [7] to [10]; Lord Hope at [47] and at [49], where he said:

> "The phrase 'public functions' in this context is thus clearly linked to the functions and powers, whether centralised or distributed, of government".

See too Lord Hope at [59], Lord Hobhouse at [88], and Lord Rodger at [163]:

> "163. In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs. ..."

44. It follows that the Court of Appeal decision in *Aga Khan* is authority for the proposition that the Jockey Club is not a public authority for the purposes of section 6 and that the particular function exercised in that case, which was identical to the function exercised in the present case, was not a function of a public, i.e., governmental, nature. And it also follows that the decision of the Appeal Board was not made in the exercise of a public function for the purposes of CPR Part 54.

Conclusion

45. It follows that *Aga Khan* is applicable to the decision of the Appeal Board. I have to say that if I assume that I am free to reconsider the amenability of the Appeal Board to judicial review, I should reach the same decision, for the reasons given so clearly by all three members of the Court of Appeal. Review of the disciplinary decisions of the Jockey Club and its organs is a matter for private law, not public law.

46. I shall therefore decide the preliminary issue in favour of the Appeal Board and the Jockey Club and answer the question whether its decision that is the subject of these proceedings is amenable to judicial review under Section 1 of Part 54 of the CPR in the negative.

Procedural issues.

47. In *Leonard Cheshire*, at [38], Lord Woolf CJ referred to procedural issues such as the present as "wholly unproductive". He did not, however, indicate how such issues may be avoided. In a case in which on the claimant's case a public function is involved, but the defendant asserts that it is not, it is difficult to see how an issue as to the mandatory requirement of Part 54.2 can be avoided, and counsel were not able to suggest a procedure other than the wasteful issue of two sets of proceedings, one under Part 54 and the other under Part 8 or if appropriate Part 7, which could be ordered to be heard together. This is a question that deserves the attention of the Rules Committee.

48. In the present case, however, once the Claimant abandoned his claims for a quashing order and a mandatory order, proceeding under Part 54 ceased to be compulsory: see Part 54.2. He could therefore at that stage have sought a transfer to the Queen's Bench Division on the basis that, whether the decision in question was made in the exercise of a public function or not, and whether it was public or private in nature, he was entitled to relief.

49. As I said during the hearing, if the Claimant wishes to pursue his application for a transfer of his claim to the Queen's Bench Division before me, I shall require him to produce draft Particulars of Claim for consideration. The Court may refuse to make an order for transfer if it is not satisfied that there is a properly pleaded and arguable claim to go to that Division.