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In the Keiron Fallon dispute the forces assistant commissioner, Mike Bowron, said:

"This case is one of great national significance, not just to the racing community, but to the wider public throughout the UK" [1]

Fallon was arrested as part of a high profile investigation into allegations of race fixing he was charged with conspiracy to defraud customers of the online betting exchange Betfair. The Horse Racing Authority accordingly banned him from riding in Britain. Fallon was able to make representations to support his application for a new licence or restrictions on his licence to be lifted when he attended the HRA hearing but his career was effectively shattered when the judge ruled that Keiron`s ban from riding in Britain should stand until completion of his criminal charges next year. Obviously Fallons legal team argued that this would be disastrous and lawyer David Penneck stated:

"Prohibiting him from racing in the UK until the end of 2007 is effectively going to end his career as a leading jockey" [2]

The aim of this essay is to discuss this dispute in relation to the obligations of the Jockey Club to the Jockey and to show how if these obligations are breached how the jockey can seek a remedy within the courts. It will also assess to what extent the courts are wiling to intervene in these circumstances and show a range of case law as evidence of this.

Firstly it is important to note that Jockeys have alternative methods of dispute resolution outside of the courts that are beneficial in the sense that they are speedy, inexpensive, and confidential many sporting bodies in recognition of this offer arbitration, mediation and conciliation services but as Gardiner so nicely puts it ;

"Mediation and other forms of ADR are not a universal solution for dispute settlement: In this way it is very much a case of horses for courses"[3]

The Jockey Clubs decisions have such a colossal impact on not only the on- field actions of sports persons but also on commercial transactions, employment relationships, and the livelihoods of its participants. This is reflected in *Fallon v The Horseracing Regulatory Authority* [4] and the case of *Modahl*[5] where sporting governing bodies have effectively ended competitors careers when at the top of there game arguably to never be the same again. The sheer control and power of these organisations makes them not so dissimilar

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[1] The Scotsman, 29th July 2006
[2] The Scotsman , 29th July 2006
[3] Simon Gardiner, *Sports Law*, Third Edition, Cavendish Publishing, London [2006].
[4] (2006) EWHC 2030
[5] (28 June 1996, unreported); CA 28 July 1997;HL 22 July 1998;[2002] 1 WLR 1192 CA

to how we would expect the state itself to regulate, as Anderson states;

> *"Certain sports bodies are necessarily governmental in operation because: they have power over a not unsubstantial area of economic activity, they have private power that affects the livelihoods of many individuals"*[6]

This has been the basis for a range of challenges to be made in the courts for the need of Judicial review but the courts have long preferred to decide disputes on a private law proceeding basis;

> *"The courts have stressed that because the relationship between a sports governing body and its members is generally private and contractual in nature, it gives rise to private rights on which effective actions for a declaration an injunction or damages might be based"*[7]

It must be remembered that sports governing bodies are private bodies and therefore self regulatory in nature. Even the FA remains outside the public law sphere by virtue of a first instance decision[8].

In the case *Law v National Greyhound racing Club Ltd* [9]the court of appeals decision proved to be a significant one as the contractual relationship excluded the application for judicial review and emphasised that judicial review did not extend to domestic tribunals such as sports governing bodies.

The law further developed through the cases that followed *R v City Panel on Takeovers and Mergers ex p Datafin*[10] and *R v Jockey Club ex p Aga Khan*[11] . Datafin signaled a shift from a strictly source based test of amenability to a more functional test where the source of power was of greater importance. Aga Khan's argument was based on the jockey club being a private club susceptible to judicial review on the grounds that in decision making was exercising a public function in the de facto control of a major national industry. Hoffman and Bingham both recognised the public position of The Jockey Club and went as far to say that many of the powers were essentially public in nature but did not grant the action for review. The Aga Khan case would suggest that Fallon and mistreated jockeys may not use judicial review as a remedy found in the courts. The position is strikingly different in other jurisdictions where sporting bodies are held liable to public law.[12]

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[6] Jack Anderson an Accident of History, *Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review*, Common Law World Review.

[7] Jack Anderson an Accident of History, *Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review*, Common Law World Review.

[8] See (*R v Football Assciation Limited ex parte Football league Ltd* (1983)1 WLR 1302 where it was decided that there was no evidence that if the FA ceased to exist that it would be replaced with a governmental body.

[9] [1983]1 WLR 1302

[10] [1987]1 ALL ER 564

[11] [1993] 1 WLR 909

[12] See *Finnegan v New Zealand Rugby Football Union* and *Forbes v New South Wales Trotting Club Ltd.*

In the past it was accepted that sport was not important enough for the state to be involved. We have recently seen a huge change in this opinion and the government is showing a greater interest as shown in the case *R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [13]Neil LJ clearly highlighted that the character of the powers of The Jockey Club were such as to strongly suggest that it was public in nature but still clamped down on the matter of reviewability[14].

This is raising questions to what extent governing bodies are accountable for their actions and the availability of remedies for individuals in private law when dealing with a body such as The Jockey Club which is so public in nature.

So when will the courts intervene? Firstly under natural justice the Jockey Club is obliged to comply with the two fundamental pillars, centuries old that are essential to any legal system geared towards justice. The right to a fair hearing, and rule against bias[15] . The rule against bias and right to a fair trial if compromised by a sporting governing body will see the courts happily intervening *Jones v WRFU* [16] . In Jones he was successful on the grounds that he had been denied the right to defend himself fairly as he had a speech impediment which handicapped his attempt to represent himself effectively, he was unable to call witnesses this showed a clear violation of a right to a fair trial. Other examples of this might be failure to give the player enough time and opportunity to review evidence against him, to challenge this evidence or failure to have an independent adjudicator .In Fallon's case he argued that the panel should have acceded to his request to study video evidence of the races concerned and to consider the transcripts of his police interviews. If the courts felt that this was a clear violation to Fallon's right to a fair trial as in Jones they would have been happy to intervene as discussed in *Mcinnes v Onslow Faine.*[17]

Also if the body has acted unreasonably or disciplined a player disproportionately to the offence in question then the court will declare that any such action is void, this was not the case for Fallon as Nigel Davies ruled that:

"the ban was not disproportionate and the decision to impose the ban could not be styled as capricious or obviously wrong and was

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[13] (1993)2 ALL ER 207

[14] See *R v Jockey Club ex parte RAM Racecourses Ltd*

[15] Audi altered partem and nemo judex in causa sua. The modern tendency Is to run the two together and speak of the duty to act fairly.

[16] [1997] The Times, 6th March;{1998}The Times 6th January

[17] [1978] 1 WLR 1520

taken by responsible HRA panels with legal and horse racing expertise."[18]

The restraint of trade route has been the most successful for those seeking to call sports governing bodies into account and has been described by Little and Morris as a

"powerful weapon for challenging sports bodies rules or practices which unreasonably interfere with the right of an individual to earn a livelihood."[19]

Successful claims under this avenue of challenge are characteristically a declaration that the sports bodies are in restraint of trade the leading case in this area is *Greig v Insole*[20]. The restraint of trade doctrine can be used in many areas of sport not just to merely challenge disciplinary hearings. This doctrine can be used for unduly restrictive covenants found in standard contractual terms, entrenched practices, rule changes that operate to restrictively restrict a sportsman's opportunities to pursue his trade and finally refusal to admit an individual membership as it compromises the individuals right to work. Domestic restraint of trade principles are now supplemented by EC competition law, Articles 81 and 82 EC, and by provisions of the Competition Act 1998.

It is important to note here though that Fallon still enjoys the right to work in other jurisdictions such as in Ireland and abroad if the ban had been extended further to Europe and Ireland this could be seen as a restraint of trade as was the case in *Greig v Insole*[21]. The obvious difference in this case is the fact that Fallon still enjoys the right to ride in Ireland and other jurisdictions whereas in *Greig v Insole*[22] the ban extended from not only domestic cricket but to international making it an unfair restraint of trade.

Finally the passing of the Human rights Act with particular reference to Section 6 and the introduction of EC law will have an impact on sports governing bodies and the remedies which its participants may seek:

"One group of organisations likely to experience dramatic changes (from HRA) *are those who regulate sporting activity"* [23]

The European courts have not shown any reservations in becoming involved in sporting issues. *Bosman*[24] demonstrates that when the rules of a sport relate to economic activity such as the free movement of persons the European courts are again prepared to intervene.Where the sporting rule in question is genuinely discriminatory on grounds of nationality, whether directly or indirectly, EC free movement

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[18] The Scotsman, 29th July 2006

[19] Gavin Little and Philip Morris, *Challenging Sports Bodies Determinations* Pg 7.[1998] 17 CJQ 128

[20] (1978)1 WLR 302

[21] [1978] 1 WLR 302

[22] [1978] 1 WLR 302

[23] Simon Boyes *Regulating Sport after the Human Rights Act [*2001] 151 NLJ 4448**

[24] Belgian FA v Bosman [1996] All ER [EC] 97

principles will prove a potent weapon.

Many sports now have provisions which relate to bringing the sport into disrepute as is the case with Fallon. Criminal matters off the pitch can be brought to the attention of the Jockey Club; race fixing could be seen in this light. Fallon has lost his right to earn a living in the UK due to this. In other professions article 6 of the ECHR recognises the right of an individual to have membership of a profession as a basic civil right see *Albert and Le Compte v Belgium* [25] and *Fleurose v Securities and Futures Authority* [26]. If this basic civil right was extended to sports professionals Fallon could investigate this avenue and why should this not be available as a remedy in court when so many other professionals enjoy this right.

Could therefore the introduction of the HRA 98 broaden the susceptibility to challenging sporting bodies such as The Jockey Club?

The Human Rights act has had a huge impact on the UK not only does it have the responsibility to interpret legislation as far as possible in accordance with the Human Rights Act 1998 , under section 2 of the act courts and tribunals are required to take into account the jurisprudence of the conventions Strasbourg institutions. This is significant as Strasbourg has already imposed obligations under section 6 of the convention on private disciplinary tribunals.

There appears to be an argument that the Act will impact upon purely private relationships such as the Jockey Club but Boyes states that;

> *"Even if the courts are influenced by the convention in their regulation of private law relationships, the impact is likely to be a gradual one a more likely and immediate effect is likely to be felt as a result of the classification of sports governing bodies as quasi public authorities" .*[27]

The quasi public issue arises from section 6 (3) (b) of the act [28].Jack Straw drew particular attention to the Jockey club as being the type of body that may fall into the category under section 6 (3)(b);

> *"There will be occasions, it is the nature of British society, on which various institutions that are private in terms of their legal personality carry out public functions I would suggest that it includes the Jockey Club. The jockey club is a curious body: it is entirely private, but exercises public functions in some respects and to those extents, but to no other it would be regarded as falling into this*

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[25] [1983] ECHR 10 (24 October 1983)

[26] [2002] IRLR 297

[27] Simon Boyes, *Regulating Sport after the Human Rights Act.* [2001] 151 NLJ 4448**

[28] This obliges "any person certain of whose functions are functions of a public nature (quasi public authorities) to meet the requirements of the Act" this is limited to only public acts of those persons therefore having no immediate effect on their private matters.

classification"[29]

Since the decision in *Poplar Housing and Regeneration Community Association Ltd v Donoughue*[30], where Section 6 was given a generous interpretation, the Jockey Club has rapidly responded by ensuring that its disciplinary procedures comply with the European Convention on Human Rights as have the FA.

In conclusion mistreated jockeys can seek remedies in courts using natural justice which is a fundamental longstanding remedy, more successfully the unfair restraint of trade doctrine can be applied. But more recently and arguably more importantly remedies can now be sought through the growth of European law which appears to be the initiation of a superior roll in the future of sports governing bodies;

> *"it now seems likely that the coming into force of the HRA 1998 will involve the courts reconsidering their position; that the sports governing bodies will be required to respect not only economic rights but also the fundamental human rights enshrined in the Convention"*[31]

Through these advances we may see a new willingness of intervention and maybe a widened range of remedy available to not only the mistreated jockey but all sportsmen.

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[29] Simon Boyes, *Regulating Sport after the Human Rights Act.* [2001] 151 NLJ 4448**
[30] [2001] 3 WLR 183
[31] Simon Boyes, *Regulating Sport after the Human Rights Act.* [2001] 151 NLJ 4448**

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- *Law v National Greyhound racing Club Ltd* [1983]1 WLR 1302.
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Table of Statutes

- The Competition Act 1998
- The EC Treaty
- The Human Rights Act 1998

Further Reading

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- Simon Boyes, *Regulating Sport after the Human Rights Act.* [2001] 151 NLJ 4448**

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